Judgment 19/2004 **A v A – Court of Appeal (Civil Appeal 340) – 21 April, 2004**

Matrimonial Law – judicial separation by consent – unsuccessful application to Royal Court to set aside – Appeal to Court of Appeal – submissions that procedure unfair, terms unduly onerous and the decree a nullity – review of the law on judicial separation by consent – court needs to be satisfied that the proposed terms reflect the genuine desire of both parties – judicial separation by consent a well established procedure – appeal dismissed.

IN THE COURT OF APPEAL OF GUERNSEY

The 21st day of April, 2004 before Sir Philip Bailhache, Presiding, Sir John Grenfell Nutting, QC., and Jonathan Philip Chadwick Sumption, Esq. QC

A

Appellant/Husband

v

A

Respondent/Wife

In the appeal of the Appellant from the judgment of the Royal Court given on 4th November, 2003;

THE COURT, having heard Advocates G. S. K. Dawes and Mrs. C. R. Whitmore for the parties thereon, GAVE JUDGMENT in the terms attached hereto, DISMISSED the appeal and AWARDED costs of these proceedings to the Respondent, on the standard recoverable basis, without prejudice to the decision as to costs in the Royal Court which was expressly reserved on 4th November, 2003.

K. H. TOUGH
Registrar of the Court of Appeal

Approved Text

WEDNESDAY 21ST APRIL 2004

COURT OF APPEAL

Before

Sir Philip Bailhache; presiding
Sir John Grenfell Nutting Bt., QC
Jonathan Philip Chadwick Sumption, Esq., QC

A v. A
(Civil Appeal No. 340)

Judgment delivered by Sumption, JA

1. The customary law of Guernsey permits a husband and wife to apply for a judicial separation by consent. This is not an annulment of the marriage, nor is it a divorce. It is simply an agreement by which the parties agree to live apart, and usually agree also on a number of ancillary matters arising from that, in particular the custody of any children of the marriage, the arrangements for the financial support of the wife and children, and any division of the assets of the marriage. Under Article 27 of the Matrimonial Causes (Guernsey) Law 1939:

> *"27. No agreement for or in relation to separation between married persons ... shall have any legal validity in the Bailiwick unless it is sanctioned pursuant to a decree or pronouncement of judicial separation by a Court in the Bailiwick competent to make such decree or pronouncement."*

Article 45 of the same law empowers the Royal Court, after the making in Guernsey of a decree of divorce or nullity of marriage to

> *"... cancel, vary or modify...*
>
> *any marriage contract, marriage settlement, post-nuptial settlement, or terms of separation subsisting between the parties to such marriage, in any manner which, having regard to the means of the parties, the conduct of either of them or the interests of any children of such marriage appears to the Court to be just."*

2. The parties obtained a decree of judicial separation by consent on 28 November 2000 on terms set out in the decree. A decree absolute of divorce was subsequently pronounced on 25 April 2003. On 30 April 2003, the husband applied to the Royal Court for an order under Article 45 varying the terms of the judicial separation. In the Royal Court, the application succeeded in part. The husband now seeks to obtain on appeal what he did not to obtain from the Royal Court. This is the judgment of the Court on that appeal.

3. *[The parties' ages, employment and family composition were summarised.]*

4. The agreed terms of separation provided for the husband to pay maintenance of £280 per month to his wife; to pay the elder child's residence fees while at university; and to pay £500 per month and £1,000 per year, each July, in respect of the younger child's maintenance until that child reached the age of 18 or ceased full time education, whichever was later. In addition, the husband was to pay the premiums for life cover on both lives and for health insurance for the wife and both children. The £280 and the £500 were to be index-linked. An important part of the terms of the agreement related to the matrimonial home, which was the only valuable capital asset of the marriage. The house had been purchased jointly in 1991 for £93,000 and at the time of the separation decree was worth considerably more than that. The property had been charged with a loan secured by a bond. Shortly before the decree of separation was pronounced, the parties agreed to replace this with a new bond in favour of the Bank of Scotland, which secured the amount outstanding under the previous bond, plus an extra £30,000, of which £25,000 represented the cost of refinancing other debts and £5,000 was to be used to pay for a new bathroom. The terms of separation provided that the house should be transferred into the sole ownership of the wife, and she continues to live in it. But the husband agreed to pay all the principal and interest due under the new bond until the loan secured by it was discharged and to maintain the payments due under the endowment policies taken out in connection with it. The house is said now to be worth something between £300,000 and £350,000, and the total amount secured on it is said to be about £150,000.

