

JERSEY / JUDGMENT

P -v- O (Matrimonial) [2016]

JRC 166 (15 September 2016)

[2016] JRC 166

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judgment

the deputy bailiff: 1. This is an appeal by P ("the Appellant") from an order of the Family Registrar of 15 th December, 2015, (O-v-P (Matrimonial)

[2015] JRC 258A) ("the Order") whereby the Registrar made a number of orders in the ongoing proceedings between the Appellant and O ("the Respondent"). 2. The Order deals with a number of matters of a financial nature and provides that:- "1. The former matrimonial home, namely Property 1 ("the property") shall be re-marketed at a price of £799,000 and any offer in excess of or equal to £765,000 shall be accepted by the parties; 2. The Respondent shall pay the Petitioner, if possible, from his share of the sale of proceeds of the property: (i) 57.45% of the interest which is accrued or will accrue on the two mortgages with Barclays from 26th November 2015 until the date of the sale; (ii) any financial penalties, bank fees or other costs incurred by the parties in respect of the mortgages since 26th November 2015; (iii) the sum of £474.76 per month being the payments due to Cherry Godfrey from December 2015 until the date of the sale; (iv) the sum of £110 per month in respect of storage costs from December 2015 until the date of sale; (v) the sum of £197.53 in respect of the purchase of oil for the property; (vi) the sum of £92.50 per month in respect of the life insurance policy from December 2015 to the date of the sale; (vii) the sum of £704 in respect of outstanding child care costs; 3. The Respondent shall be responsible for the monthly capital repayments on both mortgages if Barclays does not extend the mortgage holiday; 4. The Respondent shall pay to the Petitioner 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 Respondent shall pay the costs incurred by the Petitioner of and incidental to this hearing, to be taxed if not agreed. ..." 3. In order to understand the Order it is necessary to understand some of the background to this matter. Essentially, insofar as it seems to us to be relevant, the background is as follows: (i) The Order is itself based on an order of 3 rd July, 2015, ("the July 2015 Order") which also provided that the property should be sold on the open market for a price as may be agreed between the parties. The proceeds of the sale of the property were to be applied in settlement of the outstanding mortgage on the property including any

redemption penalty, the conveyancing costs and disbursements, estate agents charges, the clearing of the overdraft and closing of the parties' joint Barclays account; the redemption of the Petitioner's Cherry Godfrey loan; and the division of the net sale proceeds as to 57.45% to the Petitioner (the Respondent in this case) and 42.55% to the Respondent (the Appellant in this case). The July 2015 Order also contained provisions that the Appellant should pay child maintenance and one half the holiday club, after-school club and breakfast clubs; a sum in respect of outstanding child-care costs; a sum in respect of repairs and decoration to the property, and a sum in respect of the Respondent's divorce costs. The sums, which totalled £3,880.13 should be paid "within 8 weeks of today's date".

(ii) The parties had two mortgages with Barclays secured on the property and in April 2015 Barclays had agreed to vary the terms of the mortgage by suspending repayment of the principle until the 18 th September, 2015, so that interest alone was paid; (iii) Thompson Estates had begun marketing the property in April 2015 for £825,000; (iv) Neither maintenance nor any of the sums listed had been paid by 21 st August, 2015, and an email had been sent by the Respondent's legal advisers to which the Appellant responded saying that he had only just received a copy of the July 2015 Order and the written reasons of the Registrar and he therefore took the view that no payment should be made until the expiry of 8 weeks from that date. He also claimed a right of set-off against maintenance because his equity in the property had, so he alleged, been dissipated by the Respondent. (v) The Respondent summonsed the Appellant to the Petty Debts Court. The matter was adjourned but ultimately on 16 th September, 2015, judgment was given against the Appellant in the sum of £3,880.13 together with interest and costs with authority to cause the personal property of the Appellant to be arrested and sold and his wages to be arrested to the extent of £80 per week. It is understood that the Appellant's father paid the judgment sum before enforcement measures were taken. (vi) There was an exchange of correspondence between the Appellant and the Respondent relating to the payment of the school clubs. We do not need to set these out in any detail. Suffice to say that there was a dispute as to the basis on which they should be paid with the Appellant wishing to take on direct responsibility for payment of his share and the Respondent wishing to continue to make payments of the whole for which she would be paid by the Appellant for his share. (vii) An offer was made on the property for £765,000 which was accepted on 16 th October, 2015. (viii) On 28 th October, 2015, Messrs Benest & Syvret, a law firm which had initially acted for the Appellant, obtained a caveat preventing the sale of the property in the light of their claim for unpaid fees from the Appellant. On th November, 2015, Benest & Syvret issued a summons for the outstanding legal fees in the sum of £42,750.09 and this was placed on the pending list. The caveat remained in force. (ix) The Respondent's legal advisers then wrote to Benest & Syvret explaining the prejudice that their client was suffering because of the caveat and Benest & Syvret agreed that it would be sensible to obtain an injunction over the Appellant's share of sale proceeds so that the caveat could be lifted. (x) On 26 th November, 2015, the Appellant wrote to Thompsons Estates. We set the letter out in full: "I write further to your email dated 25th November 2015 timed at 12.30 as a matter of courtesy to provide an outline of the situation and of the position going forward. I

