

Neutral Citation Number [2016] EWCA Civ 497

B6/2015/2308

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM BRISTOL CIVIL AND FAMILY JUSTICE CENTRE**  
(HIS HONOUR JUDGE WILDBLOOD QC)

Royal Courts of Justice  
Strand  
London WC2A 2LL

Tuesday, 24 May 2016

**B e f o r e:**

**SIR JAMES MUNBY**  
**PRESIDENT OF THE FAMILY DIVISION**

**Between:**  
**HART**

**Applicant**

v

**HART**

**Respondent**

DAR Transcript of  
WordWave International Limited trading as DTI  
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(Official Shorthand Writers to the Court)

The **Applicant** appeared in person

**Mr P Mitchell** (instructed by Irwin Mitchell LLP) appeared on behalf of the **Respondent**

J U D G M E N T  
(Approved)

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1. SIR JAMES MUNBY: This is a renewed application for permission to appeal in ancillary relief proceedings, the application being made by the husband, as I shall refer to him. The judgments under challenge were given by His Honour Judge Wildblood QC in the Bristol Family Justice Centre, although the judge was sitting in the High Court under section 9. The first judgment was dated 20 May 2015 and the second, supplementary, judgment was dated 25 June 2015.
2. In the event both the husband and the wife, as I shall refer to her, sought to appeal against Judge Wildblood's decision. The two applications came on the papers before Kitchin LJ on 26 February 2016. The single judge gave the wife permission to appeal and refused the husband's application for permission to appeal.
3. As before Judge Wildblood, the husband has appeared today before me in person. His complaints about Judge Wildblood's judgment are set out in 20 numbered grounds of appeal, elaborated in a helpful and more detailed skeleton argument. In accordance with Kitchin LJ's order, the hearing today was fixed on notice to the wife, and she has appeared today, as she has throughout, by Mr Peter Mitchell of counsel who, to the extent that I thought it helpful and appropriate to do so, has addressed submissions to me as to why the husband's application should be refused.
4. I should add that, although it had not come either to my attention or seemingly to the husband's attention before this morning, Mr Mitchell put before me a "First respondent's note opposing grant of permission to appeal" dated 30 July 2015. Before I commenced the hearing, I gave the husband as much opportunity as he needed to read that document. Although he complained about the fact that it was the first he had seen of it, he made clear in answer to a question from me that he did not seek any adjournment.
5. The husband's grounds of appeal as formulated before me this morning, and I bear in mind that he has not withdrawn any of his grounds of appeal, so I treat as being before me not merely those which he has addressed me on orally this morning but also those set out in his grounds of appeal, fall under seven headings. I shall take them in the order in which he presented them to me.

6. The first complaint arises out of the fact that the wife has for some years now been, as the husband would have it, cohabiting with and indeed living as husband and wife with another man. The husband, in reliance upon the decision of Mostyn J in the case of AB v CB [2014] EWHC 2998 (Fam), complains that Judge Wildblood was wrong or at least arguably wrong in his decision that that was not a matter which led to any reduction in the wife's needs. Mostyn J's decision was before Judge Wildblood and was indeed relied upon before him by the husband. Judge Wildblood rehearsed the evidence of both the wife and her current partner (see paragraphs 34 and 35 of his first judgment) and went on to explain (see paragraph 45 of the same judgment) why it was he concluded in the light of that evidence that, as he said:

"I do not consider that the presence of Mr Chubb in the life of Mrs Hart should in any way diminish her needs."

7. Mr Mitchell submits, and I agree, that Mostyn J's judgment does not lay down any principle of law. In my judgment, these matters are quintessentially matters of fact where the trial judge has to have regard to the totality of the evidence, including the nuance of that evidence, before coming to a conclusion as to whether the prospects of remarriage, or indeed the future prospects of the relationship, should or should not, and if they should to what extent they should, be taken into account.
8. Despite what the husband has said, and I have carefully read the relevant paragraphs of Mostyn J's judgment (see in particular paragraphs 66 and 67), these were fundamentally matters of fact upon which Judge Wildblood had to hear the evidence. He came to a conclusion which was plainly open to him on the evidence he heard, and in my judgment there is no realistic prospect of the husband disturbing that essentially factual finding by way of appeal.
9. The second point which the husband takes I can conveniently link with the seventh. The second point is that he produced a substantial volume of case law which he wished to put before Judge Wildblood. Judge Wildblood, he complains, prevented him from deploying the whole of his armoury, brushing it aside on the basis that he, Judge Wildblood, was

very familiar with the principles. The seventh ground, identified this morning, is put by the husband on the basis of unfairness, there being, as he would have it -- although Mr Mitchell disputes this on the facts -- an imbalance between the time which was afforded to Mr Mitchell and the time which was afforded to him, the husband, to make final submissions.