5. The husband did not take legal advice before agreeing to a separation on these terms. It is clear from the evidence before us that this was a considered decision on his part. It is equally fair to say that he made it because he considered that the proposed terms were fair to his wife, that he could afford them, and that he wanted the separation to be achieved as amicably as possible. This is apparent not just from the wife's evidence in these proceedings, but from the contemporaneous correspondence. Advocate Morgan, who was instructed on behalf of the wife, wrote to the husband shortly after the separation had occurred, on 9 February 2000, proposing a judicial separation by consent, and asking for information about the husband's means. In this letter, she wrote that he was 'advised to consult your own advocate regarding this matter.' In his undated reply, received on 6 March 2000, the husband supplied much of the information requested of him, and wrote:

> *"I am not instructing an advocate at this point, as I believe that matters can be resolved to every one's satisfaction without recourse to confrontation. I am happy to continue maintaining my wife and the children for as long as is necessary and for as much as my finances will allow, particularly as my wife for various reasons will never be able to afford a mortgage herself. It may well be necessary for me to relinquish my share of the house. Again, I am prepared to do this in order to provide long-term security for my wife, provided that ultimately it or the proceeds therefrom will go to the children. I would request that the property could not be sold or re-mortgaged without my agreement, or that if she were to remarry or cohabit with some one, I would be entitled to half the equity at that point. Additionally, I might also need to be able to draw on the equity at some point in the future in order to provide a deposit were I able to afford to buy a house myself. Since I will be paying the mortgage on the house, I cannot see that this will be a problem."*

Advocate Morgan responded to this on 27 March 2000. After making a number of requests for further information, she wrote:

> *"I note that you are not instructing an advocate at this point and can only stress*

that my client is not interested in confrontation either. However you are advised to consult an advocate... I am however willing to negotiate with you directly if this is your wish."

6. Between April and November 2000, the parties agreed directly between themselves, first the basic principles subsequently embodied in the separation decree, and then the details. Once the terms had been agreed, the wife then instructed Advocate Morgan to draw up a draft order embodying what had been agreed. She duly did so, and sent the document to the husband on 9 November 2000. In this letter Advocate Morgan said:

"If you require any legal advice, you should consult your own advocate regarding the matter."

7. The husband was invited to sign the document by way of consent and duly did so. On 28 November 2000 both parties attended at the Royal Court, before Deputy Bailiff Day. There was a short hearing at which both of them reaffirmed their agreement to be separated on the terms of the draft order. The Deputy Bailiff asked the husband whether he had ever taken legal advice on the terms, to which he replied that he had not. He was then asked whether he had read through them very carefully, and confirmed that he had. The Deputy Bailiff asked both parties whether there was any chance of a reconciliation, and was told by both that there was none. He asked what would happen to the house, and was told by the husband:

"My wife is going to remain in the house and in fact it's going to be put in her name and she will live in it... I will continue to maintain it."

Asked what the position was about maintenance of the wife and younger child, the husband replied:

"Well again, I shall be making payments. As detailed in the documents sir, we've come to an amicable financial arrangement."

The Deputy Bailiff then made the order.

