

JERSEY / JUDGMENT

C v S [2003] JRC 104 (26 June 2003)

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judgment

the deputy bailiff: 1. The matter before us today is an appeal by S, the husband, against a decision of the Family Registrar on 28 th October, 2002, that he should pay maintenance pending suit to his wife in the sum of £2,000 per month in respect of her ongoing liability to pay legal fees; such payment to be upon the wife's undertaking to pay the sum punctually to her advocates on account of her costs of the divorce proceedings and ancillary matters and to be credited against any ultimate liability of the husband to pay or contribute to her costs (but not otherwise to be refundable by her to him). The order was apparently stayed pending this appeal with effect from 1 st May, 2003. 2. The background is as follows: the parties were married on 11 th March, 1995, and separated during March 2002. There is one child of the marriage Y aged 7. There is also one child of the family, A, aged 19. She is the child of the wife. The wife and the children have moved out of the matrimonial home and presently live, at their choice, in rented accommodation. 3. Initially the wife filed a petition on the grounds of cruelty. In due course the wife then filed a new petition relying on adultery. A decree nisi was granted on this ground on 14 th May, 2003. The husband is a practicing advocate. His practice has an associated trust company. The wife has not worked. The former matrimonial home is in the joint names of the parties and is presently lived in by the husband. It is currently for sale. All the other assets are apparently in the name of or under the control of the husband. The wife is therefore entirely dependent upon the husband for her income. She has no assets of her own apart from a car which he gave her, and some jewellery. 4. On 28 th October, 2002, the Registrar made an order for maintenance pending suit. All of it, bar the provision now under appeal, was made by consent. In broad terms the order provided that the husband should pay monthly maintenance pending suit of £2,083 for the rental of the property now occupied by the wife and children, £2,000 for the wife, £460 in respect of Y and £60 in respect of A. This totals £4,603 per month, i.e. £55,236 per annum. In addition the husband agreed to pay for school fees and other items in respect of one or more of the children and this totalled a further £30,960. In other words the annual total was £86,192 in respect of agreed maintenance pending suit for both the wife and children. On the same occasion, as we have said, after a contested hearing the husband was ordered to pay an additional £2,000 per month for legal costs; so on an annual basis the total order was for £110,172 per annum. 5. Finally by way of background, because it is said by the husband this is a normal divorce which does not justify the exceptional step of making an interim order of this nature, we should refer briefly to the history of the proceedings between the parties. 6. In May 2002 the wife obtained an ex parte injunction

to secure the removal from the matrimonial home of a private detective whom the husband had invited to be there. Subsequently the wife presented a representation seeking leave to take Y out of the jurisdiction for a short holiday because the husband apparently would not agree. In September 2002, as we have stated, the wife filed a petition for divorce on the grounds of cruelty. This was defended. A request for further and better particulars was filed, as was an answer in due course. There have been ongoing proceedings concerning the question of access by the husband to Y. Furthermore, the wife has issued a summons on three occasions since the order of the Registrar of 20 th October because, it is said, she had to do so in order to enforce the maintenance pending suit or penalties for late payment of the wife's rental. The hearing to determine the permanent financial provision to be made for the wife is apparently now fixed for early July. 7. Turning to the appeal Mr. Le Cornu accepts that the Registrar had jurisdiction to make the order in question. In our judgement he was right to do so. The case of A-v-A (Maintenance pending suit: Provisions for legal fees)

[2001] 1 FLR 377, determined that there was jurisdiction under the equivalent English legislation for the court to order maintenance pending suit which included an element towards the payee's legal costs of the suit. Mr. Le Cornu did not suggest that the position was any different under the relevant provision of the Matrimonial Causes (Jersey) Law 1949 . Furthermore, in the recent case of PS-v-C ,

[2003] JCA 012 , the Court of Appeal upheld an order by the Royal Court that the husband in that case should pay £20,000 per month towards the wife's accrued and future professional fees in relation to her claim for ancillary relief. There is therefore precedent in this jurisdiction for an order of this nature. 8. Mr. Le Cornu's main point was that such orders should be reserved for exceptional cases. He relied upon the comments of Holman J. in A-v-A at 380 where he said: "In a 'normal' divorce it is usually predictable that there will be a decree of divorce, and it may be possible to predict that the wife will receive an approximate amount of capital. So the wife may be able to borrow from a bank in the expectation of her future lump sum, and/or the solicitor may be able to rely upon a deed of assignment of her rights to financial provision on the authority of *Sears Tooth (A Firm) v Payne Hicks Beach (A Firm)* [1997] 2FLR 116. But in the present case the argument of the husband, if he succeeds, is that the wife will not be entitled to anything at all." 9. The argument of the husband referred to by the judge in that passage was that there had never been a valid marriage at all. It followed that if he was right there would no jurisdiction in the court in that case to make a lump sum award to the wife. It was therefore, said Mr. Le Cornu, a very different case to the normal one where the wife is bound to receive a lump sum of some description out of which she can then pay her legal fees. But we do not read the judgement of Holman J. as saying that the court should only make orders of this nature in the particular circumstances that arose in that case. Thus at page 382 he said this: "But Mr. Singleton submits that the costs of the suit itself are in a different category. I do not agree. Just at the moment they are, after the provision of a roof over her head and food in her mouth, the wife's most urgent and pressing need and expense. She could manage without holidays, though I have made some provision for them. She could no

