

Judgment 31/2008

**E v E - Court of Appeal (Civil Appeal 397) –
17 September 2008**

Matrimonial Causes (Guernsey) Law, 1939 – husband’s appeal from order of the Royal Court revesting the former matrimonial home – husband had refused to execute documentation to give effect to an earlier decision of the Court of Appeal (See Judgment 43/2007, reported at 2007-08 GLR 133) – Royal Court had failed to have regard to the European Convention on Human Rights, Article 1 of the First Protocol – Article 57 of the 1939 Law provided a straightforward remedy for refusal by a party to execute a document – submission that Article 46 gave no power to a Court to order concurrence to a change in the terms of an existing liability over-ruled – only in exceptional circumstances can a Court reopen its earlier decision – held that the previous order of the Court was enforceable and must be enforced - appeal allowed, matrimonial home to be revested in the parties jointly and order made under Article 57 for the relevant documentation to be executed by HM Sergeant

IN THE COURT OF APPEAL IN THE ISLAND OF GUERNSEY

Civil 397

The 17th day of September, 2008 before The Hon Michael Jacob Beloff, QC., presiding, Michael Scott Jones, Esq., QC and John Vandeleur Martin, Esq., QC

E Husband/Appellant

v

E Wife/Respondent

In the appeal by the Appellant from the decision of the Royal Court made on the 18th day of June 2008;

THE COURT, having heard the Appellant in person, Crown Advocate P T Nicol Gent on behalf of Her Majesty’s Procureur, as amicus, and Advocate F J Haskins for the Respondent, GAVE JUDGMENT in the terms attached hereto and ORDERED:-

1. That paragraph 1 of the Order of the Matrimonial Causes Division of the Royal Court dated the 18th day of June 2008 (“the 2008 Order”) be set aside.
2. That [the former matrimonial home ("the property")] be revested in the Appellant and the Respondent jointly.
3. That paragraph 2 of the 2008 Order shall remain in full force and effect.

4. That the Order of the Royal Court dated the 24th day of January 2006, as varied by the Order of the Court of Appeal dated the 7th day of December 2007 (“the Order”) be hereby reinstated in full force and effect SAVE THAT paragraph 8 thereof shall be varied to read as follows:-

“That on the sale of [the property] the proceeds of sale shall be first applied to the discharge of any sums outstanding in relation to the Bonds and Replacement Bonds and then the remainder shall be divided between the parties as follows:-

(a) the Respondent shall receive one half of the net proceeds of sale, together with a sum equal to the capital repayments made by the Respondent to Barclays Bank in respect of the Bonds from the 7th day of December 2007 up to and including the 17th day of September 2008;

(b) the Appellant shall receive the balance of the net proceeds of sale.

The costs of any sale, including Estate Agent’s and legal fees shall be borne by the parties in equal shares.”

5. That in light of the Appellant’s refusal to sign the documentation required by Barclays Bank to change the mortgage to interest only (“the Documentation”), pursuant to Article 57 of the Matrimonial Causes (Guernsey) Law 1939, as amended, H M Sergeant is hereby authorised and directed to sign the Documentation on his behalf.

6. That there shall be no Order for costs in respect of this Appeal and no liability on either party to pay the Court fees of this Appeal.

K H TOUGH
Registrar of the Court of Appeal

IN THE COURT OF APPEAL
OF THE ISLAND OF GUERNSEY

CIVIL DIVISION

Wednesday 17 September 2008

Before: The Hon Michael Jacob Beloff, Esq., QC, President
Michael Scott Jones, Esq., QC
John Vandeleur Martin, Esq., QC

Between: E Husband/Appellant
v
E Wife/Respondent

Crown Advocate P Nicol-Gent acting as amicus for the Appellant
Advocate F J Haskins representing the Respondent

Cases: -

C V C CA (Judgment 44/2005)

Smith v Harvey CA Civil Report 9 (1981)

Taylor v Lawrence [2003] QB 528

Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd [1981] AC 909, 977)

Daisystar Ltd v Town and Country Building Society [1992] 1 WLR 390

Young v Bristol Aeroplane Co Ltd [1944] KB 718

Lancaster Motor Co. (London) v Bremith, Ld.[1941] 1 KB 675

Texts: -

Article 46 of the Matrimonial Causes (Guernsey) Law 1939 as amended ("the 1939 Law")

Article 1 of the First Protocol to the European Convention on Human Rights

JUDGMENT

Martin, J A

1. This is an appeal by [the Appellant] against an order of Lieutenant Bailiff Finch dated 18th June 2008. By that order, the Lieutenant Bailiff directed that the former matrimonial home of the parties should be transferred into the sole name of his former wife, and that he should pay the costs of the hearing on a full indemnity basis.
2. Although they are no longer married, in the rest of this judgment I describe [the Appellant] as "the husband" and his former wife as "the wife".

