[2013] UKPC 27
Privy Council Appeal No 0021 of 2011

JUDGMENT

Monica Jane Ramnarine (Appellant) *v* Chandra Bose Ramnarine (Respondent) (Trinidad & Tobago)

From the Court of Appeal of the Republic of Trinidad & Tobago

before

Lady Hale
Lord Kerr
Lord Wilson

JUDGMENT DELIVERED BY LORD WILSON ON

31 July 2013

Heard on 1 July 2013

Appellant	*Respondent*
James Guthrie QC	Lesley-Ann Lucky-Samaroo
Iain McLeod	Alisa Khan
(Instructed by MA Law (Solicitors) LLP	(Instructed by Alisa Khan)

LORD WILSON:

1. An ex-wife (whom it will be convenient to call "the wife") appeals against an order made by the Court of Appeal of Trinidad and Tobago (Mendonca, Stollmeyer and Smith JJA) dated 15 March 2010 in proceedings for financial relief between her and her ex-husband ("the husband") following divorce. On that date, by an outline judgment delivered orally by Mendonca JA (with which the other Justices of Appeal agreed and which, upon request, was amplified by a written judgment of the court dated 19 October 2010), the Court of Appeal dismissed the wife's appeal against orders made by Tam J sitting in the High Court on 8 February 2006. He had dismissed the wife's claims against the husband for financial relief and had made an order (with which she had complied) that she should vacate the matrimonial home in Arouca by 30 April 2006.

2. The wife was born in Trinidad in 1944 and is now aged 68. The husband was born in Trinidad in 1945 and is now aged 67. As a teenager, the wife moved from Trinidad to Britain and she has dual nationality. The husband, who is a citizen of Trinidad and Tobago, married the wife in London in 1967. By then, the eldest of the four children of the family had been born. The three others were born in 1969, 1974 and 1982.

3. From 1967 to 1980 the parties lived first in London, then in New York City and then in Trinidad. From 1980 until 1996 the wife lived basically in London together with two, and at times all three, of the younger children and the husband lived basically in Trinidad; but they visited each other. The wife lived in local authority accommodation. The husband lived in the home in Arouca, which he had inherited from his father and became vested in his name.

4. In 1996, for no obvious reason, the wife returned to live basically in Trinidad, where, subject to substantial visits to London and elsewhere, she has remained. But she did not return to live with the husband. At least by then, if not before, the marriage was at an end. The husband vacated the home and the wife moved back into it and there, for two years, she cared for their youngest child.

5. In July 1996 the husband petitioned for divorce. A welter of litigation between the parties then ensued. The wife filed an answer to the petition. She applied for an order restraining the husband from interfering with her occupation of the home in Arouca, which resulted in his undertaking to allow her to have exclusive occupation of it until her applications for financial relief, made in her answer and activated in February 1997, had been determined. There were cross-applications for relief against molestation. There was an issue about the custody of the youngest child, then aged 14, and, once custody of him had been awarded to the wife, about his maintenance; later she issued a judgment summons about the husband's alleged non-payment of it. She

also applied unsuccessfully for maintenance pending suit. In particular, however, following the grant of a decree nisi in July 1997 (made absolute in August 1997), the wife was able fully to proceed with her applications for other forms of financial relief.

6. Before the Board the wife is represented by Mr Guthrie QC and Mr McLeod. They appear for her free of charge and also as a service to the Board, which is deeply grateful to them. Unlike their predecessor in the Court of Appeal, who may have felt some inhibition in this regard, they place at the forefront of the appeal the history of delay in the conclusion of the proceedings for financial relief. The delay can be broken down into five main periods:

(a) The period between the date of the activation of her applications and the date when Tam J began to conduct the substantive hearing of them. This was four years and nine months (February 1997 to November 2001).

(b) The period between the date of the conclusion of the substantive hearing and the judge's judgment, which he delivered orally. This was in effect four years (January 2002 to February 2006).

