

JERSEY / JUDGMENT

P -v-) (Matrimonial) [2016]

JCA 216 (22 November 2016)

[2016] JCA 216

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Court of Appeal (Samedi) 22 November 2016 Before : Sir Michael Birt, Sitting as a Single Judge.
Between P Appellant And O Respondent The Appellant appeared on his own behalf. Advocate M. R. Godden for the Respondent.

judgment

birt ja: 1. The Appellant is appealing to the Court of Appeal against a decision of the Royal Court dated 15 th September, 2016, which in turn dismissed his appeal from a decision of Registrar Canavan ("the Registrar") of the Family Division dated 15 th December, 2015. 2. The essential relief sought by the Appellant is that the decision of the Registrar, as upheld by the Royal Court, should be overturned. However, his Notice of Appeal asks for certain interim orders. These are (i) that the Registrar and the Royal Court should be directed to expressly state the legal basis of their rulings and (ii) that the estate agents appointed to market the former matrimonial home should be ordered to disclose certain information. 3. Having been alerted by the Greffier to the existence of these interlocutory applications, I directed that the Appellant should submit written submissions on the interlocutory matters within seven days and that I would thereafter rule upon the matter on the papers as a single judge pursuant to Article 18 of the Court of Appeal (Jersey) Law 1961 . The Appellant duly filed his submissions and what follows constitutes my decision on the interlocutory applications. I have not found it necessary to call upon the Respondent.

Background

4. There is a long and complicated history to this dispute; but it is not necessary to describe this in any detail for the limited purposes of my decision on the interlocutory applications.
5. The parties were married in October 2006, having co-habited since 2003. They separated in August 2014 and a decree nisi was granted on 19 th November, 2014. There are two children of the family now aged 9 and 6.
6. On 3 rd July, 2015, ("the July 2015 Order") Registrar O'Sullivan ordered that the former matrimonial home ("the property") be sold for such price as the parties agreed and that, after payment of the mortgage, selling costs and certain outstanding loans, the net proceeds should be divided as to 57.45% to the Respondent and 42.55% to the Appellant. The July 2015 Order also contained detailed provision concerning payment of various other sums including child maintenance, half the

holiday club, after-school club and breakfast clubs, a sum in respect of outstanding childcare costs, a sum in respect of repairs and decoration to the property and a sum in respect of the divorce costs. 7. Subsequently, in circumstances described in detail in the judgment of the Registrar and the Royal Court, a number of differences arose between the parties. In particular, a disagreement arose as to the price at which the property should be sold. 8. The Respondent brought the matter back before Registrar Canavan and, after a contested hearing, she made an order in the following terms on 15 th December, 2015, ("the Order"):- "1. [The property] shall be re-marketed at the price of £799,000 but any offer in excess of or equal to £765,000 shall be accepted by the parties. 2. [The Appellant] shall pay to [the Respondent], if possible, from his share of the sale proceeds of the property:- (a) 57.45% of the interest which has accrued or will accrue on the two mortgages with Barclays from 26th November 2015 until the date of the sale; (b) any financial penalties, bank fees or other costs incurred by the parties in respect of the mortgages since 26th November 2015; (c) the sum of £474.76 per month being the payments due to Cherry Godfrey from December 2015 until the date of sale; (d) the sum of £110 per month in respect of storage costs from December 2015 until the date of sale; (e) the sum of £197.53 in respect of the purchase of oil for the property; (f) the sum of £92.50 per month in respect of the life insurance policy from December 2015 to the date of sale; (g) the sum of £704 in respect of outstanding childcare costs; 3. [The Appellant] shall be responsible for the monthly capital repayments on both mortgages if Barclays does not extend the mortgage holiday. 4. [The Appellant] shall pay to [the Respondent] the sum of £234.67 per month by standing order in respect of his one-half share of the holiday club and after-school club costs. 5. [The Appellant] shall pay the costs incurred by [the Respondent] of and incidental to this hearing, to be taxed, if not agreed. 6. There shall be liberty to apply for further directions in respect of the implementation of this order." She issued a 61 paragraph judgment, P-v-O (Matrimonial)

[2015] JRC 258A explaining her decision. I should add that the sub-paragraphs of paragraph 2 of the Order were in fact numbered (i)