3. The circumstances in which the matter arises are as follows.
4. The parties were married [in 1993], but the marriage failed and a Final Order of Divorce was granted [in 2004]. There are two children of the marriage, a son born [in 1993] and a daughter born [in 1996]. Since June 2000, the husband, the wife and their children had been living [in a property in Guernsey ("the property")]. That property was in the joint names of the husband and the wife, and had been bought with the benefit of a substantial mortgage from Barclays Bank Plc. The mortgage was a repayment mortgage, so that the monthly repayments contained an element of both interest and capital. In October 2005 the value of [the property] with vacant possession was £346,500, and the mortgage debt was £144,443.72. The net equity value was accordingly approximately £200,000.
5. The marriage having failed, the wife made an application to the Matrimonial Causes Division of the Royal Court under Article 46 of the Matrimonial Causes (Guernsey) Law 1939 as amended ("the 1939 Law") in respect of the vesting of [the property]. The Deputy Bailiff dealt with the application on 27 October 2005. His order provided for the vesting of [the property] in the wife alone, with a secured charge over it in favour of the husband in the sum of £100,000. The secured sum was to be repayable in November 2014 (when the parties' daughter would be 18), or in August 2015 (if their daughter was still occupying [the property] and in full-time education in Guernsey). The order also provided for early repayment of the secured sum in certain events, in which case the sum payable would be discounted at the rate of 4% per annum simple interest – meaning that the earlier the sum was repaid, the less the husband would get. Pursuant to that order, [the property] was vested in the wife alone.
6. The husband appealed. His appeal was heard by this Court in 2007, its judgment being issued on 7 November 2007 and the Act being dated 7 December 2007. The Court allowed the appeal, and varied the order of the Royal Court in certain respects. In particular, it disapproved of the notion of discounting the sum representing the husband's interest on early repayment. The effect of its order was to direct a re-vesting of [the property] in the parties jointly, giving the wife the right to sole occupation until November 2014 or August 2015 (but terminable earlier in defined events), permitting her to take for her own benefit any payments made by lodgers, directing her to insure [the property] and providing for joint payment of the costs of repairs.
7. Paragraph 3 of the Act of the Court of Appeal inserted into the order of the Royal Court an order in the following terms (in which the wife is described as "the Petitioner" and the husband as "the Respondent"):

"The Petitioner shall be responsible for all payments of interest due in respect of two bonds in the sum of £133,000 and £21,000 (or any replacement bond or loan) consented to by the parties jointly and severally in favour of Barclays Bank Plc ("the

Bank") [.....] ("the Bonds"), the Respondent shall cooperate in the execution of any documents which may require to be executed to enable the refinancing of the loans from the Bank with any other lender of the Petitioner's choosing ("the Replacement Bonds")."

The requirement that the husband "cooperate" is perhaps misleading: in substance, the order amounts to a direction that he execute the documents.

8. Although the Act does not in terms say so, it is evident from the Court of Appeal's judgment (in particular paragraph 44) that the purpose of the refinancing was to replace the existing repayment mortgage with an interest-only one. The husband says that he understood that the replacement of the mortgage would be to enable his share in [the property] to be bought out by the wife, although I can find nothing in the Court of Appeal's judgment capable of encouraging that view. In any event, because he perceives that the Court's order was unjust (a familiar reaction in disputes of this kind), he has consistently refused to execute any of the documents put forward by the wife to enable refinancing to take place; and he maintained this refusal in his submissions to us.
9. Following the decision of the Court of Appeal, attempts were made on behalf of the wife to obtain execution by the husband of the refinancing documents. As the terms of the Act indicate, the original expectation was that a loan would be obtained from a different lender; but the contemplated lender (Bank of Scotland) withdrew its offer shortly after the Court's decision, and early this year Barclays agreed to change the existing mortgage to an interest-only basis. On 31 January 2008 the relevant forms were sent to the advocate then acting for the husband, but despite repeated requests made to him were not signed by the husband. Accordingly, on 17 April 2008 the wife made the first of three applications to Lieutenant Bailiff Finch, asking for directions generally in the light of the husband's failure to cooperate in the execution of the documents pursuant to the Court of Appeal's direction. The application was heard on 24 April 2008, and resulted in an order that the husband "sign the documentation from Barclays Bank to change the mortgage to interest only by 5.00pm on 25th April 2008, failing which he will be at risk of proceedings for contempt of court". The husband failed to do so; and on 29 April 2008 the wife made a further application to the Lieutenant Bailiff, again applying for directions but additionally seeking an order that [the property] be transferred into the sole name of the wife. That application was heard on 8 May 2008, when the Lieutenant Bailiff ordered the husband "to sign the documentation from Barclays Bank to change the mortgage to interest only by 5.00pm on 15th May 2008, failing which a date to hear the Application of the [wife] to transfer the property into her sole name will be listed". In the course of the hearing on that occasion, the Lieutenant Bailiff asked Advocate Brehaut, who then appeared for the wife, if he had power to make the transfer order sought, and was told that the application

