

[2024 Gib LR 543]

OCHELLO v. OCHELLO

COURT OF APPEAL (Kay, P., Rimer and Davis, JJ.A.):
October 17th, 2024

2024/GCA/010

Family Law—financial provision—pension rights—in case where clean break required, husband to pay wife lump sum in respect of his Ministry of Defence pension upon receiving pension, even though only entitled to commute 25% of pension into lump sum—calculation of lump sum

A dispute arose regarding financial provision following divorce.

The parties married in April 2004 and separated in August 2016. The wife filed for divorce in November 2016 and the decree absolute was dated November 21st, 2018. Ramagge Prescott, J., dealing with financial matters, considered that a clean break was required in the circumstances. An order was made dealing with the assets and liabilities. However there was an outstanding issue in relation to the husband’s Ministry of Defence pension. The wife valued the cash equivalent transfer value (“CETV”) at £50,236.40 and the husband valued it at £45,918.25. The judge’s order directed the husband to write to the MOD requesting an accurate CETV. The order then provided:

“the [husband] shall pay to the [wife] a lump sum in respect of the [wife’s] beneficial interest in the [husband’s] MOD pension upon the [husband] receiving the said pension . . . The said lump sum shall be calculated by dividing the CETV . . . by the number of months that the [husband] or his employers has/have been contributing to the MOD pension, multiplied by 40 being the number of months from the date of the marriage to the date of separation and divided by 2.”

The number of months from the date of marriage to the date of separation was in fact 148.

The MOD response to the husband’s legal advisers stated:

“I have attached a commutation table for your information. Unfortunately, your client is unable to receive the full value of his pension CETV. He is entitled to a full pension with no lump sum, however, he can commute up to 25% into a lump sum and monthly pension.”

The husband contended that the wife’s entitlement to a lump sum by reference to his MOD pension should be limited to 50% of the maximum

lump sum available to him under the commutation provision, namely £5,494.53. The wife disputed this.

Restano, J. concluded that the wife was essentially correct. He considered that the original CETV for the full pension was the more reliable figure and that the correct figure to use was the original figure of £50,236.40, rounded down to £50,000. The wife's share of the £50,000 should be calculated using the formula referred to by Ramagge Prescott, J. in her order.

The husband appealed, submitting that Restano, J.'s implementation of Ramagge Prescott, J.'s order, following the information obtained from the MOD, was unreasonable. The husband submitted that his understanding of Ramagge Prescott, J.'s order was that he would be able to transfer to the wife the requisite part of the capital sum which would become available to him on retirement, whereas he was now required to transfer to the wife a sum on retirement which would significantly exceed the maximum lump sum that he would be eligible to obtain. He would prefer to transfer to the wife half of the lump sum that he would actually receive and to make monthly payments to the wife out of his pension income.

Held, dismissing the appeal:

The husband's suggested approach was contrary to Ramagge Prescott, J.'s analysis and intention and would effectively undermine the clean break that was central to her reasoning. It was unfortunate that the parties originally chose to base their contentions on the CETV, which was more relevant to contractual private pensions based on an identifiable or calculable fund with a transfer value in the strict sense. In the context of public sector pensions, which did not have an identifiable or calculable fund, it could only be a putative measure. In the present case what had to be valued was a capitalized sum which would putatively generate the eventual entitlement, whether it was taken on the basis of a monthly income alone or a lump sum plus a reduced monthly income. In a different case, an outcome based on half the available lump sum plus half the monthly pension income might be appropriate but in the present case, where a clean break was considered essential, a way had to be found of capitalizing the lump sum and the income elements under the pension. Restano, J. considered the original fairly close CETV figures and the latest 25% lump sum plus monthly income figures and came to the pragmatic conclusion that the most reliable starting point was the originally higher CETV, rounded down to £50,000. That was neither unreasonable nor unjust, having regard to all the circumstances including the duration of the marriage and the assumed chronology of the crystallization of the pension. Only in this way could the wife be fairly compensated for the loss of participation in the lump sum and monthly income elements in an obvious clean break case. The husband's appeal would therefore be dismissed and the MOD pension would be dealt with in the manner prescribed in the judge's order, amended so as to refer to the number of months as 148 rather than 40 (paras. 15–19).

J. Rodriguez (instructed by Isolaz LLP) for the appellant;
No appearance by the respondent, who filed written submissions.

1 **KAY, P.:** This appeal relates to an issue arising out of the judgment and order of Ramagge Prescott, J. dated March 2nd, 2023 dealing with financial remedies following the divorce of the parties. Although neither party appealed that order, it later fell to be considered by Restano, J. The appeal is against his judgment and order of March 15th, 2024 and is related solely to the appellant husband's Ministry of Defence (MOD) pension.

