

Matrimonial Causes Law (Guernsey) 1939 – wife’s petition for divorce – applications, inter alia, for interim occupation order of the matrimonial home – whether such an order could be made in respect of a States tenancy – construction of sections 43 and 46 of the 1939 Law

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

28 April 2005

**Advocate F J Haskins and A M Merrien for the Petitioner
and
Advocate C M Fooks for the Respondent**

Lieutenant Bailiff Cherry McMillen summarized the law in relation to the making of an interim occupation order, in paragraphs 25 to 42 and 47 to 49 of her judgment, as follows: -

25. However, during the initial hearing on the 16th March 2005, Advocate Fooks submitted that the court did not have jurisdiction to make an interim occupation order. It was her submission that this was due to the fact that the family home is a States tenancy (in the joint names of the Petitioner and the Respondent) and Advocate Fooks has submitted that the relevant legislation does not allow the court to grant or make an interim occupation order in relation to a tenancy of States housing.

The Law

26. The application for an interim occupation order by the Petitioner is made under Article 43B of the Matrimonial Causes (Guernsey) (Amendment) Law, 2003.

“ARTICLE 43B – POWER OF COURT TO MAKE INTERIM OCCUPATION ORDER

(1) At any stage during proceedings commenced under this Law which involve any child of the marriage, the Court may, before the making of the decree of divorce, judicial separation or nullity of marriage, upon the application of either party or of its own motion (having, where reasonably practicable and possible, given both parties the opportunity to be heard), make an order (an “interim occupation order”) –

- (a) *designating any relevant property as property which shall be used for the purposes of providing living accommodation for any child of the marriage;*
- (b) *granting to a party to the marriage a right (including, where the Court thinks fit, the exclusive right) –*
 - (i) *as between the parties to the marriage; and*
 - (ii) *subject to such limitation as the Court fit,*
to occupy the property with any child of the marriage;
- (c) *containing such further or consequential orders as the Court thinks fit, including, without limiting the generality of the foregoing –*
 - (i) *an order requiring a party to the marriage to leave the property;...*

(4) *For the purposes of this Article, “**relevant property**” means property of a type described in Article 46 or such part of such property as is specified in an interim occupation order.”.*

27. I refer to Article 46 of the Matrimonial Causes (Guernsey) Law, 1939 which is specifically referred to in Article 43B(4) of the amended Law.

28. Article 46 states:-

- a. *Where a decree of divorce or nullity of marriage or a decree of pronouncement of judicial separation has been granted, the Court may, if it thinks fit as regards real and personal property in which each of the parties to the marriage has, notwithstanding the provisions of Article 44 (entitled “Successoral interest to cease on divorce, etc.”) of this Law, an interest present, prospective or conditional, direct that their interest and such property shall be vested solely in the one or the other of the properties or shall be divided between them in such proportion as the Court directs...”*

29. In this case I have received skeleton arguments from both Advocates Haskins and Fooks (for the Petitioner and Respondent respectively), and I have further heard from both Advocate Fooks and Advocate Merrien (Advocate Haskins colleague) in oral submission.

30. After some lengthy submissions and discussions, both Advocates accept (although Advocate Fooks did so with some hesitancy) that a tenancy (in this case a weekly periodic joint tenancy) was personal property.
31. In this regard I refer to the 1852 Report/Ordinance “*Des Biens Meubles et Immeubles*” which at Article 21 states:-

“21 Est aussi réputé Meuble, le droit qui compète à un Locataire à l’égard des Immeubles qui lui ont été loués.”.

Which in translation means: -

“It is also deemed to be personalty the right which belongs to a tenant in relation to realty, which has been rented to him.”.