was in effect to vary the property adjustment order in the light of non-compliance. After remarking that the next step would ordinarily be a motion for contempt of court, the Lieutenant Bailiff said that he would make an order for signature within seven days,

“and we will also have a date as soon as possible ... to consider the question of the vesting of the house when we will hear what both sides have got to say and any evidence that both sides wish to bring. That could be quite a short hearing because the issues are quite short ...”.

Yet again the husband failed to execute the documents, and on 5 June 2008 the wife’s third application was issued, claiming the same relief as the application dated 29 April 2008. It was that application that resulted in the order dated 18 June 2008 which is referred to in paragraph 1 of this judgment and is the subject of the appeal. At the hearing of the application, Advocate Haskins for the wife described the factual background to the application and the husband gave an explanation of his position before once more refusing to sign the mortgage documentation. The Lieutenant Bailiff then rejected an offer of further submissions from Advocate Haskins, and said this:

“I am a subordinate Judge to the Court of Appeal and as a matter of law ... the Court of Appeal binds me, and it’s a decision by that Higher Court, and I must give effect to that decision loyally and comply with the decision of the Higher Court. So I’ve heard really all that is relevant today and I grant the applications I’ve been as fair as I can to everybody but I’m left with no alternative anymore”.

These remarks were the only expressed basis for the order he made.

10. As a result of the Lieutenant Bailiff’s order, [the property] is now vested in the wife alone; but by an order made by the Bailiff, as a single judge of this Court, on 27 June 2008 she has been prohibited from dealing with it pending the outcome of this appeal. The same order stayed the order for indemnity costs, again pending the determination of this appeal.
11. I have considerable sympathy with the frustration evident in the Lieutenant Bailiff’s remarks at the hearing on 18 June 2008. He was faced with a situation in which the husband had repeatedly failed to comply with an order of this Court and was making clear that he had no intention of complying. It cannot be stressed too strongly that orders of the court are to be obeyed. The husband’s dissatisfaction with the outcome of the financial adjustment proceedings, which he has expressed consistently since the Court of Appeal judgment and repeated before us, is no excuse. Unless and until the order is set aside, it is binding on him.
12. Nevertheless, I am of the clear view that the Lieutenant Bailiff’s decision was wrong. The effect of his order was to deprive the husband of his entire interest in [the property] -

which had been treated in October 2005 as having a value of about £100,000 - without any compensation or any mechanism by which he could seek to recover it once the refinancing was complete. The Royal Court was obliged to have regard to the right to the protection of his property guaranteed to the husband by Article 1 of the First Protocol to the European Convention on Human Rights (incorporated into the law of Guernsey with effect from 1 September 2006 by the Human Rights (Bailiwick of Guernsey) Law 2000); but the Lieutenant Bailiff's solution to the problem caused by the husband's refusal to comply made no attempt to balance the husband's rights to his property against those of the wife to secure compliance with the Court of Appeal's direction, and was a wholly disproportionate response to the situation facing the Court.

13. That is particularly so, because there exists in Article 57 of the 1939 Law a straightforward remedy for non-compliance of this nature. That Article (which, like Article 46, is in Part VIII of the Law, dealing with property and contributions for support) is in the following terms:

"Where any person neglects or refuses to comply with an order of the Court directing him to execute or make any conveyance, assignment, or other document or instrument or indorsement for giving effect to any Act of Court under this Part of this Law, the Court may, on such terms and conditions, if any, as may be just, order that the conveyance, assignment, or other document or instrument or indorsement shall be executed, made or done by such person as the Court nominates for the purpose, at the cost of the person in default, or otherwise, as the Court directs, and a conveyance, assignment, document, instrument or indorsement so executed, made or done shall operate and be for all purposes available as if it had been executed, made or done by the person originally directed to execute, make or do it".

