IN THE SUPREME COURT OF THE TURKS AND CAICOS ISLANDS

Case No.: CL-APM 5/09

BETWEEN

JIMMY CHARLES BAKER

Appellant

-AND-

KIMBERLY JUNE COX-BAKER

Respondent

Heard: 25th November 2009

Circulated: 5th January 2010

For the Appellant: Mr J. Katan

For the Respondent: Ms T. Muhammad

RULING

APPLICATION

1. This is an appeal from a decision of the Learned Chief Magistrate at the South Caicos Magistrate's Court on the 17th February, 2009 when she refused to discharge or fix a time limit in respect of a Protection Order and attached power of arrest, which had been made by the same Court on 10th January, 2008.

BACKGROUND

2. The background history can be shortly stated. The parties to this appeal are Jimmy Charles Baker, who is the Appellant, and Mrs Kimberly June Cox-Baker, who is the Respondent. They were parties to a marriage which was dissolved by Decree Absolute, pronounced on 31st July, 2008. There are no relevant children of the family.

3. On 2nd January, 2008 the Respondent was granted an ex parte protection order with attached power of arrest. The Court then had before it an affidavit filed by the Respondent. In the affidavit, the Respondent referred to business and property disputes between the parties and stated that the Appellant had a violent temper. Paragraph 6 of the affidavit referred to judgment being passed on the Appellant. This appears to relate to the sole allegation of violence which occurred during an incident in May 2006. The assault came during an argument in the workplace about one of their company's assets. The Respondent suffered a bite mark on her fingers, a small bruise to the lower part of her back and it was alleged, but not accepted, that she had been head-butted. The Appellant was convicted for the offence of assault occasioning actual bodily harm and was fined $1,000. I note that this incident occurred over two and half years ago.

4. The Chief Magistrate extended a modified Protection order power of arrest on the return date heard on 10th January, 2008. That order did not have an expiry date.

5. The parties were, and technically remain, in business together as directors in June Bugging Me Ltd, a company run as a quasi-partnership. Difficulties with their business coincided with their matrimonial problems. On 18th January, 2008, the Respondent brought a derivative action in her own name and on behalf of the Company. In addition there were, and still are, ongoing proceedings in relation to the former matrimonial home. It is clear that the Chief Magistrate placed importance on those proceedings when she reached her decision which is under appeal.

6. At the February 2009 hearing of the Appellant's application to revoke the order, pursuant to Section 18(1) of the Domestic Proceedings Ordinance, the Chief Magistrate "thought it prudent to keep the Protection Order in place because of the outstanding business concerns that still existed between the parties." The Chief Magistrate was of the view that the 2006 "altercation which led to the assault had arisen during an earlier business discussion" and, as there was an ongoing dispute, the Chief Magistrate concluded that if the protection order were removed there "might be violence or threatened violence" and so the order should remain in place. The Chief Magistrate gave leave to the Appellant to apply to revoke the order once the business and property disputes had been resolved. Although the Appellant would not need such leave, it is evident that the Chief Magistrate was of the view that the order should not be revoked until that time. The Chief Magistrate made no mention of the power of arrest in her Ruling but it is evident that she made no order revoking the same.

7. On 20th November, 2009 this Court refused to grant the Respondent leave to continue the derivative action in Case Number CL 7/08. It is hoped that, now that the derivative action proceedings are over, the remaining business issues may be resolved by a Liquidator in the suggested less contentious and hopefully more timely manner.

8. The matter before me was dealt with on submissions. There was written evidence from the Respondent before the Court. The parties were not called to give oral evidence. Both parties agreed to the hearing taking this form. Both parties agreed that the Court should approach the hearing as a rehearing pursuant to Order 55 rule 3.

THE RESPONDENT'S SUBMISSIONS

9. Ms Muhammad, who appears for the Respondent, asserts that the Chief Magistrate was entitled, in the circumstances, to make the open-ended protection order with attached power of arrest. Ms Muhammad also contends, although the act of violence was committed in May 2006, that as of the date of the hearing of the appeal, some two and a half years later, the order was still required. Ms Muhammad submits that the circumstances prevailing at the time of the January 2008 order continued to

prevail at the time of the Chief Magistrate's decision in February 2009. I note that during the Magistrate's Court hearing Ms Muhammad submitted that if the Chief Magistrate was unwilling to grant an open ended order then the order should be extended for a period of six months, namely to August 2009, a date which has of course now passed.

