

JERSEY / JUDGMENT

B v R [2002] JRC 27 (29 January 2002)

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judgment

The Commissioner: 1. This is an appeal from the decision of the Greffier Substitute dated 22 nd June 2001 ordering that the appellant husband pay half of the taxed costs of the respondent wife. 2. Fortunately, both counsel are agreed on the law. We have the judgment of the Court of Appeal in *Dixon v Jefferson Seal*

- (1998) JLR 47 at page 57, which clearly allows this Court to exercise its own discretion on an appeal for costs. We agree with counsel that we can extend those principles to appeals against orders for costs made by the Greffier to this Court. 3. We perhaps might usefully add two pointers set out by Singer J in the Judgment of *A v A* (Cost Order: Appeal) 1 FCR 1996 where he said: "I would not conclude that an appeal in ancillary relief from a district judge as to costs alone should be any more sacrosanct a part of the district judge's decision than this discretionary decision on the main issues. I have to exercise my own discretion giving such weight as I think fit to the manner in which the district judge exercised his discretion. That means if I conclude that he was wrong I can say so and act accordingly without having to weigh up nicely how wrong I think he was before being in a position to do something about it. In other words, the appellate Judge can interfere on the simple basis that he would have reached a different decision". 4. Singer J then went on to make two observations. The first of these is particularly relevant to cases of this nature: "Nothing I say should be taken as an invitation to litigants to launch appeals as to costs alone in any frivolous or ill-considered way, for the costs of such appeals, even on so limited a basis, may be substantial and will otherwise fall upon them". 5. We must say immediately that nothing in this present appeal struck us as in any way frivolous or ill-considered. 6. This was not a short marriage. The parties were married on 5 th September 1970. Three children were born of the marriage. Only one, E, was under 18 at the time of the divorce. She was born on 31 st December 1981 and was applying to attend university. 7. Originally the wife applied for a judicial separation on the grounds of the husband's adultery with a named co-respondent. The petition was issued in November 1999
- (the husband left the matrimonial home in May of that year) - and the judicial separation decree was granted on 19 th January 2000. Eventually, however, a divorce was granted and the decree was made absolute on 27 th December 2001. 8. The negotiations over the eventual divorce were fraught with difficulties and filled with unexpected complexities. The learned

Greffier Substitute made his judgment in relation to the costs hearing on 22 nd June 2001. The substantive hearing had taken place on 15 th April 2001 concerning ancillary matters pursuant to the wife's application for a judicial separation from her husband. (As we have said, this decree was later superseded by the decree for divorce made absolute in December of last year). 9. In his reasoned judgment on costs (it covers ten pages) the Greffier Substitute said (at paragraph 24): "So, at the costs hearing, taking into account a) the costs due in respect of the maintenance pending suit; b) the fact that the wife had been at least partly successful in the substantive proceedings; I came to the conclusion that the husband should pay one half of the costs". 10. The reasons were written and distributed on 3 rd October 2001, over three months from the date of the order. A Notice of Appeal was filed on 4 th July 2001. At that time the parties had no expectation but that the appeal would be " de novo ". 11. On 10 th July 2001, the learned Greffier Substitute wrote to Advocate Le Sueur (his letter was copied to Advocate Whittaker) explaining that there would be a delay before reasons could be forthcoming. The letter contains this paragraph: "The gist of my decision is that, on balance, the more successful party was the petitioner. The argument concerning pensions was critical, and although I do not accept that the wife would suffer "hardship" on divorce, and did accept that there should be a "clean break" by and large I accepted Advocate Whittaker's argument for an enhanced CETV. The two "Calderbank" letters from each side seemed to me to cancel each other out. In making the decision I had particular regard to the case of Gojkovic." 12. The delay in delivering the reasons is not a criticism of the learned Greffier Substitute. He made it very clear that the pressures of his office inevitably meant delay and that while he initially felt that the appeal would have to be by way of rehearing, he did eventually deliver very detailed reasons. This Court is grateful to him for that. 13. The appellant bases his appeal on ten main grounds. We are extremely grateful to both counsel in this case for the care that they have taken to ensure that this Court had as full a background as possible to what developed into a somewhat complicated series of negotiations. 14. The Greffier Substitute said that he relied on *Gojkovic v Gojkovic*

