***Owens v Owens [2018] UKSC 41*: A Decision Divorced From Reality?**

31 August 2018

The judgment by the Supreme Court in *Owens v Owens [2018] UKSC 41* may have come to some as a somewhat shocking aberration to accepted norms; the decision to defend divorce proceedings understood commonly as a fruitless task for many respondents. However, what the Supreme Court have done, whether rightly or wrongly, is to peel back the plasters stuck over the cracks of legislative failure, and put the ball back into Parliament's court.

Background

The facts of this matter are not far removed from many divorces in later years. Mrs Owens aged 68, Mr Owens aged 80; they had married in 1978 and had two children together. Mrs Owens in November 2012 began an affair which ended in 2013; an affair that Mrs Owens described as "the result of a bad marriage", but not the cause for ending it. Mrs Owens left the matrimonial home in February 2015 and issued a petition for divorce in May 2015 citing s.1(2)(b) of the Matrimonial Causes Act 1973- **that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent**. The content of that petition contained the oft seen reasons that the husband had prioritised his work over their marriage, that his treatment of her had lacked love and affection, disparaging comments, argumentative and that she was now upset, unappreciated and unhappy. A cumulative effect of many small instances that over time had broken down a 35-year marriage.

Lower Court

Mr Owens denied the above reasons, and thus the case came before the first instance court in October 2015. The Recorder conducting the initial case management hearing ordered, with the consent of Mrs Owens' representatives, that the aggrieved wife and husband would be the only witnesses required, and the hearing would last a maximum of one day.

When surmising as to why the distinct lack of witnesses and time agreed for the hearing of the matter, Lord Wilson, who gave the leading judgement in the Supreme Court, touched upon the heart of this debate. That the practical operation of the Family Court on this issue was misaligned with the legislation it sought to implement. Lord Wilson drew upon the President of the Family Court Munby LJ's use of statistics in his hearing of this case on appeal to demonstrate how rare a contested divorce application was. 114,000 divorce petitions in 2016, 800 cases litigated in response, and a final contested hearing percentage of 0.015%. Of course, what this really was showing was how low the bar was set, in practical terms, for the granting of divorces; the irony was not lost on Lord Wilson:

"*The degree of conflict between the parties which is evident in a fully defended suit will of itself suggest to the Family Court that in all likelihood their marriage has broken down*" (para 15).

Lord Wilson went on to encapsulate the current judicial approach to applications like Mrs Owens' made under section 1(2)(b) of the Matrimonial Causes Act 1973:

"*the subsection nowadays sets at a low level the bar for the grant of a decree. The expectations therefore are that, even when defended to the bitter end, almost every petition under the subsection will succeed … the court will deliver a brief judgment, almost certainly culminating in the pronouncement of a decree"* (para 17).

Nevertheless, Mrs Owens came fully armed at the first hearing of the petition with references of 27 separate incidents of such behaviour. A compelling case at first blush, especially given that 99.985% of divorces of this type would be granted by the courts. Yet whether she was swayed by the modus operandi of essentially automatic assent to such applications in the Family Court, or whether such allegations had little substance, in any event, no evidence was put before the judge at first instance in relation to most of the 27 examples- apart from her own evidence, and the acceptance in part of Mr Owens who sought to place most of them in differing contexts of exaggeration and unclarity. The judge at first instance dismissed the application wholeheartedly, labelling the 27 allegations as flimsy, exaggerated and at most, isolated incidents.

The Law

A strange outcome on a cursory glance. Why had this petition failed when nearly all others did not? Given that such an issue had never come before the Supreme Court in both its current guise and previously as the House of Lords, Lord Wilson helpfully summarised the law.[1] Of the six cases mentioned perhaps the most relevant example of the current approach is found in *Livingstone-Stallard v Livingstone-Stallard [1974] Fam 4 at 1125*:

"Would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him".

Here, the principle of objectivity is pushed to the forefront; and whilst the subjective reaction to alleged behaviour for the purposes of s.(1)(2)(b) is acknowledged as a relevant factor, "at the end of the day the question falls to be determined on an objective test" *Balraj v Balraj (1981) 11 Fam Law 110 p.112*.

Paragraph 29 of Lord Wilson's judgment is essential reading. In it, he makes the delineation that the question posed by the subsection is not, as Mrs Owens' counsel contended, entirely subjective- ***how Mrs Owens perceives*** the behaviour of Mr Owens, but rather, principally objective with consideration given to the subjective: whether as a result of Mr Owens behaviour, ***Mrs Owens cannot be reasonably expected*** to live with him (my emphasis). In an attempt at not dismissing the subjective reaction of Mrs Owens entirely, Lord Wilson added the caveat that an assessment of the objective behaviour of the respondent must be "assessed in the light of it's effect on the petitioner" (para. 29).

With this twin test established, Lord Wilson made the point quite rightly that an objective assessment of behaviour within a marriage has changed a great deal in the nearly 40 years since the above cases were decided. That with the progressive change in social norms, the court's approach to behaviour where a petitioner cannot be reasonably expected to live with a respondent should too become progressive and not rooted in 1980s marital convention. Indeed, Lord Wilson remarked, "I cannot readily think of a decision which more obviously requires to be informed by changing social

[1] *Pheasant v Pheasant [1972] Fam 202*; *Livingstone-Stallard v Livingstone-Stallard [1974] Fam 4*; *O'Neill v O'Neill [1975] 1 WLR 1118*; *Stevens v Stevens [1979] 1 WLR 885*; *Balraj v Balraj (1981) 11 Fam Law 11*; *Buffery v Buffery [1988] 2 FLR 365*.

norms than an evaluation whether, as a result of the respondent's behaviour and in the light of its effect on the petitioner, an expectation of continued life together would be unreasonable" (para 32).[2]

Judgment

The starting point for Lord Wilson, and Munby LJ, was that the judge at first instance had got the essential test right:

"I apply an objective test - what would the hypothetical reasonable observer make of the allegations - but with subjective elements." .