10. Ms Muhammad contends that the Chief Magistrate was satisfied that the Appellant had used or threatened to use violence against her client and that a power of arrest was therefore necessary to protect her. Ms Muhammad relies upon **McCartney v McCartney 1980 Fam 63** which states:

"Whatever may be the precise application of the requirements of section 16(3) of the Act of 1978 subjective belief of the complainant is not one of them. If there is to be demonstrated a danger, such as is mentioned in the last part of section 16(3), it must in my judgment, be an objectively observable danger, one which the justices think to exist and not one which the complainant thinks to exist. Further, I can see no justification for saying that a danger to qualify for that section must be an imminent danger."

11. Ms Muhammad submits that there remains ill-feeling between the parties and relies upon the judgment of **Lord Justice Hale** in **Re: B-J (Non-Molestation Order: Power of Arrest) [2001] 2 WLR,** when Her Lordship stated:

"A non molestation order rarely prohibits a person from doing something that would otherwise be completely unobjectionable. It is not usually appropriate to use or threaten violence, or to harass, pester or molest another person. There are obviously cases of which this is one in which the continuing feelings between the parties who separated long ago are such that a long term or indefinite order is justified....."

Ms Muhammad contends that this case is an authority for saying that open ended or injunctions orders made for a long duration should not be viewed by the Courts as being "exceptional" or "unusual" as "protection should be available for as long as needed."

12. Ms Muhammad referred the Court to the judgment of **Evans LJ** in the Court of Appeal case of **McCann v Wright 1995 1 WLR at p.1565,** in which he stated:

"If he (judge) is satisfied that there is a likelihood of repetition I do not see that it can be necessary for the previous occasion of injury to have occurred at a particular time, whether before or after any previous order was made. The Act is concerned with the prevention of injury in the future, and the past occasion is relevant only as evidence that a substantial risk does exist..... He was entitled to rely on the injury which founded the original order."

THE APPELLANT'S SUBMISSIONS

13. Mr Katan, who appears for the Appellant, contends that the Chief Magistrate was wrong to refuse to revoke the orders and to then go on to grant open-ended orders. Mr Katan also submits that, as this is a rehearing, it would be wrong to further extend the order. Mr Katan rightly states that the Court should have regard to the fact that there have never been any breaches of the orders. However, Ms Muhammad contends matters have only progressed satisfactorily because the orders have been in place.

14. Mr Katan submits that the Chief Magistrate, when considering the application to revoke, must be satisfied that the continuation of the order was "necessary for the protection of the applicant," before extending the order.

15. Mr Katan highlighted that the Chief Magistrate, in her ruling, only found that there "might" be violence or a threat of violence. Mr Katan contends that this was the wrong test. Mr Katan states that, even if the correct test had been applied, it would not have been satisfied as an order was not necessary for the Respondent's protection and that the Appellant was not likely to injure her. It is submitted that the test is not whether the Respondent believed that she was at risk of violence, as the case of **McCartney v McCartney 1 Fam 59** establishes that it is an objective test. Mr Katan states that the Chief Magistrate failed to take into account matters which one would

need to have regard to if approaching the question as to whether there was a danger in an objective manner. Mr Katan contends that the Chief Magistrate failed to take into account the length of time which had passed since the alleged violence which occurred in May 2006. Mr Katan rightly concedes that there need not be an immediate risk but went on to say that the risk must be a real one to warrant the continuation of the order.

16. Mr Katan contends that, in relation to the continuation of the power of arrest, the Chief Magistrate must be satisfied that the Appellant is likely to injure the Respondent again. Mr Katan submits that the Chief Magistrate failed to address at all whether there was a need to continue the power of arrest, apply the statutory test or consider the duration of such an order.

17. Mr Katan concedes that the legislation does not cap the length of any order. Mr Katan accepts that the initial approach of the Courts to restrict the duration of orders has been replaced with a recognition of the Court's wide discretion as to the length of the order.[1] Mr Katan submits that the order should not have been continued in February 2009 and, if it was, it should have been extended for only a short duration.

THE LAW

18. The appeal is brought by way of rehearing. This Court did not hear afresh the oral testimony of witnesses. The parties did not invite the Court to receive further evidence by oral examination, affidavit or deposition. I am not limited to enquiring whether there has been an error in the Court below and, if so, ordering a new trial; instead, I may review the case on the basis of the evidence contained in the record and make such order as the case may require.

