

JERSEY / JUDGMENT

Q v R (20 February 2018)

[2008] JRC 031A

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judgment

the COMMISSIONER: 1. This is an application by the respondent ("the ex-husband") to review the spousal maintenance payable by him to the petitioner ("the ex-wife") under the terms of a consent order. 2. The parties, who are both now aged 55, were married on 14 th July 1990, and separated in September 2009; the duration of the marriage was therefore 19 years. They have three children, who are now aged 25, 24 and 22 respectively. 3. The ex-husband has a 50% shareholding in E Company, the other substantial shareholder being his brother. A financial statement prepared on behalf of the parties in November 2010 for the purposes of the divorce proceedings showed their means at that time as follows:- Capital Income Husband £1,851,829 £162,640 per annum Wife £892,795 No income other than maintenance payable by ex-husband. 4. The ex-wife's capital included one half of the net proceeds of the family home that had been sold, and which was held in escrow, and one half of the value of a foreign property owned by the parties. The ex-husband's interest in E Company was valued at £650,000. 5. Following mediation, the parties reached an agreement that was made the subject of a consent order of 27 th January, 2011, ("the consent order"). 6. The consent order was expressed as being in final satisfaction of all claims the ex-wife may have against the ex-husband, save in relation to child and spousal maintenance. The ex-wife relinquished her interest in the foreign property and received the following capital provision:- (i) £590,000 to meet her immediate housing needs. (ii) £300,000 in respect of an adjustment of her capital claims. (iii) By 1 st July 2016, a further lump sum of £250,000 to be paid directly into an annuity to provide a pension for the ex-wife, on the payment of which there would be a clean break as to capital. 7. Under paragraph 7 of the consent order, the ex-husband agreed to pay the ex-wife spousal maintenance in the sum of £3,250 per calendar month, index-linked annually. The spousal maintenance is currently paid at the rate of £3,604 per calendar month (£43,248 per annum). There was no order for the maintenance of the children, then aged 20, 18 and 15, because they were all mainly living with the ex-husband and he met the majority of the childcare and education costs. 8. Paragraphs 8 and 9 of the consent order provided as follows:- "8 The spousal maintenance payments detailed in paragraph 7 above shall be paid on a joint lives basis and shall cease to be payable upon the happening of whichever shall be the sooner of the following trigger events: (a) the petitioner's re-marriage; or (b) the petitioner's cohabitation with a man for a period in excess of 6 months. The spousal maintenance payments detailed in paragraph 7 shall be subject to a review upon either: (a) the retirement of either party; or (b) in the event of a material change in circumstances of either party. For the

avoidance of doubt, there shall not be a review in the event that the petitioner obtains employment of any nature;" 9. With the lump sum of £590,000, the ex-wife purchased a property in Jersey. In her affidavit of 2016 (otherwise undated, but thought to have been filed in the summer of that year), she says that the younger child moved in with her in July 2012, which triggered an application by her for maintenance for him, which she subsequently withdrew, due, she says, to the legal costs it was incurring and the distress that it was causing the children. 10. The ex-wife's affidavit goes on to say that in 2014, when all the children had left Jersey, she felt lost and lonely, and moved to England, to be closer to them. Her Jersey property was let out on short-term lets. 11. She lived initially with her mother and father and then moved into a two bedroomed property in G ("the G property") which she says she thought was owned by her mother. She spent £20,000 refurbishing this property which had been badly treated by previous tenants of her mother. 12. Of the £300,000 capital sum payable under the consent order, the ex-wife says she only received £204,000 after deduction of legal fees and she used the balance in renovating her Jersey property and on general living expenses, including expenditure on the children. She says candidly in her affidavit that she found it difficult to adjust to the reduction in her standard of lifestyle from that which she had enjoyed during the marriage. 13. The ex-husband purchased a property in Jersey on 10 th August, 2012, for £1.85M, jointly with his now wife, whom he married on 15 th July, 2016, both of them, he says, contributing to the purchase price. It is subject to a mortgage of £1.1M. There are also two mortgages on the foreign property retained by him under the consent order, of which the sterling equivalent at the time of the hearing was £308,000 and £231,000 respectively, one of which was taken out to finance the final payment of £250,000 made to the ex-wife on or around 1 st July 2016. 14. That payment was not paid directly into an annuity, as stipulated in the consent order, but to the ex-wife. According to her affidavit of 2016, £25,000 was used to pay off debts, leaving £225,000 in her account at that time. She says she kept back the rest to cover the legal costs of these proceedings which had been initiated by the ex-husband by summons dated 18 th May, 2016. She had paid legal fees of £43,000 and had a further £45,000 to pay. By the time of the hearing, she told us there was only £70,000 left out of this sum, so that a substantial part has been spent on living expenses. 15. In his affidavit of 30 th June, 2016, sworn in support of his application for a review the ex-husband raised two substantive grounds for a review of the spousal maintenance pursuant to paragraph 9 of the consent order:- (i) He planned to retire from E Company by reducing his working hours to two days a week by the end of 2016 and to retire fully within a year. This would result in a drop in his salary from £100,000 per annum to nil, leaving him only with unearned income on his shareholding in E Company of around £85,000 per annum. (ii) He had ascertained that the ex-wife owned the G property, which had been bought in her name for £124,000 on 28 th October, 2001. The ownership of that property was not disclosed in the divorce proceedings and he said he had no knowledge of it. 16. The allegation of non-disclosure gave rise to two affidavits being sworn and filed by the parties, specifically in relation to that issue, dated 18 th November, 2016, and 5 th December, 2016, respectively, and, as we understand it, this issue was the reason for this matter being referred up to the Royal Court. 17. On 21 st June 2017, the Court directed that should the ex-wife's mother wish to intervene in the proceedings in relation to the G property, she should make that application supported by an affidavit on or before 20 th July 2017. She did file an

