JERSEY / JUDGMENT

W -v- X (Matrimonial) [2014] JRC 191 (07 October 2014)

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[2014] JRC 191 [New search] [Help] Matrimonial - application regarding legal fees and maintenance to be paid by the respondent. [2014]JRC191 Royal Court (Family) 7 October 2014 Before : Carol Elizabeth Canavan, Registrar. Family Division Between W Petitioner And X Respondent Advocate V. Myerson for the Petitioner. The Respondent appeared on his own behalf.

reasons

the registrar: The Background 1. The parties in this case were married for 21 years and have two children. They separated in 2009; the petitioner instituted divorce proceedings in March 2012. The parties finally reached agreement on ancillary matters after lengthy negotiations and a consent order was ratified by the Court on the 9 th September, 2013. 2. One of the provisions of the consent order was that the respondent should pay periodical payments to the petitioner in the sum of £4,166.67 per month to be increased annually according to any increase in the Jersey Retail Price Index ("the maintenance"). 3. In a letter dated the 6 th February, 2014, the respondent, through Advocate Davies who was then acting for him, indicated in a letter to Advocate Myerson, acting for the petitioner, that he might encounter difficulties in paying the maintenance. The reason given was that the tenant of a property belonging to one of the respondent's companies had given notice that the lease of the property would not be renewed at the end of its term and, as this was the source of funds from which the maintenance was paid, he would be unable to continue to pay maintenance at the agreed level. 4. The respondent issued his summons for a variation of the maintenance on the 17 th July, 2014. 5. In a letter dated the 20 th August, 2014, from Advocate Myerson to the court, copied to the respondent, the respondent was put on notice that the petitioner would be making an application for the payment by him of her legal fees if he were to continue with his application. The petitioner issued her summons on the st September, 2014. The applications 6. The petitioner's summons was for an order that the respondent pay the legal fees incurred by the petitioner in connection with the respondent's

applications to (i) vary the maintenance and (ii) reduce or stay the maintenance. No mention had been made in the summons of the Article in the Matrimonial Causes (Jersey) Law ("the Law") pursuant to which the application was made. In her skeleton argument the petitioner referred to her "application for legal funding" brought pursuant to Article 31 of the Law which provides for "Contribution for support; interim orders". Advocate Myerson, at the opening of her submissions, clarified that the application was brought under Article 33 of the Law. 7. Both applications are therefore brought under Article 33 of the Law which states:- "(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." 8. The petitioner's application was heard on the 7 th October, 2014, and the respondent's will be heard on the 21 st October, 2014. The petitioner's submissions 9. Advocate Myerson submitted that courts in Jersey have the power to make orders for costs allowances in applications to vary orders pursuant to Article 33 as well as in maintenance pending suit applications. She relied on and cited extensive passages from the case of Currey v Currey

[2006] EWCA Civ 1338 , referred to in detail below. She further submitted that the petitioner fulfilled all the criteria required by an applicant for a costs allowance as set out in that case and other cases (also referred to below). The petitioner has an asset in her home; she has savings of approximately £23,000. Her only income is the maintenance and a small income from her sporadic seasonal employment as a tour guide. She had tried unsuccessfully to obtain a loan from her bank to fund her legal fees and also to obtain legal aid. Advocate Myerson's firm had advised her that she could not continue to represent the petitioner in the absence of legal funding. 10. The petitioner has already incurred legal fees exceeding her savings, although she has not yet paid those fees. If she cannot find funding then she will become a litigant in person in respect of the respondent's application. 11. In his skeleton argument, the respondent had criticised the conduct of the petitioner in that she had refused to attend mediation in an attempt to settle this matter out of court. Advocate Myerson emphasised that the petitioner had not refused to mediate - she took the view that mediation was a possibility but not until full financial disclosure had been made. In any event, even if there had been conduct which ought to be taken into account, such conduct could not be compared to that of the husband in the case of Currey where a costs contribution order was made in the husband's favour. She referred me to paragraph 27 of the judgment:- "There is, in particular, one most unusual feature of the pending proceedings. It is that the primary application is brought by the rich spouse against the relatively poor spouse. The husband seeks funds with which not primarily to pursue the wife but to defend himself against an application of profound importance to him which she brings against him; and, insofar as he cross-applies, it is prima facie reasonable for him to do so. It seems to me that, by virtue of this feature, the significance of his past forensic misbehaviour, including its legacy in terms of