(c) The period between the date of the oral delivery of the judge's judgment and the date of the court's issue of it in writing (11 pages), together with the court's notes of evidence (62 pages). This was one year and ten months (February 2006 to December 2007).

(d) The period between the issue of the judge's written judgment, together with the notes, and the hearing of the wife's appeal, notice of which she had issued immediately following the oral delivery of his judgment. This was two years and three months (December 2007 to March 2010).

(e) The period between the issue of the wife's notice of appeal to the Board and the hearing before the Board. This was three years and two months (May 2010 to July 2013), of which the first five months were spent waiting for the written amplification of the Court of Appeal's judgment and the next 21 months were devoted to the ventilation of issues relating to the husband's claim for substantial security for his costs of the further appeal.

The Board will address the delay later in this judgment and will seek to express itself in measured terms. But, although the delay must also be appraised in its totality (16 years and five months), the reader should keep in mind in particular the length of the delay at (b) above, namely of four years between the conclusion of the hearing before the judge and the oral delivery of his judgment. Mr Guthrie contends that this delay, which the Board believes to be of a length beyond its previous experience, led the judge into fatal error and, in particular, led him to fail to perform his duty under section 27(1) of the Matrimonial Proceedings and Property Act ("the Act").

7. In substance the wife was applying for orders for the husband to make periodical payments and/or a lump sum payment to her under section 24(1)(a) and (c) of the Act and, in particular, for an order for a settlement of property in her favour under section 26(1)(b) of the Act, whereby she would receive a life interest in the home in Arouca. In the Court of Appeal, however, as an alternative to a life interest in the home, the wife contended for an order under section 53 of the Act which would afford to her a right personally to occupy it for the rest of her life.

8. The applications before Tam J were governed by section 27(1) of the Act. The Act was enacted in 1972 and the terms of the subsection closely followed those of section 5(1) of the Matrimonial Proceedings and Property Act 1970, which had come into force in England and Wales on 1 January 1971 and which was soon to be replaced in almost identical terms by section 25(1) of the Matrimonial Causes Act 1973. It is important to note, however, that, although section 27 (1) has been amended, the Republic has not chosen to make changes to it analogous to those made in England and Wales by the new subsections (1) and (2) of section 25 which were substituted for subsection (1) by section 3 of the Matrimonial and Family Proceedings Act 1984.

9. The judge correctly noted that, in determining whether, and if so in what manner, to accede to the wife's applications, section 27(1) placed him under a duty. The subsection required him to have regard to "all the circumstances of the case including the following matters". Although the judge paraphrased it as a reference to "all the circumstances...but including certain other matters", the Board is clear that his use of the word "other" was no more than an infelicity. He then duly recited the specified matters, which the Board summarises as follows:

(a) income, earning capacity, property and other financial resources;

(b) needs, obligations and responsibilities;

(c) standard of living;

(d) age of each party and duration of marriage;

(e) disability;

(f) contributions;

(g) any order made under section 53, i.e. in relation to occupation of the matrimonial home; and

(h) any pension lost as a result of the divorce.

Then the judge quoted the tail-piece of section 27(1), which in England and Wales was eliminated by the 1984 Act and which the Board should set out in full:

"... and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."

10. At the hearing before the judge there was no issue about many of the relevant matters, including the following:

(a) The wife was then aged 57.

(b) The husband was then aged 56.

(c) Although punctuated by periods of physical separation, the marriage had lasted for 29 years.

(d) The husband had worked in effect throughout the marriage and, in particular, had done so from 1974 in the family sawmill business, from 1989 as a trader in logs and since 1996 as the manager and part-owner of a roti shop.

(e) He had contributed to the welfare of the family not only financially but also for example, by caring for the youngest child in Trinidad for seven years.

(f) At the time of the hearing he was earning only $1500 p.m. from the roti shop.

(g) He had minority interests in family properties.

(h) At the time of the hearing he was living partly in his brother's home and partly in rented accommodation with the youngest child (who was by then an adult).

