

JERSEY / JUDGMENT

C v D (Matrimonial) 19-Aug-2019

[2019] JRC 159 (19 August 2019)

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judgment

the commissioner: 1. On 23 rd May, 2019, the Court determined that it should give effect to the terms of an agreement reached between the parties on 21 st August, 2018, in respect of ancillary relief and we now set out our reasons.

Background

2. The parties met in 1997 through their work, and married in 2001. The petitioner had two young children from her previous marriage, and the parties had a daughter, who was born in 2000. The parties both came to the marriage each owning a property of their own, with the respondent moving in to the petitioner's property, eventually selling his own property in 2008, and investing the bulk of the proceeds in an investment portfolio. 3. The parties separated in 2017. The petitioner consulted Advocate F. Binet, and the respondent Advocate S. McFadzean. In her opening communication, Advocate Binet expressed the hope that agreement could be reached between the parties with the minimum of legal involvement, and in that spirit, the parties proceeded with mutual disclosure of their assets, without the formality of affidavits of means. 4. The parties' financial resources are not complicated. Leaving aside personal effects and bank accounts, the petitioner owns her own property, has a widow's pension from a policy established by her late first husband and a small pension asset she had been contributing to during her marriage to the respondent. The respondent has his portfolio of investments from the sale of his property and substantial pension assets. His income is and was substantially in excess of that of the petitioner. 5. Advocate Binet initiated the disclosure process with her e-mail of 14 th July, 2017. She attached a schedule of the petitioner's estimated monthly outgoings and a schedule of assets as follows:- "b) A schedule of assets with supporting docs (x2 property valuations, a recent bank statement and a pension valuation). Please note that the BM pension has no real value other than as income. This is [the petitioner's] widow's pension which she receives following the death of her first husband. The amount paid to her each month is £1,766.57 and is evidenced on her disclosed bank statement." In so doing, Advocate Binet had inadvertently referred to the BM pension as producing the widow's pension of £1,766.57 per month. In fact, as the petitioner's bank statement shows, that the monthly payment came from Aviva under the policy which

the petitioner's first husband had established and the BM pension was the pension she had been contributing to during the course of the parties' marriage at the rate of £100 per calendar month. The documents disclosed by the petitioner in relation to the BM pension showed that it had investments totalling £55,053 and that it produced a yield of 0.84% and an annual income of £460. 6. The process of disclosure continued and there was a delay of about a year, because the petitioner was unwell. Negotiations commenced through correspondence from February 2018 with further exchanges and responses to questions being raised by both advocates. 7. On 11 th July, 2018, Advocate Binet made a without prejudice offer. The petitioner's widow's pension is referred to under the heading of "Income". At that time, she was also receiving a "top up" of approximately £1,000 per month from the respondent. The widow's pension was not listed as a capital asset of the petitioner. The offer suggested an equal division of the capital assets of the parties, which with the value of his portfolio and his pension assets would involve the respondent making a lump sum payment to the petitioner of £428,323, with the petitioner retaining her property and the BM pension. In the alternative, and if the respondent preferred a clean break, Advocate Binet proposed a lump sum payment of £595,000. That offer was not accepted, but the parties agreed that there should be a round table meeting with them and their legal advisers, with a view to reaching a settlement. 8. On 21 st August, 2018, Advocate McFadzean wrote to Advocate Binet with a counter proposal that the petitioner receive a lump sum of £417,446, being a balancing sum to bring both parties up to 50% net asset value of their capital assets, including pensions, together with spousal maintenance of £800 per calendar month. The respondent's schedule of assets attached to that e-mail records the petitioner having an income from the widow's pension of £1766.57 per calendar month. 9. That round table meeting took place on 21 st August, 2018. At the request of the petitioner, she and the respondent remained in separate rooms, with their respective advocates conducting the negotiation in a separate room, shuttling back and forth to their respective clients. It is not in dispute that during that meeting, Advocate Binet informed Advocate McFadzean that the BM pension was not the widow's pension. According to an e-mail sent by Advocate Glynn on 2 nd October, 2018, this came as a surprise to Advocate McFadzean, but nevertheless, the parties went ahead and together with their advocates, signed a handwritten agreement which we set out in full:- "(i) C retains [Her Property] (ii) D pays C 428,323.50 £495,523.50 as soon as possible; (iii) D pays C £1,000/m until he attains the age of 65 (commencing September 2018); (iv) Mini Clubman to be transferred into C's name; (v) each party retain his/her own assets; (vi) each party be responsible for own liabilities; (vii) D to provide tax assessments and returns for last two years by return; (viii) C to take on responsibility for pet insurances and her car insurance from September 2018; (ix) D to cancel sky forthwith; (x) standing orders in joint account o be moved to C's sole account by 1 st Sept. 2018 and account to be closed; (xi) Decree Absolute to be held off pending C either being clean bill of health or her setting up her own private health insurance following receipt of the lump sum in (ii) above, whichever is the earlier. (xii) D to provide C with all photo CDs within 7 days for her to make copies. AND UPON THE UNDERTAKING OF C to use her best endeavours to take over her private health insurance as soon as practicable after receipt of the lump sum