costs to her, to some extent recedes. In my view, the presence of this feature, when added to the judge's answer to the central question, makes it impossible even for Mr Le Grice to persuade us to set the order aside." 12. In paragraph 21 of his skeleton argument, the respondent had submitted that if the petitioner were to be successful in this application but unsuccessful in the respondent's application, the respondent would be unable to claw back the costs he might have paid. Advocate Myerson submitted that if this did happen, there are avenues which the court might pursue to remedy this, such as awarding the petitioner a further lump sum or ordering that repayment of costs be deducted regularly from her ongoing maintenance or even by capitalising the maintenance so that a lump sum could be paid by way of refund of the costs out of the capitalized maintenance. She referred to paragraph 31 of Currey where Wilson LJ said:- "It would be open to the court to provide for a deduction, or in the case of periodical payments for regular deductions, in order to reflect any conclusion that in the circumstances the costs allowance should be reimbursed to the wife in whole or in part." 13. Advocate Myerson submitted that the lease on the property in the Isle of Man does not expire until December 2014 and therefore the respondent will have the benefit of the rental income even after the hearing of his application. She did refer to the respondent's financial position and his expenditure but I take the view that it is not necessary for the purposes of this hearing to repeat her submissions here. Those are matters to be raised at the hearing of the respondent's application. However, she made the point that a comparison of the petitioner's financial situation with that of the respondent shows that there is no level playing field with regard to the parties' finances and therefore the imbalance must be corrected. Moreover, she submitted that it was evident from the documentation produced by the respondent that he had received advice from Davies & Ingram and indeed, she believed that Davies & Ingram had settled the documentation for the respondent, in particular his skeleton argument and the reply to the questionnaire. Although no lawyer from the firm was present in court, the respondent had received advice and, she thought, would probably continue to take advice and receive assistance from Davies & Ingram, whereas the petitioner will have no representation or assistance whatsoever if her application does not succeed. 14. Other reasons put forward on the petitioner's behalf as to why she needs legal representation were:- (i) English is the respondent's first language but it is the petitioner's second language. (ii) She does not have the business acumen that the respondent has. Although she had trained as a teacher she has been a housewife and homemaker for 21 years. (iii) Initially the petitioner herself had completed and filed an affidavit of means which she realised was incomplete and incorrect when she saw the affidavit of means filed by the respondent. She had then instructed Appleby. Advocate Myerson submitted that the petitioner's efforts to complete her affidavit of means clearly demonstrated the difficulty she would have in preparing the paperwork for the hearing and in representing herself at that hearing. (iv) She is in poor health and the stress of these proceedings has not helped her. (v) The outcome of the respondent's application is of great importance to her - if the maintenance is reduced she will have no option other than to sell her home. (vi) There will be no equality of arms if the petitioner is not legally represented. 15. Advocate

Myerson asked for an order that the respondent should pay the petitioner's legal costs to date and settle her fees on a monthly basis thereafter. She also asked for an order that the respondent should pay the costs of this application. Even if, which she did not accept, the respondent's income had decreased, she was of the opinion that the respondent could easily liquidate shares or sell the Krugerrands which he has in his possession. The respondent's submissions 16. The respondent's written skeleton argument queried the legal basis upon which the petitioner's application had been made. He submitted that it could not be a request for a costs order as the hearing of his application had not yet taken place. It could not be an application for a costs allowance as part of a maintenance pending suit application as there had been a final determination of ancillary matters and therefore there could be no further application for maintenance pending suit. 17. The respondent submitted that he could not afford to pay the petitioner's legal costs and that it would be unfair to order him to do so as her application for costs to be paid, was, in effect, asking the court to prejudge the outcome of his application. 18. The respondent's financial situation was already such that he had had to apply for a reduction in the maintenance and an order in the terms sought by the petitioner would only make things worse. 19. The respondent's skeleton argument set out reasons why the petitioner could not make an application under Article 31 of the Law, but I will not repeat those arguments because as stated above, Advocate Myerson advised that she was making an application under Article 33. It is unfortunate that the petitioner's skeleton argument did not make this clear. However, the respondent did state in his argument that the only way in which he believed the petitioner could frame her application would be as an upward variation of her current maintenance i.e. an application under Article 33. However, he felt that this would be a very odd situation in this case where he is seeking a reduction in the maintenance. 20. Like Advocate Myerson, the respondent was unaware of any family case in Jersey where one party had been ordered to fund the legal costs of the other party in advance. 21. The respondent submitted that in this case there was a real risk of prejudice being caused to him if ordered to pay a contribution towards the petitioner's legal fees in that he would not be able to recoup those fees if his application were to be successful. 22. He submitted that in an application under Article 33, the court should have regard to all the circumstances of the case but at the time of the hearing the petitioner's application, the court was not aware of all the circumstances of the case and would not be until the hearing of his application. 23. The respondent submitted that the parties would be on an equal footing if neither of them were represented at the hearing of his application but he would be disadvantaged if the petitioner was represented and he was not. 24. The respondent criticised the petitioner for:- (i) not heeding the warning in February 2014 that it might be difficult for the maintenance to continue; instead she went ahead with the purchase of her property; (ii) she had refused to attend mediation. 25. In his oral submissions, the respondent said that the petitioner is attempting to import UK legislation into Jersey law. The UK statute had been altered by Act of Court and not case law. He said that there is no provision in Jersey law for such an application and the petitioner was attempting to create new areas in Jersey law. He said that the amendment

