

JERSEY / JUDGMENT

Marett -v- Marett [2014]

JRC 100A (28 April 2014)

[2014] JRC 100A

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judgment

the master:

Introduction

1. This judgment follows on from the main decision given by me in relation to Stephen's application to strike out Jonathan's counterclaim and for summary judgment in respect of Stephen's application for possession of the Property. For ease of reference I will use the same definitions as in the main judgment. 2. The two issues I have to consider are:- (i) What order for possession should I make; (ii) Costs. 3. I will deal with each of these in turn. An order for possession 4. Stephen in his application seeks an immediate order for possession. By an affidavit dated 2 nd April, 2014 he asks for an order for Jonathan to vacate the Property within 48 hours. He also argues that he is suffering loss of rent of £2,000 per month in relation to the Property. While this is a matter I have decided is arguable for the period Jonathan has been in occupation of the Property up to now, as Stephen has succeeded in his application for possession, if an order for possession is stayed, Stephen will not be able to let the property or have the benefit of it. 5. In relation to the location of the Property, this adjoins the office premises of Stephen. Stephen in his latest affidavit also identified a number of incidents that have occurred since 2012, including subsequent to the handing down of a judgment by me in draft, where he complains about the conduct of Jonathan's and his partner Rita Bell. Some of those complaints have been referred to the Police. Also attached to Stephen's affidavit were letters sent from Sinels about some events in 2012 together with correspondence in response from Jonathan and Rita Bell where they dispute the allegations. 6. For the purposes of exercising the discretion vested in me, it is not necessary for me to decide the respective claims and counterclaims of Stephen, Jonathan and his partner. If it was not already clear from my previous judgment, it is clear that the relationship has broken down in a significant way and will not be repaired in the near future, if at all. As long as Stephen and Jonathan are in close proximity to each other the more likely it is that further incidents of one kind or another will occur. I have therefore reached the view that Jonathan should leave the Property sooner rather than later. 7. In exercising my judgment, I have also reminded myself that the basis of Jonathan's occupation

is a licence. He has never therefore enjoyed the security of tenure enjoyed by a tenant. Against that, Jonathan has been in occupation of the Property since the beginning of 2008. Although he occupied the Property under a licence, to all intents and purposes, the Property has been his home since that time. I do not therefore consider it realistic to expect to him to vacate the Property within 48 hours, as asked for by Stephen. 8. Ultimately, what I am required to do is to strike a balance between Stephen's desire to have the Property returned to him sooner rather than later and a need for Jonathan to find a new home. The decision I have reached is that Jonathan must vacate the Property by 12 noon Friday, 2 nd May 2014. This allows Jonathan one month to move out. In reaching this view I have taken into account the fact that at the conclusion of the submissions to me on 20 th March, 2014, I warned Jonathan that if Stephen's application was successful (and I had not reached any decision at that time) then I would deal immediately with an application for possession. The possibility of an order for possession being made has therefore been known to Jonathan for nearly 2 weeks. 9. I also require Jonathan to pay £1000 on account of rent into court pending assessment of what rent might be due to Stephen from the expiry of the licence until 2 nd May, 2014. I do not consider it fair for Jonathan to pay nothing at all for the next month. I have therefore ordered him to pay half the amount claimed. If Jonathan cannot pay this sum then he must apply to me with an affidavit of means before 2 nd May, 2014, setting out his financial position. In making such an application, I will consider any application by Jonathan that any such affidavit will not be shared with Stephen and his legal adviser, on the grounds that it may contain commercially sensitive information. Stephen will however be entitled to be made aware of such an application through Advocate Journeaux and will be entitled to address me on it, albeit without seeing the affidavit itself, until a ruling is made. 10. If Jonathan does not vacate the Property by 12 noon on Friday, 2 nd May, 2014, Stephen will be able to enforce the order for possession I have made but only with the assistance of the Viscount's Department. Stephen must not otherwise seek to take the law into his own hands by seeking to evict Jonathan himself or to repossess the Property. In the meantime, both parties as far as possible should not seek to communicate with each other, apart from arrangements for possession, and there should not be any repetition of the matters that led to the allegations referred to in Stephen's latest affidavit. 11. Any failure by any party to adhere to the orders I have made may also be a contempt of court where the Royal Court is entitled to impose whatever sanctions it sees fit, including imprisonment. 12. Jonathan has indicated that he may appeal the main decision and this judgment. If he does then he will have to make an application to me for a stay of this order pending appeal. One of the issues that such an application may well give rise to is Jonathan's financial position. Any evidence on Jonathan's financial position should therefore be set out in an affidavit. If Jonathan is concerned that such an affidavit contains sensitive material, then I will adopt the same approach set out in paragraph 9 above. If on such an application, Jonathan has not paid £1,000 into Court, as I have ordered, that is a factor I will take into account in deciding whether or not to grant a stay. Costs 13. I now turn to deal with the question of costs. It is clear that Stephen has been the successful party and should therefore as a starting point recover his costs. 14. The first application before me is for indemnity costs. 15. Advocate