- (vii) in the Act, but, as the Appellant has re-numbered them (a)
- (g) in his Notice of Appeal, I have done the same for ease of reference. 9. The Appellant appealed to the Royal Court. Although the Notice of Appeal was against the whole of the Order, it appears that the Appellant pursued his appeal only in respect of paragraphs 2, 3 and 4 of the Order. In its judgment of 16 th September, P-v-O (Matrimonial)

[2016] JRC 166 , the Royal Court (Le Cocq, Deputy Bailiff with Jurats Fisher and Ramsden) dismissed the appeal. It is against that decision that an appeal is now brought before this Court. Grounds of Appeal 10. In his Notice of Appeal dated 12 th October, 2016, having set out the terms of the Order, the Appellant states as follows:- "... the Appellant will ask the Court of Appeal to order :- (1) that the Registrar of the Family Division of the Royal Court must expressly state the legal basis upon which the awards referenced at paragraph 2(a) to (f) and 4 were made in accordance with the provisions of the Matrimonial Causes (Jersey) Law 1949; (2) that the Inferior Number of the Royal Court must expressly state the legal

basis upon which the awards referenced at paragraphs 2(a) to (f), and 4 were allowed to stand notwithstanding:-

- (a) there being no agreement between the Appellant and the Respondent in relation to the sale of the property at the relevant time; and
- (b) there being no actionable claim by the Respondent against the Appellant at law in connection with the sale of the property at the relevant time; (3) that the agents appointed by the Respondent and the Appellant to market the property for sale over the relevant periods, namely Thompson Estates and Messrs Gaudin & Co., be ordered to disclose to the Appellant all information in their possession relating to the marketing of the property and any enquiries or arrangements relating thereto for the purpose of enabling the Appellant to comprehensively and appropriately frame the instant appeal having regard to the material disadvantage that the Appellant has suffered by the Respondent's control of the property and the respective relationships with jointly appointed estate agents; (4) that the instant proceedings before the Court of Appeal are stayed until such time:-
 - (a) the Registrar of the Family Division of the Royal Court and/or the Inferior Number of the Royal Court have stated the legal basis upon which the relevant awards were made; and
 - (b) the joint agents for the property have disclosed to the Appellant all information in their possession relating to the sale of the property in accordance with Prayer (3) above. (5) That the Court of Appeal grant leave to the Appellant to amend the instant Notice of Appeal pursuant to Rule 6 of the Court of Appeal (Civil) Rules 1964 as amended, providing the Appellant with sufficient time to do so immediately following delivery of the further and better particulars requested by the Appellant at prayers (1) to (3) above; (6) That the awards referenced at paragraphs 2(a) to (f) are quashed on the grounds that the Registrar of the Family Division of the Royal Court and/or the Inferior Number of the Royal Court have made orders that are:-
 - (a) unsustainable as a matter of fact and law; and/or
 - (b) ultra vires the powers of the Registrar under the provisions of the Matrimonial Causes (Jersey) Law 1949 as amended; OR IN THE ALTERNATIVE that it is declared that
 - (c) the awards referenced at paragraphs 2(a) to (f) amount to substantial over-compensation of the Respondent at the expense of the Appellant and his creditors; and
 - (d) the awards referenced at paragraphs 2(a) to (f) are substituted for orders for the compensation of the Respondent only to the extent that the Respondent can prove that a loss was sustained by her as a result of the property not in fact being sold on or about 26th November 2015; (7) That the award referenced at paragraph 4, that is, the obligation for the Appellant to:
 - (a) make payments to the Respondent in respect of prospective liabilities of the Respondent; and

- (b) make such payments by way of standing order; Is unsustainable as a matter of law and is ultra vires the powers of the Registrar under the provisions of the Matrimonial Causes (Jersey) Law 1949 as amended....". 11. The Notice of Appeal then goes on to ask for a variation in the order for costs and follows this with a detailed statement of the Appellant's case. 12. In essence therefore the Notice of Appeal falls into two parts. At paragraphs (1) to (3), the Appellant asks for certain interlocutory orders, namely that the Registrar be ordered to expressly state the basis of her awards which are being appealed (paragraph (1)), the same request in respect of the Royal Court (paragraph (2)), and that the estate agents be ordered to disclose certain information (paragraph (3)). 13. The second part (from paragraph (6) onwards) then asks the Court of Appeal, having received the further information referred to at paragraphs (1) to (3), to overturn the decision of the Registrar as upheld by the Royal Court. 14. I am sitting as a single judge in order to consider the interlocutory applications contained at paragraphs (1) to (3) of the Notice of Appeal and, if appropriate, the consequential interlocutory applications at paragraphs (4) and (5). The Appellant's submissions on the interlocutory matters 15. The Appellant has filed detailed written

submissions.