2 The parties were married on April 26th, 2004. There are two daughters [redacted].

3 The parties separated in August 2016. The husband left the former matrimonial home, a tenanted government property, at that time. The wife filed for divorce on November 11th, 2016. The decree absolute is dated November 21st, 2018. The children resided with the wife but contact was a continuing issue. In December 2018 the wife, without prior notice, left Gibraltar with the children and went to live in the United Kingdom. Unsurprisingly, this led to acrimony and litigation, including extradition proceedings in London which the wife successfully resisted. She and the children continue to reside in the United Kingdom.

4 Initially, in February 2017, the husband was ordered to pay the wife £50 per month pending suit and £450 per month by way of child maintenance. He made the payments until late 2018 but ceased to do so around the time when the wife and children relocated to the United Kingdom. Indeed, he did not know their whereabouts until February 2019, when he was contacted by the Care Agency, who informed him that they were intending to remain in the United Kingdom permanently. At that point he returned to live in the former matrimonial home. Between November 2018 and October 2021, arrears of maintenance accumulated to the tune of £19,100.

5 On December 20th, 2021 an order was made excluding future spousal maintenance but continuing interim child maintenance in the sum of £450 per month, with an additional payment of £450 per month in relation to the accumulated arrears. An attachment of earnings order was made in the sum of £900 per month.

6 In the light of this history, it is unsurprising that, when financial matters came before Ramagge Prescott, J. for final determination, it was common ground that the case cried out for a clean break solution. She made an order systematically and holistically dealing with all the assets and liabilities. However, there was an outstanding issue in relation to the husband's prospective MOD pension because of an unresolved issue of valuation. The order directed the husband to write to the MOD within seven days "requesting an accurate Cash Equivalent Transfer Value (CETV) in respect

of his MOD pension . . . as at the date of writing to the MOD.” Paragraph 2 of the order then stated:

“the Respondent shall pay to the Applicant a lump sum in respect of the Applicant’s beneficial interest in the Respondent’s MOD pension upon the Respondent receiving the said pension, following his retirement for service at the MOD. The said lump sum shall be calculated by dividing the CETV of the MOD pension by the number of months that the Respondent or his employers has/have been contributing to the MOD pension, multiplied by 40 being the number of months from the date of the marriage to the date of separation and divided by 2.”

7 I should add that the figure 40 is agreed to be erroneous. The number of months from the date of marriage to the date of separation was in fact 148.

The background to Ramagge Prescott, J.’s order in relation to the MOD pension

8 At the hearing in 2023, the parties’ respective valuations of the CETV were not far apart. The wife put it at £50,236.40 based on an estimate from the MOD’s Human Resources Department, while the husband contended for a figure of £45,918.25 which he said arose out of a more recent recalculation. It was submitted on behalf of the wife that she should receive £25,118.20, viz. 50% of her CETV figure. The husband’s case was that on his eventual retirement he should be allowed to elect for a lump sum of £11,082.29 plus a monthly income of £263.29 and that, on this hypothesis, the wife’s entitlement should be limited to £5,529.15, viz. 50% of his lump sum.

9 In her judgment, Ramagge Prescott, J. resolved this dispute in the following passage (at para. 61):

“With regards to the MOD pension the Respondent urges me to allow him to opt upon retirement for a small lump sum which he estimates at about £11,000 and a monthly income of £263. Whilst this might serve the Respondent well, the same could not be said for the Applicant. She would take the £5,500 lump sum and not receive the benefit of monthly payments. £5,500 is not a fair reflection of the estimated total value of the pension. I therefore propose to apportion the pension applying the same approach as the Friends Provident Pension. The Applicant would be entitled to receive half of the CETV that relates to the period during which the parties have been married. For the avoidance of doubt, this means the CETV divided by the number of months that the Respondent or his employers has/have been contributing to the fund multiplied by 40 being the number of

months from the date of marriage to the date of separation and divided by 2. I have differing CETV estimates from the Respondent and the Applicant so I direct the Respondent to write to his employers within 7 days of the date of this judgment, requesting an accurate CETV value as at that date, and that will be the figure that will be used to calculate the Applicant's interest."

10 The judge plainly believed that the remaining issue was limited to valuation and was contained within narrow parameters.

