

JERSEY / JUDGMENT

PS v C [2003] JCA 012 (17 January 2003)

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court OF APPEAL th January 2003 Before: R. C. Southwell, Esq., Q. C., President; Sir de Vic Carey, Bailiff of Guernsey; and P. S. Hodge, Esq., Q. C. Between PS Petitioner/RESPONDENT And C Respondent/APPELLANT And M Co-Respondent Application for leave to appeal, under Article 13(e) of the Court of Appeal (Jersey) Law, 1961, and appeal by the Respondent/APPELLANT from the Order of the Family Division of the Royal Court of 11th October, 2002, whereby it was (a) adjudged that the Respondent/APPELLANT's application to vary maintenance to reflect his assuming care and control of H should fail, and that maintenance should increase as the Respondent/APPELLANT should pay H's school fees, in addition to £20,000 per month maintenance to the Petitioner/RESPONDENT; (b) noted that the Respondent/APPELLANT had taken on the financial burden of H, including payment of school fees, and that this burden remained with the Respondent/APPELLANT, notwithstanding the decision of the Royal Court not to increase or decrease the interim award referred to at paragraph (a) above; (c) ordered that the sum of money payable under a Sun Life endowment policy, be transferred to an escrow account in the names of counsel for the Petitioner/RESPONDENT and for the Respondent/APPELLANT, and that this money should be expended (i) to pay the Petitioner/RESPONDENT's legal and accountancy fees and (ii) to offset the Petitioner/RESPONDENT's overdraft.; and (e) ordered that from 1st November, 2002, the Respondent/APPELLANT should pay £10,000 per month into the escrow account to offset the future legal and accountancy fees properly incurred by the Petitioner/RESPONDENT. Advocate A. D. Hoy for the Respondent/APPELLANT; Advocate A. D. Robinson for the Petitioner/RESPONDENT

judgment

HODGE JA: 1. This is an appeal on an interlocutory matter in an acrimonious divorce. The appeal is taken by the husband against an order of the Royal Court (Family Division) dated 11 October 2002. In making that order, the court was dealing with an application by the wife to increase interim maintenance and for an order that the husband pay her legal and accountancy costs pending final resolution of her financial claim and also an application by the husband to reduce the interim maintenance. 2. The Royal Court in making an award of interim maintenance exercises a discretion. This Court has held in *Laugee v Laugee* (1990)JLR 236 that it is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere. 3. In making the awards on 11 October 2002 it is clear that the Royal Court was seeking to do two things. It was seeking to

provide funds to the wife, who did not otherwise have access to cash and who is financially dependent on her husband, to maintain her established lifestyle and to provide for the parties' youngest child, J, until the resolution of her financial claim, for which a hearing is scheduled at the beginning of April. Secondly, because the wife did not have funds while the husband did, the Royal Court was seeking to provide her with funds to pay accrued and future legal and accountancy costs in the pursuit of her claim. Both of these aims were wholly reasonable. 4. The husband's application in this appeal as presented in his written contentions was to reduce the interim maintenance from £20,000 per month to £15,000 per month and to reverse the Royal Court's order that funds be provided to meet the legal and accountancy fees. Advocate Hoy however conceded at the outset of the oral hearing that he was not seeking to reduce the figure for interim maintenance from £20,000 per month. He accepted that that figure had been set by the earlier order of the Royal Court on 22 July 2002, and the husband had not appealed that order. In my opinion that was a sensible concession as the papers made available to this court did not support the reduction which had been sought in the written contentions. 5. Advocate Hoy, however, submitted that the wife should be required to pay the school fees of the parties' elder daughter, H, as well as those of the younger daughter, J. He also sought to reverse the orders by which the Royal Court had sought to put the wife in funds to prepare her claim properly. This is not a result which I consider to be reasonable. 6. In fact, the husband's appeal is wholly without merit. His first ground of appeal was that the Royal Court had failed properly to interpret the judgment of 22 July 2002 in the judgment of 11 October 2002. This is misconceived as it is clear from paragraphs 1, 9 and 10 of the latter judgment that the Royal Court was deliberately varying the earlier order by allowing the wife to continue to receive the monthly payment of £20,000 while imposing on the husband the obligation to pay the school fees of H, who on 24 September 2002 had been transferred by consent into the husband's care and control. Similarly I see no merit in the second ground, namely that the Royal Court failed properly to take account of material changes in circumstances. It is clear that the court did take account of the transfer of the care and control of H. The fact that the hearing to resolve ancillary relief had been adjourned from October to April is, in my opinion, of no significant materiality in the circumstances. In any event the Royal Court expressly referred to the postponement in paragraph 11 of its judgment. The third change of circumstance is stated thus: "M's situation had changed in that he was undergoing interviews with law firms seeking sponsorship. If successful, all his tuition fees would be paid." It would not have been appropriate for the Royal Court to have given any weight to this alleged change in circumstance as that would have involved speculating about the outcome of the application. 7. The third ground was that the Royal Court took account of irrelevant matters (namely the husband's capital resources) and failed to take account of relevant matters (namely the assertion that the court's order would exhaust his disposable income). The latter point was put thus in paragraph 19 of his contentions: "In fact the court ordered him to pay £240,000 per year interim maintenance, plus H's school fees of £20,000 per annum plus £120,000 per annum in legal and accountancy fees, totalling £380,000, which equates to £11,452.43 more than his disposable income..." 8. It is however clear on reading the voluminous papers lodged in support of the appeal that the husband's income is in fact considerably greater than his drawings from his partnership. We were informed that the partnership, in which he has a 63 per cent