8. In his application under Article 45, the husband invited the Royal Court to set aside the judicial separation agreement. Alternatively, he asked the Court to modify it by cancelling all the financial provisions, that is to say the provision for the maintenance of the wife and the children, the provisions for the payment of premiums for life insurance and health cover, and the provisions for the servicing of the debt secured by the bond in favour of the Bank of Scotland. The matter came before Lieutenant Bailiff Brelsford in Royal Court. She declined to set aside the separation agreement. But she accepted that although in some respects the Husband's position had improved since the separation agreement, for example, because he had moved in with his girlfriend and because the elder child was no longer needed to be maintained at university, that the husband could not afford all payments due under the separation agreement. She therefore reduced the monthly maintenance payments due to the wife from £280 to £1 and cancelled the obligation to pay the annual £1,000 each July, with effect from July 2004. The reason for leaving an obligation to pay a nominal £1 a month in maintenance to the wife was to preserve the jurisdiction of the Court to increase it later if circumstances should justify it. In addition, the Lieutenant Bailiff inserted an express power to vary the maintenance payments in the event of a change of circumstances and limited the obligation to pay the health insurance premiums until the wife remarried or the younger child reached the age of 18 or ceased full-time education, whichever was later.

9. Before us, the husband's advocate, Advocate Dawes, made a number of criticisms of the Lieutenant Bailiff's order. But the real target of his appeal is the obligation to service the loan charged on the former matrimonial home and the associated endowment policies, which is now the only really substantial recurrent financial obligation. His case can be summarised as follows:

    (1) The procedure leading to the decree of separation was unfair, because

        (a) The husband did not have legal advice;

        (b) the terms were markedly less favourable to the husband than those which the Court would have imposed on the parties in proceedings ancillary to a judicial separation without consent or to a divorce; and

        (c) the Deputy Bailiff did not scrutinise the terms for their fairness, but only satisfied himself that the parties were content with them.

    (2) The terms of separation were unduly onerous to the husband, principally because

        (a) they imposed on him an obligation to make payments by way of maintenance and payments in respect of the loans and insurance policies which together amounted to about two thirds of his net income after tax, and made it impossible for him to meet his own outgoings without the assistance of his girl-friend;

        (b) they required him to continue to service the loan charged on the matrimonial home, notwithstanding that the home was to be transferred to the wife's sole ownership, without his retaining any contingent interest in it; and

        (c) the wife's financial position had improved because she had taken a further part-time job at a bookmakers', and would improve even more if she took full-time employment as a secretary.

    (3) The decree of judicial separation was a nullity, because a decree of judicial separation could not be made without showing cause, for example, adultery or cruelty. A decree such as was made in this case, which was purportedly justified by no other consideration than the parties' consent, was not a procedure known to the law of Guernsey. Advocate Dawes, who appeared for the husband, acknowledged that this was a radical submission, 'pulling the house down', as he called it. But he said that he felt driven to make it if there was no other way in which his client could obtain a substantial alleviation of the burden of complying with the terms of separation.

10. Advocate Dawes made a sweeping attack on the procedure for judicial separation by consent, which he characterised as arcane, obscure, irrational and confused. Since some of these criticisms appear to us to be based on a misconception of the nature and effect of a decree of judicial separation, some general points should be made about it at the outset. The jurisdiction to decree a judicial separation may be ancient, but it is certainly not irrational. It may be customary, but its existence is undoubtedly recognised by statute. It is a procedure for permanent separation which does not terminate the marriage, and is commonly employed in cases where a termination of the marriage is either inappropriate or impossible. This may be because there are religious or other

conscientious objections to a termination of the marriage, or because the grounds for divorce in Articles 16 and 16(a) of the Law of 1939 do not (or do not yet) exist. In the latter case a judicial separation will commonly be followed by a divorce petition once the parties have been separated for two years or more. It is important to point out that the nature of the proceedings is quite different, depending on whether there is a contest or not. A judicial separation may be sought by petition, or by consent. Under Article 23 of the Law, a party may petition the Court for a judicial separation on any ground which would justify a divorce under Article 16(a), i.e. adultery, unreasonable behaviour, desertion for more than two years, and so on. Consent may or may not be forthcoming, but its existence is irrelevant to the jurisdiction of the Court, which will have to be satisfied that these grounds, or one of them,exists, even if the parties are agreed. The procedure is an alternative to divorce, governed by the same criteria, but which does not actually terminate the marriage. It is a proceeding essentially similar to a divorce *"a mensa et thoro"* under ecclesiastical law, which might have been thought redundant when the modern divorce jurisdiction was introduced into Guernsey law by the Law of 1939. As the Billet d'Etat which preceded the enactment of that Law pointed out (para. 24), it was nevertheless retained because parties might conscientiously object to the termination of a marriage, even though entitled to petition for it.