Journeaux contends, by reference to Pell Frischmann v Bow Valley & Ors

[2007] JLR 479 and C v. P-S

[2010] JLR 645 , approving Pell Frischmann , that there is no longer a need for a "special or unusual feature" for the Court to make an order for indemnity costs, although he accepts that there is usually some special circumstance giving rise to the order. He also argues that unreasonable behaviour is enough for an indemnity costs order to be made and ultimately it is a question of what would be fair and reasonable in all the circumstances. 16. At paragraph 25 of Pell Frischmann , Commissioner Page noted:- "the circumstances in which an award of indemnity costs may, as a matter of discretion, be ordered are less restrictive than they used to be; there must, ex hypothesi, still be something to take the case out of the ordinary, but the range of potentially relevant considerations, as described by Millett, J. (later Lord Millett) in Macmillan Inc. v. Bishopsgate Inv. Trust (11), is considerable and need not involve any finding of a lack of moral probity; the test, in a word, is unreasonableness; the purpose of such an award is to achieve a fairer result for the party in whose favour it is made than would be the case if he were only able to recover costs on the standard basis; in the end, it is a question of what would be fair and reasonable in all the circumstances." 17. The extract from Pell Frischmann I have just cited was approved by the Court of Appeal C v. P-S At paragraph 8, the Court of Appeal stated:- "The Commissioner's summary is entirely consistent with the English case law such as Excelsior Comm. & Ind. Holdings Ltd. v. Salisbury Hamer Aspden & Johnson (2), where, in the Court of Appeal in England and Wales, Lord Woolf of Barnes, C. J. said (

[2002] CP Rep 67 , at para. 32): "there is an infinite variety of situations which can come before the courts and which justify the making of an indemnity order." 18. The Court of Appeal also referred to its own earlier decision in Marett v Marett

[2008] JLR 384 at paragraph 73 where it stated:- "A court may make an indemnity costs order only where there has been some culpability, some abuse of process such as deceit, underhanded or unreasonable behaviour, abuse of court procedures, or the submission of voluminous and unnecessary evidence." 19. At paragraph 12 of its judgment in C v P-S the Court of Appeal stated:- "We therefore approach the costs contentions on the understanding that in order for an indemnity award to be made there must be something to take the case out of the ordinary and a degree of unreasonableness (of which abuse of process is but an example) but recognizing that there is an "infinite variety" of circumstances where it may be right and proper for the court to make such an award." 20. Advocate Journeaux contends that the defence put forward by Jonathan was unarguable and therefore must be deemed to be unreasonable. He relied on two cases, Select Health (UK) Limited v Crompton Health Care Limited & Anor

