

JERSEY / JUDGMENT

Flynn -v- Reid [2012]

JRC 121A (18 June 2012)

[2012] JRC 121A

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judgment

the deputy bailiff: 1. On 24 th April a copy of a draft judgment in this case was sent to Advocates Hall and Heywood acting for the parties. It was supplied on the usual terms, namely to enable the parties to consider the draft judgment and decide what consequential orders if any they might seek and secondly to enable the Advocates to submit suggestions to the Court about typing errors, factual errors, wrong references and other minor corrections of that kind. It was made plain in the circulating email that I would sit to deliver the judgment and to hear any costs argument in accordance with usual practice and a date would be provided shortly. 2. Subsequently my Chambers supplied a date of 14 th May when the judgment would be delivered. Advocate Baxter then appeared for the Plaintiff and Advocate Heywood for the Defendant. Judgment was handed down. Advocate Baxter sought to have questions of costs put off. This was not an application made with consent, and I did not acquiesce in it. First of all, Mr Baxter had been present during much of the hearing, and was therefore familiar with the case. Secondly, the date for delivery of the judgment had been settled in advance and the parties were aware that costs matters could be raised. I had been given no information that either side would wish an adjournment in this connection. Thirdly, to put off the matter for argument on another occasion would have been to cause further costs to be incurred and I was already concerned that the exposure to costs was capable of taking up a disproportionate amount of the sum in dispute. 3. Advocate Baxter applied for costs on the basis that the Plaintiff was the clear winner. Furthermore he said that the Plaintiff had offered to settle at a figure which was in fact less than the amount which had been awarded to her and if that offer had been accepted, all additional costs could have been avoided. Advocate Heywood suggested there should be no order for costs and that that would achieve the justice of the case. He said these were effectively quasi matrimonial proceedings; that the Plaintiff did not succeed with the majority of her claims; and that both parties were on legal aid. His firm had agreed a cap on the quantum of fees which the Defendant would pay at £20,000 although their time costs were nearer £60,000. He expected that the Plaintiff's lawyers would also submit a reduced fee note, given that they also were on legal aid. 4. Although the Jurats were sitting with me for the purposes of handing down the judgment, the decision on costs was mine alone, in accordance with the Royal Court (Jersey) Law 1948 . Having heard argument, I ordered the Defendant to pay 60% of the Plaintiff's costs not exceeding £16,000 and the Plaintiff to pay

40% of the Defendant's costs not exceeding £8,000. Advocate Hall has requested as reasoned judgment in order that she can consider an application for leave to appeal the costs order. Although I gave some ex tempore reasons at the time, I have agreed to deliver a full decision as requested. 5. As the full judgment on the merits shows, the Plaintiff brought her claims to a proportion of the sale proceeds of the Property on four different grounds. She was unsuccessful on three of them. In relation to the grounds upon which she was unsuccessful, there were subordinate arguments such as the claim for waiver and contractual variation, which made the unsuccessful grounds more expensive to deal with. The Plaintiff has succeeded in the sense that she has a judgment for a sum of money which previously she did not have, but on the other hand she has lost at least three quarters of the main issues which she litigated in the case. By indicating without prejudice that she was prepared to settle for the sum of £60,000 when in fact the award granted to her was in excess of that sum, the Plaintiff has put herself in the position of rightly being able to say that the costs were incurred unnecessarily from the moment of that offer. Nonetheless, the fact that costs might have been incurred unnecessarily does not justify incurring costs on the unsuccessful parts of the claim, because those costs were unnecessarily incurred on two counts, one on the Plaintiff's side, the other against her - both because the Plaintiff's offer should have been accepted, and secondly because the Plaintiff in fact failed on those arguments. 6. So those are the first litigation factors which I took into account. In accordance with the principles set out in *Pell Frischmann Engineering Limited-v-Bow Valley Iran Limited* and others

[2007] JLR 479 , it is permissible to take into account that a successful party has raised issues on which it was unsuccessful thereby causing a significant increase in the length or costs of the proceedings. Here, the increase in costs was not attributable to the time taken in relation to the evidence, because that was much the same on all grounds, but it is attributable to the research, preparation and argument upon those grounds. 7. Secondly, I took into account that these were quasi matrimonial proceedings. I put it that way because, as the judgment itself makes plain, the parties treated themselves as a married couple and there is at least some attraction therefore in the Court treating them the way they wanted to treat themselves. Now of course the Court does not necessarily order costs to be split equally in all matrimonial cases. There is a discretion to be exercised - sometimes it may be right to make no order as to costs, and on other occasions it may be right to order one or other party to pay all or some of the costs. In *R-v-G*

[2006] JRC 112 , Birt DB accepted the submission of the petitioner that the Court adopts a more flexible approach in matrimonial causes than in others. He referred to the English case of *Gojkovic-v-Gojkovic* (No. 2)

[1992] 1 All ER 267 the headnote of which reads: "Although the award of costs in the family division prima facia followed the event, as in other divisions of the High Court, that presumption was displaced more easily than in other divisions and might be affected by the behaviour of a party in failing to disclose material documents or assets, the incidents of legal aid and the inadequacy of available assets, especially if children were involved." 8.