to the UK statute had been brought about because of dramatic changes in the legal aid system in the UK - there is no such problem in Jersey. 26. He made the point that the firm of Appleby had acted for the petitioner so far and he could not see why the firm should not continue until the final hearing and seek a costs order then, if appropriate. The petitioner's application has only led to an increase in the legal fees, whereas he had been trying to keep the fees down. 27. He submitted that the case of Currey could be differentiated from this case as the wife in that case could afford legal representation on a full time basis. He could only afford part-time representation because Davies & Ingram had offered him a payment plan. 28. In Currey the husband was bankrupt whereas the petitioner in this case has £23,000 in the bank, she has equity in her home and therefore could get an equity release loan. She has not exhausted her funding options. 29. The respondent submitted that the fact that the husband in Currey had only been granted a costs allowance up to the FDR stage of the proceedings was authority to show that the court was providing an incentive to mediate but the petitioner had failed to make any attempt in this case to mediate. 30. The respondent's income has decreased dramatically whereas in the case of Currey the wife's income had increased dramatically. He submitted that it was not right for him to pay more when he was receiving less. 31. In answer to Advocate Myerson's submission that he would still be receiving rent until December he advised that he had had to pay liabilities out of the rent received. 32. He accepted that he has substantial capital assets which he had acquired prior to the marriage. 33. He asked the court not to make the order requested and determine the issue at the final hearing of his application. He also suggested that if I refused the application then the petitioner might consider mediation. 34. The respondent asked that the petitioner's prospects of success with regard to his application should be taken into account and as authority for this he cited the case of Vince v Wyatt

[2013] EWCA Civ 495 . 35. The respondent said that he was only asking for a temporary reduction in the maintenance and that he would resume full payments when the property was re-let. I asked him if he had received advice on how long this might take but he replied that he had not brought that information with him. 36. Advocate Myerson's reply can be summarised as follows:- (i) Information with regard to the "temporary" nature of the reduction of the maintenance should have been provided but has not been forthcoming. (ii) She repeated that this is not an application for costs but for a costs allowance and the court is not being asked to prejudge the respondent's application. (iii) In answer to the respondent's assertion that there would be inequality if the cost allowance is awarded she submitted that the respondent was choosing not to be legally represented in the same way as he chose to pay liabilities from the rental as opposed to paying the maintenance. (iv) The petitioner had not refused to attend mediation but required full disclosure before attending mediation; the disclosure process had only just been completed. (v) The respondent had agreed to the level of maintenance after he knew that the tenant was not renewing at the end of the lease, as advised in a letter dated the 5 th September, 2013, (prior to the ratification of the consent order) from Advocate Davies to Advocate Myerson