affidavit dated 1 st December, 2017, but did not pursue any application to intervene. She was instead called as a witness by the ex-wife. 18. Two points arise at this stage:- (i) Firstly, in August 2017 Advocate Heath disclosed in correspondence that the ex-husband was receiving a substantially higher dividend income from E Company and expected to continue to do so after his full retirement. His income for 2017 was disclosed at £295,000 comprising a salary of £55,000 (for working two days reducing to one day a week) and a dividend of £240,000. He anticipated that his dividend income would continue post full retirement at the rate of £240,000 per annum. It was not clear from Advocate Heath's letter whether this dividend income was gross or net, but assuming it was gross, then his anticipated net income from dividends from E Company would be £192,000 per annum, a significant rise from his net income in 2011 of £162,640. Freed from the costs of children, the ex-husband was now in a better position financially than he was in 2011, and Advocate Heath accepted that the spousal maintenance could not be reviewed downwards on the basis of his inability to afford it. (ii) Secondly, the allegation of non-disclosure of the G property was not pursued, as the ex-husband said he did not wish to re-open the whole question of capital distribution, though Advocate Heath said it was plain the capital award made in 2011 was over generous to the ex-wife " now that the truth of the housing position has come to light ". The ex-wife's ownership of the G property was, however, a change in circumstance, which Advocate Heath said should be taken into account. 19. Despite not being formally pursued, the allegation of non-disclosure underpinned much of the ex-husband's case and as we have heard evidence on the issue, we think it is helpful to set out our findings. The G property 20. The ex-wife said the first she knew of the existence of the G property was in 2014, when she was discussing the idea of moving to England with her mother ("the mother"), who informed her that she (the mother) owned a property in G that she could stay in at a preferential rent. No mention was made by the mother of the property being in the ex-wife's name. 21. She discovered the house was in her name when she opened a letter addressed to her from H Borough Council dated 2 nd November, 2015, in which they were seeking a charging order over the property in relation to a judgment obtained against her as the owner of the property. She was on good terms with the ex-husband at that time, and often asked his advice on financial matters. She told him about the situation at the G property, an exchange that took place before he had started the review proceedings, which showed, she said, that she had nothing to hide in this respect. 22. The mother, now 80 years old told us that the G property had been purchased in 2001 for her grandchildren (the children of the parties). She had discussed the purchase with the ex-husband and he suggested that it be purchased in the name of the ex-wife as trustee for the grandchildren. 23. The mother handled the conveyance personally and the documents appended to her affidavit did show everything being signed by her and her paying the purchase consideration, stamp duty and associated fees. She holds the land registry certificate. The ex-wife appeared to play no part whatsoever in it. 24. The mother said that she and the ex-husband were very close until the breakdown of the marriage, and often discussed property matters. Shortly after the purchase of the G property, she said the ex-husband entered into an agreement to purchase another leasehold property in that area and she appended a copy of the agreement signed by him. 25. The ex-husband confirmed that he discovered the ownership of the G property during a telephone call with the ex-wife in February or March 2016, at a time when he agreed they were on good terms.