(i) The wife had worked in New York City and between 1980 and 1996, while she was living in London and notwithstanding her need at that time to care for the children, she had undertaken a variety of reasonably remunerative jobs and had thereby, in both respects, also made an important contribution to the welfare of the family.

(j) The parties had had a reasonable standard of living during the marriage, had made savings, including in the names of the children, and had bought jewellery.

(k) At the time of the hearing the wife was not working.

(l) She was occupying the home in Arouca which was in poor condition and had recently been valued at about $350,000.

No doubt the judge considered it more important to address what was in contention. But it was unfortunate that he referred only to some of the above matters because they were all relevant under section 27(1) and the exercise thereunder has to be conducted rigorously (see *Scheeres v Scheeres* in the English Court of Appeal, [1999] 1 FLR 241 at p 243G). The discharge of the judge's duty under the subsection would more easily have been demonstrated if he had referred to all of them, perhaps even, as an aide-mémoire, in the order set by the subsection. The husband's interests in the family properties and in the roti business may well have been of small value; but in any event the judge would have been wise to refer to their value and it is good practice for the court to draw a balance sheet of the value of all of the parties' assets, reflective of its conclusions.

11. The controversy before the judge surrounded two questions. They were;

(a) In and after 1996, when the marriage broke down, what had happened to the parties' savings and to the jewellery?

(b) Did the wife still have an earning capacity?

12. It was agreed that the bulk of the parties' savings had been vested in the name of the wife or of the children. It was the husband's contention that, in about 1996, the wife had liquidated the savings, including some in the name of the children, and was either hiding the proceeds or had squandered them during the following five years. The wife admitted that she had liquidated them (including, on at least one occasion, by forging the signature of one of the children) but she denied that she was hiding the proceeds and contended that, instead of squandering them, she had applied them to meeting her reasonable maintenance requirements during those years. The husband also contended, with the support of evidence from her own mother, that the wife had retained possession of most of the jewellery, while the wife contended that he had taken possession of it. A large part of the hearing before the judge, which proceeded over five days, was devoted to these issues and he resolved them by upholding the husband's contentions. In her final written submissions to the judge Ms Lucky-Samaroo, who has represented the husband at all three substantive stages of these proceedings, set out a calculation to the effect that the parties' savings liquidated by the wife had amounted to $1,359,000, exclusive of the jewellery which was valued at $120,000. It is important to note that, before the judge, the wife's counsel did not dispute these figures: the issue was only whether it was reasonable to ascribe them to the wife as the value of funds actually or notionally still available to her.

13. In his judgment the judge explained why he disbelieved the wife's evidence in relation to the savings of $1,359,000 and to the jewellery. But he did so in a way which precipitates in the Board a sensation of unease. In her written submissions Ms Lucky-Samaroo had set out 11 examples of the wife's alleged lack of credibility and the judge imported into his judgment all her examples in precisely the order which she

had favoured and by the adoption of much of her terminology. Indeed the judge even replicated one minor error which had crept into counsel's submissions about the wife's evidence in relation to one of her allegedly lost passports. The judge, submits Mr Guthrie, was clearly unable to bring any independent recollection to bear upon the evidence which he had heard four years earlier and in that regard he betrayed only too plainly his need to explain his preferred conclusion by reference to the written analysis of the husband's counsel. Uneasy though it feels, the Board does not consider that, taken alone, this particular criticism, which relates only to about 25% of the judgment, can substantially advance the wife's appeal. Certainly the incorporation into the judgment of the successful party's argument was, in the present case, much less extensive than in the recent English case of *Crinion v IG Markets Ltd* [2013] EWCA Civ 587, in which, notwithstanding that almost all of his judgment had been taken word-for-word from counsel's closing submissions (para 4, Underhill LJ), the Court of Appeal eventually, if hesitantly, concluded that the judge had conducted a proper judicial evaluation (para 17). It is not, of itself, bad practice for a judge who has considered the rival contentions on a discrete issue, such as credibility, to decide that the contentions which he prefers have been expressed by counsel in terms upon which he cannot improve and which he should therefore incorporate into his judgment. But the Board indorses the recommendations of Longmore LJ in the *Crinion* case, at para 44, that their incorporation should be expressly acknowledged and accompanied by a recital of the other party's contentions and an explanation of their rejection.

