

JERSEY / JUDGMENT

L v V [2004] JRC 033 (19 February 2004)

[2004] JRC 033

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judgment

the bailiff:

Introduction

1. This is an unhappy but also an unusual case. It is unhappy because, as frequently happens when matrimonial disputes are allowed to drag on for too long, the parties have now each adopted entrenched and equally unsustainable positions. It is unusual because the Court is being asked to set aside two consent orders which in turn superseded an earlier agreement, all of which involved legal advice on both sides. The issues for the Court, following an order of the Registrar of the Family Division of 5th September 2003, are whether the consent orders may be set aside and the extent, if any, to which the orders should be varied.

Background

2. The brief history is that the petitioner (to whom we shall refer as 'the husband') and the respondent (to whom we shall refer as 'the wife') were married in 1986. They have two children now aged 12 and 8. The parties separated in 1997, the wife taking the children with her to live in a rented flat while the husband remained in the matrimonial home (to which we shall refer as 'the property'). 3. During 1998 negotiations took place between the parties which led to the conclusion of a separation agreement on 5th October 1998. The husband was then represented by Pickersgill & Le Cornu and the wife by Mourant, du Feu & Jeune. The agreement made provision for joint custody of the children, with care and control to be vested in the wife. The husband agreed to pay maintenance for each child at £50 per week, until the age of 16 or he ceased full-time education, whichever was the earlier. (Presumably this was a mistake and should have read 'whichever was the later'.) That figure to be reviewed annually on 3rd October in accordance with any rise in the Jersey Retail Prices Index. The husband was also to be responsible for the school fees. 4. So far as the wife was concerned, she abandoned any claim for maintenance. Furthermore, she agreed to transfer her interest in the property to the husband in consideration of a single payment of £45,000. The contents of the property were divided between them. A motor car was transferred into the name of the wife. Although some figures were prepared by the husband's legal advisers which purported to show that the payment to the wife represented approximately 50% of the

net value of the property, this arrangement was in our judgment unduly favourable to the husband. 5. Two years later the wife had changed her legal advisers and sought to re-open the financial arrangements to which she had agreed as a 'clean-break' settlement. Correspondence took place between Voisin & Co, then (and now) representing the wife and Pickersgill & Le Cornu. The wife regarded the accommodation for herself and the children as comparing unfavourably with the property, which the husband had in the meantime been extending and improving. The husband claims that he had made financial disclosure to Maurant, du Feu & Jeune in 1998 but it seems that this information was not passed on to the wife. The wife's current legal advisers were accordingly in the dark as to the extent of his assets. The wife's perception was the husband was enjoying a relatively high standard of living and that the property, (the former matrimonial home) was now worth a substantial amount. 6. On 9th March 2001 Voisin & Co wrote to Pickersgill & Le Cornu suggesting (in the absence of any information as to the extent of the husband's assets) that the husband should pay the wife £250,000 which would enable her to buy a modest 3 bedroomed house. In consideration of such a payment she would abandon any claim for maintenance for herself. It seems that there was no immediate reply to this proposal and that the husband sought to have the 1998 agreement ratified by the Registrar of the Family Division. There was a hearing before the Registrar on 23rd October 2001 at which various directions were given. An indication was perhaps given that the 1998 agreement would not be ratified. On 29th October 2001 Pickersgill & Le Cornu wrote to Voisin & Co stating that they had been instructed by the husband to accept the proposals set out in the letter of 9th March 2001. It is to be noted that financial disclosure had still not been made by the husband to the wife's legal advisers. 7. On 29th January 2002 a memorandum of agreement was signed, and this agreement was ratified by the Greffier Substitute on 30th January 2002. The payment of £250,000 to be made by the husband to the wife was in addition to the £45,000 paid in 1998. In fact the only asset of the husband was the property. In February 2002 it was agreed between the parties that the husband would undertake further work to the property before it was placed on the market so as to enable him to make the payment of £250,000 from the proceeds of the sale. 8. On 2nd May 2002 the decree nisi granted on 20th September 2000 was made absolute. 9. In June 2002 the property was placed on the market for sale at an asking price of £850,000. At about this time the husband ceased to be represented by Pickersgill & Le Cornu and transferred his business to Crill Canavan. By letter of 9th October 2002 Crill Canavan wrote to Voisin & Co stating that the agreement to pay the wife £250,000 had been made on the husband's understanding that the property was worth £850,000. They suggested that advice from different estate agents indicated that the property was in fact worth some £200,000 - £250,000 less than that figure. If the property were to be sold at £600,000 - £650,000, the wife would receive virtually all the net proceeds of the sale. The husband's legal advisers suggested a without prejudice discussion to try to resolve the matter. 10. Voisin & Co replied on 17th October 2002 pointing out that the agreement to pay £250,000 to the wife was not linked to the sale of the property, and that the wife needed a minimum of £250,000 to buy a small house. They declined to negotiate. Enforcement proceedings were threatened. 11. By the end of 2002 the property had still not been sold and