doubt manage for a while without buying new clothes. She could manage without her manicures, pedicures and yoga and keep fit classes, for all of which I have, on the facts of this case, made provision. She could even manage without the provision for forms of private medical care (to which the family has been accustomed) for, if necessary, she could fall back on the NHS. But she simply cannot make any progress with the dominating issue in her life if she cannot pay her lawyers, and for this the State will not provide." 10. Later at 385 he said this: "Finally, Mr. Singleton submitted that the pressure comes not from the wife but from her solicitors; and he submitted in effect, that they should be willing to wait for their costs and run the risk of not recovering them, as many other solicitors in their position have had to do. I did not find that submission an attractive one, coming, as it did, during the same hearing in which the husband's own solicitors were asking for the release of funds so they could be paid fully up to date and also for future funding as it arises. Further, we live in times of high overheads and a close eye on cash flow. There is a real risk that if wives (for it is usually wives) cannot obtain some funding as they go along, solicitors simply will not be willing to act for them at all." 11. And finally at 387 he said: "This wife has always been dependent on her husband. She is locked into a bitter struggle with him, whose outcome is of intense importance to her. She has an acute need for good legal representation and in circumstances in which her lawyers do not have always to be desperately economising relative to the husband. He, himself, is spending huge sums on the litigation. He can, in my judgment, afford to pay the sums I have ordered and it is reasonable that I should require him to do so. In *Sears Tooth (A Firm) v Payne Hicks Beach (A Firm)* [1997] 2 FLR 116 at 118H-119A Wilson J referred to: '... a grave and widespread problem encountered increasingly in the Family Division: namely, how can a spouse, usually a wife, who is ineligible for legal aid but who has negligible capital, secure legal advice and representation in order to pursue her rights against her husband, particularly one who is rich, litigious or obstructive or whose financial circumstances are complex or unclear?' In my judgement, in an appropriate case, maintenance pending suit provides a partial answer..." 12. We accept, of course, that the circumstances in that case were very different but the underlying reasons for the court making such an order where appropriate appear clearly from those passages and are applicable in a wider category of case than the particular one which Holman J. was considering in that case. 13. Moreover, the Court of Appeal in *PS-v-C*, to which we have already referred, did not suggest that the jurisdiction is so limited. Thus at paragraph 3 of that judgment Hodge JA said: "In making the awards on 11 October 2002 it is clear that the Royal Court was seeking to do two things. It was seeking to provide funds to the wife, who did not otherwise have access to cash and who is financially dependent on her husband, to maintain her established lifestyle and to provide for the parties' youngest child, J, until the resolution of her financial claim, for which a hearing is scheduled at the beginning of April. Secondly, because the wife did not have funds while the husband did, the Royal Court was seeking to provide her with funds to pay accrued and future legal and accountancy costs in the pursuit of her claim. Both of these aims were wholly reasonable." 14. We accept that orders of this nature should not be made in the ordinary case. They should be reserved for those cases which are of such