I have carefully considered them and, for present purposes, would summarise the key points as formulated in his submissions as follows:- (i) The giving of reasons is one of the fundamentals of good administration. A right of appeal might be rendered illusory if the relevant person does not know the basis for the decision against him and the Registrar and the Court were under a duty to give adequate reasons for their findings. A party should know why he has won or lost. (ii) The Registrar's judgment did not provide any suggestion or evidence that she was operating within her powers to make the awards which she did. The award appeared to have been made arbitrarily without reference to any guiding provisions of the Matrimonial Causes (Jersey) Law 1949 ("the 1949 Law") and without reference to the principles of fairness inherent in, for example, the Respondent suffering an actual loss rather than a prospective loss. The Registrar appeared to have implied a duty at law or in equity upon the Appellant but without announcing the nature of that duty and there was no evidence that she gave consideration to the principles upon which, and the extent to which, she was entitled to vary the July 2015 Order. (iii) The Registrar had a duty to make the basis for her decision to vary the July 2015 Order by reference to established provisions and principles at law and in equity. (iv) The Appellant therefore invites this Court to request the Registrar to justify her decision to vary the July 2015 Order by reference to established provisions and principles at law and in equity pursuant to procedural fairness in an effort to enable the Appellant to fully understand the basis upon which the Respondent had won and to properly exercise his statutory rights of appeal by reference to the matters which were critical to the relevant decision rather than by reference to the nebulous reasoning provided so far. 16. His submissions in relation to the decision in the Royal Court are broadly similar. He submits that the Royal Court failed to analyse adequately the reasoning of the Registrar. There was a lack of precision in the Royal Court's review of the Registrar's exercise of powers under the 1949 Law and the Court failed to enunciate the principles of 'appropriate' and 'fair' as applied in

the context of the division of the parties' assets in circumstances where customary law already has well established principles of propriety, fairness and proof on the balance of probability. The Royal Court should be directed to give reasons for its decision not to allow the appeal in circumstances where

- (a) the Respondent had no actionable claim against the Appellant; and (b) the standard of propriety and fairness relating to the resolution of claims and counter-claims required by the general law was not applied. 17. As to the estate agents, the Appellant submits that they were instructed on behalf of both the Appellant and the Respondent and that accordingly the Appellant is entitled to demand information from them as agents to the Appellant and the Respondent. He states that the agents have refused to disclose documents to him unless the Respondent agrees. The relationship in practice was between the agents and the Respondent and he submits that he needs access to the information in order properly to pursue his appeal. The documents which he requires are:- (i) written and electronic mail correspondence between the relevant agent and the prospective purchasers of the property; (ii) written and electronic mail correspondence between the Respondent and the agents; (iii) file notes recorded by the agents in relation to the property arising from telephone conversations, meetings and internal discussions. Decision (i) Further reasons from the Registrar and the Royal Court 18. I have considered the submissions filed by the Appellant but I am quite satisfied that it would be inappropriate to make the order which he requests. I would summarise my reasons as follows:- (i) Assuming for the moment that the Court of Appeal has power to direct the Registrar and the Royal Court to provide further and better reasons for a decision, it would certainly be an unusual step to do so. I am not aware of it having been done during my time as a judge in this jurisdiction. (ii) There is good reason for this. Normally, if the reasoning of the lower court is inadequate, this is likely to assist an appellant who is able to point out that his submissions have not been adequately dealt with and that that may be because the court below did not have a good answer to them. (iii) The Registrar delivered a 61 paragraph judgment in support of the Order. It is quite clear what power under the 1949 Law she considered she was exercising. Paragraph 29 of the judgment states specifically that, because the July 2015 Order had not been complied with, there was no full and final order in place and it was therefore open to either party to apply to vary the order under Article 33 of the 1949 Law. She stated that in exercising that power, the Court should take into account all the circumstances of the case, including any increase or decrease in the means of either party. There can therefore be no doubt as to the statutory power which she was purporting to exercise. (iv) Although the Royal Court does not specifically refer to Article 33, it was hearing an appeal against the Registrar's decision and it was obvious that it was also considering the matter pursuant to Article 33. (v) The Appellant's essential submission is that the Registrar should not have varied the July 2015 Order as she did under paragraphs 2(a) - (f) and 4 and that the reasons she gave in her judgment were not sufficient to justify her decision. That is an absolutely standard submission. An appellant criticises the reasoning of a lower court and argues to an appeal court that the reasoning was erroneous or lacking, and that the correct order should be