acknowledge the purchaser's position and can only apologise for the situation I find myself in. Briefly stated, I presently hold my interest in the property for the benefit of a number of unsecured creditors, rather than for myself per se; the total amounts claimed are greater than the anticipated proceeds of sale; and of my ability to discharge the balance within a reasonable time having regard to child maintenance and other liabilities I am expected to discharge on a monthly basis going forward. Whereas Benest & Syvret (B&S) have sought discharge of their claims in priority to all other creditors and to have secured a caveat against the sale of the property is a form of quasi security, I have a duty to treat all creditors fairly. I have therefore suggested that the proceeds of sale ought to be applied toward discharge of the immediate claims on a *pari passu* basis pending the outcome of a dispute concerning repudiatory breach of contract and excessive fee claims. I regret that B&S appear to have rejected the suggestion with the result that I am left in a position of having to try to satisfy their claim in full in an effort to secure release of the caveat, while also having to ensure that other creditors receive equal benefit from the proceeds of sale. Having consulted with B&S and the third party creditors, and in default of constructive proposals for resolution of the immediate dispute in circumstances where independent professional estate agents have valued the property at £799,000 I regret I am obliged to ask that you remarket the property for sale at this price point in an effort to maximise potential distributions to each claimant." (xi) On 27 th November, 2015, the Respondent's legal advisers wrote to the Appellant asking him to confirm that he would accept the offer already on the table at £765,000 and proceed with the sale. (xii) On 1 st December, 2015, Benest & Syvret were granted an interim injunction over the Appellant's share in the sale proceeds from the property which was confirmed by the Court on 4 th December, 2015. On that same date the Appellant's parents issued proceedings against him for the recovery of a debt of approximately £20,000. The caveat was lifted with effect from 9 th December, 2015. (xiii) The prospective purchasers withdrew their offer on 11 th December, 2015. 4. The larger part of the Order made was made as a result of the Registrar's finding that the Appellant had failed to co-operate in and blocked a sale of the property, which was in joint names, as a result of which further additional expenditure had been incurred for which the Appellant should be responsible. 5. In his notice of appeal the Appellant gives notice that he is appealing against the entirety of the Order. However in the general grounds of appeal he advances contentions in connection with paragraphs 2, 3 and 4 of the Order and not paragraph 1. Naturally if the Appellant succeeds in whole or in part of his appeal the Order made at paragraph 5, that concerning costs, also falls to be considered again by this Court. 6. The law that is to be applied on considering appeals to this Court from the Family Registrar is well known and set out in the case of *Downes v Marshall*

[2010] JLR 265 , where at paragraph 12, the Court said this: "12. What then should be the test on appeal to this Court? We wish to underline the fact that we confine ourselves to appeals from the Family Registrar and his deputy pursuant to Article 3 of the Matrimonial Causes (Jersey) Law 1949 where evidence has been heard before them and a discretion has been exercised. We are not concerned with appeals from the Master of the Royal Court