14. In the course of argument Advocate Haskins for the wife suggested that neither the Royal Court nor this Court could make use of Article 57 in a case such as the present. The basis for that apparently startling submission was a supposed limitation on the powers given by Article 46 of the 1939 Law. That Article is, so far as relevant, in the following terms:

"Where a decree of divorce or nullity of marriage or a decree or pronouncement of judicial separation has been granted, the Court may, if it thinks fit, ... as regards real and personal property in which each or either of the parties to the marriage has ... an interest, present, prospective or conditional, direct that their interests in such property shall be vested solely in the one or other of the parties or shall be divided between them in such proportions as the Court directs, and, where such property is so directed to be vested solely in one of the parties or to be divided between them, order that the one party shall pay to the other for his or her absolute benefit such gross sum or shall secure to the other for his or her benefit, such gross or periodic sum or both for any

term not exceeding the life of the party in favour of whom the same is secured as the Court may direct, or may refrain from making any order as to payment or security”.

In C v C, a decision of this Court given on 20 July 2005, the Court accepted as correct the following statement of the Lieutenant Bailiff at first instance:

“In my judgment it is apparent that an interest in property under Article 46 applies to an asset. No third party can be involved when this Article is used. In other words I agree that Article 46(1) cannot apply to a liability. To say otherwise would do violence to what I take to be the plain and ordinary meaning of the statute”.

There had, however, been no appeal against that part of the Lieutenant Bailiff’s judgment, so that the Court’s acceptance of the statement was plainly obiter and not relevant to circumstances such as those in the present case. C v C itself was concerned with personal liabilities, the question for the court being whether or not power existed under Article 47 of the 1939 Law (dealing with Contributions for Support) to direct payment of sums for the purpose of allowing the recipient to discharge debts incurred during the marriage. The case accordingly provides little foundation for the proposition advanced by Advocate Haskins that the courts have no power to deal with liabilities secured on the former matrimonial home.

15. If that submission is correct, it affects not only the Court’s power now to utilise Article 57, but also the order made by the Court of Appeal in December 2007 requiring the husband to concur in the refinancing. For if there is no power to deal with liabilities, but only with assets, there is no power to order concurrence in a change to the terms of an existing liability.
16. Advocate Haskins’ submission, properly understood, therefore required us to contemplate the possibility that the order made by the Court of Appeal in December 2007 was not validly made and so could not be enforced by any means. That in turn required consideration of the circumstances in which we were entitled to question a decision of a court of coordinate jurisdiction. I am grateful for the assistance given to us in this and other areas by Crown Advocate Nicol-Gent, who appeared as *amicus curiae*.
17. The ordinary rule, in this jurisdiction as in England, is that this Court cannot reopen decisions it has given once the order has been perfected, and must follow previous decisions it (but not its predecessor, the Cour des Jugements et Records: see Smith v Harvey, a decision of this Court pronounced on 14 May 1981) has given in other cases unless they are distinguishable. The proper way to rectify errors is by an appeal to a higher court. The rule is a reflection of the fundamental principle of law that the outcome of litigation should be final. There are, however, exceptions to the rule. Those which are potentially of relevance to this case are that the Court may in exceptional circumstances

reopen decisions it has given, and may refuse to follow previous decisions of the Court which are given per incuriam.

18. The first exception is considered in Taylor v Lawrence [2003] QB 528, a case in which the English Court of Appeal was asked to reopen an appeal it had already determined on the ground that new evidence of bias in the first instance judge had emerged. The Court held that it had power to reopen an earlier decision in exceptional circumstances, in particular where the circumstances require (in the words of Lord Diplock in Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd [1981] AC 909, 977) "the doing by the courts of acts which it needs must have power to do in order to maintain its character as a court of justice". One extreme example, derived from the judgment of Lord Donaldson MR in Daisystar Ltd v Town and Country Building Society [1992] 1 WLR 390, is mischance: "if, for example, a Lord Justice had preread two cases and, owing to mischance and perhaps the absence of counsel or gross incompetence by counsel, in the course of the argument it was never borne in on him that the case upon which counsel was addressing him was not in fact the case to which he was applying his mind. I can see that, in those circumstances, it could be argued that there had not been a decision...."

