

JERSEY / JUDGMENT

C v C [2009] JRC 092A (06 May 2009)

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judgment

the REGISTRAR: 1. The history of this case is long and complicated. I will not attempt to recount all of it. Matters were almost resolved on th January 2007, when a consent order was made, ("the consent order") but there have been outstanding issues. The last pieces of the jigsaw, as it were, have been completed by the orders made on 6 th and 15 th April, 2009. These two orders were not made as a result of a complete re-hearing of the case, but deal with the outstanding issues, necessitating some relatively minor amendments to the consent order. 2. I shall attempt to extract and clarify what the problems have been. 3. The divorce proceedings proceeded apace from the time the petition was filed in September 2005 until the pronouncement of Decree Absolute in May 2006. 4. There are 5 children of the marriage, who live principally with the wife and who have contact with the husband. However, there were, unfortunately, continuing disagreements about arrangements for the children, principally contact, in respect of which orders were made on 12 th July 2006 and on 20 th November 2006. 5. There were also ongoing arguments about financial matters, which have continued until today. I attempted to encourage some finality as long ago as 29 th March 2006, when it was ordered, by consent, that the draft order in respect of ancillary matters handed to the court by the respondent's advocate should be approved in final form and submitted to the court for signature by the registrar within 7 days. 6. Unfortunately, agreement was not possible about which party should be responsible for the matrimonial home and the mortgage. In November 2006, it was noted that the respondent was to continue to pay the mortgage on the former home "until August 2008; however, there shall be liberty to the respondent to apply to the Court requesting a contribution...for the period after she has completed her degree course in 2007 until August 2008, if she is financially capable of doing so". 7. What has actually happened is that the respondent has continued to pay all the mortgage contributions up to and including January 2009. Earlier attempts to settle financial matters all failed because of the petitioner's inability to contribute. 8. The consent order provided this (I have paraphrased the important provisions):- (i) the former matrimonial home shall be transferred into the sole name of the petitioner as soon as possible or no later than within one month of 31 August 2008; (ii) the respondent shall continue to assume sole responsibility for the mortgage and associated insurance cover up to and including 31 August 2008; (iii) the petitioner will, upon the transfer of the home to her, use her best endeavours to have transferred to her the mortgage and to secure the release of the respondent; (iv) if the respondent is required to continue making a contribution beyond 31 August 2008, the property shall be valued as at 31

August and the respondent shall receive the due percentage increase in the value from 31 August in proportion to his continued mortgage contribution. (v) the petitioner shall maintain the building insurance premiums and contents insurance. (vi) the insurance policy with Century Life shall be surrendered and the proceeds applied as to 75% to the petitioner and 25% to the respondent. (vii) in the event that the petitioner is unable to assume responsibility for the mortgage from 1 September 2008, the home shall be held on a Mesher basis as follows:- (a) the petitioner will occupy the property to the exclusion of the respondent until "the determining extent" ; (b) the home will not to be sold without consent of the parties until the first to happen of these determining events:- (1) the death of the petitioner; (2) the youngest child attaining 18 years or completing tertiary education to first degree whichever be the later; (3) the remarriage of the petitioner; (4) the cohabitation by the petitioner with another person; (5) further agreement as to the respondent's interest; (6) voluntary sale; (7) further order; (c) the respondent shall be responsible for the payment of the balance of the mortgage contributions not paid by the petitioner, so that should the respondent be required to contribute beyond 31 August 2008, the property shall be valued as at 31 August 2008 and the respondent shall receive the due percentage increase from 31 st August 2008 in proportion to his continued mortgage contribution ending in the earliest determining extent; (d) (e) upon the earliest determining event, consequential provisions apply regarding the sale of the property and the proceeds of sale shall be applied as follows:- (1) to discharge the mortgage; (2) to pay conveyancing costs; (3) to pay estate agents' fees; (4) "in payment of a lump sum to the respondent representing the total of the contributions that he has made towards the mortgage secured upon the former matrimonial home as from and including 1 September 2008 up to the date of sale" [italics added by me]; (5) payment of the balance to the petitioner. 9. This was a sincere attempt to settle matters. The idea was for the house to become the property of the wife, who would pay the mortgage as soon as she was capable of doing so. Exactly when, no one knew for sure, but it had to be done by the end of September 2008. If it was not done till then, the house was to be valued for its true value as at 31 st August. If the husband was obliged to continue to contribute towards the mortgage, he would be entitled to receive back a proportion of any increase in value of the property after that date, to be calculated at the determining event date. The proportion to which he would be entitled was to be equivalent to the proportion of the mortgage he had contributed after 31 st August. 10. It has not worked, because:- (i) the house has not been transferred to the petitioner; (ii) she has not been sufficiently secure financially to take over the payment of any of the mortgage until February 2009, since when she has paid 25%; (iii) she has secured further teaching qualifications, but still only has a job as a teaching assistant; (iv) between 2005 and 2008 the equity value in the home increased by approximately £110,000, leaving the husband with a sense of injustice that he has not benefited in any way from that increase, yet has had to fund all of the mortgage; (v) between December 2005 and August 2008, the respondent has paid mortgage contributions of approximately £40,000, and, in the meantime, has encountered his own financial difficulties. 11. Meanwhile, the wife maintains that she has at all times done her best to raise five children, obtain qualifications and obtain the best employment available to her. 12. On 9 September 2008, I ordered a further Case Review hearing to take place in October 2008 to consider:- (i) the extent to which the petitioner can/will contribute from 31 August 2008 towards the mortgage payments; (ii)