14. Thus it was that the judge came to attribute $1,359,000 (exclusive of the jewellery worth $120,000) to the wife as the value of her actual, or deemed, current property. He held that she had "either hidden it away or frittered or squandered it" and that, in the latter case, the property should notionally be attributed back to her pursuant to the decision of the English Court of Appeal in *Martin v Martin* [1976] Fam 335. The judge proceeded to note that, if (which he doubted) the home in Arouca, owned by the husband albeit occupied by the wife, had a value of as much as $350,000, it followed "that the wife would have had the benefit of about four times the value of what the husband now has available to him". He added:

> "Even taking into account the husband's shares in other properties, it is still clear that the wife comes out way ahead."

In the Board's view the Court of Appeal was correct to interpret that sentence as a reference to the sharing principle. This was defined by the English Court of Appeal in *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246, at para [65], as the principle "that property should be shared in equal proportions unless there is good reason to depart from such proportions". In the present case it has not been suggested, whether to the Court of Appeal or to the Board, that the judge was wrong to refer implicitly to the sharing principle; and although it might be worthwhile, on another occasion, for the Court of Appeal to consider, if it has not yet done so, the interface between the sharing principle and the tail-piece in section 27(1), the Board is happy to proceed on the footing that the principle does indeed have a role to play in the determination of applications for financial relief in the Republic.

15. The judge expressed his ruling upon the wife's earning capacity as follows:

> "The wife has painted a picture of her great resourcefulness, yet, she asks the Court to accept that now that she is in Trinidad, she has been unable [to] find employment for several years; the Court is being asked to attribute this simply to her age. No other explanation has been put forward by her. Without more, I am unable to find that she cannot support herself or that she cannot work. The evidence suggests that she chooses not to work because she believes, and her mindset is, that her husband should pay her and support her. "

The Court of Appeal indorsed the judge's conclusion about the wife's earning capacity in the following terms:

> "She now holds herself out as being unable to find employment, but that is not likely to be so given her lack of credibility."

With respect, it is illogical to say that, because a person lacks credibility, she is likely to be able to find employment. More fundamentally the Board has to ask itself: even if, at the time of the hearing before him, the judge was entitled on the evidence to conclude that the wife, then aged 57, had an earning capacity, did his conclusion remain safe four years later, when he orally delivered judgment, or a further four years later, when the Court of Appeal indorsed it?

16. Mr Guthrie implicitly recognises that, unless he can cast doubt on the validity of the judge's attribution to her of assets worth $1,359,000 (together with the value of the jewellery), the wife's challenge to the judge's order is doomed to fail. For the decision in the *Martin* case is indeed authority for the attribution back to a party of assets which, if not hidden, she or he has squandered. Moreover the case was decided when the tail-piece of section 27(1) was also present in the analogous English subsection and Cairns LJ expressly observed, at pp 342G and 343G, that the squandering of assets amounted to conduct to which, in accordance with the tail-piece, it would be just to have regard. The sum of $1,359,000 is so large in comparison with the apparent value of all the parties' other resources that, unless the attribution of it to the wife can be attacked, it in effect demands the dismissal of her claims.

