IN THE SUPREME COURT OF BELIZE, A.D. 2015

ACTION NO. 274 of 2014

LEROY ALVAREZ **PETITIONER**

AND

MELINA ALVAREZ **RESPONDENT**

BEFORE THE HONOURABLE MADAM JUSTICE SONYA YOUNG

Hearings
2015
1st April
8th April

Mrs. Robertha Magnus-Usher for the Petitioner.
Mr. Oscar Sabido SC and Ms. Rosami Sabido for the Respondent.

Keywords: Matrimonial – Divorce – Grounds for Divorce – Admissions – Petition and Cross Charges – Supreme Court of Judicature Act Cap 91 (The Act) – Matrimonial Causes Rules (The Rules)

DECISION

1. The Petitioner, Leroy Alvarez originally sought a divorce decree on the no fault ground of three years separation and irretrievable breakdown. The respondent, Melina Alvarez, admitted this period of separation but opposed

the relief sought on the grounds of adultery and cruelty and likewise prayed relief. The Petitioner now urges the court that where the no fault ground in the petition has been admitted by the Respondent then judicial enquiry need go no further. Notwithstanding that submission, Mr. Alvarez in his reply included the additional grounds of cruelty and adultery and again prayed for relief. Mrs. Alvarez did not file a rejoinder. Counsel for the Petitioner states that by not filing a rejoinder Mrs. Alvarez has also admitted the reply. Therefore, the divorce should now proceed uncontested and be granted on any of the three purportedly admitted grounds, that is three years separation, the cruelty and/or adultery of the Respondent.

2. The issues before the court are:

1. Whether a divorce ought to be granted on the proven no fault ground without inquiry into an opposition and counter charges of adultery and/or cruelty.
2. Whether a Petitioner is allowed to make new claims in a reply.
3. Whether failure to file a rejoinder results in the admission of allegations raised in the reply.

Whether a divorce ought to be granted on the proven no fault ground without inquiry into an opposition and counter charges of adultery and/or cruelty:

3. To support his position Counsel for Mr. Alvarez presented the British cases of ***Grenfell v Grenfell (1978) 1 All ER 561 and Khoo Eng v Wong Kien Kong (2005) – SC – 148***. The court's attention was also drawn to certain excerpts from **Rayden on Divorce 18th Ed** which dealt with the applicability of the current UK law. Counsel contended that once there

were sufficient facts on the face of the pleadings, the court was bound to grant a decree of divorce. Furthermore, it would be wrong to permit a party to have other facts investigated.

4. I quote in particular an excerpt from ***Grenfell (ibid) pg 566-567 paragraph j-a*** on which Counsel placed great reliance. To my mind it equally highlights the very view of this court that the particular applicable statute and its content cannot simply be disregarded.

> *"There is no point, as I see it in a case like this in conducting an enquiry into behaviour merely to satisfy feelings, however genuinely and sincerely held by one or other of the parties. To do so would be a waste of time of the court and, in any event, would be running, as I think, counter to the general policy or philosophy of the divorce legislation as it stands today. The purpose of Parliament was to ensure that where a marriage had irretrievably broken down, it shall be dissolved as quickly and as painlessly as possible under the Act, and attempts to recriminate in the manner in which the wife in this case appears to wish to do should be, in my judgment, firmly discouraged."*

5. There is a distinct difference between the applicable law in Belize and that in England. Using U.K authorities blindly will lead to a misinterpretation of and a departure from the statutory provisions in Belize.

6. In England there is but one ground for divorce – irretrievable breakdown which may be proven in one of five ways. If the Petitioner is able to prove one of these five facts, the court is obliged to pronounce a decree nisi, unless it is satisfied that the marriage has not broken down irretrievably. The absolute and discretionary bars as are available under The Act have been abolished and specific statutory bars or defences to each fact now exists.

The issue of grave financial or other hardship considered in ***Grenfell*** (ibid) was in fact a statutory bar and the only one available to the particular fact of five years separation proven in that case. It was raised, considered and rejected. Thereafter, it is clear why judicial inquiry need go no further.