interest, carries on business through a group of companies, including Caversham Financial Services Limited. It is the practice of the partnership to arrange that that company and others in the group declare dividends whenever there are profits available so that the partners become entitled to those profits, although not all of those dividends were extracted from the companies. Instead part of the dividends were left in the companies to provide working capital and the partners were treated as creditors of the companies in relation to the retained sums. Thus in a document ("ADDC 1") which had been produced on behalf of the husband it was clear that in the year ending 31 December 2001 the husband had income, in addition to his salary and cash drawings, of £504,000 on which tax had been paid by the company or companies. We also note that among the creditors of Caversham Financial Services Limited in its statutory accounts for the year ending 31 May 2002 there is an item "accrued income" amounting to £406,826. 9. Against this background I see no justification for the suggestion that the Royal Court took account of an irrelevant consideration when it referred to substantial fallback capital assets in two companies. In relation to CFS Limited there appears to be substantial undrawn income to which the court could undoubtedly have had regard. It is not in the circumstances necessary to consider this point further. 10. We were informed that there were sound business reasons for retaining the income in the companies in the light of changing economic circumstances. No doubt it is appropriate that the companies have sufficient working capital and the retention of dividends is a means of providing that capital while avoiding or minimising interest charges on bank borrowing. The fact remains however that the retained dividends are the husband's income and it would have been perfectly possible for him to have drawn further sums to provide interim maintenance for his wife, replacing the extra drawings if necessary by bank borrowing which would have been modest in the context of the group's financial performance. In the light of this, the point made at paragraph 19 of the husband's contentions, which I have quoted and which had initially impressed me, loses its cogency. 11. I turn then to the provision of sums to meet the wife's legal and accountancy fees. As I have said, the wife's claim is likely to be substantial. As the husband's business and financial interests are wide-ranging and complex, it is reasonable that she receives expert legal and accounting assistance. The problem which has arisen is that the Royal Court has ordered (a) that the proceeds of a matured endowment policy in the name of WH Limited, a vehicle for holding family investments, be paid into an escrow account and (b) that the husband pay £10,000 per month from 1 November 2002 into that escrow account to offset the wife's future legal and accountancy fees. 12. The parties are agreed that the Royal Court did not have jurisdiction to order the establishment of an escrow account and that the account should therefore be closed. The account, we are informed, comprises three elements. First, there is the sum representing the proceeds of the endowment policy. Secondly, there is the sum of £30,000, which is three months of the husband's instalments since 1 November 2002. Thirdly, there will be a modest sum of interest accrued on the balance in the account. In his application the husband wants the first and third elements returned to WH Limited and the second element repaid to him. The wife opposes this and seeks further interim maintenance by which she can be funded to prepare her claim. 13. As the wife does not have access to funds other than those awarded by the court we consider that this attempt by the husband to deprive her of the wherewithal to pursue her claim is oppressive. While Advocate Hoy suggested that the wife could borrow on security of