[2010] EWH C3055, and National Westminster Bank Plc v Rabobank Bank Nederland

[2007] EWHC 3163. 21. In *Select Hotels*, the English High Court noted that the claimants had given every impression of playing games in the action and also that they did not know what their case was and they had been reluctant to be pinned down as well as demonstrating a tendency from time to time to change their case. Advocate Journeaux emphasised that neither Jonathan nor his then legal advisers, Voisins, (up to the point they ceased acting as legal aid was withdrawn), ever responded to Carey Olsen's letter of 15th January which stated that there was no defence to the claim for eviction and that damages could not be claimed for undue influence. 22. In the *Rabobank* decision, Rabobank had brought proceedings in England in breach of an anti-suit clause. Indemnity costs were awarded against Rabobank. It appears that the Court, in ordering indemnity costs, was influenced by, firstly, that Rabobank had committed a breach of an express contractual obligation and, secondly, Rabobank had caused the plaintiff to incur costs in another jurisdiction by suing in California. The Court seems to have concluded that this was conduct out of the norm which justified indemnity costs. Advocate Journeaux argued by analogy that a similar breach of an express contractual term had occurred which justifies indemnity costs namely a breach of clause ix) of the heads of agreement concluded in September 2009. 23. In relation to the application before me, the essential reason why I have found against Jonathan is because of the effect of clause ix) of the heads of agreement. At paragraph 44 of the main judgment, I noted that Jonathan had not advanced any case at all to explain why the heads of agreement reached in September 2009 should be set aside. The effect of the heads of agreement also meant that there was no arguable claim in estoppel because part of the promise that otherwise could have been relied upon had been compromised. 24. However the allegations made in the answer and the particulars as well as in Jonathan's Statement, although not easy to follow at times, also gave rise to other issues in particular an allegation of undue influence which I found was arguable. These issues were complex as can be seen from the main decision and required careful analysis of the history of this dispute, the pleaded allegations, and the affidavits and materials relied upon. What Jonathan did was to fall into error by focussing on how he perceived he had been treated by Stephen rather than on the legal effect of the heads of agreement signed in 2009. I have reached the view that this error is understandable in the context of how Jonathan felt he had been treated. While the point was found by me to be unarguable, that does not mean that Jonathan necessarily acted unreasonably. I consider it is open to me to conclude that a point that cannot be sustained on a summary judgment hearing or on a strike out application is not something that is always unreasonable. Rather each case turns on its own facts. I do not therefore regard Jonathan's approach in the same light as the *Rabobank* decision where a large and sophisticated organisation clearly chose to act contrary to a clause not to sue by starting a second action without any apparent justification. Although I have found that Jonathan acted in breach of the September 2009 agreement, I am also not satisfied that the way the case was argued before me was done so in a manner that takes the case out of the ordinary as occurred in *Select Hotels*. I do not think the matter was pursued by Jonathan in an unreasonable or oppressive manner or that he was playing procedural games. The failure

to address the relief sought raised in Carey Olsen's letter of 15 th January is also something that could have been addressed by allowing an amendment to the answer as it was clear from the particulars that Jonathan was seeking to enforce a claim to stay in the Property until he was paid by Stephen. I do not regard this as justifying indemnity costs. I have also taken into account the fact that Jonathan was a litigant in person and, although he had access to legal advice until early 2014, he felt, and still feels, very aggrieved as to how he perceived he had been treated by Stephen. 25. Taking all these circumstances into account, the view I have reached is that the just result in this case is to award standard costs rather than indemnity costs. Although ultimately his case was unarguable in law, for the reasons I have given, I am not persuaded it was pursued in a manner that was unreasonable. I wish to make it clear however the decision was not an easy one and there was much force in the points raised by Advocate Journeaux. As I said when I gave my oral decision, this case is as about as close as a litigant gets to the threshold where indemnity costs might be ordered. Ordinarily a clear breach of a settlement agreement or pursuing an unarguable point could well justify indemnity costs. 26. The second part of my decision is whether the order for standard costs I would otherwise order should be affected by what occurred at the mediation and, in particular, the attendance of Advocate Sinel at the mediation. 27. In relation to this issue, the chronology is important. At a directions hearing on 2 nd October, 2013, I raised the issue with Advocate Chiddicks whether or not Sinels could continue to represent Stephen in light of the fact that certain parts of the further and better particulars appeared to make Advocate Sinel a witness. Advocate Chiddicks agreed to consider the issue with Advocate Sinel, his principal. 28. The matter came back before me on 21 st October, 2013, when Advocate Chiddicks confirmed that Carey Olsen who previously acted for Stephen's wife, Annette, would act. I was informed this was to address any conflict. I am now told that Carey Olsen were only going to take over from Sinels following the mediation. I have no note of being informed of this on 21 st October, 2013. 29. During the costs hearing I received a letter from Advocate Sinel about what occurred on 21 st October. In that letter Advocate Sinel states:- "Advocate Chiddicks attended and the Court was informed that Carey Olsen would be stepping in in the event that the mediation failed, and that is exactly what happened. We did not acknowledge a conflict but were putting the matter beyond peradventure." 30. What I had noted in my file note prepared that day was:- "Advocate Chiddicks confirmed that Carey Olsen had previously acted for Mrs Marett wife of Stephen Marett in relation to the defendant's divorce and would act. This was to address any conflict." I also noted it was a matter for Carey Olsen to satisfy themselves that in so acting this did not give rise to any conflict. 31. By the time of this hearing, Sinels on behalf of Stephen had issued a summons to strike out the counterclaim. On 21 st October, it was also debated whether the strike out application or mediation would occur first. Jonathan, after a brief adjournment to consult with Advocate Giovannoni, then decided that he was content for mediation to occur first and the strike out application only to proceed, if mediation proved to be unsuccessful. As part of this discussion, Advocate Giovannoni expressed his concern that Stephen was playing lip-service to mediation. I made it clear to both parties that, if any party did pay