That information took him by surprise, and he carried out a search of the UK property register, which confirmed that it had been purchased in 2001 in the ex-wife's name. He had no memory of any conversation with the mother about this purchase, or of the leasehold property agreement appended to her affidavit. 26. He said the mother would sometimes discuss with him buying properties and giving them to her grandchildren, but he did not take a lot of notice of it. As far as he was aware, this was never carried through. He says he certainly never knew anything about the G property at the time of the consent order. 27. The mother told us that she was the beneficial owner of the G property and that the ex-wife could not deal with it without her releasing the land registry certificate. If the ex-wife tried to sell the G property she would put a charge on it. She told us she was in a position to give the property to the grandchildren on her death and all of them had been told that it was to be theirs. 28. The ex-wife was currently paying the mother £750 per month by way of rent, but the mother told us that if the rent was not paid, she would not do anything about it as the ex-wife was her daughter. She would not evict her own daughter. As Advocate Heath pointed out, it would be difficult for her to do so whilst the legal title in the property vested in her daughter. 29. The mother had to accept in cross-examination that this was registered land and that anyone could order the land registry certificate, as made clear by the Land Registry's explanatory note produced by Advocate Heath. Accordingly, the mother's possession of the land registry certificate could not prevent the ex-wife obtaining the same directly from the Land Registry and, subject to any claim by the mother, selling the property. 30. The mother disclosed to us that she had not made specific provision for her interest in the G property in her will and that accordingly, that interest would devolve to all four of her children in equal shares. 31. While we are not in a position to make findings as to the ownership of property situated in England, we express the view that the ex-wife is the legal owner of the G property and that the mother may have a claim to its beneficial ownership, having provided the entirety of the purchase consideration. 32. We accept the evidence of the mother and the ex-wife and find as follows:- (i) The ex-wife did not know that she was the legal owner of the G property in 2011 and accordingly there has been no failure on her part to disclose that ownership in the divorce proceedings. (ii) The ex-wife has not agreed to act as trustee of the G property for her children. (iii) The G property is available to the ex-wife to live in without fear of eviction. (iv) The payment of rent by the ex-wife to the mother is in essence a voluntary arrangement, no doubt reflecting the fact that the mother provided the entirety of the purchase consideration. Current financial position of the parties 33. In summary, the current financial position of the ex-husband is as follows:- (i) He is the joint owner with his wife of a Jersey property purchased for £1.8M and subject to a mortgage of approximately £1.1M. (ii) He is the owner of the foreign property, which for the purposes of the hearing he valued at around £1.1M and which is subject to two mortgages of the sterling equivalent of £308,000 and £231,000 respectively. (iii) As at the date of his affidavit on 30 th June 2016, he had bank accounts and investments of circa £114,000; that was not updated for the purposes of the hearing. (iv) The ex-husband provided no valuation of his shareholding in E Company, but judging by the dividends he has earned and anticipates earning in the future from it, we express the view that it has a substantial value, way in excess of the £650,000 attributed to it in 2011. (v) He will be in receipt of dividends of around £240,000 per annum gross or £192,000 net, subject to the continued profitability of the business, and he assessed his

outgoings at £9,487.66p per calendar month or £113,851.92p per annum. By taking early retirement, he has foregone his salary. 34. Turning to the ex-wife, her current financial position is as follows:- (i) She owns her Jersey property, which is apparently worth some £590,000, not much more than the sum she paid for it in 2011, and the G property valued at around £295,000, the latter being the subject of a potential claim as to beneficial ownership on the part of the mother or her estate. (ii) She has some £75,000 left in her bank accounts. (iii) She has the rental income of her Jersey property of £2,500 per calendar month or £30,000 per annum gross. She assesses the costs incurred on the Jersey property as much as £2,018.83p per calendar month or £24,225.96p per annum, which includes a large reserve for repairs, which she says are currently needed, together with items such as storage of her furniture pending her return to Jersey and the cost of regular trips here to inspect the property. (iv) She assesses her current expenditure at £8,867.83p per calendar month or £106,413.96p per annum. She plans to return to live in the Jersey property and estimates her future expenditure in that eventuality at £4,904.50p per calendar month or £58,854 per annum. Legal principles to be applied 35. The power of the Court to order the payment of spousal maintenance arises under Article 29(1)(a) of the Matrimonial Causes (Jersey) Law 1949 ("the 1949 Law") and any order so made is subject to review under Article 33 of the 1949 Law, which is in the following terms:- "33 Power to vary orders (1) The court may from time to time discharge or vary any order made under Article 25, 27, 28, 29, 30 or 31 or suspend any of the provisions thereof temporarily or revive the operation of any of the provisions so suspended. (2) In exercising the powers conferred by this Article, the court shall have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage." 36. Pursuant to the provisions of paragraph 9 of the consent order the Court has ordered that spousal maintenance would be reviewed on the retirement of either party or in the event of a material change in the circumstances of either party. 37. Advocate Orchard did not argue that the reference to material change in circumstances in paragraph 9(b) of the consent order restricted the undoubtedly wide discretion vested in the Court under Article 33, which is similar to the wide discretion vested in the English court under Article section 31(7) of the Matrimonial Causes Act 1973. In *Harris v Harris*

[2001] 1 FCR 68 Thorpe LJ commented that the court exercised "... an almost unfettered discretion ". Advocate Orchard did maintain that the starting point should be the consent order, the basis and intended effect of which must be taken into account; the Court did not approach a review of spousal maintenance *de novo*, as suggested by Advocate Heath, on each occasion that a review arose. 38. The point was made by Registrar Obbard in *J v M*

[2008] JRC 031A , where he said at paragraphs 18 and 19:- "[18] ...the Matrimonial Causes (Jersey) Law 1949, as amended would seem to imply that the Court should begin with a starting point of maintenance and decide whether the changed circumstances of both parties should cause an increase (or decrease) when considering a review. This is apparent in Article 33 of the Law which reads:- '(1) The Court may from time to time discharge or vary any order made under Article 25, 27, 28, 29, 30 or 31 or suspend any of the provisions thereof temporarily or revive the operation of any of the provisions so suspended. (2) In exercising the powers conferred by this Article, the court shall have regard to all the

circumstances of the case, including any increase or decrease in the means of the parties to the marriage' [19] In many cases, the starting point will be a previous order. In *L v D and R*