(1992) CA 40 and we shall deal with that case and the other cases cited to us in due course but let us remind ourselves of what Butler-Sloss J said at page 59 of that judgment: "Both parties must make full and frank disclosure of all relevant assets, and put their cards on the table. Thereafter the respondent to an application must make a serious offer worthy of consideration. If he does so, then it is incumbent on the applicant to accept or reject the offer and, if the latter, to make her/his position clear and indicate in figures what she/he is asking for (a counter-offer). It is incumbent on both parties to negotiate if possible and at least to make the attempt to settle the case. This can be done either by open offers or by Calderbank offers, both adopted by the husband in this case. It is a very wide discretion in the court in awarding costs, and as Ormrod L. J. said in *McDonnell*

- v. McDonnell [1977] 1 W. L. R. 34, 38, the Calderbank offer should influence but not govern the exercise of discretion. There are many reasons which may affect the court in considering costs, such as culpability in the conduct of the litigation: for instance (as I have already indicated earlier) material non-disclosure of documents. Delay or excessive zeal in seeking disclosure are other examples. The absence of an offer or of a counter-offer may well be reflected in costs
- or an offer made too late to be effective. The need to use all the available money to house the spouse and children of the family may also affect the exercise of the court's discretion. It would, however, be inappropriate, and indeed unhelpful, to seek to enumerate and possibly be thought to constrain in any way, that wide exercise of discretion. But the starting point in a case where there has been an offer is that, *prima facie*, if the applicant receives no more or less than the offer made, she/he is at risk not only of not being awarded costs, but also of paying the costs of the other party after communication of the offer and a reasonable time to consider it". 15. This is not the passage upon which the learned Greffier Substitute relied. He cited this passage which he said influenced his judgment. He added the emphasis: "However, in the Family Division there still remains the necessity for some starting-point. That starting-point, in my judgment, is that costs *prima facie* follow the event (see Cumming-Bruce LJ in *Singer v Sharegin* [1984] FLR 114 at p.119) but may be displaced much more easily than, and in circumstances which would not apply, in other Divisions of the High Court. One important example is, as the judge pointed out, that it is unusual to order costs in children cases. In applications for financial relief, the applicant (usually the wife) has to make the application in order to obtain an order. If the financial dispute can be resolved, it is usual, and normally in the interests of both parties, that the applicant should obtain an order by consent; and if money is available, and in the absence of special circumstances, such an agreement would usually include the applicant's costs of the application. If the application is contested and the applicant succeeds, in practice in the divorce registries around the country where most ancillary relief applications are tried, if there is money available and no special factors, the applicant spouse is *prima facie* entitled to, and likely to obtain, an order for costs against the respondent. The behaviour of one party, such as in material non-disclosure of documents, will be a material factor in the exercise of the court's discretion in making a decision as to who pays the costs. The incidence of legal aid, the inadequacy of the financial assets available, for instance, to house both parties or even one spouse and the children, are major circumstances which may affect or even distort an order for costs that would otherwise have been expected to be made. In the vast majority of cases, where one party is, or both parties are, legally aided, and where the assets are insubstantial or at least inadequate for the needs of the family, the question of costs may be academic". 16. The Greffier Substitute appears to us to be saying that costs were due to the wife in respect of the maintenance pending suit hearing. He made no award at that time, nor did he give an indication of what his award might be. Advocate Le Sueur argued before us that if the wife were entitled to costs at that maintenance hearing then the order should have been an order for costs of and incidental to the hearing. That might well be so if that decision could be

