

JERSEY / JUDGMENT

P-S v C and M [2007] JRC 153 (08 August 2007)

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judgment

the bailiff: 1. On 25th July 2007 I granted an application by the petitioner (to whom I shall refer for convenience as "the wife") for the relief set out in her summons, and indicated that I would give my reasons at a later date. This I now proceed to do. I shall refer to the respondent, again for convenience, as "the husband". 2. The summons sought an order - "That the valuation of the [husband's] interest in the Caversham Group required to be carried out for the purpose of re-determining the amount of any lump sum award in favour of the [wife] (the Original Award by this Court in her favour dated 9th July, 2003 having been set aside by this court for lack of full and frank disclosure by the [husband]), be conducted on the basis of valuation evidence as at the original date of trial which commenced on 28th April, 2003". 3. The lump sum payment in the original award was set aside by this Court on 9th October 2006 ("the 2006 judgment") on the ground that the husband had been guilty of material non-disclosure in relation to his assets, in particular the business conducted by a financial services entity referred to in the 2006 judgment as "the CCB Group". The Court's conclusion was set out in paragraphs 39 and 40 of the 2006 judgment in the following terms - "39 We have reached the conclusion that there was a failure to disclose information as to his assets on the part of the husband to a material extent. We have reached that conclusion for the following reasons: (i) We think that the husband is prone to prevaricate and to seek to undermine the evidence of the wife if he can. In contending that there was no necessity to appoint a forensic accountant outside Jersey, he insisted in evidence that he had not been on holiday with Mr Branch and their respective partners. It was only when faced with the prospect of contrary evidence from the wife that he instructed his counsel to concede that he could in fact now recall this shared holiday. We find that he is prone to holding back information if he thinks that he can avoid disclosure. (ii) The husband is an intelligent and articulate chartered accountant as well as being the architect of the success of the CCB Group and its chairman. We find it incredible that he did not know in reasonable detail about the draft client entity transfer agreements nor the considerations agreed or in contemplation. To the extent that he disavowed such knowledge, we reject his evidence. (iii) With the benefit of hindsight, it seems plain to us that the decision to instruct Mr Pushman, his expert adviser in 2002/2003, not to investigate or assess the value of the Swiss operations was deliberate. The husband wanted to obscure the picture in relation to the CCB Group's activities in Switzerland and it would not have

been helpful to instruct Mr Pushman in that respect. (iv) We find that the husband's evidence was less than candid. In particular, he failed to disclose the existence of Mayo and the options agreement in relation to the shares of Mayo, and the fact that client entity sale agreements were in draft. Mr Beamish's final report stated: "CSA. We understand that this company represents CCB's investment in its Switzerland-based operations." The husband knew that this was inaccurate but failed to say anything. Mr Whale eventually agreed in evidence that the board of CFSL was aware of the agreements and the prospective considerations. (v) The failure to volunteer this information to Mr Beamish led him to undervalue the Swiss operations of the CCB Group. In addition, it was, in our judgment, an important contributory factor in persuading Mr Beamish to reduce his estimate of the value of the husband's shares in CFSL from between £5.1m and £6.6m (see his final report) to a significantly lower figure when he gave evidence at the hearing. For all these reasons, we set aside that part of the award ordering a lump sum payment of £2.2m in favour of the wife. We will hear argument, in default of agreement between the parties, as to the figure which should be substituted". 4. Disagreement has arisen between the parties as to the date at which the husband's assets should be valued. Mr Robinson for the wife contended that the valuation should take place as at the date of the original trial in respect of which the material non-disclosure took place, i.e. April 2003. Mr O'Connell for the husband contended that the assets should be valued as at the present time or, more specifically, at a current date to be determined by me at a subsequent directions hearing. 5. Counsel for the wife submitted that the task of the Court was to assess the value of the husband's 63% interest in the CCB Group as at April 2003. The Court's object should be to put the wife in the position in which she would have been put at that time but for the husband's failure to disclose the extent of his assets, or, more specifically the true value of the CCB Group at that time. Counsel told me, and this was common ground between the parties, that the husband no longer owned 63% of the CCB Group. He had sold part of his interest and his activities were now concentrated principally on business in Switzerland. Counsel submitted that what had been set aside by the 2006 judgment was the lump sum payment; the Court had not ordered a re-opening of all the financial issues settled by the award. 6. Counsel for the husband submitted that it was the established and invariable position in this type of case that the Court sought to assess the value of assets at the current time. Counsel drew my attention to paragraph 18.48 of Rayden and Jackson on Divorce and Family Matters, 18th edition, Volume 1 which states - "If the order is set aside, in deciding what order to make in its stead, the court has to reconsider the matter afresh in the light of the facts known at the date of the reassessment and having regard to all the criteria in s25(2) of the MCA 1973". This passage does not seem to me, in the context of this summons, to advance the matter one way or another. Clearly the Court must "reconsider the matter afresh". What is in issue, however, is whether the assets are to be valued at the date of the original trial or at the current time. 7. All the cases to which reference is made in a footnote to that passage from Rayden and Jackson concern a "supervening event" type of case. A supervening event type of case is where one of the parties dies shortly after judgment, or some other new event occurs which materially affects the basis upon which the judgment was given. A case of fraudulent non-disclosure, as is the case here, is entirely different. In a supervening event type of case, the Court will usually consider all the facts then current, and apply its discretion to those new

circumstances. Even there, however, caution is required. As Thorpe LJ stated in *Williams v Lindley*