The Deputy Bailiff went on to refer to the comments of Butler Sloss LJ at page 271 where she said:- "In many cases, the incidence of costs has a marked impact upon the availability of sufficient funds for the needs of the family. It may substantially diminish the cake which has to be cut. In some cases, those costs are specifically allowed for in these substantive orders made. The ambit and extent of the discretion of the Court is consequently, and rightly, far wider than in other civil proceedings." 9. In R-v-G , the Court also referred back to the case of J-v-M 2002/127, where Bailhache Bailiff said at paragraph 2:- "While the ordinary rule that costs should follow the event is an important consideration it must be subordinated, in my judgment, in this type of case to the need to justice between the parties." 10. The present case is one where an unmarried couple have parted and disagreement has arisen as to the extent to which the Plaintiff could claim a share of an asset - perhaps I can refer to it as a quasi-matrimonial asset - which was registered in the name of the Defendant alone. Given the absence of precedent directly applicable, it is in a sense unsurprising that such argument arose. The fact that there was argument is not of itself a matter to be held against either party. Neither party's conduct was the subject of substantial enquiry before the Court. Neither party has misconducted the litigation itself. The Court was faced with claims in novel areas of law in the sense that there is no indication that similar claims had previously been brought before the Courts of this jurisdiction. 11. In the event the Court decided that the justice of the matter lay in finding that the Defendant had been unjustly enriched, and in ordering him to account to the Plaintiff for 40% of the net equity in the property. In order to reach that figure, the Defendant was entitled to repayment of his own capital contribution with interest calculated thereon. If one had regard to the sale proceeds of the Property less the costs of sale and the amount due to the Royal Bank of Scotland International by way of repayment of loans, the Defendant had approximately 70% of the net; but regarding his capital contribution as a debt due by the two of them, then he had 60% of the equity as I have said. 12. Taking all these matters in the round, the justice of the case required in my view an order that the Plaintiff pay 60% of the costs incurred on both sides, and the Defendant pay 40% of the costs incurred on both sides. At that point however, the uncertainties of the legal aid scheme became relevant. Advocate Heywood had informed me that although the Defendant was on legal aid, the fees which would be charged to the Defendant had been capped at £20,000. On the basis that a party can only recover in costs an amount equal to that which he has expended, there was no basis for suggesting that the Plaintiff should ever have to pay more than 40% of £20,000, even if the amount that might be due on an advocate and own client basis might be nearer £60,000. On the other hand, Advocate Baxter said he was not in a position to let me know what the Plaintiff's exposure to fees might be. It followed that an order that the Plaintiff pay 40% of the Defendant's costs and the Defendant pay 60% of the Plaintiff's costs might end up with the Defendant bearing a very much greater overall percentage of costs than the Plaintiff. This did not seem to me to be fair, given that on the substance of the argument, the Defendant had been successful in three quarters at least of the major issues. 13. The way I resolved to handle that possible inequity was to insert a cap in the costs exposure of each party. As far as the exposure of

the Plaintiff was concerned, that was easy in the sense that Advocate Heywood had confirmed that the Defendant's exposure to costs was limited to £20,000. Accordingly, 40% of that figure meant that a cap on the costs which the Plaintiff should pay towards the Defendant would be £8,000. I had no such information in relation to the costs incurred by the Plaintiff with her lawyers. They might well be higher than £20,000, and as I indicated in the *ex tempore* reasons which were given, while I recognised that it was not possible for me to interfere in the arrangements between Messrs. Viberts and their client, I expressed an expectation that Messrs. Viberts would cap their fees at the same level as Messrs. Appleby. However, recognising that that might not be the result, and recognising also that the Defendant had received 70% overall of the sale proceeds of the Property, the cap which I put on the Defendant's contribution towards the Plaintiff's costs was not limited to £12,000 (60% of £20,000) but £16,000. This was a rough and ready calculation. If the Plaintiff's legal fees amount to something around £26,000, then the Defendant will be paying approximately 60% of them. If they are lower, because they are set at the same level as the Defendant's lawyers, the Defendant is paying a higher percentage. If they are higher than £26,000, there is a matter for negotiation between the Plaintiff and her lawyers, but ultimately I took into account that this sum represents a significant percentage of the amount in dispute, is not by any standards an insignificant sum for a three day hearing in any event and furthermore that there is no overall justice in meting any additional costs upon the Defendant given the way in which the arguments were advanced. 14. For these reasons I placed a cap on the Defendant's liability for the Plaintiff's costs at £16,000 and a cap on the Plaintiff's liability for the Defendant's costs at £8,000. The result of that approach was that the Defendant has legal fees overall of some £28,000, in all probability, and the Plaintiff will have to make overall a contribution of at least £16,000 and possibly a higher figure depending upon the outcome of any discussions with her lawyers. I was advised that the Plaintiff was in receipt of legal aid and I therefore make the assumption that the Plaintiff's lawyers will be prepared to make some reduction in the charges which would otherwise would have been made, were the Plaintiff legally aided. As Birt, DB said in *R-v-G* at paragraph 18:- "I see nothing wrong in [the Deputy Registrar] taking into account the fact that he was legally aided when having regard to the quantum of such an award." 15. It would have been more helpful if the Plaintiff's lawyers had come to court ready to argue the question of costs in accordance with the indications given by the court when the draft judgment was circulated, or, if that were impossible for some practical reason to alert or if possible agree with the opposing counsel as to the need for an adjournment. Nonetheless it is right to record that, save for his having no knowledge of the Plaintiff's exposure to the costs incurred with her own lawyers, Advocate Baxter made all the points in her favour on the application for costs that one would have expected. *Authorities Royal Court (Jersey) Law 1948. Pell Frischmann Engineering Limited-v-Bow Valley Iran Limited and others*

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[2006] JRC 112 . Gojkovic-v-Gojkovic (No. 2)

[1992] 1 All ER 267. J-v-M 2002/127. Page Last Updated: 13 Sep 2016 BAILII: Copyright Policy |
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