

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

B E T W E E N:

SIMONE BOW

Appellant

and

PAUL JOHN

Respondent

SKELETON ARGUMENT ON BEHALF OF THE APPELLANT

Authorities

Matrimonial Causes Act 1973

Human Rights Act 1998

Owens v Owens [2017] EWCA Civ 182

Cleary v Cleary and Hutton [1974] 1 WLR 73

Re G (Adoption: Unmarried Couple) [2009] AC 173

Introduction

1. Submissions are made on behalf of the Appellant, who seeks to appeal the decision of the Court of Appeal on two grounds:
 - a. The judge at the first instance was wrong to conclude that the marriage had irretrievably broken down on the basis of the fact in s1(2)(a) of the Matrimonial Causes Act 1973 ('the MCA 1973') in circumstances where the petitioner had consented in advance to the sexual act with a person outside of the marriage, and consequently should not have made a decree nisi.
 - b. In the alternative, if the judge was not wrong in her interpretation of the MCA 1973 then a declaration of incompatibility should be made due to a breach of Article 14 in relation to Article 8 of the European Convention on Human Rights. She had been discriminated against either on the basis of her sexual orientation (in that if she had been bisexual or a lesbian and had had sexual relations with a woman other than her spouse this would not have been adultery) or on the basis of her status as a wife rather than a civil partner (as had she been a civil partner the ground of adultery would not have been available). She argued that whilst it was common practice in both these

circumstances to use s1(2)(b) MCA 1973 (relating to behaviour) as a ground for dissolution where sexual relations outside of marriage occurred this would not be available where the couple were in an open relationship analogous to Simone and Paul as it would not be possible to hold that such behaviour met the required standard when the other party had agreed to it in advance. Therefore, she would not have been at risk of divorce or dissolution without her consent and would have been able to enjoy at least 5 more years of union.

Factual Background

2. Paul John and Simone Bow were married in 2015. At that stage they had been in a relationship for around 2 years already. Throughout the relationship and marriage they had an agreement that they could respectively have sex with other people as long as it was only when they were not in the same country (e.g. one of them was on holiday). The wife, Simone, had had sexual intercourse with men on a fairly frequent basis both before and after the wedding. During the same period, Paul, the husband, had only had occasional encounters with other men. Paul had however fallen in love with a woman (with whom he has not had sex), and decided to divorce Simone. In a text message he asked Simone when she had last had sex with another man. She replied that she had had sex with someone a month ago. The next day Paul moved out of their home and filed a petition for divorce on the ground that the marriage had irretrievably broken down as proven by the fact in s1(2)(a) MCA 1973 (the 'adultery' fact).
3. Simone defended the petition.
4. At the hearing it was accepted by all parties that the sexual act described in the text message was penetrative and met the requirements to be considered adultery in accordance with *Dennis v Dennis* [1955] P 153, but denied that the fact in s1(2)(a) MCA 1973 was made out because the parties had an agreement which effectively excluded the possibility of adultery. The judge at the first instance rejected these arguments and granted a decree nisi.
5. Simone appealed to the Court of Appeal. She appealed on two grounds, detailed in Paragraph 1 above.
6. The Court of Appeal rejected her appeal. Simone now appeals to the Supreme Court on the same grounds.

The First Ground of Appeal: Sexual Relations Outside of Marriage with a Spouse's Consent

An 'Always-Speaking' Statute

7. S1 of the MCA 1973 is to be understood as an 'always-speaking' statute, per Sir James Munby P (paragraph 39) in *Owens v Owens* [2017] EWCA Civ 182. Accordingly, the court is required to take into account changes in our understanding of the world, including changes in social standards and social attitudes, when construing the meaning of the Act's provisions.
 - a. Nowhere are changing social attitudes more clearly evident than when considering the changing dynamic and identity of the family. Indeed, our very conception of marriage

– originally, as a partnership entered into by a man and a woman – has changed significantly since the MCA 1973 was granted Royal Assent.

- b. Our understanding of what constitutes adultery has also been significantly developed. Although consensual non-monogamy as carried out by the parties in the present case may not be said to be a particularly widespread practice, it is nevertheless a way of life that is chosen by some men and women in modern society, none of whom would consider it to constitute ‘adultery.’ Further still, while the reasonable man may perhaps find such an agreement odd or difficult to understand, or not wish to enter into a similar agreement themselves, they would nevertheless conclude that such conduct, carried out with the knowing consent or even encouragement of one’s spouse, could not constitute adultery.
- c. The court must be aware of the diverse range of relationships and marriages that exist in 2018, and interpret the MCA 1973 accordingly. The construction of ‘adultery’ in the Act should therefore not include the sexual relationships enjoyed by the Appellant with other people whilst married to the Respondent, given their pre-agreed arrangement to accept and condone such behaviour.