- [2004] JRC 164 , the Deputy Bailiff preferred a previously agreed maintenance figure. In *W v O* [2004] JLR N 53, the Registrar chose a previous order, but relied heavily on a number of other factors, such as the changed custodial arrangements, the paying parent's debts and his financial responsibility for a new family." 39. Advocate Heath argued that once the door to review under paragraph 9 of the consent order had been opened, the Court should approach the issue of spousal maintenance *de novo* which is similar to the argument run, unsuccessfully, in the case of *L v D and R*
- [2004] JLR 334 , which involved an application to vary child maintenance payments and where Sir Michael Birt, then Deputy Bailiff, said this at paragraphs 15 - 17:- "15 It appears from the referral of the Registrar and the skeleton arguments submitted to the Court that the case was felt initially to raise a fundamental issue of principle. The wife contended that, assuming a material change in circumstances, the Court should nevertheless take the maintenance figure set out in the agreement as the starting point and decide merely by how much that figure should be varied in the light of the change in circumstances. The husband, on the other hand, appeared to be arguing that once the Court was satisfied that there had been a change in circumstances, the level of child maintenance was completely open. One in effect started from scratch and decided the case as if there had never been an agreement in the first place. In that respect, it was said that the CSA tables were a useful guide. However, during the course of appearing, Miss Colley made it clear that this was not in fact her position. She accepted that when parties had reached an agreement, one had to take that agreement as the starting point and then allow for the change in circumstances in order to determine any new figure. In our judgment, Miss Colley was correct to accept that proposition. One starts with a strong presumption that parties are free to enter into such agreements as they think fit, and that once they have done so, they should be held to their bargain. It is in the public interest that this should be so, and that parties should not be encouraged to re-visit and seek to re-open an agreement simply because of some change in circumstances. The Court should take the agreed figure as a starting point and then simply decide what variation would be fair and reasonable in the light of the changed circumstances. This principle is particularly applicable where the Court is considering financial provision for a spouse. The correct course is to acknowledge and respect the fact that the parties have reached an agreement and the Court's role is limited to determining what variation, if any, would be fair and reasonable, taking into account the change in circumstances." 40. The Registrar in *J v M* did go on to say at paragraph 22:- "22 However, there is a consideration which I am bound to make which escaped much attention in the submissions made to me (although it is listed at (iii) of the issues at paragraph 8). The Court, in reassessing the rate at which spousal maintenance is to be paid and the duration of it, must also consider whether or not a clean break is desirable between the parties. Although it does not appear in the brief

report of the case in [1955] JLR N 15A, the Registrar pointed out in the case of *Boudin v Smith* that a clean break was desirable. When hearing the appeal from the case, the inferior Number agreed and adjourned the case for an agreement on quantum of a lump sum to be paid. More recently, in *Fleming v Fleming*

- [2003] EWCA Civ 1841, Thorpe LJ said this in hearing an appeal from a maintenance payer against an extension of an existing order:- 'The Judge had before him an application for the variation of periodical payments order under s31 of the Matrimonial Causes Act 1973. By an amendment to that section which came into force on 12 th October 1984, in such circumstances the court is under an obligation to consider whether it would be appropriate to terminate continuing financial responsibility between the parties provided that that outcome is achievable without undue hardship to the payee.' In considering this additional factor one can make more sense of the spousal review clause set out at paragraph 6 above. It seems to me that the review must take place on the basis of a consideration of whether or not, under the circumstances, M could become financially independent. This can include consideration of whether or not she is making reasonable efforts to help support herself and whether a lump sum should be paid either immediately or in the future in order to achieve that aim." 41. As the House of Lords said in *Miller v Miller; McFarlane v McFarlane*
- [2006] UKHL 24 :- "The goal the court is required to have in mind is that the parties' mutual financial obligation should end as soon as the court considers just and reasonable." and "The whole point of a divorce is to enable people whose lives were previously bound up with one another to disentangle those bonds and lead independent lives." 42. We endorse this extract from the judgment of O'Sullivan, Registrar, in an untitled case in the JLJB site unreported under the heading
- [2012] Matrimonial--a clean break--2 Nov 2012 at paragraph 3, where she said: - "... it is the policy of the Court to strive to achieve a clean break if this can be achieved without undue financial hardship and also to order maintenance for a limited period." She then cites the Jersey cases from which that policy is derived. 43. The requirement for the English court to consider whether there should be a clean break on an application to vary spousal maintenance has statutory force under section 31(7)(a) of the Matrimonial Causes Act 1973, which has no equivalent in this jurisdiction, but even so, we accept the principle that the Court should in every case consider whether financial independence can be achieved without undue financial hardship. Both the parties in this case expressed a desire for financial independence, given the acrimony their dependence has caused since the divorce and the legal costs that have been incurred. 44. The general approach of the Court to the division of matrimonial assets and the making of periodical payments was summarised by Le Cocq, Deputy Bailiff in the case of *U v V*
- [2016] JRC 061 at paragraph 24 in this way:- "24 It is clear that in considering the question of 'fairness' the Court approaches the division of matrimonial assets and making a periodical payment against the three yardsticks of need, compensation and sharing. Of these three