lip-service to mediation and was not prepared to look to resolving all the issues between the parties, such conduct could be referred to a trial judge on the question of costs. 32. I have referred to my notes because I have no recollection of being told that a conflict was not accepted, albeit that Sinels were going to step down. Secondly, the discussion about whether the strike out application should occur before or after any attempt to mediate is difficult to reconcile with the idea that Sinels would continue to represent Stephen in the mediation. Had the strike out summons occurred first, then Carey Olsen would have taken over. It is not clear to me why the position is said to be different simply because the mediation was to occur first. 33. Also in an email exchange on 16 th December, 2013, in response to a request from Carey Olsen for more time to prepare for the strike out application, I was told that they had not received files from Sinels to enable Carey Olsen to prepare for the strike out application. I expressed surprise at this, which is also consistent with my recollection that Sinels had ceased acting with effect from 21 st October. I was informed that Carey Olsen had only received files for the mediation which I took to mean they were acting for Stephen and had been since the directions hearing but had only focussed on the mediation. 34. At the mediation itself, it was not in dispute that both Advocate Journeaux and Advocate Sinel attended along with Advocate Chiddicks and Mr Cushion. Mr Cushion was involved in the matters that lead to the Court of Appeal's refusal to set aside the Royal Court's order for indemnity costs. I have three concerns in relation to this. Firstly, given that a real risk of a conflict of interest had been identified and apparently accepted by Advocate Sinel through Advocate Chiddicks by 21 st October, 2013, should Advocate Sinel have continued to act at all other than for the purposes of providing information to Advocate Journeaux and Carey Olsen. Secondly, given the allegations of undue influence where it is said that Advocate Sinel played a part in exercising pressure, should Advocate Sinel have attended the mediation at all, when mediation was trying to resolve such allegations. Thirdly, what was the effect of the attendance of four advisers for Stephen at the mediation on the prospects of success? In his submission, Jonathan made it clear to me that he felt at the mediation the presence of such a team was paying lip service and was part of his brother's tactics of putting pressure on him. 35. Ultimately the issue matters because the purpose of mediation is to allow parties an opportunity to try to resolve their differences. In particular, in mediation parties are encouraged to look to the future rather than what has led them to a dispute to see if an appropriate solution can be found. This is particularly important in the context of a breakdown of family relationships. What concerns me about the matters I have raised is their impact on the prospects of a successful outcome to the mediation process. 36. Firstly, Advocate Sinel, given at least that the risk of a conflict of interest had been accepted as existing, was not in a position to given independent advice to Stephen about the allegation of undue influence. Advocate Sinel had become a witness to the part of the factual matrix surrounding that allegation. Advocate Journeaux suggested that this was only an ethical issue which arose should there be a need for a trial. I do not agree. Once an advocate, in particular an advocate as experienced as Advocate Sinel, has accepted there is a conflict or at least a real risk of a conflict, the advocate has to cease to act. The advocate is no longer able to