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[1] Re B-J(A Child) (Non-Molestation Order: Power of Arrest) [2001] 2 WLR

19. S 17 (2) Domestic Proceedings Ordinance provides:

"Where, on an application for an order under this section, the magistrate is satisfied that the respondent has used, or threatened to use, violence against the person of the applicant or a child of the family and that it is necessary for the protection of the applicant or a child of the family that an order should be made under this subsection, the Magistrate may make one or both of the following orders-
(a) an order that the respondent shall not use, or threaten to use, violence against the person of the applicant;
(b) ....."

This section mirrors S16 (2) of the Domestic Proceedings and Magistrates' Courts Act 1978 in England and Wales.

20. It is agreed, as a consequence of the conviction, that the Chief Magistrate was entitled to find that the Appellant had used violence against the Respondent, albeit only before the initial order was made. The issue is whether the continuation of the protection order was still required to protect the Respondent.

21. In **McCann v Wright** there was a finding that violence had occurred when the parties had been cohabiting and that the victim had suffered actual bodily harm. The fact that the parties in **McCann** had stopped cohabiting had no bearing on whether a restraining order and fresh power of arrest could still be ordered. Similarly, in the matter before me, the fact that parties were, in the interim, divorced did not in itself preclude the Chief Magistrate from extending the orders. In **McCann at page 1566 para D, Bedlam L.J.** stated that:

"The object of the legislation is to protect a family member partner against conduct calculated to undermine his or her security, or sense of security, and to strengthen the court's power to grant remedies for the protection of the partner from such conduct. Although no doubt in the normal case the remedies were intended to operate to give short-term relief, the ability of the court to tailor the protection to the circumstances of a particular case is important."

22. **Bedlam L.J** referred to the Law Commission report "Family Law, Domestic Violence and Occupation of the Family Home (1992) (Law Com. No. 207), which stated at paragraph 3.28:

"No distinction should be drawn on the basis of the class of applicant as protection should be available when and for as long as needed. Fixed time limits are inevitably arbitrary and can restrict the courts' ability to react flexibly to problems arising within the family. In particular, it is important that non-molestation orders should continue to be capable of enduring beyond the end of a relationship, although in some cases, short-term relief will be all that is necessary or desirable."

23. The Court must have the ability to react flexibly, tailoring the duration order to the circumstances of the particular case. This is what the Court did in **McCann** where, although there were no further acts of violence since the granting of the initial injunction, there had been further breaches of the injunction which had led to committal proceedings and committal order. In **McCann** the judge found that the appellant had failed to come to terms with the ending of the relationship and therefore the Court was entitled to take the view that there was an ongoing need to protect the Respondent.

24. I have studied the record of the proceedings in the Magistrates' Court and I have had the opportunity to view the parties' demeanour in this and the company proceedings and I have not seen anything that could lead me to form the view that Mr Baker has failed to come to terms with the end of the relationship. The Chief Magistrate did not make any comment concerning this. Additionally, there was no evidence or allegations before the Chief Magistrate and this Court that there had been any breaches of the order. These are significant distinguishing features between **McCann** and the matter before me.

25. The Chief Magistrate failed to attach sufficient, or it appears any weight, to the fact that there had been no breaches of the injunction which had, at that time, been in

place for over a year and which was primarily founded on a single act of violence which had occurred back in May 2006.

26. In **Re B-J (Non–Molestation Order: Power of Arrest) [2001] 2 WLR at 1661** a non molestation order had been made for an indefinite period with a power of arrest attached for two years. One of the grounds of appeal was that the judge had erred in making the order for an indefinite period as there were no exceptional or unusual circumstances to the case. It is important to note that the there were throughout ongoing and highly contentious parental responsibility and contact applications which had commenced in October 1995. The matter had to be transferred to the Principal Registry due to the mother's implacable hostility. However, contact orders were made which meant that the parties had to see each other and interact concerning the necessary arrangements. Initially there was no problem with the child's relationship with her father but the ongoing mutual hostility between the parents. The mother's complaints concerned the father's care of the child and in particular his involvement of his partner in contact. The parents' feuding was affecting the child and the Court Welfare officer recommended, in her fourth report dated 26th March 1997, that there should be a suspension of contact. At a hearing in May 1997 the Court made a comprehensive non-molestation and exclusion injunction against the father as a consequence of his outburst in Court. In July 1997 the orders were replaced by similar undertakings and an order for indirect contact. In July 1998 the father withdrew his Children Act applications, as the parties had decided to see if they could better progress without Court orders. However, problems continued with the father sending an abusive letter to the mother and the police having to be called after the father had allegedly forced his way into the mother's house and assaulted her partner. The father successfully applied for and was granted a parental responsibility order in June 1999. Significantly the Judge found that the father was "a bully" who felt that he could still "push his way" into the mother's life. The Judge found that there had been "bad incidents". With this in mind, the Court, when making the parental responsibility order, sought to do so in such a way that the father could not "barge his way" into the mother and child's lives. In order to do this, the Court made non-molestation and exclusion orders for an indefinite period and attached a power of arrest for two years. The Court of Appeal held that the Judge was "clearly justified"