something different. I see nothing to prevent the Appellant following the normal course in this case. To the extent that he considers the reasoning of the Registrar or the Royal Court to be deficient or lacking, he can make this point to the Court of Appeal and, if the Court agrees with him, it may result in his being successful in his appeal. (vi) The essential question is whether there is sufficient in the judgments of the Registrar and the Royal Court for the Appellant to know why he has lost and to argue against it in the Court of Appeal. In my judgment, he has the necessary information from the judgments to mount his appeal and, to the extent that he considers that the reasoning and justification for the Registrar's decision is lacking, he will be able to point that out to the Court of Appeal and ask the Court therefore to infer that the decision below was erroneous. He is certainly entitled in his submissions to point out where he considers that the Registrar or Royal Court has not given adequate reasons to explain her or its decision and the Court of Appeal will be able to consider whether it agrees with the submission and whether that leads to a conclusion that the decision below is wrong. (vii) In summary, I see no reason to take the very unusual step of directing a court below to provide further or better reasoning. The Registrar has given her reasons in her judgment for making the Order and the Royal Court has given its reasons for upholding that decision. The statutory jurisdiction being exercised, namely Article 33, is clear and in my judgment, the Appellant is well able now to put forward his arguments as to why the Registrar's decision (as upheld by the Royal Court) was wrong. (ii) Information from the estate agents 19. Whilst the Court of Appeal has jurisdiction to permit new evidence to be adduced on appeal, it is well established that this is only permitted when, amongst other circumstances, the evidence could not have been obtained with reasonable diligence in the Court below - see for example the decision of the Court of Appeal in *United Capital Corporation Limited v Bender*

[2006] JLR 242 at paras 26 - 29 following *Mayo Associates SA v Cantrade Private Bank Switzerland (CI) Limited*

[1998] JLR 173 . 20. The Appellant has had two opportunities to seek an order that the agents disclose the information which he now seeks. He could have done so during the proceedings before the Registrar and he could also have done so as part of the appeal to the Royal Court. He has not done so in either case and in my judgment it is now too late to seek this evidence at this stage. The first condition for the admission of fresh evidence, namely that it could not have been obtained with reasonable diligence in the Court below, is therefore not satisfied in this case. That is sufficient to determine the matter, but I should add that it is also not entirely obvious to me that such evidence is of significance in relation to the appeal. I therefore refuse the application in respect of the agents. Summary 21. I therefore reject both interlocutory applications. It follows that I also reject the consequential applications in paragraphs (4) and (5) of the Notice of Appeal, which contain an application for a stay of the appeal and for leave to amend the Notice of Appeal. This matter should now be listed for hearing before an appropriate sitting of the Court of Appeal. As already stated, the Appellant will be able to point out any lack of satisfactory reasoning in the decisions of the Registrar and the Royal Court and to put forward all the

arguments which he wishes to in support of his contention that they reached the wrong conclusion. The Respondent will be able to put forward the arguments which she wishes to in support the decision and reasoning of the Registrar and the Royal Court. I am satisfied that the Court of Appeal will accordingly be in a position to decide whether to allow the appeal or not. Authorities Court of Appeal (Jersey) Law 1961. P-v-O (Matrimonial)

[2015] JRC 258A . P-v-O (Matrimonial)

[2016] JRC 166 . Matrimonial Causes (Jersey) Law 1949. United Capital Corporation Limited v Bender

[2006] JLR 242 . Mayo Associates SA v Cantrade Private Bank Switzerland (CI) Limited

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