10. In relation to those two matters, the fundamental point as I see it is that the husband has not put before this court the transcript of the relevant parts of the proceedings, without which this court is in no position to evaluate whether there has or has not been unfairness in the process. If it is to be said that there has been some unfairness in the process, and each of those two grounds in substance allege unfairness on the part of Judge Wildblood and the way in which he conducted the proceedings, this court would normally expect, and in my judgment this case is no exception, that there should be put before the court an official transcript so that this court can evaluate the merit or lack of merit of the assertions being made.
11. The third matter put before me by the husband this morning relates to what he says was Judge Wildblood's inappropriate treatment of a family trust. It was a trust which it was common ground provided for the interests, as to 25 per cent each, of the husband and the wife and each of their two children. The husband's complaint is the judge treated the wife's 25 per cent share as being something that would never be in fact and in reality available to her, and correspondingly treated the husband as being interested in the remaining 75 per cent, thereby excluding the children.
12. That complaint might have some plausibility but for an overriding factor which, as can be seen from Judge Wildblood's two judgments, profoundly affected the whole of the proceedings before him; that is to say the great difficulty which the judge had, as indeed had the wife's team, in extracting from the husband satisfactory evidence as to a wide range of matters. The judgment is peppered with findings by the judge in relation to specific matters as to which the husband had been unable to provide appropriate and satisfactory evidence. Against that background, although it is the case, as Mr Mitchell confirmed to me, that Judge Wildblood did have in front of him the relevant trust deed

and would therefore have been aware of its various provisions, the judge found (see paragraph 4 of the main judgment) that:

"Mr Hart treats corporate and trust assets as though they were his own."

13. And went on to say:

"There is only very sparse information relating to the trust because Mr Hart has chosen not to provide it."

14. In those circumstances, the complaint identified by Mr Hart dissolves. He can hardly criticise the judge for coming to the conclusion he did in the light of findings which in my judgment the judge was fully entitled to make in the light of the evidence he had heard -- or rather the evidence he had been deprived of -- and for the reasons he gave. There is, it seems to me, no arguable substance in point.

15. The fourth matter relates to what the husband asserts was an error on the part of the judge in dealing with certain short term loans from a company known as Lynoma Limited, in particular in relation to the judge's treatment of the profit earned on those loans. That is a matter which Judge Wildblood dealt with in paragraph 87 of his main judgment. He referred explicitly to what on the husband's case was the correct figure for the amount of those loans, namely £5.4 million, and went on to identify what the husband would assert is the correct figure for the interest, namely £317,000. Judge Wildblood went on in the latter part of that paragraph in his judgment to explain why he rejected the husband's case in relation to the proper treatment of that sum of £317,000. The judge's analysis on the face of it displays no error in reasoning. It was, as it seems to me, an analysis and a conclusion which the judge was entitled to come to in the light of all the evidence, including the expert evidence he had heard, and therefore there is no substance in that point.

16. The fifth point, which although it was put as the fifth point by the husband in his oral presentation, forms the major part of his grounds of appeal, relates to the judge's treatment of potential capital gains tax liabilities which might, or, as the husband is keen to stress, might not, attach in future to the wife. The award made to the wife by

Judge Wildblood included a sum of £273,000 awarded by way of a lump sum, the rationale for that particular payment being the need to exonerate the wife from potential future capital gains tax liabilities.

17. In relation to that, the husband makes two points. First, he says that the judge was wrong in principle to make provision for potential capital gains tax liabilities accruing to the wife because it was entirely feasible that the relevant assets would not be disposed of in the wife's lifetime, with the consequence, as is well known, there being no capital gains tax liability on death, that the charge to capital gains tax would never accrue. In support of that, the husband sought to adduce before Judge Wildblood, after he had given his main judgment and before he gave the supplemental judgment, an expert report making that and a number of related points.
18. Judge Wildblood dismissed the argument, for reasons which he elaborated in some detail in his supplemental judgment; see in particular paragraph 4 of that judgment, where Judge Wildblood sets out in ten numbered subparagraphs the reason why he rejected the husband's arguments in relation to the capital gains tax liability. The judge's reasoning was based in part on matters of fact and in part on matters of principle and approach; see for example in subparagraph iv his reference to standard practice for such liabilities to be provided for "because they are highly likely to arise at some time ... and ... because all assets are netted down".
19. Strictly speaking, the husband was not entitled to rely upon the expert's report either before Judge Wildblood or before me, because, as a result of a debarring order made prior to the final hearing by Parker J, the husband had been debarred for failure to comply with an unless order from challenging the expert evidence of the jointly appointed expert. I have nonetheless read the expert's report which the husband seeks to put before me. The key point made by the expert is:

"The main and most common exemption to capital gains tax is that there is no CGT payable on death. That relief is therefore available to [the wife] and capital gains tax liability may never arise. Capital gains tax only arises if the shares are disposed of in a person's lifetime.

As there is no certainty the shares will ever be disposed of in her lifetime, the making of such a provision is untenable."

20. Well, that may be the view of the expert. It is not as a matter of law an approach which the court is bound to follow. In my judgment, Judge Wildblood was fully entitled for the reasons he gave, in particular in the supplementary judgment, to make provision for the wife in relation to a prospective capital gains tax liability which, insofar as one can predict the future, was much more likely to accrue than not to accrue.

21. Linked to that are certain complaints by the husband as to Judge Wildblood's calculation of the capital gains tax liabilities. In my judgment, there is no substance in any of those complaints.

22. I have before me the reasons that Kitchin LJ gave when refusing the husband permission to appeal on the papers, and it is appropriate for me to record -- because, with respect to Kitchin LJ, I entirely agree with it -- that judge's observations on this particular point:

"The judge took into account Mrs Hart's liability for CGT in relation to Drakestown based on the evidence of Ms Round (see main judgment at paragraphs 24 to 27 and the supplemental judgment at 3 to 5). This was appropriate for the reasons the judge explained in the supplemental judgment at paragraph 4. The judge was entitled to refuse to admit the report of the Wood Consultancy [that was the husband's expert] for the reasons he gave."

23. The husband's sixth point as deployed before me this morning focussed on a sum of £298,000 which the husband asserts is owing by a company which is now the wife's company to another company which as it were lies within his, the husband's, camp. In answer to questions I put to him in order to ensure that I correctly understood what the point was, the husband told me that nothing which Judge Wildblood had done had affected the right of the creditor company to sue the debtor company. The fact remains

that that debt, if it exists, still remains owing and is therefore a matter which is entirely outside the ambit of Judge Wildblood's order and outside the ambit of these proceedings.

24. The husband complains that it is, as he said more than once, all one way, he is on the back foot. He complains in effect that it is unfair for the wife to have been awarded the sum of £273,000 in relation to a capital gains tax liability when nothing was done to enforce the payment by her company to the other company of a sum of £298,000. Although that may at first blush appear plausible, the short answer to it is, as I have indicated, that the debt, if it exists, remains owing and can be recovered in the usual way, quite apart from the fact that that debt is an inter-company debt and not, as I understand it, directly a debt of the wife.
25. In those circumstances, and for those reasons, I have come to the conclusion that despite everything put before me by husband, both in writing and orally, he has no reasonably arguable basis of challenge in relation to any of the seven points upon which he has focussed this morning.
26. I add two matters by way of conclusion and for the avoidance of doubt: I have very much in mind the other matters which the husband canvassed in his grounds appeal and in the skeleton argument. Without going into those matters in any detail, I am likewise persuaded that there is no substance in any of those other points which would justify the grant of permission to appeal and therefore I decline to do so.
27. The other matter is this: as I have mentioned, the wife has been given permission to appeal, and I have therefore anxiously considered whether the husband's resistance to the wife's appeal would in any way be prejudiced if he was prevented from arguing any of the matters which he has sought to raise in his own appeal. Had I thought that there was any realistic basis upon which it might be said that his resistance to the wife's appeal would be hampered by his inability to raise any of these matters, I would have given anxious consideration to the question of whether that circumstance would have given rise, under the second limb of the test for permission, to some other reason why it was appropriate to grant permission despite the absence of arguable merit. I have come to the conclusion

that the husband will not be prejudiced in such a way, and therefore this is not a case in which it is appropriate for me to grant permission on that basis.

28. Accordingly, for all those reasons, the husband's renewed application for permission to appeal fails and must be refused. The consequence is that the matter, that is to say the wife's appeal, as it now is, will require to be heard in due course in the usual way. The husband will of course in the usual way be able to resist that appeal on whatever grounds are properly open to him in the circumstances.