11. Judicial separation by consent is a different proceeding, and is treated as different at a number of points in the Law of 1939. In this case, the jurisdiction of the Court is not invoked by petition, and the consent is itself the justification for the judicial separation. This is reflected in the practice of the Royal Court of decreeing separations without requiring proof of any ground for divorce. It is entirely rational that this facility should exist without the need to establish grounds, since (i) the Court is not being invited to terminate the existing legal status of the parties as married persons, but only to sanction the terms on which they propose to live apart, (ii) the parties are agreed that they should live apart on those terms, and (iii) married persons, although owing each other a mutual obligation to live together, cannot be legally prevented from living apart if they are determined to do so, with or without an order of the Court. In these circumstances, the Court is simply providing a facility to the parties to enable them to regulate their financial and other affairs in the new situation in a manner which will be enforceable. The main function of the Court's intervention is to ensure that they do so in a way which truly represents the parties' wishes, in a context where the are obvious dangers that the will of one or other of them may be overborne. It should be pointed out that the parties do not by obtaining the Court's sanction for their agreement oust the ordinary jurisdiction of the Court to ensure, where appropriate, that a party to the marriage or children of the marriage are financially supported. A judicial separation by consent does not in itself prevent the Court from making vesting orders in respect of property of the parties (Article 46), or ordering reasonable financial contributions to be made by one party to another for the latter's support (Article 47). Nor does it prevent the Magistrate's Court from making orders under Article 2(1) of the Domestic Proceedings and Magistrate's Court (Guernsey) Law 1988 for the maintenance of a spouse or child while the marriage continues. Nor does it prevent the court from setting aside the consent order if it subsequently appears that the consent was procured by undue influence or some other vitiating factor.

12. Against this background, we turn first to the suggestion that the procedure leading to the decree of 28 November 2000, which was the procedure normally followed in cases of judicial separation by consent, was unfair in some way which justifies setting it aside. In our judgment, there is no substance in this complaint. The Deputy Bailiff who heard the joint application satisfied himself that the parties had agreed the terms and wished to proceed on that basis, which they plainly did. The basis of the husband's complaint is the suggestion that it was incumbent on the Deputy Bailiff in 2000 to satisfy himself

that the terms were not only acceptable to the parties but objectively reasonable in the sense that they corresponded to what the Court would have imposed on them if the issue had been disputed. We reject this submission. In the first place, a dispute about financial provision or other ancillary matters following a separation is liable to cause significant distress to the parties or the children or both. Parties choose to separate by consent to avoid that dispute. It appears to us to be contrary to one of the main objectives of this procedure to require the court to satisfy itself that arrangements which are acceptable to both parties are not substantially different from those which would have followed a dispute. Secondly, the practical effect of that would be to require the Court to apply to the parties' bargain a standard reflecting their minimum legal obligations. Yet they may have perfectly good reasons for wishing to be more generous than that, reasons which no discernible public policy would be served by frustrating. Of course, the Court must be satisfied that the proposed terms reflect the genuine desire of both parties, but there is no reason for it to insist on more than that. And, of course, the terms of an agreement may be so unfavourable to one party that the Court may infer that that party's will has been overborne. But the husband has not claimed in this case that his will was overborne, only that he could have done better if he had fought his wife all the way. Thirdly, for the reasons which we have already given, a more intensive scrutiny of the kind now suggested would have been quite unnecessary to achieve any of the purposes for which the supervisory jurisdiction of the courts in these matters normally exists, namely to protect the legal status of a marriage, to protect a dependent party or child from being left with inadequate financial support, and to prevent the enforcement of agreements against vulnerable persons which do not truly reflect their wishes. The Court's powers to deal with all three matters are preserved. None of these traditional priorities of the state in dealing with matrimonial break-up require husbands or other bread-winners who are responsible adults in full possession of their faculties to be protected from agreeing improvidently generous treatment of their spouses or from agreeing more than they strictly need to agree.

