

JERSEY / JUDGMENT

Sappe -v- Viscount [2005]

JRC 101 (01 August 2005)

[2005] JRC 101

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judgment

the deputy bailiff: 1. This is an application brought by Advocate Martin in her capacity as Tutrice of B. She seeks a variation of an Order of the Court dated 2 nd November, 1999, which was made in connection with the désastre of B's father, whereby it was ordered that the father's half-share in the former matrimonial home should be transferred to B's mother in exchange for deferred payment of certain sums which were secured on the matrimonial home by way of hypothèque conventionnelle simple . 2. The background is as follows. B's parents were married in 1993. B was their only child being born in 1997, so he is now seven. They purchased jointly a property in St Helier, (which we shall call "the property") in 1995 with the help of a mortgage. In 2001 the parties separated. The mother remained in the property with B. 3. During the marriage the father set up a business. Unfortunately it was not a success and on 16 th October, 1998, he was declared en désastre . This had the effect of converting title to the property into ownership in common. The mother then applied under Article 12 of the Bankruptcy (Désastre) (Jersey) Law 1990 , for an order that the father's half share in the property, which had vested in the Viscount be transferred to her. 4. On 2 nd November 1999, the Royal Court after hearing the parties ordered that the father's half share in the property should be transferred to the mother but that she should pay certain sums to the Viscount for the benefit of the creditors in consideration of that transfer. The aggregate sum, in the events which have happened, amounts to £22,757. That is the sum which the mother was ordered by the Court to pay to the Viscount. The sum is non-interest bearing and it is secured by two hypothèque conventionnelle simples on the property. The sums were expressed by the Court in its order to be payable on the occurrence of any of the following: (i) The sale of the property. (ii) The death of the mother. (iii) Any other cessation of the mother's 100% interest in the property, or (iv) If she should cease to occupy the property. 5. Tragically the mother died suddenly on 4 th February 2003 at the age of 32 from a cerebral aneurysm. B now lives with his father. 6. The mother died intestate and B is her sole heir. The mortgage liability was paid off by the mortgage protection policy which had been taken out. A tutelle has been formed to administer B's assets and Advocate Martin is the Tutrice. The assets of the Tutelle comprise the property and cash at the bank of some £30,789. 7. The property is, of course, subject to the two hypothèques in the aggregate sum of £22,757 in favour of the Viscount and that sum has now become payable, following the mother's death, in accordance with the order of the

Court. 8. The problem which arises is that the property is in very poor condition. According to a report from a structural engineer, instructed by the Tutelle, the adjoining property is suffering from subsidence, and is in the process of collapsing. These are terraced houses and this adjoining property is apparently pulling down the property. 9. The report states that the property is not fit for human habitation and no one is living there now. The Court has already authorised the Tutelle to commence proceedings against the owners of the adjoining property seeking an order that they undertake appropriate repairs to the adjoining property so as to restore support to the property. 10. However, that will not be straightforward. The adjoining property was apparently owned by two elderly ladies. One still resides there, but may not have funds to carry out the repairs; the other has died and the property has been inherited by various descendents of her parents and these descendents do not live in Jersey. 11. Until the position over the adjoining property is resolved it is not possible for the property to produce any return. It cannot be let because it is uninhabitable and it would be very difficult to sell in its current condition because of the ongoing problems with the adjoining property. If a buyer could be found to take the property in its present state it would clearly be at a heavily discounted price. A valuation obtained by the Tutrice suggests a value of £80,000, effectively site value, for the property in its present condition as compared with a value of some £235,000 if the property were fully restored. 12. We turn now to this application. Miss Gilbert, on behalf of the Tutrice, invites us to vary the order of 2 nd November, 1999, by cancelling or reducing the amounts payable to the Viscount, on the grounds that the effect of the order is now to cause great hardship for a young child and the present situation could not have been foreseen by the Court in 1999. 13. There is no express power in the 1990 Law to vary an order made under Article 12 (5) of the Law. But Miss Gilbert submits that there is power to do so, either by reason of a wide reading of Article 12 itself, or under the Court's inherent jurisdiction. We will consider each of these submissions in turn. 14. The relevant provisions of Article 12 of the 1990 Law are as follows: "(2) Where any property vesting in the Viscount pursuant to Article 8 (1) or 9 (3) represents the matrimonial home or an interest in part thereof the spouse of the debtor may, within 3 months of the date of the declaration, apply to the court for such order as is referred to in paragraph (5) as the court thinks fit. (5) After considering an application under paragraph (1) the court may order - (a) that the property or the interest in part thereof as to which the Viscount is beneficially entitled, subject to - (i) any hypothec and debts secured thereby, or (ii) security interest and debts secured thereby, or part thereof attaching to the property or interest therein, be vested in the applicant; (b) the sale of the property and the distribution of the proceeds of sale, or such part of the proceeds as represents the value of the interest in the part of the property as to which the Viscount is beneficially entitled, to such persons and in such proportions as the court thinks fit; (c) a usufruct in the property or in such part thereof as to which the Viscount is beneficially entitled to be vested in the applicant for such period as the court thinks fit. (6) Where the court makes an order under paragraph (5)(a) it may make a further order that payment be made by the applicant to the Viscount of such sum as the court thinks fit for the benefit of the debtor's creditors. (7)