the concept of 'need' takes priority but once issues of need have been adequately addressed then the Court may, if appropriate, look at issues of compensation and sharing. When reaching the sharing stage of deliberation, if indeed such is ever reached in any particular case, the Court will be inclined to start from the position of equality where matrimonial property is concerned but will not feel so constrained where non-matrimonial property is concerned." 45. It was agreed by the parties that we are not dealing here with issues of compensation or sharing; we were concerned with the issue of need. 46. As to the needs of the ex-wife, much time was spent in cross-examination of her over her assessment of her income needs in respect of which this statement by Thorpe LJ in *Purba v Purba*

[1999] EWCA Civ 1730 is pertinent: - "In this field of litigation budgets prepared by the parties often have a high degree of unreality - usually the applicant's wife's budget is much inflated ... the essential task of the judge is not to go through these budgets item by item, but stand back and ask, what is the appropriate proportion of the husband's available income that should go to the support of the wife?" As Mostyn J said in *SS v NS*

[2014] EWHC 4183 (Fam) at paragraph 36:- "This decision should not be taken to mean that the individual items of the budget are irrelevant. Rather, it emphasises that it is important that the Court should clearly survey the wood as well as the trees." 47. As to how much should be paid to the applicant's wife, Mostyn J said this at paragraph 34:- "34 As for 'how much' the Commissioners wrote at para 3.96: 'Exactly how, and at what level, needs will be met will depend on the resources available and, usually, the marital standard of living. Replicating the marital standard of living in two homes, after divorce, will be rare: most parties will not be able, in the short to medium term, to live at the standard they enjoyed during the marriage. That said, their former standard of living will be relevant in so far as any reduction in standard of living as a consequence of the financial settlement made on divorce should not fall disproportionately on one party. In addition, the transition to independence, if possible, may mean that one party is not entitled to live for the rest of the parties joint lifetimes at the marital standard of living, unless he or she can afford to do from his or her own resources.' I would emphasise the final sentence. It is a mistake to regard the marital standard of living as the lodestar. As time passes how the parties lived in the marriage becomes increasingly irrelevant. And too much emphasis on it imperils the prospects of eventual independence." 48. In that case, which concerned an application for spousal maintenance and not a variation, the parties had agreed that the spousal maintenance should be for a term, but could not agree whether that term should be extendable. Mostyn J observed that extending a term set a high threshold to surmount because the 'implicit promise of the original order of the ability of the payee to achieve independence' would have been shown to be impossible to achieve. He went on to say: "44 However, I believe that if the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former. If the choice is, as here, between an extendable and a non-extendable term then the court would have to be satisfied on the evidence that it is more probable than not that independence

will be achieved at the expiration of the term. If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party (almost invariably the payee.)" 49. Mostyn J went on to summarise the relevant principles in play on an application for spousal maintenance, which although that was not a case involving a variation of spousal maintenance, it is helpful to set out:- "46 Pulling the threads together it seems to me that the relevant principles in play on an application for spousal maintenance are as follows:- (i) A spousal maintenance award is properly made where the evidence shows that choices made during the marriage have generated hard future needs on the part of the claimant. Here the duration of the marriage and the presence of children are pivotal factors. (ii) An award should only be made by reference to needs, save in a most exceptional case where it can be said that the sharing or compensation principle applies. (iii) Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating the significant hardship. (iv) In every case the court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable. A term should be considered unless the payee would be unable to adjust without undue hardship to the ending of payments. A degree of (not undue) hardship in making the transition to independence is acceptable. (v) If the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former. (vi) The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence. (vii) The essential task of the judge is not merely to examine the individual items in the claimant's income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the respondent's available income that should go to the support of the claimant. (viii) Where the respondent's income comprises a base salary and a discretionary bonus the claimant's award may be equivalently partitioned, with needs of strict necessity being met from the base salary and additional, discretionary, items being met from the bonus on a capped percentage basis. (ix) There is no criterion of exceptionality on an application to extend a term order. On such an application an examination should be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve and, if so, why. (x) On an application to discharge a joint lives order an examination should be made of the original assumption that it was just too difficult to predict eventual independence. (xi) If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party." Position of the parties 50. The ex-husband, having stated that it would have been open to him seek to set aside the capital provision made under the consent order on the grounds of non-disclosure, had elected not to re-open the question of capital distribution. It occurred to us that the ex-husband might also have been influenced by the possibility of the value of his interest in E Company being brought back into play at a far higher sum than that put forward in 2011. In any event he sought the following orders: - (i) Spousal maintenance to

