

JERSEY / JUDGMENT

J -v- M [2008] JRC 185A (28 October 2008)

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judgment

the REGISTRAR: 1. J, the husband, applied for a review and downward variation of the maintenance he was bound to pay to M, his ex-wife and children, by virtue of an agreement made in January 2002. The hearing took place on 5 th February this year. 2. Spousal maintenance, in accordance with the agreement, was £4,000 per month. There was to be a review "no later" than September 2005. The review ("the review hearing") took place, as I have said, in February this year. However, in the meantime there were negotiations, by which both spousal and child maintenance were "lumped together" and reduced to £4,666 per month in April 2007. One of the two children left school in October 2007 and, as a result of further negotiations, total maintenance was further reduced in October 2007 to £3,900 per month, on an interim basis. 3. My decision at the review hearing was that, for a period of 5 years, spousal maintenance would remain payable (without increase or decrease) at the rate of £3,000 per month. Child maintenance for one child would remain, until the child left tertiary education, at the rate of £1,000 per month, subject to annual cost of living increases. 4. The basis of my decision was that, despite uncertainty about criteria for a review of spousal maintenance, a fair assessment would be to take the present total maintenance paid as a starting point (£3,900). Looked at in relation to her expenses and anticipated income from guest house business, how was she managing? 5. M's budget figure was just over £5,000 per month. In my judgement, I assessed that these expenses could be met at present by:- (i) spousal maintenance £3,000 (ii) child maintenance £1,000 (iii) guest house income £1,000 £5,000 6. The basis of the review in 5 years time will be to decide whether or not J should be released from the payment of maintenance altogether, probably, though not necessarily, upon the payment of a lump sum. The assessment of it should not be on the basis of provision of maintenance during the parties' joint lives, but more on the basis of the time needed and the size of the payment necessary to enable M to become financially independent. I accepted that she was doing her best to provide herself with an income. Any argument about earning capacity i.e. what career she may or may not be capable of have been capable of pursuing was largely irrelevant. 7. Fundamentally, this was not a complicated case. It is therefore surprising that the parties have incurred such high costs. J's costs, I am told, are:- (i) English barrister £ 3,875 (ii) Jersey advocate £39,797 (iii) English accountant £ £44,200 M's costs (as at April 2008) are:- (i) Jersey advocates £62,880 (ii) English solicitor £15,000 £77,880 8. J's case is that costs have increased because of the respondent's failure to make a serious offer worthy of consideration. Meanwhile, he made 3 "Calderbank" offers to settle the proceedings. The last of

these dated 16 th January, 2008 sets out the details of maintenance proposed both for M and for the child still in education. He maintains that this offer is equivalent to 91% of the eventual offer made. However, if one examines spousal maintenance independently, his offer amounts to a much smaller proportion of the final offer. 9. His lawyer's letter of 16 th January reads (on the second page):- "1. My client is prepared to continue to pay maintenance to M in order to enable her to complete the current degree course and to allow her to obtain employment thereafter. He is not however prepared to fund any other course that M should choose to undertake.

Accordingly he is prepared to pay:- (a) Maintenance to your client for her benefit at the monthly rate of £2291.70 from the date of any consent order until the 31 st December 2008. (b)

Maintenance to your client for her benefit at the monthly rate of £1875 from the 1 st January 2009 until 31 st December 2009. (c) Maintenance to your client for her benefit at the monthly rate of £1458.33 from the 1 st January 2010 until 31 st January 2010." 10. Later on the same page of the letter he offers child maintenance for the child L at the rate of £12,000 per annum, but without provision for annual increases in accordance with the cost of living. 11. He maintains that the wife failed to respond to this offer, failed to negotiate and, in her open position, asked for maintenance well in excess of the figures finally ordered, namely:- (i) £1,192 for child maintenance; and (ii) £4,692 for spousal maintenance. 12. In response to these accusations, the wife's advocate drew attention to a letter dated 19 th June, 2007 in the Court bundle addressed from her firm to the advocate acting for the husband at that time. The husband objected on the grounds that it was without prejudice correspondence. It is not so marked, and the fact that it was included in the bundle gives me the reassurance necessary to set it out in full:- "Dear Advocate Whittaker I have had the opportunity of discussing a way forward with my client and am instructed in the following terms. M's health is improving slowly and she is still receiving medical attention for stress and exhaustion. She has been informed by her tutor that in view of the high standard of work that she completed during her course which was not fully completed due to ill health, she has been granted a pass by the college and will be able to continue with her course as soon as her health allows. I am instructed that she does not feel able to attend a further Court hearing at this time but appreciates that the next Court date is fixed in August and is hopeful that she will be well enough to face the rigours of a hearing before the Registrar or at the very least be able to travel to Jersey and remain in a room separate from the Court, on hand for any instructions or discussion as may be required. I am currently seeking medical advice on this area from M's GP. In relation to matters generally I am instructed that, in view of our clients extensive efforts to negotiate a settlement during 2006 (end of sentence no longer visible). For this reason she does not believe it would be beneficial, taking into account the above problems she would face with any confrontation, around the table meeting would not be beneficial. I am instructed to confirm that, in the absence of completion of financial disclosure and the schedules of discrepancies to progress this matter to trial, she would be prepared to accept an offer in the same terms or very similar to that which had been discussed and almost concluded in 2006. In the event that your client is able to repeat that offer and or vary it with a counter proposal in very similar terms, the matter will have to proceed to trial. With that in mind as you know I am away from the office from Friday 15 th June until Monday 25 th June and if your client does not feel able to offer the same proposals as were available in December 2006 or something very similar