Furthermore, both Munby LJ and Lord Wilson agreed that the judge had paid sufficient regard to the cumulative effect on Mrs Owens. The sticking point became whether the judge, or rather Mrs Owens, had indeed provided ***enough*** evidence on the issue- 27 allegations, very few substantiated with evidence, and no person other than herself to corroborate her claims. This was the very centre of Mrs Owens' appeal for Lord Wilson, and not the arguments discussed at paragraphs 41 of his judgment.[3]

On the crux of Mrs Owens' appeal, Lord Wilson believed the Court of Appeal was correct in dismissing the appeal of Mrs Owens. In that, the judge had applied the correct law, and was entitled to reach the factual conclusion he had: that the behaviour of Mr Owens was not of such a level, despite taking into account Mrs Owens' reaction, that a hypothetical reasonable observer would conclude that Mrs Owens could not be reasonably expected to live with Mr Owens, ***based on the evidence presented to the judge at first instance***.

Lady Hale's judgment was more critical of the approach of the first instance judge. For the President of the Supreme Court, the judge erred in three ways. First, the references to "unreasonable behaviour" was incorrect. The subsection does not require blame to be apportioned; fault has not and is not a pre-requisite of divorce under the law as it stands today. The real test is whether one can say that the petitioner cannot be reasonably expected to continue to live with the respondent.

Secondly, the first instance judge inferred a causal connection between s.1(1) and s.1(2), when this is incorrect (see footnote 3). Lastly, the judge failed to account for the "cumulative effect of a great many small incidents said to be indicative of authoritarian, demeaning and humiliating conduct over a period of time" (para. 50). In my view, Lady Hale arrives at the heart of the matter at paragraph 50:

"The problem, as Lord Wilson has shown, is that this hearing was not set up or conducted in a way which would enable the full flavour of such conduct to be properly evaluated".

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[2] Lord Wilson was at pains to stress that the s.1(2)(b) test is not that of unreasonable behaviour, but rather whether "the expectation of continued life together is unreasonable" (para 37). Lord Wilson corrected hi mistake in the judgment of *Miller Smith, Miller Smith [2009] EWCA Civ 1297*, and as such the term unreasonable behaviour is to be avoided for the purposes of s.1(2)(b).

[3] These paragraphs discuss the point that s.1 of the MCA 1973 does not require the behaviour under subsection 2 to be the sole or any cause of the breakdown of the marriage. The references by the judge at first instance to the causality of ss.2 on ss.1, and it's effect on this judgement were considered by Lord Wilson. Whilst agreeing that it was wrong to use ss.2 to justify the marital breakdown described in ss.1 Lord Wilson held that "*the quoted passages represent too weak a foundation for a conclusion that he had fallen into elementary error*" para 41.

Unfortunately, the justices go no further as to why the hearing was not conducted in a befitting manner, and who was to blame. If the judge was at fault, then surely it would have followed that the appeal would be allowed. Or, was it the case that given only 0.015% of cases ever reach a contested hearing in such matters, Mrs Owens believed that the 27 instances she had alleged would be more than enough to surmount the "low bar" judicially recognised that applied to such proceedings, and her petition would be granted. But it wasn't, and Mrs Owens was stuck with the evidence that had accompanied her at the first hearing of the matter as her case made its way through the appellate courts. Evidence which would often be ample for the granting of such petitions, but not enough it seems to sway the minds of appellate judges.

Conclusion

Whether Mrs Owens would, if given the chance again, put a better foot forward evidentially at the first contested hearing is secondary to the more pertinent question as to whether should Mrs Owens even be needed to? 27 allegations, a sustained course of emotional treatment, that Lady Hale at least recognised, was unbecoming of the "trust and confidence that should exist in any marriage" (para. 50). Isn't this, coupled with the fact that Mrs Owens was taking her case to the highest court in the land, demonstrative of a situation where no-one would expect Mrs Owens to continue to reside with Mr Owens.

The fact remains that Lord Wilson, Lady Hale and Lord Mance dismissed the appeal. All varying on the theme that the conclusion of the appeal left them "uneasy" with the state of the law, yet the law must be applied, and it is for Parliament to change that same law. Furthermore, the judge at first instance was not presented with the picture he probably should have been for whatever reason, and as a result, he was entitled to reach the conclusion he had- despite that conclusion leaving all 5 Supreme Court judges uncomfortable.

Whether the appeal courts should be used to send messages to Parliament is a wider debate outside the parameters of this piece. Lady Butler-Sloss is admirably attempting to act on such a message with her Divorce Law Review Bill 2017-19 at the stage of a second reading in the House of Commons.

Proponents of change will hang their proverbial hat on Lord Wilson's telling remark referenced earlier:

"*The degree of conflict between the parties which is evident in a fully defended suit will of itself suggest to the Family Court that in all likelihood their marriage has broken down*" (para 15).

A push towards reform may have gathered pace considering this landmark decision. Until then, in terms of divorce petitions being defended at a contested hearing, the figure remains at 0.015%. No doubt that number will rise in light of this latest decision.

Joseff Morgan

9 Park Place Chambers

Joseff is a second six pupil at 9 Park Place and currently accepts instructions in all areas of practice.

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https://www.supremecourt.uk/cases/docs/uksc-2017-0077-judgment.pdf