be capitalised in one lump sum payment of £25,000. No rationale was put forward as to how that sum was calculated. (ii) Alternatively, for the spousal maintenance to be tapered down to zero over a period of four years. 51. The wife's position was that given the stress and cost of the present application, spousal maintenance at the current level should be capitalised, which according to the most recent Duxbury calculations would give rise to a lump sum payment of £769,400, when extrapolated from the nearest denominator. This, she said, could be funded by the ex-husband selling the foreign property and making up the difference by a small loan against his own property or taking funds from the pharmacy business. 52. In the alternative, the ex-wife asked for his application to be dismissed in its entirety. Decision 53. The ex-husband told us that he regretted the agreement that had been reached in 2011. At the time he had the three children living with him and said he was emotionally bruised. The ex-wife was in a relationship with another man and he had assumed she would cohabit with him, thus bringing the spousal maintenance to an end under paragraph 8 of the consent order. 54. In his view, a clean break should have been provided for then, and it was wrong that he should have to pay out such large sums to his ex-wife for the rest of his life. He was visibly shaken by the revelation in Court that of the £250,000 paid to her in July 2016, only some £75,000 remained. 55. Advocate Heath was critical of many of the items in the ex-wife's assessment of her needs. We agree with many of the reductions and deletions suggested by Advocate Heath, which on her calculations reduced the ex-wife's monthly expenditure to £3200. However, we think some expenditure on her children is reasonable (Advocate Heath excluded it all) as is her voluntary payment of rent to her mother for the occupation of the G property. We also note that there is no provision for private health insurance. Under the consent order the ex-husband undertook to maintain private health insurance for the ex-wife through the E Company policy, but in discussion in Court doubt was cast over whether that was possible; an issue we invited the ex-husband to clarify when this judgment is handed down. 56. Assessing a person's needs is a difficult exercise. As Mostyn J said in *SS v NS* at paragraph 40:- "...assessment of need is elastic, fact-specific and highly discretionary. For as King Lear pointed out, needs are exceedingly hard to reason; even the poor have things superfluous to their basic needs; and most luxuries are strictly unnecessary." 57. The Court has considered each item, and without burdening this judgment with our views in respect of each, we have concluded, having stood back, that, in all the circumstances of this case, the reasonable income needs of the ex-wife are £5,000 per calendar month or £60,000 a year as against her estimate of £8,867.83p per calendar month or £106,413.96p per annum. 58. In our view, she has also inflated the costs of maintaining her Jersey property, but we are satisfied from the documents she showed to us, in particular a letter from the surveyor of 24 th November, 2017, enclosing a fee note for investigating into damp, that there are issues with the property which she is having to address. We also had judicial knowledge that ownership of property inevitably involves expenditure, so that the net return will always be considerably less than the gross rental figure received. 59. It is clear to us that following the divorce, the ex-wife has continued to live at a rate which equated to the lifestyle she had previously enjoyed but which was beyond the income available to her.

The result is that the capital she has received has been eroded, admittedly in part by legal fees she has incurred, but in the main, through her living expenses. 60. Her bank accounts were difficult to analyse because of her extensive use of Revolut (through which she spent some £4,500 every three months), in addition to the use of ordinary credit cards, for which no particulars had been requested or provided. However, we did not think that she has been squirreling money away through Revolut; on the contrary it all seemed part of her lack of financial discipline. 61. Some reliance was placed by Advocate Heath on the English case of *Wright v Wright*

- [2015] EWCA Civ 201 where leave to appeal against the decision to taper down spousal maintenance to nil over four years was refused. The case was summarised by Le Cocq, Deputy Bailiff, in *U v V* at paragraph 31:- "31 Further in the case of *Wright v Wright*
- [2015] EWCA Civ 201 Pitchford LJ refused leave to a wife to appeal against a downward variation of periodical payments order. Orders had been made requiring the husband in that case to pay a certain annual sum on a joint lives basis and he had subsequently applied to vary that order on the grounds that his financial circumstances had worsened. It was clear in the original judgment that the judge had made it clear that he had expected the wife to begin working within two years of the order being made so that she could make her own contribution to her household. The court in its judgment refusing permission to appeal reflected the fact that the court below had been highly critical of the wife's apparent failure to take any steps at all to secure employment. She had previously worked as a legal secretary and at the rates that she might be expected to secure by way of payment had she done so again that together with various allowances would have enabled her to contribute some £46,000 towards the household expenses." 62. As can be seen in that case, when the spousal maintenance was first ordered, the judge had made it clear that he had expected the wife to begin work within two years of the order being made and there were grounds upon which that expectation had been based. No such expectation was built into the consent order in the case before us. 63. On the contrary, and perhaps unusually, paragraph 9(b) of the consent order provided that there would be no review in the event of the ex-wife obtaining employment of any nature. This could be interpreted either as an encouragement for the ex-wife to find work without fear that it would impact on the level of spousal maintenance or confirmation that she could rely upon the level of spousal maintenance agreed whether or not she found employment and however well remunerated that employment was. 64. We were told that for some years during the marriage the ex-wife had managed the customer facing (but not the financial) aspects of a shop owned by the ex-husband and his father, but as we understand it she had not otherwise worked during the marriage and had not worked since. We are not aware that she has any qualifications or skills, and she is now 55. We had no evidence as to her employment prospects but accept that in all probability her earning potential is modest. 65. The starting point was the consent order, and the question which arose for consideration was what had changed to justify a reduction in the quantum of the spousal maintenance? 66. The first material change was that the ex-husband had now taken early

