29/81

IN THE PRIVY COUNCIL NO. 51 OF 1980

ON APPEAL FROM THE COURT OF APPEAL FOR BERMUDA

Between

JEFFREY CHRISTOPHER ASTWOOD — Appellant (Petitioner)

- and -

JOYCE MARGARET ASTWOOD — Respondent

CASE FOR THE APPELLANT

Record

1. This is an Appeal from a Judgment dated the 28th March 1980 P.38 of the Court of Appeal for Bermuda (Blair-Kerr P., Summerfield P.59 J.A.; Duffus J.A. dissenting), allowing an Appeal from a Judgment P.54 dated the 30th July 1979 of the Supreme Court of Bermuda, Divorce P.22 Jurisdiction), (Barcilon P.J.) and quashing the decree nisi of divorce granted to the Appellant.

2. The issue arising in this Appeal concerns the power of an Appellate Court when reviewing findings of fact by a Judge sitting without a Jury and upon the following provisions of the Matrimonial Causes Act 1974 namely,

Sub Section 5(2) which provides "the Court shall not hold the marriage to have broken down irretrievably unless the

Petitioner satisfies the Court of one or more of the following facts, that is to say - ..... (b) that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent;" and

Section 6(3) which provides "where in any proceedings for divorce the Petitioner alleges that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him, but the parties to the marriage have lived with each other for a period or periods after the date of the occurence of the final incident relied on by the Petitioner and held by the Court to support his allegation, that fact shall be disregarded in determining for the purposes of Section 5(2) (b) whether the Petitioner cannot reasonably be expected to live with the Respondent if the length of that period or of those periods together was six months or less.

3. The Appellant husband was married to the Respondent in Hong Kong on the 15th January 1955. In the Spring of 1955 the Appellant and the Respondent took up residence in Bermuda, where since then they have lived. There are four children of the family namely Jean Mary Astwood born on the 29th September 1955, Margaret Ann Astwood born on the 13th November 1956, Jeffrey Bryan Astwood born on the 14th July 1960 and Bridget Caroline Astwood born on the 5th February 1964.

4. On the 20th December 1978 the Appellant filed a Petition P.1 seeking disolution of the marriage upon the basis that the marriage had irretrievably broken down and the Respondent had

behaved in such a way that he could not reasonably be expected to live with her persuant to the provisions of Section 5(2) (b) of the Matrimonial Causes Act 1974. On the 15th February 1979 the Respondent filed an answer thereto denying the breakdown of the marriage and the conduct alleged in the Petition and sought rejection of the Prayer of the Petition. On the 4th April and the 14th May 1979 the Appellant served further and better particulars of the allegations of behaviour contained in his Petition. P. 12 P. 17

5. The suit was heard by the Honourable Mr Justice Barcilon and in his Judgment given on the 30th July 1979, he found the following facts:- P. 22

(a) That the Appellant during his evidence was trying to tell the truth to the best of his ability whereas the Respondent had no respect whatsoever for the oath she had taken to tell the truth and, where the Respondent's version of any incident or matter was in conflict with that of the Appellant, he accepted the latter's version. P. 24 C. 29

(b) Despite an agreement between the Appellant and the Respondent at the time of the marriage that they would thereafter live in Bermuda, from the moment of her arrival in Bermuda in 1955, the Respondent took a dislike to the island and tried unsuccessfully to persuade the Appellant to return to and settle in Hong Kong. When the Appellant told the Respondent that he intended to make his life and career in Bermuda she proceeded to make life difficult and P. 31 C. 36

uncomfortable for him.

(c) In 1956 or 1957 medical tests disclosed that the Respondent suffered from epilepsy, which caused her depression for about two years. P. 22 C. 37

(d) From 1963 until 1965 the Respondent refused to move into a suitable house which the Appellant had inherited namely "Aberfeldy", Somerset in Bermuda. P. 23 C. 10

(e) In the early 1960's the Appellant became heavily involved in business, community affairs and politics in Bermuda in respect of which the Respondent gave him a little support and by 1964 she had withdrawn from life in Bermuda in practically every way. P. 23 C. 21

(f) From 1966 onwards the Respondent took trips abroad on her own. P. 23 C. 31

(g) By 1970 the marriage had so deteriorated that the Appellant left the matrimonial home but returned thereto some six to eight weeks later for the sake of the children. P. 33 C. 37

(h) In 1972 the Appellant was elected a Member of Parliament and was re-elected thereto in 1976 but the Respondent took no interest in the new life on which the Appellant was embarking. P. 23 C. 43

(i) In September 1977 the Appellant discovered a draft of a letter written by the Respondent to Bill Coggins in P. 24 C. 16

affectionate terms and reasonably assumed an adulterous association between them and as a result of which he shortly thereafter moved from the matrimonial bedroom and since then has so far as possible lived separately and apart from the Respondent in the matrimonial home.