13. Does it make any difference to the Court's function that one party is not legally represented? In our judgment, it makes a difference only when it happens in circumstances which suggest that there has been no true agreement, classically when a party who is un-represented is a party in respect of whom a presumption of undue influence arises. In other circumstances, it will usually be enough to ask the un-represented party whether he (or she) has received legal advice, and if not whether he (or she) wishes to proceed anyway. That is the practice normally followed, and it is what happened in this case. But however that may be, we reject without hesitation the suggestion that the husband's failure to take legal advice vitiated the procedure in this case. The husband is an experienced [professional man], whose letters and oral evidence show him to be open, intelligent, articulate and very much in command of himself. In his evidence to the Lieutenant Bailiff in these proceedings, he did not claim to have been acting under any kind of pressure, apart of an understandable desire to get the business over with. He deliberately eschewed legal advice because, as the correspondence shows, he was not interested in knowing what was the minimum that he could get away with. His object was to do what he considered (rightly or wrongly) to be fair to his wife and affordable by himself, whether or not it was what the Court would have made him do in the absence of agreement. Far from justifying the Court in refusing its sanction, that is an objective which reflects great credit on him.

14. We turn to the second head of the husband's case on appeal, as put by Advocate Dawes, which was based on the objectively onerous character of the terms.

There was much argument before the Lieutenant Bailiff, and before us, about whether the Court should hold the parties to their agreement, and whether the English authorities

on the jurisdiction to make and enforce consensual arrangements between the parties were relevant. This may well be the right way of looking at the matter at the stage when the Court is being invited to sanction, and thereby make enforceable, the agreement which the parties have made. But it is of much more limited relevance when the judicial separation has been superseded by a divorce, as it has in this case, and the Court is being invited to exercise its express powers under Article 45 following a divorce to cancel or vary the agreed terms 'having regard to the means of the parties, the conduct of either of them or the interests of any children of such marriage.' In that context, two things can perhaps be said. First, the fact that the parties have themselves agreed certain arrangements as reasonable is strong evidence that they are indeed reasonable, at least as between the parties themselves, unless the agreement was unfairly procured or made under some misapprehension, or unless circumstances have changed in some material respect. But even strong evidence may be displaced by other evidence that the terms operate unreasonably, in which case a variation will be made. Secondly, in many cases, the Respondent to an application to vary will have organised his or her affairs on the basis of the agreement in a way which would make some variations unfair. The Court needs to be sensitive to this.

15. The main issue here concerns the obligation accepted by the husband in the terms of separation to service the loan charged on the former matrimonial home and the associated endowment policies. This is undoubtedly an expensive obligation. It represents a liability amounting to £873 per month. The Lieutenant Bailiff did not think it right to cancel or reduce it. We have reached the same conclusion. The following points should, we think, be made:

    (1) The husband did not persist in the proposal which he had made in his letter to Advocate Morgan in March 2000 to retain some form of contingent interest in the matrimonial home. His evidence in these proceedings was that the main consideration underlying the decision to allow his wife to take sole ownership of the house while he serviced the loan and endowment policies, was that the wife had no entitlement to a pension and no expectation of receiving any inheritance, apart from a small inheritance (in the event some £9,000) from her mother. By comparison, the husband had been employed for twelve years and has a generous non-contributory pension scheme leading to a pension at the age of sixty of two thirds of his final salary, and also, on the undisputed evidence, an expectation of a substantial inheritance from his parents in due course. The husband's presently accrued pension rights represent a significant asset which it would require a substantial capital sum to fund, and while it is true that future accruals to his pension entitlement between now and his sixtieth year will represent the fruits of his future labour, the prospective right remains a valuable and in modern conditions increasingly rare and important source of personal security to him.