retirement, and that was arguably a trigger for a review under paragraph 9(a). However, the ex-husband's retirement was an entirely voluntary act on his part. He was retiring some ten years earlier than most would consider doing so, and by that decision, he had given up the salary (£100,000 per annum) that he would otherwise have earned. Even so, with his dividend, his income was now greater than it had been at the time of the consent order. 67. The English Court of Appeal has recommended that a percentage comparison should be drawn between the original order and the order under variation to test a provisional conclusion. In *Hvorostovsky v Hvorostovsky*

[2009] EWCA Civ 792 Thorpe LJ said this at paragraph 33:- "... In both of the reported cases by which he directed himself (*Lauder v Lauder* and *VB v JP*), the utility of a percentage comparison between the original order and the order on variation was commended. That exercise the judge had noted at para [71] (iii), seemingly with approval." 68. In this case, in 2011, the ex-husband was paying the sum of £3,250 out of a net income of £13,553 per calendar month. The ex-wife sought a continuation of the spousal maintenance, now at £3,604 out of the ex-husband's current net income of £15,833 per calendar month, a smaller percentage that he was paying in 2011. Furthermore, the ex-husband is now relieved of the cost of maintaining the three children of the family, and in particular, the payment of their university fees. 69. The only other material change is the discovery that the ex-wife is the legal owner of the G property, in which she now lives, paying rental on a voluntary basis to her mother. We regard this as a family arrangement, in which, in reality, her freedom to manoeuvre is limited by the fact that the mother put up all of the consideration, and her children had been told that it will be theirs on the mother's death. 70. Advocate Heath addressed the issue of the G property in this way in her skeleton argument, at paragraphs 23 and 26:- "The rental income from [the Jersey property] was not disclosed during the financial disclosure process to [the ex-husband], or in the statement of financial information which was provided to the Court ... It is [the ex-husband's] position that [the ex-wife's] previously undisclosed rental income should be taken into account when calculating spousal maintenance as one of the 'circumstances of the case'. ..." 71. At first blush this does not make sense, in that the purchase of the ex-wife's Jersey property was known to the parties in 2011 and there was no rental income from it to disclose; the proposal was that the ex-wife would live there, although there was no obligation upon her to do so. 72. However, one of the ex-husband's criticisms of the consent order was that in his view the ex-wife never intended to live in Jersey. He said it was always her intention to rent it out and live in England, where she knew she had a property, the G property, the existence of which was not disclosed. We think it is in that sense that he says that the potential income from the Jersey property was not disclosed. 73. We have found that the ex-wife was not aware of her ownership of the G property in 2011, and we accept that she did live in her Jersey property until 2014, when she moved to England, to be nearer the children. We also accept that with some of the children beginning to return to Jersey, it is her wish to return here in due course, to live in her Jersey property. Her estimate of her outgoings in that eventuality, which we note ignored

the cost of maintaining her Jersey property, are too hypothetical to form the basis of any variation now. 74. Advocate Heath further argued that the ex-wife's reasonable income needs could now be met out of the income she receives from her Jersey property without spousal maintenance, but we disagree. In our view, she requires both the spousal maintenance and the income from the Jersey property in order to meet her reasonable needs, which we have assessed at £60,000 per annum. 75. Having taken into account all of the circumstances, we do not consider that the discovery of the legal ownership of the G property justifies a reduction in the spousal maintenance currently payable to her. 76. We are not therefore going to vary the amount of the spousal maintenance currently payable under the consent order. 77. However, the matter cannot rest there. The obligation on the ex-husband to pay spousal maintenance for the whole of his life runs counter to the policy of the Court to strive to achieve a clean break if this can be done without causing undue financial hardship, allowing the parties to lead independent lives. 78. Both parties were themselves anxious for a clean break. The ex-husband says this can be achieved without undue hardship by a reduction of the spousal maintenance over four years to nil or a lump sum payment of £25,000 and the ex-wife by a lump sum payment to her of £769,400. 79. The parties recognised that the Court could not proceed with a proper consideration of capitalising spousal maintenance through a lump sum payment for the following reasons: - (i) The parties needed to know first the extent to which, if at all, the Court would vary the spousal maintenance, or extinguish it altogether, as that would impact directly on the size of any lump sum payment. (ii) The Court would need to be satisfied that it had the power to do so under Article 33 of the 1949 Law, other than with the consent of the parties. (iii) The Court required greater assistance on the calculation of the quantum of any lump sum payment, so that it would be fair to both parties. 80. We therefore turned our mind to the duration of the consent order. We rejected the suggestion that the spousal maintenance should be tapered down now to nil over four years as that would cause the ex-wife undue hardship. However whilst it expressly refers to the spousal maintenance being on a "joint lives basis", there is support for the argument that the parties had in mind, if not a term expiring on the retirement of the parties, then at least a major review of the ex-husband's obligations at that point: - (i) The consent order contained this provision: - "And upon the respondent agreeing to use his BEST ENDEAVOURS to obtain a life insurance policy upon his life in the capital sum of £700,000 on a decreasing term basis to the petitioner's 65 th birthday (19.01.20[2]7), with any proceeds that may become payable under the terms of the said policy to be paid to the petitioner in the event of his death prior to the petitioner's 65 th birthday." The ex-husband's obligation to pay spousal maintenance is unsecured, and would cease on his death. This policy was presumably intended, therefore, to provide the ex-wife with security for the ex-husband's obligation to pay spousal maintenance until she was 65. Thereafter, (ii) The final lump sum of £250,000 payable by st July, 2016, was expressly for the purpose of providing the ex-wife with a pension income, presumably after attaining the age of 65 years of age. 81. The reference to "retirement" in paragraph 9(a) of the consent order is unhelpfully vague, in that it is not clear whether it refers in the case of the ex-husband to final retirement from work in the sense which perhaps most