The Necessity of Finding it Intolerable to Live with the Respondent

8. In the alternative, should the court hold that the Appellant’s sexual relationships with other men did indeed constitute adultery, the court should nevertheless hold that the judge at the first instance was wrong to hold that the marriage had irretrievably broken down on the basis of the fact in s1(2)(a) of the MCA 1973, because the Respondent clearly did not find it intolerable to live with the Appellant as a result of these relationships.
 - a. The Court of Appeal held in *Cleary v Cleary and Hutton* [1974] 1 WLR 73 that the word ‘and’ in s2(1)(a) of the Divorce Reform Act 1969 (the precursor to the MCA 1973, and identically worded to s1(2)(a) of the 1973 Act) connected two severable and independent facts and should not be read as if it were followed by the words ‘in consequence.’ Accordingly, in order to rely on the adultery fact, it was sufficient to show that the Respondent had committed adultery, and that the Petitioner found it intolerable to live with the Respondent. There need not be any nexus between these two facts.
 - b. The judgment of the court in *Cleary v Cleary and Hutton* was flawed. It did not consider s3(3)(b) of the Divorce Reform Act 1969 (reproduced as s2(1) in the 1973 Act) which bars Petitioners from relying on their spouse’s adultery if they continue to live with them for a period of 6 months or more after they first have knowledge of the fact.
 - c. The inclusion of such a bar, making it impossible for a Petitioner who initially tolerates their spouse’s infidelity to later rely on it as evidence of the irretrievable breakdown of the relationship, strongly suggests a causal link between the fact of adultery and the allegation that it is intolerable to live with the Respondent. Accordingly, the present court should hold that their Lordships erred in *Cleary v Cleary and Hutton*, and that a

causal link between the fact of adultery and the breakdown of the marriage is required in order to rely on the adultery fact.

- d. In the present case, it is clear that the Respondent did not find that the Appellant's 'adultery' made it intolerable to live with her. On the contrary, the Appellant's sexual relations with men outside the marriage occurred with the knowing consent of the Respondent. The Respondent's decision to end the marriage was not because he found it intolerable to live with the Applicant, nor because of her 'adultery', but because he had met someone new to whom he wished to commit. The fact in s1(2)(a) of the MCA 1973 is therefore not satisfied.

The Duty to 'Inquire into the Facts Alleged'

9. As a further alternative, it would be inequitable in all the circumstances of the case for the court to allow the Respondent to rely on the in s1(2)(a) of the MCA 1973 to evidence the irretrievable breakdown of his marriage.
 - a. S1(3) of the MCA 1973 requires the court to inquire, as far as it reasonably can, into the facts alleged by the Petitioner and the Respondent. The court therefore has a duty to investigate the circumstances of the marriage and of the adultery allegation.
 - b. A crucial part of the factual matrix of the present case is that the parties made a clear and unequivocal agreement with each other that both could engage in sexual relations with other people throughout the duration of their marriage. They clearly defined the scope and terms of the agreement, notably by agreeing that such relations could only take place while the other party was in a different country.
 - c. The Appellant relied on this promise by pursuing sexual relationships with other men.
 - d. Taking into account all the circumstances of the case, it would be inequitable to allow the Respondent to rely on the adultery fact when he had explicitly consented to the conduct which he now complains of. To do so would also be to breach the duty to inquire fully into the facts.

The Second Ground of Appeal: Incompatibility with the European Convention on Human Rights

The Matrimonial Causes Act 1973 as a Potential Violation of the Appellant's Rights Under Articles 8 and 14 ECHR

10. Pursuant to Article 8 of the European Convention of Human Rights ("ECHR"), everyone has the right to respect for his or her private and family life. Further, Article 14 ECHR states that the rights under Article 8 ECHR are to be enjoyed and secured without discrimination on any ground, including status (which includes sexuality). The regulation of same sex and opposite sex relationships fall within the ambit of Article 8.
11. As well as containing negative obligations under Article 8 ECHR (to not interfere with privacy rights), states are also under a positive duty to take measures to prevent interference with these rights, though they are afforded a certain margin of appreciation in ensuring this. Where there

is a difference in treatment based on sexual orientation, states are afforded a narrow margin of appreciation. In other words, states have very little scope to be able to justify maintaining a legal position that discriminates on grounds of sexual orientation.