[2005] 2 FLR 710 - "In supervening event cases the law is clear, thanks to the speech of Lord Brandon of Oakbrook in *Barder v Caluori*

[1988] AC 20 [1987] 1 FLR 480 and the subsequent decision of this court in *Smith v Smith* (*Smith and Other Intervening*)

[1992] Fam 69,

[1991] 2 FLR 432. However, how the court undertakes the determinations required by those two cases should not be too rigidly prescribed. Great flexibility is necessary to accommodate the widely differing facts and circumstances that inevitably arise. Much will depend upon the impact of the supervening event. The case of *Smith v Smith* (*Smith and Others Intervening*) illustrates a seismic impact (the suicide of the wife 6 months after the order). Much will depend upon the lapse of time between the order invalidated and the reassessment". 8. Even in supervening event cases, the Court will sometimes reconsider the matter as at the time of the original order, but taking into account the new factor or factors. An example is *Smith v Smith* (*Smith and Others Intervening*)

[1991] 2 FLR 432 referred to above where Butler Sloss LJ stated - "In my judgment, the correct approach is to start again from the beginning and consider what order should be made on the facts before the judge. The way in which the registrar actually approached the case, correctly at the time, is now irrelevant. The issue now is as to the right order to be made between the spouses where the wife is known to have only 6 months or so to live. The wife's position has dramatically changed and her needs are limited to a brief period". 9. Counsel for the husband also referred to *T v T* (consent order: procedure to set aside)

[1996] 2 FLR 640. That was a case where the husband failed to disclose negotiations to acquire his shares in a private company. The consent order had been made on the basis that there was no free market in that company. Within two months of the consent order the company had been sold for a large sum of money and the husband received £1.6m. The consent order was set aside and the Court stated - "I have come to the clear conclusion that in spite of the overall delay this is a case where the court should look again at the wife's application for ancillary relief and redetermine it in the light of all the matters which are now known about the husband's financial resources and circumstances which were concealed deliberately from the court in 1987. Accordingly, I propose to extend the time for the wife's application under Ord 37, r 1 of the County Court Rules 1981 and set aside the consent order and order a rehearing of the wife's application for ancillary relief. That application, of course, will be redetermined on the basis of all the circumstances of the case and on the basis of the parties' present and likely future financial resources and needs. The husband's ill health and cessation of employment will be factors to be taken into consideration. I remain to be convinced that the overall delay should not be taken into account in an assessment of quantum to the detriment of the wife having regard to the fact

that a reasonably prompt application under *Barder v Caluori* ought to have and probably would have resolved this matter on a satisfactory basis some years ago". 10. Another case where this Court appeared to endorse the argument put forward by counsel for the husband was *Manley v Bell*

[2006] JRC 195. At paragraph 19 the Court stated - "Both parties agreed that the Court must apportion the assets of the parties as they now are. There was a material non-disclosure relating to the husband's business interests in 2000 and, if the Court was valuing those interests as at the time of the original agreement, it is likely that the value would be greatly in excess of his currently available assets. There is no doubt that the husband's income has experienced a sharp fall since his conviction for a money laundering offence in 2005 and his departure from the financial services business of which he was a part owner. Counsel for the wife submitted that it was unfair that the wife should be penalised by this change in the husband's fortunes in that, if he had been transparent and open in the original negotiations, and a fair division has been made at that time, she would not have shared the misfortune. This is of course correct, and it is a factor to be considered, but inevitably the Court can only deal with matters as they now are". 11. In my judgment there is no hard and fast rule as to how to approach cases where there has been a material non-disclosure and the original order has been set aside. Each case should be decided on its own facts. The overriding imperative is to do justice between the parties, and to seek fairness in arriving at an award. 12. I reached my decision to grant the relief sought by the wife in her summons for two reasons. First, the Court set aside only that part of the award which related to the lump sum payment and that decision was not appealed. Counsel for the husband appeared to submit that the order made by the Court in the 2006 judgment should be ignored or alternatively interpreted in such a way as to require a complete reassessment of all the assets of both parties at the current time. I cannot accept that submission. What the Court ordered was that the lump sum order should be reconsidered in the light of the true value of the CCB Group and, by implication, the true value at the time of the original order. Secondly, a reassessment of all the assets of both parties would be a much more significant, expensive and time consuming task than that originally envisaged by the Court. I was told that part of the husband's interest in the CCB Group had been sold. Presumably, the proceeds of that sale have been reinvested elsewhere, possibly in Switzerland. Given the findings made by the Court at paragraph 37 of the 2006 judgment cited above, it is likely that an assessment of the value of the husband's current assets would not be an easy task. 13. If it is the case that the husband's assets have declined considerably in value, as suggested by his counsel, and that it would no longer be fair to order a lump sum payment to the wife on the basis of the value of the CCB Group as at April 2003, it will of course be open to the husband to file evidence to that effect which will have to be taken into account by the Court in exercising its discretion. As Lord Nicholls stated in *White v White*

[2000] All ER (D) 1546, and this Court endorsed in its judgment in this case on 9th July 2003, "the touchstone in all cases involving a division of matrimonial assets is fairness". 14. It was for all these reasons that I granted the relief sought in paragraph 1 of the wife's summons. Authorities P-S v C

[2006] JRC 139A . Rayden and Jackson on Divorce and Family Matters, 18th edition. Williams v Lindley [2005] 2 FLR 710. Smith v Smith (Smith and Others Intervening) [1991] 2 FLR 432. T v T (consent order: procedure to set aside) [1996] 2 FLR 640. Manley v Bell

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