taken in isolation but the Greffier Substitute, in his discretion, has decided to take everything in the round. He admits that costs are outstanding "from the maintenance hearing" but takes a view that because the wife was "at least partly successful" in the substantive proceeding then, looking at the whole of the negotiation, the husband deserves to be liable for one half of her costs. The legal costs amount at the present time to about £27,000 (they were £22,216 at the time that the reasons were given) so that the sum involved when the husband has to pay his costs and (with disbursements) a further sum of about £17,000. 17. The argument turns on whether the Court is able to look at the matter and to decide whether, as the appellant suggests, the wife in fact failed in the majority of her arguments at the substantive hearing. It is not, in our view, sensible to argue, as the appellant does, that if the wife were partly successful, then the husband was also partly successful and for that reason alone the correct order should have been for each party to bear its own costs. 18. We must examine with some care the Calderbank letters, the first of which was sent by the husband. We set that letter out in its entirety. It was sent on 6 th January 2000. " WITHOUT PREJUDICE SAVE AS TO COSTS Dear Advocate Whittaker, Mr. and Mrs. R I refer to the above matter and the proceedings by way of Judicial Separation which your client has caused to be served on Mr. R. Mr. R first instructed me in May 1999 and I would wish for the record to confirm that he has tried to reach some form of settlement of financial issues with your client. I would also wish to set out, for the record, the various financial contributions which have been made by Mr. R towards your client, the running of the matrimonial home and the children. Mr. R has paid to your client £1,200 per month and an additional sum of £100 per month into E's account. In addition to this, my client has also assumed sole financial responsibility for the joint mortgage, endowment insurance premiums, mortgage protection premiums, parish rates, all utility bills, pool maintenance, gardener, petrol, household contents insurance, car insurance, income tax savings for the 1998 assessment, window cleaner and even newspapers - all of which add up to a not inconsiderable contribution. My client estimates that his average monthly outgoing in respect of the property and your client have been £3,750. Until E finishes at university, Mr. R estimates that he will be incurring somewhere in the region of £10,000 per annum towards her continuing education and support. My client made it quite clear to Mrs. R in May 1999, when the maintenance was originally agreed at that level for a maximum of 6 months, that he could not continue to maintain this level of expenditure. It is an unfortunate fact that when a marriage does break down (for whatever reason) the joint income which previously supported one household has to support two with inevitable doubling-up of a number of outgoings. Such an arrangement cannot continue indefinitely and my client has now reached the stage where he must review the level of maintenance being paid and I shall deal with that issue in open correspondence. The purpose of this letter is to put forward an offer to settle the financial issues between our clients. Given that there are no minor children of the marriage, my client proposes that a clean break is the most appropriate approach and, accordingly, puts forward the following proposal:- 1. Matrimonial Home "HS" is sold on the open market as soon as reasonably practicable. After settlement of the joint mortgage liability and any estate agent's commission and scale legal fees, the net proceeds of sale are

distributed in the following proportions: 90% to your client and 10% to my client. If one were to assume a value of £550,000 for the matrimonial home, the above proposal would leave your client with approximately £380,000 in cash. That your client should receive 90% of the sale proceeds which would allow her to purchase comfortable alternative accommodation and use any surplus capital to purchase some investments is, I would suggest, considerably better than she could hope for if the matter were to be argued in Court. I understand that your client may be looking to remain in the property. Our clients simply do not have sufficient resources to achieve this and I note that to date, no proposals have been put forward by your client to this effect.

2. Contents My client is unsure what value could be placed on the home contents but estimates that they are worth £25,000 and proposes that your client takes the contents to the new home and keeps the motor cars.

3. My client has two endowment policies (Scottish Amicable) which mature in 2003 and have a present surrender value of £32,777 against which however is a charge of £11,253 in respect of a loan for school fees taken out some time ago. The policies have a net value of £21,500. My client proposes to retain the benefit of these two policies.

4. Investments There is a joint portfolio of investments which are valued at approximately £100,000. My client proposes that these investments are transferred into his sole name.

5. Your client has an account at Schroders which has a balance in excess of £20,000. These monies would be retained by your client.