her expectancy, it would be much simpler for the husband to borrow (if he cannot otherwise provide) the necessary sums. Alternatively, he could arrange for one of the partnership's companies so to borrow and thus release the necessary sums to him from the retained profits. 14. We were informed that the husband has not settled the arrears of maintenance which the Royal Court discussed in the first six paragraphs of its judgment of 11 October 2002. We are also informed, and it was not contested, that the husband has wilfully disobeyed the court's order of 11 October 2002 by making deductions in December and January from the sum of £20,000 which he was ordered to pay monthly. The deductions (of £6,500 and £5,500 respectively) were allegedly in respect of H's school fees and in relation to the expenses of the children. The husband can have had no basis for any reasonable belief that he was entitled to make these deductions: the Royal Court in paragraph 6 of the 22 October judgment made the matter quite clear where it stated "for the avoidance of any doubt at this early stage of the summons, the wife will in future receive £20,000 on the agreed date monthly". 15. A court of law takes very seriously the deliberate flouting of its order and it is only due to restraint on the part of the wife's advocates that an application for contempt of court has not been initiated. 16. The husband may have felt that the wife's attempt to gain control of the funds held by WH Limited was provocative. That attempt may have been imprudent. But the attempt appears to have resulted from the husband's failure to provide her with sufficient funds. While I recognise that emotions can run high in the context of a divorce, that cannot excuse wilful disobedience of an order of court. The husband must pay the deductions forthwith. Proposed order 17. In order to provide the wife with interim maintenance and with further interim maintenance to enable her to pay her professional advisers, I would propose the following order in substitution for the Royal Court's order of 11 October 2002: (i) That the husband should pay interim maintenance of £20,000 per month on the agreed date each month and that this be backdated to 22 July 2002. (ii) That, in addition, the husband should pay interim maintenance of a further £20,000 per month from 1 November 2002 to enable the wife to pay her accrued and future professional fees in relation to her claim. (iii) That the escrow account should be closed and that from that fund (a) £30,000 should be paid to the wife in part implement of the order in (ii) above and (b) the balance should be repaid to WH Limited. 18. The order in the first subparagraph is made on the clear understanding that the wife will pay the school fees and other maintenance of the youngest child, J. The husband will pay the school fees of H and will have full financial responsibility for H, M and R. Assistance to those children should continue at reasonable levels and in this regard the status quo should be preserved. Further procedure 19. It is in the interests of both parties and, importantly, of their children that the April 2003 hearing proceeds in order not to prolong the acrimony. We were informed that the husband did not comply timeously with the Court Order by consent of 29 August 2002, and has failed to respond fully to the inquiries of the wife's accountants. This will make it very difficult, if not impossible, for parties to comply with timetable in the Court's order of 30 October 2002. The husband must arrange that the remaining queries of Deloitte & Touche are addressed forthwith or that the court is furnished with an explanation as to why that cannot be done. To this end, it would be prudent for the Royal Court to arrange a hearing before the end of January 2003 at which the parties can report on progress towards the April 2003 hearing. 20. Parties must recognise their obligations to comply with the orders of the court. I would expect the Royal Court

to treat any continuing failure to obey its orders or the orders of this Court very seriously. I hope that parties will reflect on their obligation as parents and strive to reduce the acrimony which can only damage their children. Application for costs 21. For the reasons advanced by Advocate Robinson, I propose that this Court makes an order that the wife's costs of and occasioned by this appeal be paid by the husband on a full indemnity basis. Such order (i) would be made so as to indicate this Court's view of the husband's unmeritorious appeal which has wasted both time and money; and (ii) is not to be treated as duplicating the husband's obligation under the Order which I have proposed (in paragraph 17 above) to fund the wife's costs of these proceedings. Authorities. *Laugee v Laugee*

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