7. In Belize however, there are five grounds for divorce, six if the Petitioner is the wife. There are also absolute and discretionary bars which act as a sanction of the matrimonial misconduct of the Petitioner. Before, the amendment to Section 129 of The Act, which added the no fault ground (subsection 2), it was always necessary to show that the respondent had committed a matrimonial offence. With the amendment, a petition based on three years separation which may in no way be due to the respondent's fault can now be presented. But this does not change the fault based nature of divorces in this jurisdiction and its ensuing implications; nor does it allow for an opposition based on fault (a discretionary bar) to be ignored simply because the no fault ground has been raised and proven (whether through admission or otherwise). Although I must say this is quite an attractive argument and may save considerable time and money it runs contrary to the precise provisions of The Act.

8. The Act seems closest to the Canadian Divorce Act of 1968 which also introduced the concept of irretrievable breakdown as a ground for divorce while retaining fault based grounds. In ***Divorce Law in Canada (2008)*** Kristen Douglas commented on the 1968 Act thus - *"The change recognized that marriages often end without a matrimonial offence being the cause of the breakdown and that the reliance on fault allegations in divorce proceedings can exacerbate and prolong what is already an unpleasant, expensive and potentially harmful process. Grounds for divorce were broadened to include one no fault ground in order to spare at least some*

couples this often painful process." One could well imagine that for these very same reasons and perhaps in an effort to make the process more open and honest, the Belize Legislature decided in favour of the amendment. Unfortunately the renovative amendment simply does not go far enough to fully ensure the desired effect.

9. The Canadian Act by Section 9(1) (c) provides:

> *On a petition for divorce it is the duty of the court ...*
>
> *(c) where a decree is sought under Section 3, to satisfy itself that there has been no condonation or connivance on the part of the petitioner and to dismiss the petition if the petitioner has condoned or connived at the act or conduct ..."*

10. Accordingly, the absolute bars to divorce were relevant only for petitions based on the grounds set out in Section 3 which included adultery, sexual offences and cruelty (the fault based offences). Thus, they were not relevant to petitions concerned with irretrievable breakdown. Our legislation is silent and therefore maintains both the absolute and discretionary bars irrespective of the ground upon which the petition is filed.

11. The relevant sections of The Act read as follows:

> *"133.-(1) On a petition for divorce it shall be the duty of the Court to inquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties and also to inquire into any counter charge which is made against the petitioner.*
>
> *(2) If the Court is satisfied on the evidence that-*
>
> *(a) the case for the petitioner has been proved; and*
> *(b) ...*
> *(c) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents,*

the Court shall pronounce a decree of divorce, but if the Court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition:

"Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the Petitioner has during the marriage been guilty of adultery or if, in the opinion of the court the Petitioner has been guilty –

(i) ...

(ii) Of cruelty towards the other party to the marriage; or

(iii) ...

12. Additionally Section 135 goes on to state:

> *If in any proceedings for divorce the respondent opposes the relief sought, in the case of proceedings instituted by the husband, on the ground of his adultery, cruelty or desertion or, in the case of proceedings instituted by the wife, on the ground of her adultery, cruelty or desertion, the Court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief.*

13. Clearly, the court's refusal to pronounce the decree is the exercise of a regulated but unfettered discretion and only arises where the court is satisfied that the Petitioner's case has been proven. Once the counter charge has been made the court must enquire. This view is strongly bolstered by Section 133(1) which mandates that the duty of the court is to inquire so far as it reasonably can into the facts alleged by the petition as well as to inquire into any counter charge which is made against the petitioner.

14. The court must therefore consider every aspect and circumstance of the case to determine whose conduct substantially caused the breakdown of the marriage and may exercise its discretion accordingly. Further, the Petitioner

by paragraph 8 of the petition recognizes that the absolute bar of collusion continues to be relevant to the no fault ground. Why then have the discretionary bars lost their potency when they all reside in Section 133(2).

15. Arana J in ***Paul Gilbert Tillett v Ava Diana Tillett***, while commenting on ***Khoo Hoon Eng v Wong Kien Kong and another*** (ibid) stated:

> *"It is clear from the above quotation that His Lordship was addressing the situation where a party is seeking a divorce based on a no fault ground in* ***England****. It is in those circumstances that the court would not look at other allegations of behaviour which the other party seeks to put forward. His Lordship clarifies the rationale behind the attitude of the courts in that case as reflective of the English Parliament in 1978. In Belize for better or for worse, the situation is very different ..."*

16. I agree and find that the absolute and discretionary bars to the pronouncement of a decree of divorce are relevant to no fault based petitions. Consequently, I hold that where a petition is proven on the no fault ground the court must still enquire into any counter charges of adultery, cruelty or desertion and may exercise its discretion if the circumstances demand.