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made under paragraphs (5) and (6) shall be on such terms and conditions as the court thinks fit. (8) It shall be the duty of the court in deciding in what manner to exercise its powers under paragraph (5) to give first consideration to the desirability of reserving the matrimonial home for the occupation of the spouse and any dependants of the debtor having regard to all the circumstances of the *désastre* including the interests of creditors. (9) The court shall in particular have regard to the following matters - (a) the income, earning capacity, property and other financial resources which the spouse has or is likely to have in the foreseeable future; (b) the age of the debtor's dependants; and (c) the income, earning capacity (if any), property and other financial resources of the debtor's dependants." 15. Miss Gilbert refers in particular to paragraph (7). She argues that the Court is given a wide ranging discretion to balance the interests of the bankrupt's dependants and his creditors and that in the circumstances it must be taken to have a power to vary orders or discharge such orders when the justice of the case so requires. 16. We cannot so interpret Article 12. In our judgment it is intended to reach a once and for all decision subject, of course, to any appeal, as to the balance to be struck between the competing interests of the creditors on the one hand and the bankrupt's dependants on the other. 17. The statute itself clearly envisages this. Thus paragraph (1) requires the application to be brought within three months of the declaration of *désastre*. This emphasises that the legislature intended that the decision be taken reasonably promptly, so that everyone would know where they stand. 18. Paragraph (9) specifically directs the Court to have regard to the income, earning capacity and financial resources which the spouse is likely to have in the foreseeable future. In other words the Court has to do its best to look ahead and make its order in the light of its best assessment of what is likely to occur. 19. We do not think that any of the provisions of Article 12 can be read as conferring a power to vary a decision given, and not appealed, on an application by a spouse. 20. Miss Gilbert's second submission is that the inherent jurisdiction of the Court can be used. She submits that the Court has an inherent jurisdiction to vary a decision under Article 12. She referred to the case of *Finance and Economics Committee -v- Bastion Offshore Trust Company Limited*

[1994] JLR 370 where the Court of Appeal relied upon the inherent jurisdiction of the Court to hold that there was power to order further and better particulars of the Committee's case in an administrative appeal. But that was *par excellence* a procedural matter. It is clear that the Court has inherent jurisdiction in connection with its procedures in order to ensure that it operates effectively as a Court. 21. But we are not dealing with a procedural point here. A decision made under Article 12 is a substantive matter. It resolves the dispute between the Viscount, on behalf of the creditors, and the dependants of the bankrupt as to how the share of the bankrupt in the matrimonial home should be allocated between them. 22. Miss Gilbert referred in addition to a number of cases, but we do not think it necessary to refer to them other than that of *Mayo Associates -v- Cantrade Private Bank Switzerland C. I. Ltd*