for our client to consider we will need to agree a new timetable for the late disclosure which the parties have both permitted to occur in the hope that we can proceed to a hearing in August and there will be no need for either party to seek a delay." 13. I can only conclude that negotiations were ongoing, at least at the date of the letter, in June 2007. 14. I also conclude, from the history of agreed amendments to the original settlement in January 2002, (set out in paragraph 2 above), that negotiations were progressing in October 2007, when a further agreed reduction in the maintenance was made. 15. I must remind myself that this was against a background of a wife who, not only had certain health issues. She was also historically entirely dependant on maintenance from her husband, who was someone of superior bargaining power (even if, at the time, he was suffering financially as a result of a failed business project). 16. The husband's case is, further, that the wife was deliberately evasive in failing to disclose her earning potential. He referred to a series of letters commencing with a letter to the wife's solicitor in July 2005, and ending with her reply to his questionnaire. 17. I regret that I am not convinced that the wife was deliberately evasive. The husband wanted her to admit to an earning potential which was something she was, for obvious reasons, reluctant to do. Indeed, the husband knew she was undertaking further art studies, meaning that she was denying any income potential. However, as soon as her bed and breakfast business became a serious option for her, she informed the husband through her lawyers. 18. The only point at which the husband was surprised during the hearing was the reduced extent to which the bed and breakfast premises was said to be available for guests due to the need to accommodate the parties' children. At this point the husband claimed that his case was being 'highjacked', which in my judgement was overstating his case. 19. The husband's complaint that the wife failed to respond to his offer is more persuasive. However, in the circumstances of the case I do not consider that she should be penalised in costs. The matter of costs is at the discretion of the Court. In this case neither party has been entirely successful or entirely unsuccessful. Although in her open position, the M's reliance on full maintenance in accordance with the original agreement, her advocate's position at the hearing was less extreme. M was ready to acknowledge the fact that she would soon have an income of her own from the guest house. 20. In conclusion, this is a summary of my reasons for my decision:- (i) J's position set out in his offer letter was not close to the final order; I disagree with his claim to have succeeded in his action; (ii) neither did M succeed if one compares her open position with what was ordered, but at the hearing, she was ready to acknowledge that she would soon have a small income of her own; the order which was made took this into account; (iii) a large part of the costs were incurred on both sides in the protracted and, I would say, pointless, argument, which was engendered by J, over whether or not M had an earning capacity, an argument which is, at last, I hope, settled by M taking on the guest house business; (iv) some of the costs incurred by M with a solicitor in the UK were also pointless; (v) payment of legal costs by M would be of greater and more lasting consequence to her because of the necessity for her to pay it from her capital which is limited; and (vi) a major part of M's income is still the maintenance which was the subject of the case; it would be perverse if the Court were to cause her financial hardship through a costs order which failed to take M's continued partial financial dependence on J into account; (vii) despite the present difficulties with his development company together with his new family responsibilities, J is still, even now, in a stronger financial

position than M. 21. In addition to the costs set out in paragraph 7 above, J is still due to pay certain agreed costs of M incurred in preparing the agreement of January 2002, referred to in my first paragraph above. In my judgement, he should pay those costs within one month. 22.

Therefore, in all the circumstances of the case, the husband must contribute a further £20,000 towards the legal costs incurred by M. This is approximately one third of the costs of her Jersey Advocates. No Authorities Page Last Updated: 16 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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