(j) That the Respondent told the Appellant's father-in-law and Miss Dickinson in 1977 that she had fallen in love with another man. P.31 C.1

(k) That from the beginning of the marriage the Respondent was antagonistic to everything connected with Bermuda, the Appellant's business, his family and friends. In an oblique way the Respondent admitted many of the Appellant's grounds of complaint. Although the Respondent tried to explain away the Appellant's complaints by reference to her innate shyness and her dread of having epileptic fits in public, she grossly exaggerated these two possible reasons for her conduct and if the same had been the real reason for her conduct the Appellant would have had every sympathy for her and would have made every allowance for her. The Respondent put forward an untrue explanation for her conduct. P.31 C.36

(l) The Respondent made no attempt whatsoever to adjust to her new life in Bermuda and concentrated all her attention on her children to the exclusion of everything else. P.32 C.12

(m) The letter written by the Respondent to Bill Coggins P.33 C.8

dealt the death blow to the marriage and that from the date of discovery of that letter by the Appellant in September 1977 the marriage had irretrievably broken down.

(n) That the marriage had irretrievably broken down and that the Responent had behaved in such a way that the Appellant could not reasonably be expected to live with her. Accordingly a decree nisi of divorce was pronounced. P.34 C.14

6. During the hearing of the suit before Mr Justice Barcilon, the Appellant was questioned about a notation "14th September 1976" which occured on the top of the Respondent's aforesaid draft letter to Bill Coggins. The Appellant admitted that this notation was in his handwriting and said, "it was probably the date I found it." But a few minutes later, the Appellant said, "I did not say that I probably found the letter on the 14th September, 1976. This was doodling on my part. I found the letter in September 1977. I taxed her with it immediately and moved out of the master-bedroom. I do not agree that I found the letter on the 14th September, 1976 and that I did not move out of the bedroom until January 1978." In re-examination, the Appellant said that he could in his removal out of the master-bedroom by reference to his diary, as being September 1977. In any event the Appellant said positively that he had moved out of the master-bedroom soon after the finding of the letter. P.25 C.24 P.25 C.30 P.26 C.4 P.26 C.11

7. Mr Justice Barcilon held that "the date of the move out of the bedroom was obviously of great importance to the Defence. If the letter had been found by the husband on the 14th September 1976, and he only moved out of the bedroom over a year later, he could not be heard to say (with any chance of success) that the P.26 C.14

finding of the letter was the last straw that had broken the back of the marriage. According to the wife, the husband spoke to her about that letter in November 1976 and she and her husband had continued to share the master-bedroom until January 1978. Taking into account all the evidence on this issue, I am satisfied that the husband moved out the matrimonial bedroom soon after the finding of the letter."

8. By Notice of Appeal dated the 9th August 1979, the Respondent appealed to the Court of Appeal for Bermuda, and on the 28th March 1980 that Court, by a majority, allowed her Appeal and quoshed the decree nisi of divorce pronounced in the Court below. P.35

9. In the Judgment of Blair-Kerr, P. after describing the backgound to the Petition dealt with the issue as to the veracity of the Respondent and said that it appeared that the view of Barcilon J. was that where the Respondent's version of any incident or matter was in conflict with that of the Appellant, the Judge accepted the latter's version, because the Respondent in his opinion told deliberate lies on various occasions when testifying. In this regard the learned President observed ".....from a study of the Record they appear to be the kind of discrepancies one frequently finds when a witness is endeavouring to recall events which occured some years ago and of course when pressed in cross-examination to explain something or other. I find it somewhat surprising that they had such a profound effect on the learned Judge. A study of the Record of the husband's evidence also reveals the fact that he modified in a number of respects the picture drawn by him in his Petition." P.38

10. The learned President then said that there were three matters which appeared to call for particular mention namely:-

(i) The Respondent's epilepsy;

(ii) The Appellant's absence from the matrimonial home in 1970 and;

(iii) His statement in cross-examination that the 14th September 1976 was probably the date he found the draft letter to Bill Coggins.