referred to in (ii) above." 10. As can be seen, it was initially proposed that the respondent would pay the petitioner a lump sum of £428,323.50, as well as £1,000 per calendar month by way of maintenance. It was then decided that this lump sum would be increased to £495,523.50 by way of a clean break, with no ongoing maintenance being paid to the petitioner. 11. Advocate McFadzean e-mailed Advocate Binet on nd August, 2018, saying that she was pleased that they were able to help the parties resolve the matter, attaching a scanned copy of the agreement and asking for a draft consent order as soon as possible. It was not until Advocate Glynn's e-mail of 2 nd October, 2018, to Advocate Binet that an allegation of non-disclosure was first made. 12. In his affidavit of 11 th April, 2019, the respondent accepts that he knew from the tax returns he had submitted that the petitioner had a widow's pension, although he said he had no knowledge of the value of the fund relating to it or any of its terms. He was also separately aware that the petitioner was investing about £100 per calendar month into an annuity scheme. He exhibited his 2014 tax return, in which he had declared the petitioner's widow's pension in the annual sum of £18,617.36p, under the name of "Aviva - widow's", and her contribution to an annuity scheme in the annual sum of £1200, also under the name of Aviva together with its policy number. The petitioner explains in her affidavit of 1 st May, 2019, that the BM pension had started out with Norwich Union, was taken over by Aviva, and then moved to BM (Brooks McDonald). 13. In his affidavit, the respondent says he did not recall Advocate McFadzean telling him about the BM pension not being the widow's pension, but says "I must have at some point been made aware of it, as it played on my mind after our meeting, but certainly I do not remember expressly discussing the disclosure or any issues arising from it with Advocate McFadzean at the round table meeting." He went on to say that he recalled feeling quite unhappy at the end of the meeting, and that there was something about the agreement reached which did not sit well with him. He went away and considered matters. He pondered the value of the widow's pension and asked an IFA what sum it would need to buy a pension which would provide £2,000 per calendar month for life, and said it would be at least £500,000, if not more. The respondent did not consider it fair that although the petitioner had accounted for her widow's pension as income, she had made no disclosure at all of its overall value. On the other hand, his pensions, which included contributions by him from before their marriage, had been included at their full value. 14. He declined, therefore, to agree to the agreement reached being submitted as a consent order for the approval of the Court and put forward a counter proposal of a reduced lump sum of £175,000 and spousal maintenance of £1,000 per month until the respondent reaches retirement age or retires, whichever is the earlier. It is the respondent's case that the petitioner has failed to make full and frank disclosure of her pension position, which resulted in an agreement which he says is fundamentally unfair. The law 15. When parties to matrimonial proceedings submit an agreement to the Court for ratification, it is the duty of the Court to satisfy itself that the agreement is fair (see *L v V*

- [2004] JRC 033) as the Court retains its discretion under Article 29 of the Matrimonial Causes Law (Jersey) 1949 (as amended). 16. Advocate Heath submitted that the parties had created an Xydhias agreement. In *Xydhias v Xydhias*
- [1999] 1 FLR 683 the parties had entered into an agreement through counsel. The Court was informed that the case had settled and the trial date was vacated. Subsequently the husband attempted to vary the timetable for the payment of a lump sum and then withdrew all offers. The District judge found an agreement had been reached and based his order on that agreement. The husband's appeal was dismissed, the Court of Appeal holding:- "Ordinary contractual principles did not apply, because an agreement for the compromise of an ancillary relief application did not give rise to a contract enforceable in law. An ancillary relief award was always fixed by the court after the exercise of its independent discretionary review, applying the s 25 criteria to the facts, and could not be fixed by compromise, as was possible in settlement of other sorts of claim. The purpose of negotiation was therefore not finally to determine liability, which could only be done by the court, but to reduce the length and expense of the legal process. If there was a dispute as to whether the negotiations had led to an accord that the process should be abbreviated, the court had a discretion in determining whether an accord had been reached. Ordinarily heads of agreement signed by the parties, or a clear exchange of solicitor's' letters would establish consensus, and the court's discretion as to whether accord had been reached would rarely need to be exercised. If the court concluded that the parties had agreed to settle on terms, it might have to go on to consider whether such agreement was vitiated by a factor such as material non-disclosure. Finally in every case had to exercise its independent discretionary review to the circumstances of the accord and to the terms of the accord." 17. In this case, there is no dispute that the parties did enter into an agreement. Consensus had been reached and the Court must therefore consider whether, as alleged by the respondent, that agreement was vitiated by material non disclosure. 18. The Court will take into account the conduct of the parties before and after the agreement, in order to do justice between the parties. In *Edgar v Edgar*
- [1981] 1 FLR 19, the wife had executed a deed of separation under which she agreed that if she obtained a divorce, she would not claim a lump sum or property transfer order. Ormrod LJ said at page 893:- "To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be held to the conduct of both parties leading up to the prior agreement, and to their subsequent conduct in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal

agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue." It was held in that case that the Court was not justified in going behind the deed of separation which the wife had entered into and her application for a lump sum was dismissed. 19. The leading authority in England in respect of the duty to make full and frank disclosure in matrimonial ancillary cases is the House of Lords decision in *Livesey (formerly Jenkins) v Jenkins*

- [1985] 1 AC 424 , where it was held that:- "the court could not properly exercise its discretion under section 25(1) of the Matrimonial Causes Act 1973 unless it was provided with correct, complete and up-to-date information on the matters to which it was thereby required to have regard, and, accordingly, each party owed a duty to the court to make full and frank disclosure of all material facts to the other party and to the court; that principle of full and frank disclosure applied not only to contested proceedings but also to exchanges of information between parties and their solicitors leading to consent orders without further inquiry by the court;" 20. In that case, the wife had failed to disclose that she was engaged to remarry, which was of direct relevance and should have been disclosed to the husband or his solicitors. The consent order was therefore set aside. 21. Advocate Glynn cited the English case of *Robinson v Robinson*
- [1983] 3 FLR 102, where it was held that it is no defence to an allegation of material non-disclosure that the true facts might have been elicited by the other party if better diligence had been exercised. It was not the duty of the opposing party to "act as a ferret" . Templeman LJ, as he then was, said at page 109:- "It is said that Mrs Robinson's advisers ought to have called for more information, or they ought to have dissected all the voluminous correspondence and papers, and ought to have considered a valuation themselves, and woken up to the true facts. But the situation with which we are faced is that there is a duty in matrimonial proceedings, a duty both under the rules and by authority, that full particulars must be given by any party of income and property and, as it has been put 'there must be full and frank disclosure'". 22. In that case, Mr Robinson and his accountant had painted a "gloomy" picture of the prospects of his estate and hotel business, underestimating their true value to the order of £400,000
- £500,000. It was said that her advisers ought to have called for more information or ought to have dissected all the voluminous correspondence and papers and "woken up to the true facts". 23. Advocate Glynn also referred us to the Jersey case of *P-S v C*
- [2006] JLR 463 , where the Court considered the English jurisprudence in relation to the duty of full and frank disclosure:- "We adopt all these principles as equally expressing the law of Jersey in this area. The duty to disclose all material facts in ancillary relief proceedings is a high one ... it is inherent in the notion of a 'clean break' that the husband and wife are honest with each other, especially with regard to financial matters. No break can be clean

if suspicion lurks that assets have been hidden or that their value has been understated ... the duty of full and frank disclosure is one of the highest importance." 24. In that case, the husband had instructed his adviser to ignore the Swiss business belonging to his group of companies, which were valued at £42,846 for the purpose of calculating the lump sum awarded by the Court to her, but not long after that award, the business had in fact been valued at £1.8 million. The Court found that non disclosure material and the lump sum award was set aside. It was held that non disclosure could be active, by giving false information, or passive, by failing to give relevant information. 25. Another example is the case of *AB v CD*

[2016] EWHC 10 Fam , in which the English High Court set aside a consent order at the instance of the husband, as a consequence of the wife's failure to disclose funding negotiations that were taking place with her company that had a material impact upon the potential value of her shares in that company. 26. In *Sharland v Sharland*

[2015] UKSC 60 , the husband had represented to the court that there was no IPO (initial public offering) "on the cards to date" in relation to a software business he had developed. It later transpired that an IPO was actively being prepared at that time, which would value his company at a figure significantly in excess of the valuation prepared for the court hearing. The husband's evidence was found to be dishonest. The IPO did not, in fact, go ahead, and was no longer in prospect, and so the High Court declined to set aside the consent order, on the ground that it would not have made a substantially different order, applying the principle set out in *Livesey v Jenkins* that any attempt to overturn a consent order on the basis of non disclosure will not succeed if the disclosure would not have made any substantial difference to the order which the Court would have made. That finding was upheld by the Court of Appeal. Lady Hale said this at paragraphs 29-31:- "29 It follows that the majority in the Court of Appeal in this case were correct to say that matrimonial cases were different from ordinary civil cases in that the binding effect of a settlement embodied in a consent order stems from the court's order and not from the prior agreement of the parties. It does not, however, follow that the parties' agreement is not a sine qua non of a consent order. Quite the reverse: the court cannot make a consent order without the valid consent of the parties. If there is a reason which vitiates a party's consent, then there may also be a good reason to set aside the consent order. The only question is whether the court has any choice in the matter. This may well depend upon the nature of the vitiating factor. We know from *Dietz* that innocent misrepresentation as to a material fact is a vitiating factor. The court set aside the order because the misrepresentation had induced the defendants to agree to the settlement. We know from *Livesey* that in matrimonial cases innocent non-disclosure of a material fact is a vitiating factor. The court set aside the order because the undisclosed fact undermined the whole basis on which the order was made. Although not strictly applicable in matrimonial cases, the analogy of the remedies for misrepresentation and non-disclosure in contract may be instructive. At common law, the general effect of any misrepresentation, whether fraudulent, negligent or innocent, or of non-disclosure where there was a duty to disclose,