Further developments

11 When the MOD was approached by the husband's legal advisors pursuant to Ramagge Prescott, J.'s order, it replied as follows:

"I have attached a commutation table for your information. Unfortunately, your client is unable to receive the full value of his pension CETV. He is entitled to a full pension with no lump sum, however, he can commute up to 25% into a lump sum and monthly pension."

12 This resulted in a further dispute between the parties. The husband contended that the wife's entitlement to a lump sum by reference to his MOD pension should be limited to 50% of the maximum lump sum available to him under the commutation provision, namely £5,494.53. The wife disputed that this was the correct approach and declined to implement other aspects of Ramagge Prescott, J.'s order pending resolution of this issue.

The present position

13 As I have indicated, neither party has ever sought to appeal the dispositive order of Ramagge Prescott, J. In the event she retired on November 10th, 2023. The parties then jointly requested that the papers be referred to another judge for resolution of the dispute. Enter Restano, J. who, on March 15th, 2024, after consideration of the papers, including written submissions from both parties, concluded that the wife was essentially correct. He said:

"My view . . . is that the original CETV for the full pension is the more reliable figure and that the correct figure to use is the original figure of £50,236.40 rounded down to £50,000. The Applicant's share of £50,000 should be calculated using the formula referred to by the Judge and set out in paragraph 2 [of her order]."

It is this decision that now comes before us on appeal at the husband's behest.

Discussion

14 The husband's grounds of appeal make it clear that he is not appealing the decision of Ramagge Prescott, J. They acknowledge that Restano, J. had "correctly held that the approach to be taken . . . had been clearly set out by Ramagge Prescott J." Their assertion was that Restano, J.'s implementation of her order following the later information obtained from the MOD was "entirely unreasonable." In the course of Mr. Rodriguez's submissions in this court, it became clear that the husband's grievance is that, whereas under his understanding of Ramagge Prescott, J.'s order, he would be able to transfer to the wife the requisite part of the capital sum which would become available to him on retirement, he was now being required to transfer a sum on his retirement which would significantly exceed the maximum lump sum that he would be eligible to obtain. He would have to borrow money when that eventuality had not been contemplated. In the course of his submissions, Mr. Rodriguez said that the husband would prefer to transfer half of the lump sum that he will actually receive and to make monthly payments to the wife out of his pension income. I should add that we were told at the hearing that the husband is currently contemplating retirement at 65, in about 7 years' time.

15 The first thing to say about the husband's present approach is that it flies in the face of Ramagge Prescott, J.'s analysis and intention. It would effectively undermine the clean break that was central to her reasoning. It is essentially an attempt to re-run the argument that was rejected by her at para. 61 of her judgment. I repeat, this is a case that cries out for a clean break.

16 The case for the husband then is that the judgment of Ramagge Prescott, J. needs to be interpreted and implemented in the light of the information later obtained from the MOD. It is submitted that the deployment of CETV had been the result of a common mistake. It turned out to be an irrelevant concept. Putting it to one side, the correct approach is to use the maximum available lump sum as the starting, if not the finishing, point.

17 In my judgment, this approach is fundamentally flawed. It is unfortunate that the parties originally chose to base their contentions on the CETV. That is a concept more relevant to contractual private pensions based on an identifiable or calculable fund with a transfer value in the strict sense. When used in the context of public sector pensions, which do not have an identifiable or calculable fund, it can only be a kind of putative measure. In the present case what had to be valued was a capitalized sum which would putatively generate the eventual entitlement, whether it was taken on the basis of a monthly income alone or a lump sum plus a reduced monthly income. What had to be identified was the notional "pot," to use the word used by Ramagge Prescott, J.

18 In a different case, an outcome based on half the available lump sum plus half the monthly pension income might be appropriate. But in a case where a clean break is considered essential, a way has to be found of capitalizing the lump sum and the income elements under the pension. Restano, J. considered the original fairly close CETV figures and the latest 25% lump sum plus monthly income figures and came to the pragmatic conclusion that the most reliable starting point was the originally higher CETV, rounded down to £50,000. That, it seems to me, was neither unreasonable nor unjust, having regard to all the circumstances including the ages of the parties, the duration of the marriage and the assumed chronology of the crystallization of the pension. Only in this way can the wife be fairly compensated for the loss of participation in the lump sum and monthly income elements in an obvious clean break case.

Conclusion

19 I would dismiss this appeal. It follows that, if my Lords agree, the MOD pension will be dealt with in the manner prescribed by paras. 1 and 2 in the order of Restano, J., with para. 1 amended so as to refer to the number of months as 148 rather than 40.

20 **RIMER, J.A.:** I agree.

21 **DAVIS, J.A.:** I also agree.

Appeal dismissed.