advise independently. That applies as much to whether a client should settle at mediation as to preparing evidence for trial by drafting witness statements as well as the trial itself. It particularly applies when an allegation of undue influence is made. While therefore on the material before me, I cannot resolve the differing recollections between myself and Advocate Chiddicks about what I was told on 21 st October, albeit I have expressed my reservations above about what I am now told, Advocate Sinel in any event should have realised that he could not continue to act. 37. Secondly, Jonathan was also faced with two other lawyers and the accountant, the latter having previously been involved in the matters that on Jonathan's case led to assets being transferred and the Royal Court being misled (see paragraph 84 of the Court of Appeal judgment). This approach seems heavy handed. I see no justification for Advocate Chiddicks attending as well as either Advocate Journeaux or Advocate Sinel. It is also difficult to understand why Advocate Journeaux attended if he was not instructed in relation to the mediation as I am now told. If the mediation had been successful, he would not have played any further role. If it had been unsuccessful, then he could have been briefed on the outcome. The possible need for such a brief does not appear to justify attendance at mediation and the importance of trying to bring the parties together. Likewise it is difficult to understand the rationale of the attendance of Mr Cushion. If there was a need for information from him on a particular point no doubt he could have been contacted. The combined effect of Advocates Chiddicks and Journeaux and Mr Cushion attending together with Advocate Sinel is an approach that I regard as being heavy handed. 38. It is however observed that I am told that no objection was taken by Jonathan or Advocate Giovannoni to the mediation being conducted by Sinels. I was informed that Sinels and Voisins made arrangements for mediation. The mediation itself I was also informed that no objection was taken to the presents of Sinels, Advocate Journeaux or Mr Cushion. These observations do not answer whether Sinels should have acted at all in relation to the mediation or the concerns I have expressed about the heavy handed approach which Jonathan echoed in submissions to me; rather they are factors which have to be weighed in the balance in deciding what costs orders to make. 39. There is therefore force to Jonathan's complaint that lip service was paid to the concept of mediation. Advocate Sinel should not have attended the mediation as he was not in a position to advise. By attending he reduced the possibility of a settlement being reached in particular where he was a witness to an allegation of undue influence. The presence of three others also seems difficult to justify, appears to be a very heavy handed approach and not conducive to a settlement. In expressing these views, I recognise, in particular by reference to the affidavit of Stephen I have referred to above, that relations between the brothers have broken down and therefore the chances of any form of agreement or reconciliation were relatively low in any event. Nevertheless, they were not improved at all by the matters I have referred to. 40. In setting out the above, I have not enquired into what was said at the mediation. That is and remains confidential. The concerns I have expressed do not therefore affect the principle of the confidentiality of the mediation discussions. 41. Had matters remained there, I would have given consideration to reducing the costs that Stephen could recover. 42. However, I have also

been referred to a without prejudice save as to costs letter dated 15 th January, 2014, in which Carey Olsen repeated an offer made at the mediation namely that:- (i) Jonathan and Rita should leave the Property immediately; (ii) The counterclaim against Stephen would be withdrawn; (iii) In return Stephen would make a payment of £20,000 in full and final settlement of all claims either party may have against the other. 43. It was open to Jonathan to accept that offer up to 4.00 pm 6 th February, 2014. It is implicit in the offer, and Advocate Journeaux confirmed this, that Stephen would also bear own his costs on the basis of a payment of £20,000 to Jonathan on a full and final settlement basis. 44. The current position, by reference the main judgment I have given is that the outcome of the litigation for Jonathan is significantly worse than the terms upon which Stephen was prepared to compromise matters up to the 6 th February, 2014. In particular:- (i) Jonathan and Rita are required to leave the Property although I have allowed them a month in which to do so; (ii) The counterclaim has been struck out; (iii) No payment is due from Stephen to Jonathan; (iv) Stephen has an arguable claim for damages; (v) The effect of my concerns about the mediation would only lead to a reduction in costs that would otherwise be awarded against Jonathan. It would not lead to no order for costs being made at all. (vi) Stephen had to incur further costs because Jonathan did not accept the proposal put to him. 45. The view I have reached is that the making of this offer is sufficient to counterbalance the concerns I have expressed about the mediation and I should not make any deduction despite the reservations I have expressed on this occasion. In the round therefore and in the exercise of my discretion, the view I have reached is that Jonathan should pay Stephen's costs of the application and of the action on the standard basis, such costs to be taxed if not agreed. *Authorties Pell Frischmann v Bow Valley & Ors*

[2007] JLR 479 . C v P-S

[2010] JLR 645 . *Marett v Marett*

[2008] JLR 384 . *Select Health (UK) Limited v Crompton Health Care Limited & Anor* [2010] EWH C3055. *National Westminster Bank Plc v Rabobank Bank Nede* [2007] EWHC 3163. Page
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