by the circumstances of the case to make the injunction for an indefinite period as it was in the interests of the child. The Court of Appeal highlighted that there may be a great variety of factual circumstances in which orders may be needed and that these should not be limited by a requirement to find exceptional or unusual circumstances."

27. Although there are still ongoing ancillary relief and company proceedings, the circumstances in the matter before me can be clearly distinguished from those in **Re B-J**. Mr and Mrs Baker, unlike the parents in **Re B-J**, had, and have, no reason to come into regular contact with each other. The remaining disputes may be adequately dealt with in the Courts. The Company is not trading and, if the parties act sensibly, the action required to bring the company to an end should be straightforward. Although it is clear that Mr and Mrs Baker have feelings of animosity to each other, the chronology of their dealings with each other in no way mirrors the nature and degree of the ongoing problematic interaction of the parents in **Re B-J**. Having regard to the total lack of incident between the parties since at least January 2008 and no incident of violence since May 2006, the Chief Magistrate placed too much emphasis on the fact that there were ongoing ancillary relief and company proceedings. This Court, which has dealt with some of the company related proceedings, is aware that they have taken longer to conclude than would be desirable, partly due to to the manner in which Mrs Baker has chosen to litigate the same.

CONCLUSION

28. In her ruling the Learned Chief Magistrate only went so far as to state that due to the ongoing "business concerns that existed between the parties" that she thought it "prudent" to keep the protection order in place. Despite the fact that there had been no act or threat of violence since May 2006, the Learned Chief Magistrate concluded that violence or a threat of violence 'might" erupt during any business discussion between the parties. The Learned Chief Magistrate went on to state that if the protection order were removed, there "might" be violence or threatened violence from Mr Baker. The Learned Chief Magistrate failed to specifically mention in her ruling or in the record whether the power of arrest was also to be extended or why it should

not be revoked. If the Learned Chief Magistrate intended to extend the formerly attached power of arrest, she failed to specify the duration of the order. If such a draconian order was to be extended, that decision and the reasons for it should have been clearly expressed in the record or in the ruling. The reasons for the extension of the power of arrest and the reason for the period of its duration should have been separately set out in the ruling. However, I would have expected Counsel to have respectfully drawn this to the Learned Chief Magistrate's attention at the time of the hearing or when the ruling was being handed down, so that they could ensure there was no room for doubt and to enable the appropriate order to be drafted.

29. It is not disputed that the Learned Chief Magistrate was entitled to find that Mr Baker had used violence against Mrs Baker, so the test is whether the Court felt it was necessary for her protection to make the protection order. It is clear that the test is not whether Mrs Baker thought that she was in danger and required protection. The Chief Magistrate did not find that the threat or act of violence would be likely to happen, but only that it might happen. Having regard to the factual background of this case one can see why the Chief Magistrate went no further than say that violence or a threat of violence might erupt. Having regard to the factual background, including but not limited to the passage of time during which there had been no incident at all, and unlike in **Re B-J** and **McCann v Wright,** it is questionable on an objective approach why an order was still required to protect Mrs Baker. The Learned Chief Magistrate did not go so far as to say that it was necessary but rather to state that she felt it prudent to extend the order as there might be violence or a threat of violence.

30. The Learned Chief Magistrate did err in a way that entitles me to interfere at this rehearing. The test to be applied is not whether it was prudent to extend the order but whether the order was necessary. The need has to be approached on an objective basis. Although there had been an act of violence in May 2006, the Chief Magistrate's apparent failure to have regard to the absence of any problems since at the very least December 2008 makes it difficult to see how the matter was approached in an objective manner. The finding that violence or an act of violence might happen due to ongoing business concerns, especially having regard to the factual background, does not objectively establish a necessity for a protection order.

31. Accordingly, I allow this appeal. The protection order and any attached power of arrest are thereby revoked.

32. The Respondent is to pay the Appellant's costs.

Richard Williams (J)