11. As to the epilepsy, the learned President found it surprising that no medical evidence had been called to assist the Court as to the nature of epilepsy and as to its probable effect on the behaviour of the sufferer, and he thereafter referred to the definition of epilepsy in the Shorter Oxford Dictionary, and then said if the Court had had some expert guidance as to the nature of the disease and its probable effect on the behaviour of the sufferer, he wondered if the Respondent's explanation for her fear of social functions and private entertaining would have been so forcibly rejected by the learned Judge.

12. As to the Appellant's notation on the Respondent's draft letter to Bill Coggins which he found "in the rubbish," the learned President reviewed the Appellant's answers in cross-examination as to the significance of the date which he had endorsed on the letter, and his explanations that the same was due to "..... some doodling on my part," and in re-examination his answer "I cannot explain how the date of 14th September 1976

came to be written by me." The President then went on to say that the wife in examination in chief said that she wrote the draft letter in September in 1976 and that in November 1976 the Appellant had spoken to her about it. In cross-examination she was apparently asked again whether she wrote the letter and she said she did; but she was not cross-examined on her statement that she wrote it in September 1976 and that the Appellant spoke to her about it in November 1976.

13. The learned President then referred to the definition of the word "doodle" in the Concise Oxford Dictionary and observed that the date "14th September 1976 " was not an aimless scrawl. The learned President then went on to say "it is a definite date written distinctly; the abbreviated form of the word September was in capital letters. On a plain reading of the Record, it would be appear that the husband's immediate reaction to the question "what is the significance of the date 14th September 1976," was to say that it was probably the date on which he found the letter. But, on being reminded that he had said that he moved out of the master-bedroom in September 1977, the significance of his remaining in that bedroom for a year after finding the letter, on which he placed so much reliance, struck him. He then tried to wriggle out of it by saying firstly that he did not say that he "probably found the letter on the 14th of September 1976" and then attempted to explain the presence of the date by asserting that he was doodling. Without having seen the witness, on a plain reading of this portion of the Record, I find it surprising that the learned Judge rejected the wife's evidence and accepted the evidence of the husband that he found the letter in September 1977.

14. The learned President then considered the powers of an Appellate Court when reviewing findings of fact by a Judge sitting without a Jury and considered the decisions in Watt -v- Thomas (1947) A.C. 484, Clarke -v- The Edinburgh & District Tramways Company Limited (1919) S.C. (H.L.) 35 and Powell -v- Streatham Manor Nursing Home (1935) A.C. 243. The learned President then said that the Court of Appeal must accept Barcilon J.'s findings as regards the primary facts, but observed that in the light of the decision in Pheasant -v- Pheasant (1972) 202 Fam. before deciding whether a wife had behaved in such a way that the husband could not reasonabaly be expected to live with her, the Court was required to make a value judgment about the behaviour of the wife and its effect upon the husband; and, as regards that, an Appellate Court was in a stronger position than it was when asked to review a trial Judge's findings of primary fact.

15. The learned President said that on the primary facts as found by Barcilon J., the marriage no doubt had broken down but the question was "has the marriage broken down irretrievably, the ground of the irretrievablity of the breakdown being that the husband cannot reasonably be expected to live with the wife because of the wife's behaviour?". The President then went on to observe that "with respect to the learned Judge's value Judgment on this, I cannot bring myself to agree with it. Without the draft letter to Bill Coggins, in my view, no Court could reasonably conclude that the wife has behaved in such a way that the husband cannot reasonably be expected to live with her. The only question is: whether the finding by the husband of the letter to Coggins strengthens the husband's case suffiently. I do not think so. Even if it is accepted that the wife committed

adultery with Coggins in 1976, or the husband had reasonable grounds for believing that she did, even if she did not, adultery per se is no longer a ground for divorce. Paragraph (a) of Section 5(2) reads:

> "That the Respondent has committed adultery and in consequence the Petitioner finds it intolerable to live with the Respondent." Even accepting that the husband found the letter in 1977, and not in 1976 as alleged by the wife, (despite the date of "14th September 1976" in the husband's handwriting on the letter) the parties have continued to live under the same roof. The learned Judge has found that they did stay for the sake of the children. The Petition was not filed until the 20th September 1978. This is 1980. The husband is still living under the same roof as the wife." The President thereupon allowed the Appeal.