6. Your client also has a deposit account with the Royal Bank of Scotland which had a balance of £12,000. Again, your client would retain the balance of this account.

7. Finally, my client has a pension from his employer and the estimated transfer value as at May 1999 was £271,000. My client is not eligible to this pension until the year 2007 and he would retain this pension. My client will also have the benefit of a small private pension through Clerical Medical when he is 65 years old in 2012. The pension was taken out in the days when my client worked at the Royal Bank of Canada Trust Company and in January last year (which was the last time that my client received a valuation) had a unitised value of £25,000. The above proposals would leave our clients each with approximately half of the family assets. In the case of your client, by far the majority of this will be available immediately and in cash whereas Mr. R will have approximately £30,000 in cash and although the majority of the investments are realisable, he will derive no immediate benefit from his pension until 7 years from now. In the meantime, if he wishes to purchase accommodation he would need to raise a mortgage. Your client, on the other hand, would be in a position to purchase a comfortable house with capital left over to invest and provide for an income. In addition, your client does have the capacity to take up more remunerative employment. At present, my client understands that Mrs. R is earning approximately £16,000 per annum although she is not working for reward full time. Whilst your client has undoubtedly contributed to the family's success in providing a home for Mr. R and the children, I understand that she ceased working in 1975. Although this was with the consent of my client, the fact remains that my client's financial contribution to the family wealth is such that there is room, in my opinion, to argue that a more appropriate distribution of the assets would be for your client to receive less than one half. As my client has previously mentioned to yours, he cannot continue to incur the present level of outgoings and it is, I feel, pertinent to note that at no

time has your client come forward and informed Mr. R, either direct or through your good offices, of what she is looking for by way of a financial settlement. This offer is of course made without prejudice save for costs and, if it is not accepted and the matter proceeds to hearing, the one certainty is that there will be substantially less for both clients to argue over (in recent cases I have been involved in joint costs have amounted to somewhere in the region of £40,000 - £50,000). There is, of course, a risk to your client that if she fails to better this offer, she will be liable to pay, from whatever settlement she may receive, not only your costs but also Mr. R's costs incurred since the date of this letter. This letter is not intended to start a Dutch auction, nor is it an attempt by my client to press-gang yours into an unfair settlement. It is, quite simply, a very fair and reasonable offer made to try and prevent a deterioration in our clients' relationship and avoid the expense and turmoil which will inevitably come with a full blown hearing and attendant preparation. If the proposals set out in this letter are acceptable then my client would be prepared to pay your client's reasonable legal fees incurred to date up to a maximum of £2,500. I shall look forward to hearing from you. Yours sincerely, (Sgd;) D. G. Le Sueur"

19. There was some negotiation and Advocate Whittaker expressed her client's frustration at what was considered to be the husband's determination to try for a clean break. The wife's attitude is perhaps summed up in those words:- "Mrs. R has instituted proceedings in an effort to resolve these matters with sufficient provision for herself for the future, bearing in mind that she sacrificed her own career to support Mr. R in his, only to be faced, at the age of 53, with a very uncertain future".

20. The summons was set down for hearing on 21 st March. On 15 th March, the husband increased the offer of maintenance from £650 to £900. On 24 th March, the husband increased the offer to £1,000 per month. The counter offer was that the husband should continue to pay the mortgage, endowment policy premium, mortgage protection premium, parish rates and the house and contents insurance, together with a global sum of £1,836 by way of maintenance backdated to 1 st February 2000. The wife would take over payment of the utility bills.

21. The Greffier Substitute (after hearing evidence and counsels' submissions) made an order that the husband pay interim maintenance to the wife of £1,200 per month and pay interim maintenance to E of £325 per month. The payment to the wife was backdated to February; the payment to the daughter was to take effect in April. In his reasons, the Greffier Substitute said this: "While the wife has not been able to justify her request for an increase of her maintenance to £1,800 pr month, neither do I see why the husband should pay any less than he had been paying for some months" (that is, the amount that he was paying when he left the matrimonial home)".