but no indication had been given at that time that the rental was the sole source of funding for the maintenance. (vi) The respondent's proposal that maintenance should be reduced to £1,000 per month had only recently been put forward and as the petitioner's mortgage is £985 per month, there would be no money left for the respondent to live on. (vii) In response to the submission that the petitioner cannot have a claim on the respondent's pre-acquired assets, Advocate Myerson stated that the petitioner was not making any claim on those assets but it was not right for the respondent to refuse to liquidate some of those assets in order to comply with his obligation to pay the maintenance. (viii) The petitioner was not trying to import UK legislation into Jersey by relying on the case of Currey but rather to replicate the judicial interpretation of the UK's 31 into Article 33 of the Law. The amendments to the UK legislation to which she believed the respondent was referring came into force in April 2013 well after the case of Currey was decided. (ix) Advocate Myerson submitted that it was unreasonable for the respondent to suggest that she should look to another firm for legal representation at this stage. It was unlikely that she would find a firm willing to act and even if she did, it would cost substantially more because any new lawyer would have to spend a considerable amount of time reading the files. (x) The respondent had suggested that the petitioner should take out an equity release loan. Her bank had refused to give her a loan and even if she had obtained a loan, how would she pay it back? The Law 37. There is no doubt that Jersey courts have, in maintenance pending suit applications, included an element of payment towards legal fees e.g. S v C

[2003] JLR N 24. There is also no doubt that the courts often refer to English authorities for assistance in arriving at decisions. 38. In TL v ML (ancillary relief: clams against assets of extended family")

[2006] 1 FCR 465 Nicholas Mostyn QC said:- "Any doubt as to the legitimacy of the jurisdiction to award a costs order has now been laid to rest. It is clear that a costs allowance is not a costs order. It is a maintenance order that enables a party to fund the costs of her case." He went on to refer to the view expressed by Thorpe LJ in Moses-Taiga v Taiga

[2005] EWCA Civ 1013 that it is permissible to include in an award of maintenance pending suit an element to cover the costs only if the case is "exceptional" Mr Mostyn went on to say:- "Thorpe LJ speaks of the power only being exercised in "exceptional cases". I would be surprised if he intended by that remark to impose the need to demonstrate anything beyond the requirements that he had previously mentioned, namely, that the applicant: (1) had no assets; and (2) could not raise a litigation loan; and (3) could not persuade her solicitors to enter into a Sears Tooth v Payne Hicks Beach charge. The combination of those three factors would, to my mind, make the case exceptional." 39. In the case of Currey Wilson LJ also considered the circumstances in which such an order could be made and said:- "But I would go further than Mr Mostyn..... For it is clear that the reference by Thorpe LJ to an applicant's need to demonstrate that "she has no assets [and] can give no security for borrowings" should not be taken literally. Mrs C did have assets

and could give security for borrowings; the point was, however, that it was unreasonable to expect her to do so." He went on to say, and it is worth citing the passage in full:- "In my view the initial overarching inquiry is into whether the applicant for a costs allowance can demonstrate that she cannot reasonably procure legal advice and representation by any other means. Thus, to the extent that she has assets, the applicant has to demonstrate that they cannot reasonably be deployed, whether directly or as the means of raising a loan, in funding legal services. Furthermore, not to forget the third of Thorpe's three features, she also has to demonstrate that she cannot reasonably procure legal services by the offer of a charge upon ultimate capital recovery. I would add, fourthly, that the court also needs to be satisfied that there is no such public funding available to the applicant as would furnish her with legal advice and representation at a level of expertise apt to the proceedings." 40. Do these principles apply to applications to vary periodical payments as well as to applications to vary maintenance pending suit? In Currey Wilson LJ was presented with an argument on behalf of the wife that the judge (in the court below) had misunderstood the law referable to the inclusion of a costs allowance within an order for maintenance pending suit or for periodical payments. Wilson LJ said:- "What, then, is the law in this area? The founding jurisdiction is, in the case of an initial order for maintenance pending suit, s22 of the Matrimonial Causes Act 1973 and, in the case of variation of an order for maintenance pending suit or, as in this case, an order for periodical payments, s31 of the Act. It has not been suggested that in this regard the principles applicable to those separate sources of jurisdiction are different; and, although by virtue of the conjunction of s 31(7) and s 25(2) of the Act which applies only to periodical payments, a technical case for difference might be mounted, it would be unattractive." 41. Article 33 of the Law is set out in paragraph 7 above. S 31(1) of the Matrimonial Causes Act 1973 is as follows:- "Where the court has made an order to which this section applies, then, subject to the provisions of this section... the court shall have the power to vary or discharge the order or to suspend any provisions thereof temporarily and to revive the operation of any proviso so suspended." Article 33 and s 31(1) are therefore almost identical. 42. Can these principles be applied to applications to vary periodical payment orders in Jersey and can they apply in this case? I do not accept the respondent's submission that the petitioner is trying to change any aspect of Jersey law by importing statutes from the UK. I see no reason why the principles set out in the case law referred to above should not be applied to applications to vary in Jersey. I therefore decided that I do have discretion to make a contribution to costs order in an application to vary an order brought under Article 33. Whether or not I should do so in this case will be dealt with below. The decision 43. I find that the petitioner's circumstances satisfy the criteria set out in paragraphs 38 and 39 above. It is clear that the decision with regard to the maintenance is of "profound importance" to her as a reduction may result in the loss of her home. 44. I do not accept the respondent's submission that the petitioner is seeking a costs order. As is clear from the extract from TL v ML above in paragraph 38 above, a cost allowance is not a costs order. 45. I do not accept that the petitioner behaved unreasonably in seeking full disclosure from the respondent before considering mediation, neither do I accept that the