16. In the Judgment of Duffus, J.A. he briefly summarized the P.54 background to the Petition and then dealt with the final breakup of the marriage and the discovery by the husband of the draft letter to Bill Coggins, and said "the learned trial Judge had no hesitation in accepting the husband's case. He had the considerable advantage of seeing and hearing the witnesses and he found that the husband had been a truthful witness and accepted his evidence when there was any conflict with the wife's evidence. He then went on to say "the real ground of the husband's complaint is the wife's affair with the man Bill Coggins. As to the discovery of the draft letter by the Appellant, he observed that the Appellant's evidence on this

issue was vital on the question of whether he had condoned the offence within the meaning of Section 6 of the Act. He observed that the trial Judge, in considering the issue relating to the discovery of the draft letter, was satisfied that the Appellant moved out of the matrimonial bedroom soon after the finding of the letter and as the trial Judge accepted and believed the evidence of the husband and had the considerable advantage of the parties giving their evidence before him, he could find no reason to differ from this finding.

17. Duffus J.A. observed that the trial Judge had found that the parties had been living apart since the Appellant had discovered the draft letter in September 1977 and in considering the Appellant's claim that he had lived apart from the Respondent although they continued to occupy the same house, he quoted part of the Judgment of Barcilon J. as follows "there is no legal obligation on a person to leave the matrimonial home as soon as he considers the marriage at an end. The fact that the husband continued to live under the same roof as the wife does not mean that he continued to live with her. There is authority for saying that husband and wife can be held to be living apart even though they are living in the same house, and in the present case I am satisfied that that is what happened. As soon as it was reasonably practicable after the finding of the letter, the husband moved out of the master-bedroom, and soon after Christmas in 1977, he was putting the matter in the hands of his attorneys, and making attempts to get the wife to leave "Aberfeldy." Duffus J.A. then said that he agreed with the trial Judge and took the view that the trial Judge was correct in finding that on the evidence before him the marriage had broken down irretrievably and he would dismiss the Appeal.

18. In his Judgment, Summerfield J.A. said that there could be p.59 little doubt that the marriage had broken down and that the issue was whether the Appellant had satisfactorily established that the wife had behaved in such a way that he could not reasonably be expected to live with her. He said that the husband's complaints were trivial save as to the findings of the letter to Coggins and thereafter reviewed the evidence surrounding the discovery of this letter concluding "here, the learned Judge reached his findings of fact without any explaination - save that he preferred the evidence of the husband to that of the wife. He gave no reason for accepting that the husband found the letter in September 1977 in the face of his unguarded admission that it was probably in September 1976; his false denial that he had made that admission; his subsequent unconvincing explanation as to the origin of the words on the letter and his final inability to give any explanation at all for the words." He added "it seems highly unlikely that the copy of the letter (presumably a draft) would have been found "in the rubbish" after lying around for a year or so. The notation on the copies speaks for itself. What is the obvious explanation for it? In the absence of any acceptable explanation the inference is straight forward enough. The husband's prevarication merely strengthens that inference. The obvious inference affords more closely with the wife's version of events." Summerfield J.A. then said it would be unfair for the Respondent to be "branded" on a finding based on such insubstantial grounds, particularly having regard to the other flimsey grounds of complaint and the evidence as a whole, and he there upon said that he would allow the Appeal.

19. The Appellant respectfully submits that as the learned President did not feel able to interfer with the trial Judge's primary findings of fact he was wrong in making a value Judgment about the behaviour of the Respondent and its effect upon the Appellant, which took into account "condonation," in view of the trial Judge's findings that the Appellant had moved from the matrimonial bedroom soon after the finding of the letter and that the Appellant then lived apart from the Respondent although living in the same house. Further there was no sufficient reason for Summerfield J.A. to reject the trial Judge's primary findings of fact for the reasons set out in the Judgments of Duffus J.A. and Blair-Kerr, P.

20. On the [illegible] 1980 the Court of Appeal for Bermuda made an Order granting the Appellant Final Leave to Appeal to Her Majesty in Council.

21. The Appellant respectfully submits that the Judgment of the Court of Appeal for Bermuda was wrong and ought to be reversed, and this Appeal ought to be allowed with costs, for the following (amongst others):-

R E A S O N S

1. BECAUSE the trial Judge was in entitled to find that the Appellant discovered the Respondent's draft letter to Coggins in September 1977 and shortly thereafter withdrew from co-habitation with her.

2. BECAUSE on his findings of fact the trial Judge was

entitled to conclude that the Appellant lived apart from the Respondent although they lived in the same house.

3. BECAUSE the trial Judge was entitled to come to the conclusion that the marriage had broken down irretrievably and the Respondent had behaved in such a way that the Appellant could not reasonably be expected to live with her.

PAUL FOCKE

NO. 51 OF 1980

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Between

JEFFREY CHRISTOPHER ASTWOOD
Appellant
(Petitioner)

- and -

JOYCE MARGARET ASTWOOD
Respondent

CASE FOR THE APPELLANT

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