22. In our judgment the Greffier Substitute was entitled in the exercise of his discretion to wait upon the final result (for it was clear that the relationship had broken down) in order to assess how his costs order could be assessed. That is, no doubt, why he made the order as to costs to be costs in the cause. It must be realized, however, that the wife did not succeed in this application and we must see that in the context of the Calderbank letter.

23. It is clear that the wife was reluctant to petition for divorce (for at that point she would cease to be a "wife" and would lose her widow's pension rights) but she was also reluctant to sell the matrimonial home as this would, in her view, provide a haven for the children.

24. Nevertheless, the husband applied

for the property to be sold. The Greffier Substitute summed up the crux of the dispute nicely: "The principal reason it seems to me why this case was not settled, and why costs have risen to the amounts set out above, is that it was the argument over the value of the husband's pension which was protracted on both sides. Right from the start the stances of each party's advocate was fundamentally different. My view is that whatever negotiations there may have been to effect a settlement of all ancillary matters, even from an early stage, they were doomed to failure so long as neither party could agree or satisfactorily negotiate over the value of the pension which the other party placed upon it. In fact once the pension could be established, all the other matters were capable of resolution. Insofar as the parties' contributions to the marriage were concerned, it was not difficult to conclude that each party was entitled to half the assets, whatever such assets turned out to be worth". 25. While we agree that the pension argument was crucial there was evidently a strong reluctance by the wife to have a clean break (while the question of the pension rights remained unresolved) and a reluctance to sell the matrimonial home. The wife's argument, according to the Greffier's reasons, was that unless maintenance continued to be paid after the divorce, she would have to submit (if a two years' separation petition were to be filed by the husband) that, by virtue of Article 9A of the Matrimonial Causes (Jersey) Law, 1949 it would be wrong to dissolve the marriage because "the dissolution would result in grave financial or other hardship to her". 26. In the husband's Calderbank letter of 6 th January 2000, the husband had offered, after settlement of the joint mortgage liability and any estate agent's commission and scale legal fees, to have the proceeds divided as to 90% to the wife and 10% to the husband. The Greffier Substitute in his reasons made it very clear that he favoured a "clean break". Eventually on 4 th July 2000, a consent order issued for the sale of the matrimonial home for a sum of not less than £625,000. That consent order issued because before the husband's summons asking for an order that the matrimonial home be sold was due to be heard. The wife agreed to sell. The property was eventually sold for £665,000. The costs in the consent order were adjourned sine die. We cannot avoid the conclusion that the husband succeeded in having the property sold and that in any event the price exceeded the valuations obtained. 27. After the property was sold a Calderbank offer was filed by the wife. 28. The proposals were very detailed and gave two proposals - one based on divorce with a compensation of £299,298 for the wife for her loss of pension rights. This would have left the husband with a net £71,457 and the wife with a net £670,053. The second proposal, which was very detailed, was based on the premise that the parties were not to divorce at any time. 29. Advocate Le Sueur wrote very shortly afterwards to say that he fundamentally disagreed with Advocate Whittaker. This Calderbank letter came in one year after the first Calderbank letter and there had been an enormous amount of time spent on questionnaires and discovery in the interim. Within days the wife had found a property to purchase for a consideration of £440,000. 30. A second Calderbank letter was sent by the husband on 22 nd December. It confirmed that neither of the two proposals set out in the wife's Calderbank letter were acceptable and that the husband intended to proceed with a divorce. A counter offer was proposed. It made a cash offer of £434,600 being £400,000 from the proceeds of sale of the matrimonial home and a further sum of £34,600 from two bank accounts. There

was also an offer of £16,600 per annum for the next six years. There was an alternative of £100,000 in cash to replace the £16,000 per annum. 31. In his reasons the Greffier Substitute stated: "To be fair to Advocate Le Sueur there were indeed proposals for settlement of the case at an early stage which for one reason or another were always refused. The principal reason it seems to me why this case was not settled, and why costs have risen to the amounts set out above, is that it was the argument over the value of the husband's pension which was protracted on both sides". 32. We are not convinced that that was the principal reason but because the learned Greffier Substitute attached such importance to it we have heard substantial argument from each advocate. 33. In the leading case of *Southern (née Brownbill) v Southern*