the husband had once more changed his legal advisers. He was now represented by Viberts. Further correspondence ensued concerning the impossible position in which the husband now found himself. The wife had begun proceedings to enforce payment of the agreed sum of £250,000. On 13th January 2003 the Registrar, by consent of both parties, adjourned the enforcement proceedings for three months against the husband's undertaking to use his best endeavours to secure an expeditious sale of the property. The Registrar also ordered, by consent, that, on condition that the husband continued to pay the children's school fees in accordance with the order of 31st January 2002, the wife should repay to the husband £75,000 upon the younger child attaining the age of eighteen or leaving full-time education, whichever was the later. 12. During 2003 advice was taken from various estate agents and the asking price of the property was reduced. Eventually, in July 2003, an offer of £610,000 was accepted, and completion took place in early September 2003. An order of the Registrar of 5th September directed that out of the net proceeds of sale, £50,000 should be paid to each party and that the balance of £258,493.24 should be held in escrow pending an order of this court. The setting aside of the 2002 and 2003 orders (1) 13. Both counsel agreed that the Court's jurisdiction to vary a consent order was wider than the equivalent jurisdiction in England. English courts may vary orders for periodical payments but have no jurisdiction to vary an agreed lump sum payment. This Court has a wider jurisdiction which is set out in Article 32 of Matrimonial Causes (Jersey) Law 1949, as amended, in the following terms:- '(1) The Court may from time to time discharge or vary any order made under Article 25, 27, 28, 29, 29A or 30A of this Law or suspend any of the provisions thereof temporarily or revive the operation of any of the provisions so suspended. (2) In exercising the powers conferred by this article, the court shall have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage.' Article 29 of the Law is the article under which an order for a lump sum payment may be made. Before considering whether this is an appropriate case for the exercise of the jurisdiction to vary, we turn to the function of the Registrar when an agreement is presented to him and a consent order is sought. Functions of the Registrar 14. The general principle is that when an agreement between parties to matrimonial proceedings is submitted to the Court for ratification, it is the duty of the Court to make certain basic inquiries so as to satisfy itself that the agreement is fair. In *Rennell v Le Mière* (5 th April 1995 Jersey unreported) [1995/65] Sir Godfray Le Quesne, QC, in delivering the judgment of the Court of Appeal, stated - 'If the agreement were to be referred to the Court in this way it would become the duty of the Court to consider whether the agreement was fair and just and to ratify it only if so satisfied. It would not have been a matter of the Court's applying a rubber stamp to the agreement or ratifying it without any exercise of the Court's discretion. This position has not been disputed between the parties to this appeal but there is clear recent authority showing that that is the effect of the law.' The Court thus has a duty to form its own judgment as to whether the agreement is fair and just. This is particularly important where there are children of the marriage. It is well settled law that the paramount consideration in the mind of the Court must be the needs of any dependent children. 15. How far the Court should go in making inquiries as to the fairness of the agreement is a matter for the discretion of the

Registrar. In *Tommey v Tommey*

[1982] 3 All ER 385 at 390 Balcombe J stated - 'A judge who is asked to make a consent order cannot be compelled to do so: he is no mere rubber stamp. If he thinks that there are matters about which he needs to be more fully informed before he makes the order, he is entitled to make such inquiries, and require such evidence to be put before him, as he considers necessary. But, per contra, he is under no obligation to make inquiries or require evidence. He is entitled to assume that parties of full age and capacity know what is in their best interests, more especially when they are represented before him by counsel or solicitors. The fact that he was not told facts which, had he known them, might have affected his decision to make a consent order, cannot of itself be a ground for impeaching the order.' 16. In *Harris v Manahan*

