

**Judgment 58/2004**

**H v H – Royal Court (Divorce file 4388) –  
23 November, 2004**

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**Matrimonial law – further orders and directions relating to implementation of orders for ancillary relief – application for leave to appeal to Court of Appeal from judgment dated 28 July, 2004 – principles to be applied – leave refused.**

Before Rosalyn Le Couteur Brelsford – Lieutenant Bailiff

On the 23<sup>rd</sup> day of November, 2004.

Between

H

Appellant

and

H

Respondent

In the matter of the application by the Appellant for leave to appeal from the Judgment handed down on the 28<sup>th</sup> July, 2004;

WHEREAS on the 16<sup>th</sup> November 2004, THE COURT having heard Advocates M. G. Ferbrache and P. T. R. Ferbrache for the Appellant and Respondent respectively RESERVED JUDGMENT;

THE COURT THIS DAY issued Judgment in the terms attached hereto and REFUSED leave to appeal.

C. S. WEETMAN  
Her Majesty's Deputy Greffier

Approved Text

**IN THE COURT OF APPEAL**

**CIVIL DIVISION**

**Between:**

**H**

**Appellant**

**v.**

**H**

**Respondent**

**BEFORE Rosalyn Le Couteur Brelsford, Lieutenant Bailiff**

Date of Hearing: 16<sup>th</sup> November, 2004  
Date Judgment handed down: 23<sup>rd</sup> November, 2004

Advocate for the Appellant: M. G. Ferbrache.  
Advocate for the Respondent: P.T.R. Febrache

1. The present application is for leave to appeal from the judgment of the Royal Court handed down on the 28<sup>th</sup> July, 2004, the whole in the circumstances set out in the Notice of Appeal dated the 27<sup>th</sup> August, 2004.
2. In support of the application Advocate Mark Ferbrache referred to Kaduna Ltd v. R Durnell & Sons Ltd (Guernsey Court of Appeal 18<sup>th</sup> December, 2003 page 5 paragraph 15) and Smith v. Cosworth Casting Processes Ltd. (1997) 4 All ER 840.
3. In Kaduna Ltd. v. R Durnell & Sons Ltd. the Guernsey Court of Appeal set out the test in appeals against the exercise of a discretionary jurisdiction by the Royal Court. Such an exercise of discretion by a court of first instance is not to be interfered with by an appellate court unless the appellate court has reached the conclusion that the judge's exercise of discretion must be set aside. The appellate court does not begin by exercising an independent discretionary jurisdiction of its own. It must defer to the judge's exercise of his discretion and must not interfere merely because it would have exercised the jurisdiction differently. In reviewing the judge's decision, it may set aside that decision only if:

- (i) the decision was based on a misunderstanding of the law or of the evidence before him or a wrong inference of fact drawn from that evidence; or
  - (ii) there has been a change of circumstances after the judge reached his decision which would have justified him in acceding to an application to vary his decision.
4. In Smith v. Cosworth Casting Processes Ltd. the English Court of Appeal gave some guidance as to applications for leave to appeal. The guidance included the following:
- “(1) The court will only *refuse* leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the Appellant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word ‘realistic’ makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.
  - (2) The court can *grant* the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying”.
5. The Court should also be wary of appeals which have the effect of delaying a significant Interlocutory Order (R.A.G. Sinclair v. C.A.H. Nicholson Guernsey Court of Appeal 27<sup>th</sup> September, 2000). In addition the Court must consider whether the point is of sufficient significance to justify the costs of an appeal.
6. The judgment which is being appealed against arises out of the latest of several hearings which have been held to ascertain how best to effect the original order of the Royal Court Matrimonial Causes Division dated the 4<sup>th</sup> August, 1998. In my opinion none of the issues raised can be considered to be in the public interest nor does the case raise any issue where the law requires clarifying. Although Advocate Mark Ferbrache, on behalf of the Appellant, alleged that I had erred in law he was unable in Court to produce any example of this save to argue that the most recent decision of the Court had left the Appellant in a worse position than under the previous Act of Court. I do not accept this as an example of erring in law but more as an attempt by the Court to facilitate the implementing of the original judgment.
7. I must now consider whether the decision was based on a misunderstanding of the evidence before the Court or a wrong inference of fact drawn from that evidence.
8. Most of the “particulars” raised by Advocate Mark Ferbrache in this context are in fact a list of criticisms and complaints as to the Respondent’s alleged failure to effect the

judgment such as allegations of non-compliance with court orders or an unwillingness to co-operate. While these criticisms could seem in several cases to be justified I do not accept that they constitute a particular giving rise to a ground of appeal.

9. Advocate Mark Ferbrache's main example of an unreasonable exercise of the Court's discretion was the Court ordering that the Appellant was not entitled to be provided with copies of the bank statements in the RBSI accounts albeit it was ordered that she and/or Advocate Mark Ferbrache be granted free access to the bank statements in the presence of a Court official. It is also alleged that the Court wrongly further delayed the payment of one-half of the balance of the monies in the RBSI accounts by stating that the balance was to be paid out within seven days of the statements being seen and approved by the Appellant less deductions with regard to the children's trust fund and family expenses although the judgment of the Court dated the 31<sup>st</sup> January, 2003, had stated that the monies be paid within fourteen days of the order - in fact £636,000 of the monies had been paid to the Appellant and £570,000 to the Respondent prior to the Court Hearing of 28<sup>th</sup> July, 2004.
10. Another example of an alleged unreasonable exercise of the Court's discretion (paragraph 19 of the Notice of Appeal) was to order each of the parties to pay £25,000 into the Children's Trust and to suggest, as agreed by the Respondent, that the Appellant take over the running of the trust thus ensuring that if the parties could not communicate then monies would always be available for the children's education. The Appellant would not therefore have to deal with the Respondent through the medium of the trust although this is cited in paragraph 19 as one of the grounds of appeal.
11. In the final paragraph of my judgment of the 31<sup>st</sup> January, 2003, I stated: "Unfortunately as I was asked only to settle specific claims I have not been able to resolve this matter completely. While I have given the parties the chance to return to Court under paragraph 1, I do hope that the parties (and their Counsel) can now settle the outstanding issues without incurring further substantial legal fees and a further breakdown in relationships between the parties". The final paragraph of my judgment dated the 28<sup>th</sup> July, 2004, stated: "Six years after the definitive order was made in this matter applications are still being brought before this Court in an attempt to resolve how the agreement to share their assets, originally consented to by the parties without litigation, should be implemented. I hope for the sake of both the parties that the matter can now be resolved without further recourse to Court and a further breakdown in the relationship between them". The comments reflect the situation, which both Advocates have acknowledged in Court, namely that neither the Appellant nor the Respondent trust each other and are unable to

resolve matters between themselves. It is quite clear from the transcript of the July hearing that the Appellant, because of the lack of trust between the parties, would not accept any final settlement until she had had sight of the bank statements and therefore in an attempt to resolve the difficulties once and for all and to ensure that the Appellant was fully aware of the financial situation so that matters could be finalised, the Appellant's approval of the bank statements was tied in with the final payment of the balance of the monies.

12. While the Appellant might well have understandable grievances I do not accept that they constitute proper grounds of appeal. I am therefore satisfied that as the Appellant has no realistic prospect of succeeding on an appeal and mindful of the possible further delay and further costs arising out of such an appeal I am refusing leave.