(1999) JLR 94 the learned Bailiff said this: "Essentially the Court is driven to a compensatory approach to calculate the pension entitlement, and to do the best it can in the circumstances of each case to do justice to the parties. The valuation of a pension entitlement will usually be assisted by professional actuarial advice which, ideally, should be furnished on the joint instructions of both parties. Subject to what is said below, the method of valuation should generally be the cash equivalent transfer value of the member's benefits in the pension scheme, calculated at the date of divorce. That is the date at which the mutual obligations of husband and wife contracted upon marriage are severed. Those benefits will include any contingent spouse's pension payable in the event of the member's death to the surviving spouse during his or her lifetime. The benefits will also include, to the extent that it is appropriate in the context of the pension scheme in question, loss of any share in a death in service lump sum benefit. They will not include loss of a contingent share in any lump sum available through commutation of a pension because that will already have been taken into account in valuing the pension entitlement. Depending upon the length of the period between the date of divorce and the normal date of retirement, the valuation may need to be enhanced to take account of the likely difference between wage inflation and price inflation over that period, or any other material factors. These are all matters upon which actuarial advice will be important". 34. The parties intended a joint letter of instruction to the President of an actuarial body. The letter was eventually sent by Advocate Whittaker but because of the delay she unilaterally instructed Deloitte & Touche. 35. The appellant had argued against the Greffier Substitute taking the cash equivalent transfer value of £417,739 because £65,560 of that sum was attributable to the spouse's contingent pension which would be lost on the divorce becoming absolute. 36. The Reasons cover that point:- "In my judgment I decided upon a compromise CETV figure, namely £457,000 which I accept did not include an allowance for "lost benefits" and I did not add the "spousal element" to the figure as Advocate Le Sueur feared". He went on to say: "..... I did accept an enhancement of the Bacon & Woodrow original basic figure (£352,179) to which he insisted I should stick". 37. In his Reasons, he quotes from a letter written by Deloitte & Touche on 26 th March 2001: "Bacon and Woodrow have used long term assumptions to calculate the transfer value and have applied a market value adjustment factor based on long term index linked and fixed

interest gilt yields to convert into current market terms. These assumptions are not unreasonable. However, it should be noted that the resulting transfer value that Bacon and Woodrow have calculated using this basis is approximately 8% lower than the minimum transfer value that would be calculated under UK legislation (i.e. the later figure would be £457,000...). 38. Had the learned Greffier used the figure (which he agreed was correct) of £352,179 and enhanced it by 9.5%, the resulting figure would have been £385,636, some £90,000 less than the figure used and the asset figure would have been reduced in proportion. 39. We have carefully looked at that matter in particular and looked at the whole course of the negotiations and at the Calderbank letters. (Not two from each side which "cancelled each other out". [Letter of 10 th July 2001]). Because we have looked at the matter afresh we find it difficult to allow the Greffier Substitute's decision on costs to stand. This Court is always reluctant to interfere with a discretion, particularly when the learned Greffier Substitute has seen the parties and heard their arguments and deals with matters of this complexity on a daily basis. We do not feel that the wife helped to progress the negotiations while she did not wish the property to be sold and did not wish for the "clean break" which was proposed many times. 40. Accordingly, we have decided that this case calls for an order that each side bear its own cost and we order accordingly.

Authorities Dixon-v-Jefferson Seal

- (1998) JLR 47 . A-v-A (Costs Order) (1996) 1 FCR . Gojkovic-v-Gojkovic (1992) CA 40. Matrimonial Causes (Jersey) Law, 1949: Article 94. Southern-v-Southern
- (1999) JLR 94 . Page Last Updated: 28 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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