    (2) Whether or not the Court would have imposed such an arrangement in the absence of agreement, the avoidance of a dispute on this point was a valuable benefit to both parties. Subject to the possibility of the wife increasing her earnings (to which we shall return in a moment) unless she had been secured by the transfer to her of the matrimonial home, without the burden of the associated loan payments, it would inevitably have been necessary for her to sell the house in which she and her children had been living since 1991. This would have added to the disruption occasioned by the break-up of the marriage. The evidence is that the wife would probably have returned with the children to England, where she had originally come from, which would have diminished the practical value of the husband's rights of access, to the disadvantage of both

himself and his children.

(3) This result might have been avoided had the wife taken a much better paid job. It was suggested that she should have taken a job as a PA/secretary. This is a theoretical possibility, but not we think a practical one. The wife did once work as a secretary. But that was more than twenty years ago. She would now have to retrain in modern office technology. She would lose the support of friends with whom she has worked for many years. And assuming that she obtained a highly paid secretarial job, she would be unable to put in the hours required by it and still be available to support her 15 year-old child out of school hours and in the holidays. She has shown herself to be willing to increase her earnings by taking a second part-time job with a [.....]. We do not think that more than that can reasonably be required of her.

(4) Part of additional borrowing secured on the house in 2000 is said by the wife to have represented personal debts of the husband, rather than family expenditure. He disputes this, and the matter has never been conclusively resolved. The point is, however, that it did not need to be resolved as a result of the parties decision to settle the issue amicably. It certainly cannot be assumed that the wife would have agreed to secure the additional borrowing on what was then a jointly owned asset if she had appreciated that the cost of servicing the additional indebtedness would ultimately fall on her as a result of a variation of the terms of the agreement.

(5) The husband's obligation to pay the £280 a month and £1,000 a year has gone as a result of the variations made by the Royal Court, and his obligation to maintain the elder child has ceased since the child left university. The Lieutenant Bailiff considered that the husband could afford to meet the other obligations, as a result of this improvement in his position. His net income after discharging his obligations under the terms of the separation as varied, will remain substantially in excess of hers. Her monthly expenditure, although by no means extravagant, consumes the whole of her existing receipts. It is true that, on the evidence, the husband cannot afford to buy a house. But his desire to do that, however understandable, cannot as it seems to us justify the redistribution of burdens which is now proposed.

(6) It is right to say that the continuance of the separation agreement, even after the variations in the Royal Court, are quite inconsistent with there being a 'clean break'. There is much to be said for a clean break when it is possible. But the parties decided against that course in 2000 for reasons which seem to us to have been realistic in the light of the circumstances which existed then and still exist. A clean break is particularly difficult to achieve when there are dependent children, a substantial disparity of earnings between the parties, and no income-generating assets, and when the parties are in their forties.

16. We can deal quite shortly with the other points, which are less significant in financial terms. The Lieutenant Bailiff could properly have cancelled the obligation to pay the BUPA premiums, particularly in the light of the fact that the divorce meant that the husband's employers were no longer paying it. But we cannot characterise her failure to do this as an error justifying our intervention as a court of appeal. The same is true of the Lieutenant Bailiff's decision not to backdate the cancellation of the obligation to pay the £1,000 a month to July 2003, bearing in mind that the payment due in July 2003 had accrued and ought to have been paid by the husband at that time notwithstanding that his application to the Royal Court was pending. It was suggested to us that both the

nominal maintenance obligation of £1 a month and the obligation to pay the BUPA premiums should have been expressed to terminate on the wife's cohabiting, and not just on her remarrying, and that it should terminate even if one of these things happened before the younger child reached the age of 18 or ceased full-time education. In our judgment, the husband's position is sufficiently protected by his right to make a further application to the Court under Article 45 or the liberty reserved in paragraph 6 of the various terms of separation if the question arises. This last point is one which should be emphasised, although we do not by doing so wish to encourage unjustified or tinkering applications to the Court. Nothing that we have said is intended to rule out the possibility of a further application to the Court if there is some change of circumstances, whether predictable or not, which makes it no longer reasonable for the parties to be held to the current arrangements.