17. But, in attacking the attribution of the sum to the wife, Mr Guthrie faces a difficulty. In her submissions which the judge accepted, and all too obviously replicated, Ms Lucky-Samaroo made points about the wife's lack of credibility in relation to the parties' savings which on any view were powerful. In order to combat them Mr Guthrie aspires to rely on explanations which the wife had given in paragraphs of an affidavit sworn on 2 July 1998 and to which the judge paid no regard. Mr Guthrie's difficulty is that most of the paragraphs which contained the explanations were, along with many others, struck out by an interlocutory order made by another judge on 15 October 2001, namely five weeks prior to the start of the

substantive hearing. Indeed Mr Guthrie's difficulty is compounded by the fact that the paragraphs were struck out by consent: the note of the court clerk records the wife's then counsel as informing the judge that he was "not using" a large number of paragraphs, there conscientiously enumerated, in the undoubtedly prolix affidavit which the wife had sworn on 2 July 1998. Why he was not proposing to rely on the paragraphs in which she attempted to explain her deployment of the savings remains a mystery. The husband was then given leave, of which he took advantage, to file an affidavit in answer to the wife's affidavit but, for obvious reasons, he did not address the paragraphs which had been struck out.

18. Mr Guthrie's predecessor in the Court of Appeal, who had not represented the wife at the trial, also attempted to rely on explanations about her deployment of the parties' savings which she had given in some of the paragraphs which had been struck out. Section 39(3) of the Supreme Court of Judicature Act at least gave him some handle for the difficult piece of advocacy upon which he was then embarking. It provides:

> "The powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal."

The transcript of the hearing shows, however, that, in this regard, the Court of Appeal gave the wife's counsel short shrift. The Board cannot accede to Mr Guthrie's submission that the Court of Appeal fell into error in declining to pay regard to evidence to which a party of, on any view, doubtful credibility had deposed, which had been struck out with that party's consent and to which the other party had therefore had no opportunity to respond. During the hearing Mr Guthrie placed before the Board ingenious calculations through which, by substantial reference to the paragraphs which had been struck out, he sought to present a reasonable explanation for the wife's deployment of some of the parties' capital and indeed to challenge the arithmetic which had yielded the hitherto agreed total of $1,359,000. His strategy was to try to tempt the Board to order a rehearing. But are there grounds for it?

19. The Board returns to the startling feature of this appeal, being not only the overall delay of over 16 years in the final determination of these proceedings but also, and in particular, the delay of four years between the conclusion of the hearing before the judge and the oral delivery of his judgment. The decision of the Court of Appeal in *Lalla v Lalla*, Civil Appeal No 102 of 2003, concerned a challenge to a decision that a will was valid. One of the grounds of appeal was that the judge had delivered judgment 16 months after the conclusion of the hearing. Mendonca JA, in giving a judgment with which Hamel-Smith and Warner JJA agreed, said:

> "73. Without in any way seeking to justify the delay, I may note that the Courts in this jurisdiction are subject to a very heavy workload with too few resources to handle it. In the not too distant past there was an embarrassing delay in the time a matter would take to be tried. While

> significant inroads have been made in reducing the time to trial, there is still a delay in the system. The result is that "writing time" for Judges is viewed generally as an unaffordable luxury, and Judges start new matters right after the completion of the hearing of one. The consequence is that in some cases, judgments do take undesirably long periods to be written. There is no denying that this was the case here...16 months is excessive."

The Board will address in para 21 below the way in which Mendonca JA then proceeded. For present purposes, however, it wishes to recognise the constraints under which judges at first instance in Trinidad and Tobago laboured in 2004 and no doubt continue to labour; indeed, in those words of Mendonca JA, the Board hears a strong echo of concerns increasingly ventilated about the work-load of judges in England and Wales. Nevertheless, after all reasonable allowances are made, the Board concludes that the delay of four years was entirely unacceptable and must never be allowed to happen again. It would be bad enough in any sphere of litigation, even in one, such as an issue in contract or tort or indeed about the circumstances of execution of a will, which required no more than the application of law to an analysis of past events. But proceedings for financial relief following divorce mandate a different legal exercise. The determination of issues relating to past events may enter into it. But at its centre is the need for an analysis of present circumstances, financial and otherwise, and for the crafting of the fairest future financial arrangements for the parties on foot of it. So the court seeks to take a photograph of a changing scene; and a system of family justice which permits the photograph and the consequential arrangements not to be promulgated until four years later defeats the system's whole object. Apart from the burden cast by the delay upon the litigants, the orders then ultimately made may well have become unrealistic in the interim. At the hearing before the Board there was discussion about the possibility that, as each of those four years came and went, either party might have applied to the judge for permission to put before him evidence of changes in circumstances or that, of his own motion, he might have invited them to do so. But might that have conduced to yet further substantial delay? The Board is not asked to determine whether delay in the delivery of his judgment, entirely unexplained, was unconstitutional but on any view it was an affront to family justice; and it was made worse by the further delay of almost two years, also unexplained, in the court's provision to the parties of a transcript of it and of the notes of evidence.