New Claims in a reply:

17. The Petitioner may not make new claims in a reply. This amounts to a departure in pleadings which *"is said to be when the second plea containeth matters not pursuant to his former and which fortifieth not the same; and therefore it is called decessus, because he departeth from his former plea."* **Sir Edward Coke Litt 3049**. The new claim for a divorce on grounds of adultery or cruelty in the

reply to the answer is really setting up a new case which should have been in the petition and is clearly embarrassing. A reply is not the proper place in which to raise new claims; to permit this would tend to spin out the pleadings to an intolerable length. The proper procedure is for the petition to be amended to include the new matters in addition to or as a further or alternative allegation. The editors of ***Rayden on Divorce 10th Edition page 478*** explain that *"it is inappropriate to include in the reply a new charge of cruelty which could have been made in the petition; but in a proper case leave to amend the original petition may be obtained."* And earlier at page 379 under the heading **"Methods of adding charges**" – "*If all the acts to be added occurred before the date of the petition amendment is appropriate."*

18. The Court of Appeal in ***Nelson v Nelson and Slinger (1958) 2 All ER P 744*** considered this exact issue and found that "*the registrar before whom the matter came suggested that the husband should introduce the charges of cruelty which he desired to raise in his reply. That would not make them an issue in the cause, and on the hearing of the petition the husband would not be allowed to rely on cruelty as a ground for seeking divorce. Any such reply would be a departure from the original proceeding and it would obviously be an inconvenient way of introducing the matter."* They presumed that if it were allowed to be introduced in that way then the Respondent would have to apply for leave to reply (a rejoinder). The court went further; they commented on their decision to grant an amendment to the petition on the basic need to have the full case before the court. They relied on ***Duchesne v Duchesne (1950) 2 All ER 784*** and concluded that the Petitioner would otherwise be *"in great difficulty in relying on any suggestion of cruelty on the wife's part in any ancillary proceedings that might take place in those proceedings for divorce."*

19. Further, if we again look at the precise wording of The Act, Section 129(1) states that a petition for divorce may be presented, on certain grounds. Rule 1(2)(6) states that the matrimonial offences charged should be set out in the body of the petition and Sub rule (3) informs that the petition should conclude with the particulars of the relief claimed. Section 133 of The Act then speaks of **counter charges** being made against the Petitioner and Rule 24 (2) contemplates an answer alleging adultery and prays for relief. Section 135 refers to the Respondent **opposing** the relief sought by the Petitioner and being given relief as if the Respondent himself had presented a petition. This court could find nothing in The Act or The Rules which considered new claims for relief being contained in a reply.

20. The Respondent is expected to admit, deny and/or counter charge in his answer. He may also claim relief. The Petitioner may reply if he deems it necessary likewise admitting or denying any allegations contained in the answer. He may even assert his own reasons and build on the allegations in his petition by adding charges similar to the charges he has already made in his petition, but he cannot include entirely new grounds or fresh claims for relief.

21. For these reasons the counter charges and claims for relief based thereon pleaded in the Petitioner's reply are struck out in toto. Any admissions or denials to the Respondent's counter charges will remain. Consequentially, the Petitioner's application for a decree based on the Respondent's purported admission of cruelty and or adultery falls away.

Failure to file a rejoinder:

22. Having thus decided, the issue of the absence of a rejoinder really becomes mute as all that would be left of the reply would be bare denials and/or admissions to the counter charges which do not require any subsequent pleadings. In fact Archbold Civil Proceedings 2013 contends at page 463 that pleadings should rarely go beyond reply, - *"Save in the most exceptional cases the supposed need for additional pleadings normally evidences a failure to plead the case properly in the first place."* The Rules give bite to this particular view by requiring at Rule 23 that filings beyond a reply can only be done with leave. Such leave will only be given where the court is satisfied that it is necessary.

It is hereby ordered:

23. 1. The charges of adultery and cruelty and the consequential claims for relief in the Petitioner's reply are struck out.
    2. The Petitioner's application is dismissed.
    3. Costs to the Respondent to be taxed if not agree.
    4. Matter is set for trial on the 2nd July, 2015 as agreed by both sides.

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SONYA YOUNG
JUDGE OF THE SUPREME COURT

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