17. Mr. Dawes submission of last resort, that the whole separation agreement is void for want of grounds that would have supported a petition for divorce, may be characterised as technical, as he accepted. It has nothing to do with the appropriateness of the parties financial arrangements, and if right would apply even if their financial arrangements were beyond criticism. It will be apparent from what we have already said that, like the Lieutenant Bailiff, and for substantially the same reasons, we think that the submission is wrong. Grounds do not have to be shown where the parties seek no more than a separation, and are agreed upon that. The current practice of the Court in cases of separation by consent has not been developed over all these years contrary to law, without any one noticing the fact.

The appeal is therefore dismissed.

ADVOCATE WHITMORE: Thank you sir. If I may make an application in relation to costs on the basis that the appeal has been unsuccessful, I would ask for costs on the standard recoverable basis.

ADVOCATE DAWES: Sir, there is one matter I would seek clarification in respect of; paragraph 10, the obligation to make payments in respect of the loan, still has no long-stop in terms of re-marriage?

SUMPTION, JA: Yes that is a matter which can, if appropriate, be addressed by a further application if circumstances change.

ADVOCATE DAWES: Very well sir. Sir, as to- I do resist the application for costs, this being a family matter it's uncommon for costs orders to be made or rather less common for them to be made. The procedure, for all that you say, your judgment is very helpful in terms of clarifying matters for the future, but it wasn't clear in the past and there were problems with this order and there are problems still with it, and the idea that we will have to re-apply in future indicates that should there be any change in circumstances on behalf of the wife.

SUMPTION, JA: We haven't said that you will have to apply, simply that it is open to you to do so if the circumstances make that course appropriate.

ADVOCATE DAWES: Yes sir, you've said that but equally one could reasonably expect those safeguards to be built into such an order in the first place and that it is entirely standard for example that there should be a provision that marriage certificates (inaudible) determine an obligation, in fact in English courts sir, it's a matter of statute. So sir, there were objectively problems with this order, even on the face of the order, it was purporting to grant a decree, there were objectively problems with the procedure and

uncertainty in Guernsey Law- I'm not aware of any other authorities, let alone learning or anything else. In those circumstances where the husband did genuinely perceive an imbalance and an injustice, and given the result of the hearing itself, to punish him further with a costs order in my submission would be oppressive.

SUMPTION, JA: What was the order below?

ADVOCATE DAWES: Costs have been reserved below, sir.

SUMPTION, JA: Costs have been reserved to?

ADVOCATE DAWES: I think after the determination of this hearing.

SUMPTION, JA: But who have they been reserved to, to us or to?

ADVOCATE DAWES: I think to-

ADVOCATE WHITMORE: Back to the Court to determine.

SUMPTION, JA: I see, so in the light of this appeal the matter will go back to the Court to determine the costs of the hearing before them.

ADVOCATE WHITMORE: Yes sir. If I might address you in relation to my client's application for costs, she has, as a result of the application by the husband…(inaudible) … this appeal, she has had to experience a great deal of inconvenience and cost, and that was all made after what she had thought was a finality to the resolution of matters between them, so it has caused her a great deal of-

(Pause whilst Judges of Appeal confer)

SUMPTION, JA: We propose to order that the husband should pay costs of the appeal.

We should make it clear that by saying that we are not in any way prejudging what ought to be the appropriate order in relation to the costs of the hearing in the Royal Court, which is entirely a matter for the discretion of the Royal Court, but having brought an appeal which has failed we think that the husband must pay the costs of the appeal.

ADVOCATE DAWES: Thank you sir.

ADVOCATE WHITMORE: I'm obliged.