complexity or where there are circumstances which for other reasons are so unusual that there is a real risk of the wife (and it is usually the wife) being unable to put forward her best case with equality of arms unless the order is made. 15. In the light of the history of these proceedings we do not disagree with the Registrar when he concluded that this was such a case. He was told that the wife's legal costs at that time totalled some £38,000. She simply was not in a position to fund her lawyers without such an order and for the reasons given by Holman J. we do not think in this particular case it would be fair to her to ask her to borrow against the lump sum which she will, no doubt, be awarded in due course, or to prevail upon her lawyers to defer seeking any payment from her until conclusion of this matter. 16. Mr. Le Cornu's second point is that the order would operate unfairly against the husband in the event of his not being ordered in due course to pay the wife's costs. Clearly if he is so ordered no prejudice will be suffered because the Registrar's order expressly provides that he will be credited with the interim payments in such circumstances. But if he is not ordered to pay the costs the interim costs paid by him will not be refundable. Mr. Le Cornu therefore submits that he will, in effect, end up paying his wife's costs, to the extent of the aggregate interim payments he has made, even though the Court will not have awarded her her costs. But in our judgment that is to misunderstand the effect of the order. Although it states the payments will not have to be refunded, this would not prevent the Court which adjudicates on her final ancillary relief claim from taking the payments into account when assessing the correct lump sum. We are in no doubt that such payments ought to be taken into account. It would surely be quite wrong for a Court to say on the one hand that the husband need not pay the wife's costs but on the other hand effectively to make him pay those costs by not making an allowance against the lump sum for the amount which he has previously contributed towards her costs. 17. Mrs. Colley clearly understood that the Registrar's order did not prohibit this because in her statement of submission filed in connection with this appeal as long ago as 11 th December, 2002, she said at paragraph 10: "In the event that the Petitioner must meet her own costs, she will do so from the lump sum she is eventually granted and any prior contributions to her legal fees by the Respondent may be deducted from that lump sum." 18. This was repeated in her skeleton argument prepared for this appeal and again before the Court during oral argument. Advocate Le Cornu's point has therefore been fully accepted and met by the wife since early December. 19. Mr. Le Cornu's final point is that the order should not have been made at all, or should have been made for a lesser sum because, even before allowing for this point of the order, the husband's expenditure exceeded his income. 20. We have been taken through the figures. We do not think it necessary to rehearse them in detail. It is sufficient to say simply this: according to the husband his total expenditure following the order as made by the Registrar will be some £273,000 per annum. His income from his practice and his trust company for 2002 comfortably exceeded that amount, even after stripping out one large exceptional item of income from his practice accounts. But he asserts that his income for this year will be of the order of £200,000 because of ongoing litigation and the effect that that litigation and these matrimonial proceedings will have on the time that he can devote

to his legal practice. 21. We are satisfied that the Registrar was perfectly entitled to conclude that it was reasonable for the husband to pay £2,000 a month towards the wife's legal fees. It is common for the aggregate expenditure of parties to matrimonial litigation to exceed their income during the period of litigation. This is because legal fees are incurred at a substantial level by both parties over and above their normal expenditure. It often means that the parties have to dip into capital assets until all the financial matters are sorted out. That option is available to the husband in this case because, according to his affidavit, he has other capital assets. In any event the Court is not convinced that his expenditure will necessarily exceed his income; it will depend on how matters progress on the income side during 2003. 22. Furthermore the real dispute between the parties in terms of cash flow is minimal. The Court asked Mr. Le Cornu during the course of the hearing what he was inviting the Court to do if it allowed the appeal. After all the payment for legal fees under the order has been made up until May 2003. The wife cannot repay those sums as they have gone to the lawyers. Mr. Le Cornu accepted that this was so and that any repayment would have to wait until any lump sum order was made at the time of the hearing for ancillary relief and could then be set off against that order. But, as we have said, that is the position even if the appeal is dismissed. Thus allowing the appeal would make no real difference in respect of money already paid. That leaves only the payments from May until ancillary matters are resolved. The hearing for ancillary relief has been fixed before the Registrar for early July so that even if we dismiss the appeal the husband will only have to pay £2,000 for a few more months. We are quite satisfied that in the overall context of his financial position that would not cause him any hardship. 23. On an appeal from the Registrar the Court exercises its own discretion whilst taking due account of the decision of the Registrar. We have approached this matter afresh but for the reasons we have given we are satisfied that the decision of the Registrar was correct and we therefore dismiss this appeal. 24. As to costs, Mr. Le Cornu argued that even though the appeal has been dismissed he had to bring it because the order made by the Registrar did not make it clear that, in the event of the husband not being ordered to pay costs at the hearing for permanent ancillary relief, the payments of £2,000 could still be taken into account. It is true that the order might have been more clearly expressed and we certainly recommend that it is so on any future occasion. But Mrs. Colley clearly understood the position and she stated unambiguously in her submission filed in early December, 2002, that she accepted on behalf of the wife that allowance should be made against the lump sum in such circumstances. There was, therefore, no need to proceed with this appeal thereafter. In the circumstances I order the husband to pay the costs of and incidental to this appeal on the standard basis. Authorities A-v-A (Maintenance pending suit: Provision for legal fees [2001] 1FLR 377. PS-v-C (22 nd July, 2002) Jersey Unreported; [2002/141]. PS-v-C (11 th October,

2002) Jersey Unreported; [2002/192]. PS-v-C

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Prepared on 23 October 2026 · Esheria