20. The judge's delay did not form a ground of the wife's appeal to the Court of Appeal and it did not figure in her counsel's submissions to that court. In *Cobham v Frett* [2001] 1 WLR 1775, on appeal from the Court of Appeal of the British Virgin Islands, Lord Scott, in delivering the judgment of the Board on an issue about the acquisition of title to land by adverse possession, noted the failure of the appellant's counsel in the Court of Appeal to have referred to the judge's delay of one year in the delivery of his judgment; and, at p1782, Lord Scott described his failure as "the dog that did not bark in the night". In the present case there was no reference to the delay even in the oral and written judgments of Mendonca JA. Nevertheless the Board declines to accept that a delay of that magnitude is unremarkable in Trinidad and Tobago. It also derives comfort from the Family Proceedings Rules 1998, which came into force only in June 2003 and did not apply to proceedings, such as the present,

which had been commenced earlier. By rule 1.1(1)(a), the overriding objective of the new rules is to enable the court to deal justly with family matters, including, by rule 1.1(2)(e), by ensuring that they are dealt with expeditiously. Furthermore, by rule 14.1(l), the court is required to further the overriding objective by actively managing cases, which may include giving directions to ensure that their trial proceeds quickly and efficiently. The Board hopes that these admirable rules are nowadays able to be implemented in such a way as to consign the length of the judge's delay in the present case to history.

21. So the Board reaches the final difficult issue, which relates to the impact of the judge's delay upon the proper disposal of the appeal, being an issue upon which, as is apparent, the Board lacks the benefit of analysis by the Court of Appeal. In the *Cobham* case Lord Scott proceeded to state, at p1783, 1784:

> "In their Lordships' opinion, if excessive delay, and they agree that 12 months would normally justify that description, is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant."

In the *Lalla* case Mendonca JA, again at para 73, proceeded to cite Lord Scott's words and, at paras 74 to 79, he explained that, in his view, the delay of 16 months had not led to error and that the appeal should be dismissed.

22. In the present case, gross though was the judge's delay in its delivery, the Board fails to find significant consequential error in the reasoning of his judgment. It balks at the prospect of a rehearing, which Mr Guthrie concedes to be the only realistic outcome of any success in the appeal. The costs of the financial proceedings and the length of their pendency to date are both already out of all proportion to the sums conceivably at stake. The primary focus of the wife's claims has been the home, which the husband inherited and in which for the last seven years he has again been residing. The up-to-date evidence of the parties, placed before the Board and of course untested, is that the wife continues not to be in employment and that the husband has closed the roti shop and no longer works. In the light of their ages, their evidence in this regard may well be true. One relevant development, however, is that, on her attaining the age of 60 in 2004, the wife became entitled – and for the time being remains entitled – to a U.K. State Retirement Pension now amounting to £7540 p.a., which in context is a significant sum. The husband avers, by contrast, that his Trinidad state pension amounts only to $36,000 p.a.

23. Ms Lucky-Samaroo contends that what the wife really seeks from the Board is the opportunity for a "do-over" which, she explains, is the neat playground abbreviation in the Republic of "do-it-all-over-again". The Board has some

sympathy for the wife (and indeed for the husband) but it concludes that she has failed to make out her entitlement to a “do-over” and it hereby dismisses her appeal.