(notwithstanding that they are all Greffier Substitutes), where different considerations may apply. An appeal from the Family Registrar should only be allowed if there has been a procedural irregularity or if, in exercising his discretion, he has taken into account irrelevant matters, or ignored relevant matters, or otherwise arrived at a conclusion which the Court believes to be wrong. This test is not precisely the test applied on appeal from this Court to the Court of Appeal. It reserves a wider discretion for this Court to intervene, but it places nonetheless greater weight on the Registrar's exercise of discretion. This test will, we think, establish the right balance. Sufficient weight is to be attributed to the Registrar's findings of fact and exercise of discretion to discourage litigants from seeking a fresh bite of the cherry. On the other hand, this Court will have the power to intervene if it thinks that the Registrar has gone wrong to the extent that intervention is required in the interests of justice and fairness." 7. In essence the Appellant's case on appeal is that he was not responsible for the failure to sell the property when it was possible to do so for £765,000 because the sale of the property was already restricted by a caveat placed on it by Benest & Syvret which meant that it could not be sold without their consent. In any event he had not agreed to sell the property at any specific figure, and he believed that that figure was an undervalue. In his opinion, any claim for any losses arising out of the failure to sell the property when such a sale was capable of being made are the responsibility of Benest & Syvret, the holders of the caveat to whom the Respondent should look for recourse. Accordingly, so the Appellant argues, the orders set out in paragraphs 2 and 3 of the Order should be overturned. Additionally the Appellant argues that paragraph 2(iii) of the Order should not have been made without proper consideration for the division between interest and capital and paragraph 2(vi) of the Order should not have been made without detailed consideration by the Registrar of the terms of any life insurance policy which, so the Appellant argues, applies to married couples and not to his and the Respondent's current circumstances. 8. Further, he argues that the Order at paragraph 4 should be overturned in that the Appellant should make direct payments to the service provider as the payments made under this head were there to ensure that both the Appellant and the Respondent were able to maintain their full-time or near full-time employment. 9. In addition the Appellant makes further points under the heading "erroneous findings of fact and evidence of undue bias" but we do not think that these additional points carry the appeal any further forward. Either the Registrar had a sufficient basis for making the Order or she did not. 10. The Registrar heard evidence. She heard from Mrs Rebecca Sokrati of Thompson Estates. Her evidence was to the effect that £765,000 was a very good offer because there had been no other interest in the property and the potential purchasers were not in a chain. She also gave evidence to the effect that she considered that it would be highly unlikely that the property would sell at £799,000 if it were to be marketed at that price and her advice would be to take any other offer of £765,000. Mrs Sokrati was cross-examined at some length by the Appellant. 11. The Registrar set out her reasons for paragraphs 2 and 3 of the Order in the following terms:- "58(i) The husband criticised Thompsons for the way in which the firm had marketed the property between April 2015 and the date of the offer being made. There was no evidence

to show that the husband had made any comments to or criticism about the marketing strategy to Thompsons during that period. Mrs Sokrati is a well-known, experienced estate agent and in the absence of any evidence put forward by the husband, apart from the Jersey house price index figures, I accepted her opinion that £765,000 was a good price for the property and that the husband and wife might not even achieve that price again. The price at which the property should be marketed are, as Mrs Sokrati said realistic prices which had been set by looking at market research, the sale prices of similar properties and so on. Sale prices are not calculated by reference to the Jersey house price index figures. I do not accept the husband's argument with regard to Mrs Sokrati conflict of interest. Any estate agent would receive a commission on the sale of the property. As she said, Mrs Sokrati had given her professional opinion as to a realistic achievable price for the property. While the husband did not agree with her opinion, he had not called any expert witnesses of his own to show otherwise. (ii) Much was said by both parties about the reasons why the sale of the property did not go through, where the blame should lie and who should be responsible for the payment of additional costs incurred. I have not found it necessary to comment in detail on the submissions. There is no doubting the fact that the caveat prevented the sale from going through in November 2015. However by the end of November discussions between B&S and LeG&L had resulted in B&S taking action to replace the caveat with the injunction. As set out in paragraph 14 above, the husband wrote to Thompsons on 26th November 2015 withdrawing his agreement to sell at £765,000. That letter contained his assertions that he held the property for the benefit of his creditors. He, in effect, blamed the fact that the property had to go back on the market at a higher price and B&S as the firm would not agree to the compromise he had offered, namely a pound for pound payment for B&S and for his parents. The offer from the potential purchasers was not withdrawn until 11th December 2015, some two weeks after the husband changed his mind. I do not believe that the husband would have cooperated in a sale at £765,000 after 26th November. The husband had once again acted unilaterally, without consulting the wife, and providing new instructions to Thompsons. The Order clearly stated the sale price had to be agreed between the parties. The husband had not gained the wife's agreement to withdraw from the agreed sale and to remarket the property." 12. The Registrar then went on to comment upon the husband's assertions as to his duties towards his creditors that he had made reference to in his letter of 26 th November, 2015, the fact that even if the property had been sold at £799,000, which the Appellant wished, his debts would still not have been payable in full, and also made certain observations relating to the claim by the Appellant's parents for £20,000. She then went on to say: "I have no doubt from what he said at the hearing that the husband would not agree or cooperate in the sale of the property for anything less than £799,000. He said at the hearing that he thought that they should "hold out" for £799,000. The parties cannot afford to wait until an offer of £799,000 is received. They cannot pay the mortgage; further delay will result in there being less money. I made the order that the husband and wife must accept any offer over £765,000 or above because of my belief that the husband will not cooperate if future offers are not to his liking." 13. Furthermore, in paragraph 60 of her