other areas of criticism submitted by the respondent are such that she should be refused a costs allowance on the grounds of conduct. 46. I believe that it would be extremely difficult, if not impossible for the petitioner to obtain alternative legal representation at this stage even if she had funds to pay another firm. 47. I do not accept the respondent's argument that the parties will be on an equal footing if neither have legal representation at the final hearing. With no disrespect to the petitioner, I do not believe that the petitioner would be able to present her case in a manner comparable with that of the respondent. Moreover, it is highly likely that the respondent's paperwork will be professionally settled by Davies & Ingram. The petitioner would have to produce her own paperwork and it has already been seen that she would find this extremely difficult if not impossible. 48. I have a duty to consider all the circumstances of the case. The respondent made the point that I am not aware of all the circumstances of the case at this time. I agree that although I have a clear picture of the petitioner's financial circumstances at this time, I do not have a clear picture of the respondent's financial situation (save that he has substantial capital assets) and will not do so until the final hearing of his application. I have therefore had to reach a decision based on all the circumstances which are known to me at this time. 49. This has been an extremely difficult application upon which to make a decision. Not only was there a decision to be made with regard to cost allowance applications in Article 33 applications, but I have had to ask myself questions relating to fairness, the answers to which will have an impact on both parties. Would it be fair to ask the respondent to pay more when he is making an application to pay less? Is it fair for the petitioner not to have legal representation to defend an application which might have a detrimental outcome for her, namely the sale of her house? Will it cause prejudice if a costs allowance is ordered and the respondent is unable to claw back any monies paid in the event that his application is successful? 50. I have asked myself these questions and also asked whether or not the fact that I am unaware of some of the circumstances outweighs the importance of the petitioner not having legal advice. I have reached the conclusion that she should be legally represented. 51. I do not consider that the respondent should be responsible at this stage for the payment of all of the petitioner's legal fees, which at the date of the hearing amounted to approximately £22,000. The petitioner has savings of £23,000 and it is clear from the respondent's affidavit of means that he does have assets which could be readily available, namely some shares and the Kruggerands. I therefore made the order that the respondent should contribute £10,000 in respect of fees to date on the basis that the petitioner can meet the balance with some of her savings. 52. Realistically, unless either party appeals the decision of the outcome of the hearing on the 21 st October, 2014, the petitioner's legal fees should cease at the end of this month. I made an order that the maintenance should be varied to include payment of the costs which will be incurred by the petitioner to the end of the respondent's application but not the costs of any appeal. A further application would need to be made in that event. 53. In the authorities cited and as submitted by Advocate Myerson, there are ways in which any possible prejudice to the respondent as a result of this order can be dealt with e.g. capitalisation of maintenance or regular reduction of maintenance. The

whole question of costs will need to addressed and decided upon at the final hearing of the respondent's application. Authorities Matrimonial Causes (Jersey) Law 1949. Currey v Currey

[2006] EWCA Civ 1338 . Vince v Wyatt

[2013] EWCA Civ 495 . S v C

[2003] JLR N 24 TL v ML (ancillary relief: clams against assets of extended family")

[2006] 1 FCR 465 . Moses-Taiga v Taiga

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Prepared on 29 October 2026 · Esheria