12. s1(6) MCA 1973 defines ‘adultery’ (that is used to inform the meaning of s1(2)(a) MCA 1973) as relating to conduct between the respondent and a person of the opposite sex. It is submitted that this directly discriminates against heterosexual spouses on the grounds of their sexual orientation and marital status. Had the Appellant engaged in an extra marital sexual relationship with another woman, or had she been in a civil partnership, the Respondent would not have been able to petition for divorce on the grounds of adultery. As a result, this amounts to a violation of the Appellants’ Article 8 and 14 ECHR rights.
13. Therefore, on the basis that s1(2)(a) MCA currently maintains the inconsistent position that adultery can be cited where a spouse engages in a heterosexual sexual relationship but not a same-sex sexual relationship, the Court should make a declaration of incompatibility (see s4(2) Human Rights Act 1998 (“HRA”)).

The Wording of s1(6) Matrimonial Causes Act

14. The wording of s1(6) MCA 1973 infringes the Appellant’s Article 8 and 14 ECHR rights. The relationship landscape in modern day England and Wales is diverse. With many more people identifying as bisexual and sexually fluid, there is a clear possibility of a spouse engaging in sexual relationships outside of marriage with members of the same sex. In this regard, the wording of s1(6) MCA 1973 is plainly discriminatory on the grounds that only those who engage in a heterosexual relationship outside of marriage will be at risk of a divorce on the basis of adultery.
15. The interpretation of the MCA 1973 ought to always change in line with the views of current society. The current wording of s1(6) MCA 1973 conflicts with popular public conceptions of meanings of adultery – regardless of gender or sexuality, engaging in sexual conduct (in particular, penetrative conduct) outside of marriage is seen by many as a form of adultery; it is therefore imperative that the possibility of consequences attach to that.
16. The Appellant’s position explains the pressing need for a declaration of incompatibility to be made here: given the nature of their agreement, neither party would be able to rely on another ground of appeal such as ‘unreasonable behaviour’. Yet the Respondent was able to rely on adultery as a ground of divorce purely because the Appellant had engaged in a heterosexual sexual relationship with another person.
17. It is therefore submitted that this provision is plainly discriminatory on the basis of sexual orientation: it precludes individuals from bringing adultery-based divorce petitions where the respondent has engaged in sexual conduct with a person of the same sex. Moreover, because the Appellant committed adultery with a person of the opposite sex, the Respondent was able to bring a petition and therefore terminate their union much earlier than the Appellant anticipated; this amounts to an infringement of her Article 8 and 14 ECHR rights.

The Compatibility of the Matrimonial Causes Act 1973 with Convention Rights as Appropriate for Judicial Scrutiny

18. The Appellant submits that the Supreme Court is able to take constitutional responsibility and scrutinise calls for change closely. Given the highly contentious nature of this issue, there is now a very real risk that many people, including the Appellant, are being discriminated in a way that infringes their rights under the ECHR.
19. Given the clear and unambiguous nature of the wording of s1(6) MCA 1973, there is no room for judicial interpretation of the provision. This singular interpretation is discriminatory on grounds of the Appellant's sexual orientation, in that if she had engaged in sexual relations with a woman other than her spouse this would not have been adultery. This therefore engages her Article 8 and 14 ECHR rights. In order to effectively safeguard and protect the rights afforded to individuals under the ECHR, it is necessary for the Supreme Court to thoroughly scrutinise the discriminatory effects of the MCA 1973 in its current form (Lord Hope in *Re G (Adoption: Unmarried Couple)* [2009] AC 173, para 48).
20. In grappling with the question of whether s1(6) MCA 1973 is incompatible with the ECHR, the Court must strike a fair balance between the interests of the Appellant and those of the general public. The wording of s1(6) MCA 1973 is no longer suitable in a modern era – Parliament ought to amend this provision and implement a gender neutral definition of adultery to ensure all married persons can have recourse to it. This is especially important in situations where parties are unable to rely on an alternative ground of divorce.
21. Thus, a modern approach to the MCA 1973 will assist in providing stronger safeguards to vulnerable individuals, and will cease to be discriminatory in practice.

Conclusion

22. In relation to Ground 1, it is submitted that the judge at the first instance erred in concluding that the marriage had irretrievably broken down on the basis of the fact in s1(2)(a) of the Matrimonial Causes Act 1973.
23. In relation to Ground 2, it is submitted that in the alternative, a declaration of incompatibility should be made due to a breach of Article 14 in relation to Article 8 of the European Convention on Human Rights.
24. It is for these reasons that the Appellant invites the court to allow the appeal.

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