[1996] 4 All ER 454 Ward L J expressed the view that while the Court was no rubber stamp, nor was it some kind of forensic ferret. He continued, at page 462 - It is important to stress the practical common sense of Balcombe J's approach. The realities of life in the principal registry and the divorce county courts are that the district judges are under inevitable pressure and the system only works because the judges rely on the practitioners' help. I would, therefore, be very slow to condemn any judge for a failure to see that bad legal advice is being tendered to a party. The statutory duty on the court cannot be ducked, but the court is entitled to assume that parties who are sui juris and who are represented by solicitors know what they want. Officious inquiry may uncover an injustice but it is more likely to disturb a delicate negotiation and produce the very costly litigation and the recrimination which conciliation is designed to avoid. 17. In our judgment these observations have equal force in this jurisdiction. What then should the Registrar do? It seems to us that the Registrar should first of all always be alert to protect the interests of minor children. Those interests will clearly be affected by provisions in an agreement for custody, care and control, and access, and for maintenance. They may also be affected however by provisions relating to lump sum payments, particularly if such payments are intended to enable a home to be acquired for the main carer and the children. But the Registrar also has a duty in a broad sense to oversee the fairness of the arrangements between the parties. He is not obliged to go down the hole like a ferret. But he should use his experience and his nose to smell out any obviously lurking rat that has been overlooked by the parties. To that end he might find it useful to draw up a questionnaire for the parties to complete before any agreement is submitted for ratification. The parties obviously have a duty of full and frank disclosure. In England certain information which is required to be disclosed is prescribed by rules of Court. Those rules might offer some assistance in the formulation of the questionnaire that we have suggested. To put it at its lowest, there must be some judicial scrutiny of an agreement before it is embodied in a consent order. The setting aside of the 2002 and 2003 orders (2) 18. Counsel for the husband relied upon a passage in *Braid v Barnes and Bree* [1988] JLR15 to support his submission that the orders should be set aside. In that judgment Sir Peter Crill, Commissioner, referred to the passage that we have cited from *Rennell v Le Mière* and to

the grounds usually urged in support of an application to vary, viz. mistake, bad legal advice, a raw deal, and intervening events, and continued - However, we do not feel called upon to settle the argument in respect of those four matters because, as it is the duty of the court to examine every consent order before it makes an order, and thereby converts the consent order into an order of the court - again I refer to the passage I previously mentioned in *Le Mière (née Rennell) v Le Mière*

- and as there is no evidence that in December 1996, the Greffier Substitute did so, even if he may have done so, as seems to be apparent from his notes and the transcript at the August hearing, I am bound to say that I can find nothing in the transcript of any particular passage referring to these matters. But in our view because he may not have done so in December, that apparent omission is sufficient for us to order that the consent order of December be set aside. 19. In this case we too have been invited to set aside the agreements on the basis of bad legal advice, a raw deal, and an intervening event, namely the sale of the property at a price greatly inferior to that originally anticipated by the husband. We would certainly have done so upon the last ground but it is sufficient to base our decision, as in *Braid v Barnes*, upon the absence of any evidence that the Greffier Substitute applied his mind to the fairness of the agreement that was ratified on 30th January 2002. The Registrar has written to counsel for the husband stating - 'I am certain that there were no notes taken by me regarding the order made on 30th January 2002. This order was drafted and signed by my assistant of that time, ..., who has now left the Department. It was prepared solely from details taken from the agreement signed by the parties and is in very standard format.' It seems clear from that letter that the agreement ratified on 30th January 2002 was not subjected to any judicial scrutiny. We therefore set it aside, and it follows that the order of 13th January 2003 must also be set aside. Division of family assets 20. We stated at the beginning of this judgment that both parties had adopted positions that were entrenched and unsustainable. The wife's position is that, of the amount held in escrow, she should receive £225,216 whereas the husband should receive £33,277. The husband's position is that he should receive the entire amount held in escrow, namely £258,493. The husband also contends that the maintenance payable for the children should be reduced from £120 per week to £100 per week and that he should be released from his obligation to pay school fees. 21. The financial position of the parties, as disclosed by the evidence, is as follows. The husband is now living in a rented one-bedroomed flat. He is a carpenter by trade although until relatively recently he ran his own business fitting kitchens. The accounts of the business show a net profit of £36,768 for the year ended 31st January 2001 and a net profit of £44,160 for the year ended 31st January 2002. These proceedings appear, however, to have taken their toll, both upon the husband's health and upon his business. By the early part of 2003 the business had shrunk considerably, and the turnover had fallen from nearly £200,000 in 1999 to £120,000. The business was sold in 2003 for £50,000 of which the husband received half, the balance going to his partner, Mr B. The husband is now employed on an occasional basis earning, according to his affidavit of means, in the region of £20,000 per annum, although counsel submitted that his earning capacity was now even more limited.