people would understand, or whether it included voluntary early retirement. In the case of the ex-wife, she could only retire if she had first taken on full-time employment. If she did not take on full-time employment, then she would never retire. 82. In our view, the reference to "retirement" in paragraph 9(a) was intended to be reference to the parties attaining the age of 65 years, the point at which most people in work would expect to retire. They are both the same age, and as the ex-husband has already retired early, we are concerned in reality with the ex-wife attaining the age of 65 years. 83. At the age of 65 years, she will have the Jersey property, or its proceeds should she have sold it, and, we anticipate, the continued use of the G property. She should also have had the balance of the £300,000 lump sum she received in 2011 (£204,000), and the £250,000 lump sum, both invested to provide an income/ pension together with a state pension (although we had no evidence as to the pension entitlements of the ex-wife). These lump sums have been dissipated in part through legal fees associated with the current proceedings, but in the main through the ex-wife spending at a level that was not sustainable. Instead of investing these sums with a view to generating income, she has simply used the same in large part as spending money with the inevitable result that sooner or later there will be nothing left. 84. We gave consideration as to whether the term of the spousal maintenance should now be reduced to when the ex-wife attains 65, the point at which we think it was intended that there should be a major review of the spousal maintenance and a substantial reduction in the amount paid. That term might be made extendable on the application of the ex-wife in order to provide for unforeseen circumstances, but the onus would be in her to apply for and justify such an extension. 85. The difficulty for the Court is that we had no basis upon which to find that she could by then become financially independent, so that termination of the spousal maintenance would not cause her undue hardship. She was not in the same position, for example, as the wife in *Wright v Wright* who had worked as a legal secretary capable of earning some £46,000 a year. The only work which the ex-husband had suggested the ex-wife could do was in retailing i.e. as a shop assistant and we had judicial knowledge of the low levels of pay in that industry. In other words, having assessed her current needs at £60,000 per year, we were provided with no evidence by the ex-husband upon which we could base an expectation that the ex-wife should become financially independent by the age of 65, even if she worked and it was assumed that she had retained and not dissipated the capital sums received by her. 86. We therefore concluded that we could not fairly and without causing undue hardship convert the agreed joint lives term to a fixed term ending on the ex-wife attaining 65, even if made extendable on her application. In our view the only fair way that financial separation can be achieved is for the spousal maintenance to be capitalised by the ex-husband paying a lump sum. In calculating the amount of such a lump sum, it should be assumed that on the ex-wife attaining 65 there would be a major review of spousal maintenance with an expectation that it would be substantially reduced. 87. If any agreement is reached, we would urge the ex-wife to seek financial advice on how the capital of such sum can be invested and protected to provide an income for her. 88. We will, however, vary paragraph 9 of the consent order, so that, subject to counsel's input on

the drafting, it would read as follows: - "9 The spousal maintenance payments detailed in 7 above shall be subject to a review upon either:

- (a) the petitioner attaining the age of 65 years; or
- (b) in the event of a material change in circumstances of either party. For the avoidance of doubt, there shall not be a review in the event that the petitioner obtains employment of any nature." 89. Finally, we note that no life insurance policy has been taken out by the ex-husband, and on inquiry, it would seem that it has been overlooked. He had to use his best endeavours to obtain such a policy, and it provides important security for the ex-wife. We therefore require the ex-husband to address this issue when this judgment is handed down. Authorities Matrimonial Causes (Jersey) Law 1949. Matrimonial Causes Act 1973. Harris v Harris [2001] 1 FCR 68. J v M

[2008] JRC 031A . L v D and R

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[1999] EWCA Civ 1730 . SS v NS

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[2015] EWCA Civ 201 . Hvorostovsky v Hvorostovsky

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