if she is unable to contribute, whether the terms of the Mesher order agreed on 10 January 2007 should be varied; I also ordered on 9 September a joint house valuation by Gilborn Associates, and narrative affidavits by the parties to deal with relevant matters. 13. Further directions were made on 8 October, including an updated house valuation. 14. Application for a further valuation of the property was refused by the Court on 26th January 2009. It was noted that the petitioner was willing to contribute 25% towards the mortgage commencing either 1 September 2008 or 1 February 2009. 15. Directions for a final hearing on 6 April 2009 were made on 28 January 2009. The issues for determination were:- (i) whether the petitioner should contribute 25% towards the mortgage (or a greater amount) and from when; (ii) depending on the petitioner's means, can she be relied upon to maintain such contribution? If not, whether the Mesher order should be varied so that the respondent shall obtain a fair percentage of capital. 16. It was a mystery to me why these issues could not be resolved by agreement. They are simple enough. I can only assume that the passage of time has not eased the ability of the parties to communicate with each other. If I am subject to criticism for any delay in coming to a decision, I would say that I could not see why the expense of coming to Court would need to be incurred. By 6 April, the wife was already paying a 25% contribution. The issue was really whether or not she could be relied upon to continue to pay it, bearing in mind:- (i) that the children were growing up and her responsibilities to them were diminishing; (ii) that she has succeeded in acquiring a Social Sciences degree and an M. Sc. in Profound Learning Disability, (no mean achievement whilst looking after 5 children); (iii) that she has acquired a job as a teaching assistant and otherwise relied on child maintenance, some Income Support and the support of her family. 17. It was a fair assumption that, at some point, she would succeed in acquiring better employment. For the time being, she still relies to a considerable extent on Income Support, and, to be fair to the husband, her financial affairs are, not surprisingly, precarious. However, I am satisfied that her situation is only likely to improve. 18. There is a danger which the wife's advocate was not slow to point out that it is not for the Court to ignore the consent order and re-impose a new regime with the benefit of hindsight, but without reconsidering all the complicated issues which led up to the making of the consent order. That would not be fair. 19. When I heard the wife's evidence as to whether or not she could be relied on to make the 25% payments, I also bore in mind both parties' written evidence and the parties open offers. There was some confusion about what the wife's offer was, because the first attempt at giving this to me in writing was withdrawn and another version offered. Meanwhile the husband's advocate submitted a new offer after the close of proceedings before me, causing the wife's advocate some alarm. All this activity was surprising to me in a case which, as I have said, should have been settled. Each party has not only instructed their advocates at length, but those advocates have insisted in producing their own individual bundles without reference to each other with a view to saving expense. 20. The principal decision which I had to make

- the wife's reliability - I do not find a hard one. I find that she can be relied upon to contribute $\frac{1}{4}$ of the mortgage, presently £309.21 per month. Her financial situation is certainly precarious and she is at times overdrawn at the bank. Her benefit payments are likely to reduce but will temporarily rise again. She has the support of her family. I accept that she

wants to obtain better employment, but she has been hampered by attending to the needs of the children. I do not think that she knowingly misled any one, but may have made some rash promises with regard to her ability to take over the house without sufficient financial thought or backing. 21. What troubles me rather more is the meaning of one of the Mesher terms which I have italicised in paragraph 8 above. What it says is that the husband is due to receive back all the contributions paid by him since August 2008. This is patently not fair if he is also to receive back a proportion of the increase in property value since August 2008. It is not clear to me how this paragraph came to be included. 22. It would be much fairer if he were to receive back some compensation for the increase in the value of the property between 2005 and 2008. With this in mind I did not complete my decision until 15 th April and asked for more detail about the mortgage contributions paid and to be paid until the first projected determining event. 23. This announcement attracted criticism from both lawyers who appeared to be unaware of my power to "make such order as the Greffier thinks just" under Rule 60(1) of the Rules and to "make such interim order upon such terms as the Greffier thinks just" under Rule 60(2). 24. I was told on 15 th April that it would not be possible to forecast mortgage payments, but that the mortgage payment made by him for the relevant period was approximately £40,000. The increase in value of the property had been approximately £110,000. I concluded on 15 th April that it would be fair for the husband to receive back his approximate contribution of £40,000. 25. In addition, I have made small clarifications with regard to the ownership of the former home, the commencement date of the Mesher order and the basis on which the increase in value is to be calculated. In summary, I have made some necessary amendments to the consent order, which, unfortunately, the parties have not been able to agree for themselves. 26. What is the legal basis for these amendments and has the Court the power to make them? It may stretch the interpretation of paragraph 6 of the consent order which reads:- "There shall be liberty to apply as to the interpretation and implementation of this order". However, without the adjustments I have made in accordance with the principle of that paragraph, it would have been impossible to give effect to the order at all and the parties would have been left in limbo with an uncertain future. No Authorities Page Last Updated: 14 Feb 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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