was to render a contract voidable at the instance of a party who had thereby been induced to enter into it. This has now been modified by the Misrepresentation Act 1967, which empowers the court to impose an award of damages in lieu of rescission for negligence or innocent misrepresentation. This does not, however, apply in cases of fraudulent misrepresentation, where there is no power to impose an award of damages in lieu. The victim always has the right to rescind unless one of the general bars to rescission has arisen." We apply all of these principles to the case before us. Non disclosure 27. It is the respondent's position that Advocate Binet's statement in her e-mail of 13 th July, 2017, that the BM pension and the widow's pension were one and the same was misleading, and did not arouse suspicion. The respondent did not feel the need to question it. The key allegation, however, is that the petitioner should have provided a valuation of the widow's pension, a failing that the respondent says is material, bearing in mind the advice he had received, that it would cost £500,000 to purchase an annuity, providing the same level of income. 28. We cannot accept that this is a case of non disclosure for the following reasons:- (i) Despite the mistake made by Advocate Binet in her e-mail of 13 th July, 2017, the documentation disclosed with her e-mail was clear as to the underlying position. The petitioner's bank statements showed the monthly income of £1,766.57 being received from Aviva, and the BM valuation showed precisely the assets held in that pension, its yield, and the limited income it produced. The BM pension could not conceivably have produced a monthly income of £1,766.57 and the valuation stated in terms that it did not provide that income. (ii) The respondent was, in any event, fully aware of the two pensions as he disclosed them both in his tax returns. He expressly admits this in his affidavit. This is not a case where the true financial position of the petitioner was hidden away in voluminous documentation and obscure accounts, requiring the respondent to "act like a ferret". (iii) To the extent that there was any confusion over the names of the pension providers in respect of both pensions, that was clarified at the round table meeting before the agreement was reached. Advocate McFadzean was fully aware of the petitioner's widow's pension as a financial resource of hers and could have asked for it to be valued, if that were possible. (iv) The policy under which the widow's pension was paid was not in the petitioner's name and she had made no contribution into it. She explains in her affidavit that it was a policy taken out by her first husband through his work. He died in a tragic accident at work in 1989, less than two years after they had been married and nine years before the petitioner and the respondent commenced their relationship. To her it provided an income stream with no capital value. 29. The widow's pension was a financial resource of the petitioner openly disclosed by her, but to which she had attributed no capital value. Indeed the respondent was fully aware of it in any event from the many tax returns he had submitted during the marriage. The petitioner had been honest with the respondent. There was no misrepresentation on her part innocent or otherwise. It was open to the respondent to contend that a capital value should be attributed to the widow's pension. On advice, he did not do so. 30. Accordingly, we find that the agreement reached between the parties was not vitiated by non disclosure, and it follows that we did not need to go into the question of whether that non disclosure was material. 31. The Court must

still exercise its independent discretionary review of the circumstances and terms of the agreement. There is no question here of undue pressure being applied by the petitioner, or exploitation by the petitioner; it is not suggested that she was in a dominant position. Both parties were legally represented by experienced Advocates and the respondent does not suggest that he received bad legal advice. As was said in *Edgar v Edgar*, there is an important general proposition that formal agreements, properly and fairly arrived at, with competent legal advice, should not be displaced, and there is no good or substantial ground for concluding that an injustice will be done by holding the parties to the terms of their agreement. 32. For these reasons, the Court determined to give effect to the agreement reached between the parties. *Authorities L v V*

[2004] JRC 033 Matrimonial Causes Law (Jersey) 1949 *Xydhias v Xydhias*

[1999] 1 FLR 683 *Edgar v Edgar* [1981] 1 FLR 19 *Livesey (formerly Jenkins) v Jenkins*

[1985] 1AC 42 *Robinson v Robinson* [1983] 3 FLR 102 P-S v C

[2006] JLR 463 AB v CD

[2016] EWHC 10 Fam *Sharland v Sharland*

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