32. The wording of the 1852 Report/Ordinance is clear and I am satisfied that a tenancy is defined as personal property in the law of Guernsey.
33. Advocate Merrien submits that once I am satisfied that a tenancy is personal property then the court has jurisdiction to make an interim occupation order. Advocate Fooks disputes this and submits on behalf of the Respondent that the property must not only be personal property but the parties must have an interest in the property (“present, prospective, or conditional”) and further that that interest must be capable of being made the subject of an Act of Court in ancillary relief proceedings, which provides for the vesting of the tenancy solely in one of the parties. Advocate Fooks has directed the court to English case law as to the difficulty in vesting similar (but not identical) tenancies in ancillary relief applications.
34. Further, I have been helpfully referred to the Bar sub-committee proposals for the reform of Matrimonial Causes Law – dated 25th April 2000 (section 15 of the court bundles).
35. Paragraph 26 of those proposals states “*the law should be amended... to include the right for either party to a marriage to apply to the court to make an interim occupation order and/or an ouster order where the court is seized of an application for interim custody of children... ”.*
36. Further, in the Billet d’Etat of the 25th September, 2002, where the proposed reforms of matrimonial law were presented to the States, the States Advisory and Finance Committee recommended (paragraph 3.11 in section 16 of the bundle) – “*the Committee recommends that the Matrimonial Causes Law is amended so as to empower the Matrimonial Causes Division of the Royal Court to make interim occupation orders where appropriate.”.* That recommendation itself is dated 22nd August 2002. And on the 25th September, 2002, the

recommendation was placed before the States under the heading “*Reform of Matrimonial Law*” and states:

“Whether after consideration of the Report dated 22nd August, 2002, of the States Advisory and Finance Committee, they are of the opinion:-

1. That the Matrimonial Causes Law, 1939, shall be amended so as –

(a) to empower the matrimonial Causes Division of the Royal Court to make interim occupation order where appropriate;

37. There is nothing in the submissions of either the Bar sub-committee or in the recommendation of the States Advisory and Finance Committee which gives any indication that it was not thought appropriate to include States housing tenancies in the ambit of the proposed legislation. Both Advocate Fooks and Advocate Merrien concur in this. Both also concur that if the court is of the view that the interpretation of Articles 43B and 46 of the Matrimonial Causes (Guernsey) Law, 2003 as amended, prevents interim occupation orders being granted in relation to States tenancies, then it was their joint understanding that that was not necessarily the intention of the States in enacting the amendment to the 1939 Law.
38. I have considered the wording of Article 43B in conjunction with the wording of Article 46 and I am satisfied that the relevant words in Article 43B(4) are “relevant property which means property of a **type** described in Article 46” (my emphasis).
39. I find that the words “property of a type described in Article 46” would cross-refer to the wording in Article 46 “*real and personal property in which each of the parties to the marriage has..., an interest, present prospective or conditional,...*”. I am satisfied that that was what was intended in the use of the words “*relevant property means property of a type described in Article 46*” and the court does not have to consider whether the type of property can be vested or not. If the tenancy is personal property and the parties have an interest in it which is present, prospective or conditional, then Article 43B of the Matrimonial Causes (Guernsey) (Amendments) Law, 2003, applies and the court does have jurisdiction to make an interim occupation order.
40. In this instant case, the joint tenancy is personal property. Both parties have an interest in the tenancy, namely a right to occupy the premises on a weekly periodic tenancy.
41. I am not of the view that the jurisdiction of the court in Article 46, namely to “vest” such property is relevant to the definition of the “type of property” as defined in Article 43(B) 4 of the amended law. Whether a court has the power to vest real or personal property or not refers

to the powers of the court in relation to the property but not to the type of property that the court is dealing with.

42. I am therefore satisfied that in the instant case before the court, the court does have jurisdiction to make or grant the application for an interim occupation order under section 43B of the amended law, if it is considered appropriate on the facts of the case.

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47. I refer to Article 43B(2) of the Matrimonial Causes (Guernsey) (Amendment) Law, 2003, which sets out the criteria that the court ought to apply in relation to applications for an interim occupational order.

“(2) In deciding to exercise its powers under subsection (1) and (if so) in what manner, the court shall have regard to all the circumstances, including, without limiting the generality of the foregoing –

- (a) the housing needs and housing resources of each of the parties to marriage and of any child of the marriage;*
- (b) the financial resources of each of the parties to the marriage;*
- (c) the likely effect of any order, or any decision of the Court not to exercise its powers under subsection (1), on the health, safety or well-being of the parties to the marriage and any child of the marriage; and*
- (d) the conduct of the parties to the marriage in relation to each other and otherwise.*

48. I have also been helpfully referred to English case law in providing some assistance to the interpretation and application of similar, but I stress not identical provisions under section 33 of the Family Law Act, 1996.

49. I bear in mind that making an interim occupation order is a draconian step. It is not to be done lightly. Interim occupation orders should only be granted or made in exceptional circumstances and as a last resort. The court must approach its decision by using the statutory criteria in section 43(B)(2) of the amended law. It is not permissible to make an order solely because the atmosphere in the house is very difficult or “not viable”