22. His health has undoubtedly suffered in recent years. According to his family doctor he has been suffering from anxiety and reactive depression since 2001. His level of stress has been such that, when interviewed by a consultant psychiatrist in October 2003 he was found to be distraught and tearful and to have difficulty in reasoning clearly. He told the psychiatrist that he expected to obtain immediate mental relief from the conclusion of these proceedings. We think that recovery may take a little longer but our expectation is that the husband will in due course rediscover his equilibrium and his ability to enjoy reasonable success in business, whether as an employee or trading on his own account. Our conclusion has been predicated on that basis. 23. The wife is now employed by a local trust company on a part-time basis and earns £993 net per month. Her view is that she needs £250,000 to enable her to acquire a reasonable property for the accommodation of herself and her sons. The obligation to look after her children means that the opportunity to increase her earning capacity is limited, although that will of course change in time. 24. The schedule of assets and liabilities placed before us shows the following picture - Asset Husband Wife Comment HSBC Investment Bond £10,035 HSBC Personal a/c £36,774 HSBC Other a/cs net £426 Post Office a/c £35,000 Motor vehicles £4,000 £500

£41,200

£45,535 Liabilities Husband Wife Comment Goldfish Credit Card £1,130 HSBC Business a/c £10,212 Legal fees £28,000 Blackhorse loan £5,934 Lombard loan £4,329 Loan due to Mr B £10,300 The existence of this loan is disputed by the wife

£59,905

Net position

- £18,705 £45,535 25. We remind ourselves that the interests of the minor children of the parties, and the provision of a suitable home for them, particularly as they reach their teenage years, are of the first importance. Whether it will be possible for the wife to acquire the three-bedroomed house that she desires following our award is difficult to say. We consider, however, that our award will enable her to acquire a reasonable property. Her evidence is that she can afford to borrow no more than £30,000 by way of mortgage, given her limited income. In our calculations we have assumed that statement to be correct. It is also important however that the husband should not feel that his financial circumstances are so reduced that moral and financial recovery is impossible. We consider that our award, together with a loan by way of a mortgage, will enable him to acquire a modest flat and that, as his income increases, he will be able to improve his position. 26. The net proceeds of sale of the property held on escrow amount to £258,493.24. Both parties have received an

advance of £50,000 so that the total divisible assets are £358,493.24. In our judgment that figure should be divided as to 60% to the wife and as to 40% to the husband. Any interest accrued on the escrow account should be divided in the same proportions. 27. The arithmetical result of our award is as follows - Wife Husband £215,095.94 (60%) £143,397.29 (40%) Less £50,000

£50,000

£165,096.94 £93,397.29 Add £45,535

Deduct £18,705

£210,630.94

£74,692.29

28. It is to be noted that the wife disputes that £10,300 is due to Mr B. We made no finding as to whether this sum is due. We observe only that in his affidavit Mr B makes no mention of this alleged debt. If he is willing to forego this debt, or it is not recoverable, the net amount available to the husband rises to £84,692.29. 29. We have not ignored the fact that the wife received £45,000 in 1998 as part of the original separation agreement. The evidence was that most of that sum has been spent in general living expenses over the past five years. The HSBC Investment Bond of £10,035 apparently represents the residue of that sum. In our judgment the arrangements embodied in that separation agreement were very unfair. We treat the £45,000 paid by the husband in 1998 as representing a capitalised maintenance payment in advance for the wife and we have, for that reason, not taken it into account in calculating our award. 30. There remains the question of maintenance for the children and school fees. We see no reason to vary the current amount of £120 per week which will continue to be paid and to be subject to increase in accordance with any movement in the Jersey Retail Prices Index with effect from the 3rd October each year. As to school fees we note that the elder son has now moved to "X" School following a decision of the husband (in which the wife has acquiesced), that he could no longer afford private education. We assume that the younger son will in due course follow his brother to "X" School. At present, however, he is being educated at "Y" Primary School where the fees are currently £2,220 per annum. In the light of our award we think that the husband should honour his commitment to pay the school fees of the younger son while he remains at "Y" Primary School, and we so order.

For the avoidance of doubt, the obligation to maintain the children will continue until the age of 16 or until they leave full-time education, whichever is the later. 31. There remains only the question of costs. I am of course prepared to hear submissions, but it may assist counsel to know that my present inclination is to make no order for costs. Authorities Matrimonial Causes (J) Law 1949. Rennell -v- L:e Miére (5 th April, 1995) Jersey Unreported [1995/65]. Tommey -v- Tommey [1982] 3All ER 385. Harris -v- Manahan [1996] 4 All ER 454. Braid -v- Barnes & Bree

[1988] JLR 15. Page Last Updated: 24 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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