[1997] JLR 326 . That, however, was the decision of the Royal Court. We were not referred to the decision in the Court of Appeal reported at 1998 JLR 173 where the decision of the Royal Court that it could exercise its inherent jurisdiction in that case was overturned. The Court of Appeal reviewed the question of inherent jurisdiction and the head note reads as follows on this topic: "The boundaries of the Royal Court's inherent jurisdiction could not be precisely defined for there was no unifying principle behind the instances in which it could be invoked. It was clear however that it was derived solely from necessity in that the Royal Court had to be able to exercise such powers as were needed to make it effective as a court. In the context of civil proceedings necessity referred to the need to protect or enforce the legal rights in relation only to issues raised by the parties to proceedings then before the court. The court's inherent jurisdiction could not be invoked simply on the basis of fairness or to do justice in a given situation although fairness and justice would be major factors to take into account. Nor was it available to provide new remedies at will. Rather whether the court's inherent jurisdiction allowed it to wield any particular power was to be established using traditional legal reasoning from precedents relating to the existence, merits, consequences of, and alternatives to the use of that power." 23. In our judgment we cannot bring a power to vary a decision under Article 12 of the 1990 Law within the principles there set out. The jurisdiction of the Court to transfer a bankrupt's interest in the matrimonial home to his spouse is entirely statutory. Before the enactment of the 1990 Law the Court had no such power. We have already found that the legislature did not itself confer a right upon the Court to vary its orders made under Article 12. It cannot, therefore, be necessary for the Court to find that it must have such a power to vary a decision which it has come to in exercise of this statutory jurisdiction. 24. If Miss Gilbert's arguments were to prevail in this case, it is hard to envisage any decision made pursuant to a statute which would not be capable of variation if later events were to suggest that the decision had led to unfairness or hardship which had not been foreseen at the time of the decision. 25. Indeed, in the customary law field when assessing damages for personal injuries, the Court has to make all sorts of assumptions as to what may happen in the future. For example it has to make an assessment of the severity of the injuries, whether they will be permanent, the prospects of regaining employment and so forth; yet the Court has no jurisdiction to vary an award of damages for the personal injuries many years later simply because some of the assumptions used in assessing the quantum may have turned out to be wrong. Accordingly we find that the Court does not have inherent jurisdiction to vary a decision made under Article 12 of the 1990 Law on the grounds that the circumstances have changed since the order was made. A party may, of course, appeal such an order at the time, or indeed out of time with leave of the Court of Appeal, but subject to that, a decision is taken at the time by the Royal Court and there is no further jurisdiction in relation to the matter. 26. So far the decision we have announced has been one of law. However, even if there had been jurisdiction in this particular case, the Jurats would not have varied the order. The Order of 1999 specifically stated that the sums due to the Viscount would become payable on the death of the mother. The Court may well have expected her to live longer than she did, but nothing in life is certain. The

Court cannot possibly have ruled out the possibility of her dying at an earlier than normal age, i.e. in a car crash or through illness. Furthermore, an early death would still result in a substantial asset going to B and would not have called for any reassessment of the position. 27. The added complication in this case is that there is difficulty in realising the value of the property because of the damage caused by the adjoining property. It is possible, depending on the outcome of the litigation, that it may not be possible to realise the full value. Nevertheless, the Court does not think that this is sufficient to vary the Order even if there were jurisdiction. The interests of the creditors were fixed in 1999. Any further variation at this very late stage would prejudice their interests. The Court does not think it would be right to further prejudice their interests in the particular circumstances of this case on the facts as disclosed to the Court. 28. We would add that the Viscount has come forward with a helpful suggestion. From the papers before us it is apparent that some of the creditors may have indicated a willingness to forgo their claim in order to assist B. The Viscount has suggested that such creditors might be invited by the Tutelle to assign their claims in the désastre to the Tutelle. Thus, to the extent that any creditors did so assign their claims, the sum of £22,759 to be paid by the Tutelle to the Viscount under the Order will ultimately find its way back to the Tutelle. We would certainly suggest that the Tutelle should explore this option further by approaching the creditors direct in order to see if any of them are willing to assign their claims in this way. 29. However, for the reasons we have given, the Court refuses the application. The 1999 Order therefore remains in force. Authorities Finance & Economics Committee -v- Bastion Offshore Trust Company Limited [1994] JLR370. Mayo Associates -v- Cantrade Private Bank Switzerland C. I. Ltd

[1997] JLR 326 . Bankruptcy (Désastre) (Jersey) Law 1990. Page Last Updated: 27 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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