reasons the Registrar said:- "I did not accept the submission of the husband that B&S should be responsible for the payment of the additional sums claimed in the summons as they had not arisen as a result of the caveat. The sale of the property to the potential purchasers could not go through after 26th November because of the husband's actions. The wife had incurred and will continue to incur additional costs and payments through no fault of her own. I made the orders set out in paragraph 2 of Order dated 15th December 2015, to be paid out of his share of the sale proceeds should B&S agree that the injunction can be lifted with regard to these sums. In addition, the husband is to be responsible for repayment of the capital to Barclays in the event that a further mortgage holiday is not agreed." 14. The husband had already agreed to an offer of £760,000 if completion was within a specific period, but he had in effect changed his mind when an offer to purchase of £765,000 had been secured. Why he did so and whether or not there was any merit in what was set out in his letter, we do not need to say. What is abundantly clear to us, however, is that the Registrar was right in her finding that the Appellant would no longer cooperate with the sale at £765,000 and had given different instructions to Thompson Estates prior to the purchaser's withdrawal. 15. We observe, however, that the Registrar did not need to determine precisely what had been agreed and what had not but rather to make orders which progressed the appropriate and fair division of the parties' assets. She was, in our view, entitled to find that the Appellant would no longer cooperate in a sale of £765,000 and, in the light of the evidence before the Registrar, that was an unreasonable stance on his part. 16. It is for these reasons, so it appears to us, that the Registrar made paragraphs 2 and 3 of the Order and we do not see any reason to interfere with it. It seems to us that, the Registrar having found that the offer in the sum of £765,000 should have been accepted and proceeded with, it was open to the Registrar to find that the financial consequences of not having done so should be visited upon the Appellant. We do not think that the Registrar needed to consider the details of the insurance policy or the capital interest division of loan repayments where these were outstanding commitments and were extended as a result of the Appellant's delay. 17. The Registrar's reasons for paragraph 4 of the Order were as follows:- "It is clear from the correspondence between LeG&L and the husband detailed above that there has been difficulties in extracting the child maintenance and child care costs from the husband. Whilst I accept that the husband did not receive the Order and the reasons until 10th August 2015 that was no reason for him to unilaterally decide to change the terms of the order to suit himself by extending the period of 8 weeks. the sums were to be paid within 8 weeks of the date of the order. The husband did not comply, he did not seek an extension of time to pay from the Registrar and he did not seek to vary the terms of the Order. I do not accept the husband's assertion that the Magistrate himself considered that the 8 week period should begin to run from the date of receipt. The maintenance was paid late; it could be seen from the correspondence and from what the husband himself said at the hearing, that he was not going to comply with the order for payment of one half of the child care costs to the wife. He advised Advocate Godden in correspondence he was going to pay the service provider direct. He entered into correspondence with the service provider giving

unilateral intrusions to change the method of payment. He had therefore, once again, tried to vary the terms of the Order without consultation with the wife. I do not accept his argument that the problems with regard to child-care costs had been because of lack of transparency on the wife's part. I was concerned by his statement such as he wanted to "make his own arrangements" with the service provider and "the wife had decided that she, for her benefit, wanted a standing order paid in advance, but that might not be to his benefit or preference." I accept Advocate Godden's submission that the husband wanted to keep control and may be alter the terms of payment to the detriment of the children. the plain fact of the matter is, even accepting the husband did not receive the order and reasons until 10th August 2015, there were still outstanding sums due on 15th December when the hearing took place. ...in my view, the wife needs, as submitted by Advocate Godden, to extricate herself from the husband and move on with her plans to set up a new home for the children and herself. The wife needs to be certain in future that the child-care costs will be paid without argument and the only way for that to happen, judging by past performance, is to place the obligation on the husband to pay one half of the child care costs by monthly standing order to the wife.". 18. Whilst we have not set out the correspondence in full it is clear as we have said that there had been a dispute between the Appellant and the Respondent about the methods of payment and we cannot fault the Registrar's reasons for wishing to achieve clarity and certainty. Accordingly we see no basis for overturning that part of the Order. 19. In the circumstances we dismiss the appeal and order that the Appellant should pay the Respondent's costs of and incidental to this appeal on the standard basis to be taxed if not agreed. Authorities O-v-P (Matrimonial)

[2015] JRC 258A . Downes v Marshall

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Prepared on 24 October 2026 · Esheria