19. The second exception is derived from the well-known decision of the English Court of Appeal in Young v Bristol Aeroplane Co Ltd [1944] KB 718. At pp728-9 Lord Greene MR, giving the judgment of the Court, said this:

"It remains to consider the quite recent case of Lancaster Motor Co. (London) v. Bremith, Ld.[1941] 1 KB 675, in which a court consisting of the present Master of the Rolls, Clauson L.J. and Goddard L.J., declined to follow an earlier decision of a court consisting of Slessor L.J. and Romer L.J. This was clearly a case where the earlier decision was given per incuriam. It depended on the true meaning (which in the later decision was regarded as clear beyond argument) of a rule of the Supreme Court to which the court was apparently not referred and which it obviously had not in mind. The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute. Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam. We do not think that it would be right to say that there may not be other cases of decisions given per

incuriam in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts.”

20. I find this last citation, and in particular the distinction it draws between construction of a statute and ignorance of a statute, especially useful. It seems to me that we could not regard the decision of this Court in December 2007 as invalidly made unless I were certain that Article 46 could have no application; anything short of that, and in particular mere doubt about the availability of the Article, would be insufficient. In argument, the example was canvassed of a decision given expressly on the basis of a statutory power but in ignorance of the fact that the power had recently been repealed; and I think it is that sort of degree of certainty that would be required before we would be entitled to disregard the earlier order of this Court as made per incuriam or to reopen it.
21. In fact, however, it seems to me that the earlier order was well within the powers given to the Court by Article 46. Whilst I accept that that Article gives power to deal only with interests in property, it is important to identify the nature of the property interests that arise in cases of this type. Where the matrimonial home is subject to a mortgage, as will commonly be the case, the property interests of the parties to the marriage are necessarily encumbered interests. The Article 46 power entitles the Court to direct how the encumbered property is to be dealt with as between the parties; and that must necessarily include a power to determine where, as between the parties, the burden of the encumbrance is to lie. If, for example, the Court’s decision is that the jointly-owned matrimonial home should be vested in one party alone, it can direct that the burden of the encumbrance shall be borne by that party alone; for in doing so it is doing no more than directing how assets which together are subject to the burden of the encumbrance are to be allocated between the parties. That situation is quite different from the one that prevailed in C v C, where the liabilities were unsecured and there was accordingly no affected asset to be distributed. Once that position is reached, I see no difficulty in construing Article 46 in accordance with well-known principles of statutory construction so that it gives implied ancillary powers to direct the parties to do what is requisite to bring about a fair allocation of the encumbered property; and the Court’s order directing the husband to concur in the refinancing in my view is well within the scope of those ancillary powers. It also seems to me that Article 57 itself suggests that a wide
22. interpretation is to be given to the Court’s dispositive powers contained in Article 46. Article 57 applies only to Part VIII of the 1939 Law, and that Part consists of Articles 44 to 57D. Of those Articles, the one which seems most likely to give rise to a potential application of Article 57 is Article 46 itself, although it is not impossible that other Articles (such as Article 50, which enables the court to direct a settlement of a wife’s

property in favour of her husband and children) might do so also. Article 57 contemplates that a court might make orders whose implementation would require the execution or making of conveyances, assignments, and other documents, instruments or indorsements; and that suggests that the legislature contemplated that the powers in Part VIII would be used to deal with the widest possible range of property involving the widest possible means of distribution and intended to give the court maximum flexibility in achieving an equitable division of the parties' property. In those circumstances, I consider it unlikely in the extreme that it was intended that Article 46 could apply only in circumstances where the property was unencumbered.

23. For these reasons, it seems to me that the order of the Court of Appeal that the husband facilitate the refinancing is enforceable in principle and must be enforced. Although that order referred to refinancing with a different lender, the Lieutenant Bailiff's orders of 24 April 2008 and 8 May 2008 both directed the husband to execute the documents from Barclays Bank, and those orders are not appealed against. As I have said, I do not consider that the method of enforcement proposed by the wife and accepted by the Lieutenant Bailiff on 18 June 2008 was the right one; but Article 57 is available and provides the obvious means of resolving the problem created by the husband's refusal to sign. Documents executed pursuant to Article 57 will be as valid and binding on the husband, and will give the mortgagee the same rights of enforcement against him and his property, as if he had executed them himself.
24. Accordingly, I would allow the appeal, set aside that part of the Lieutenant Bailiff's order that ordered the vesting of [the property] in the wife and direct its re-vesting in the parties jointly as directed by the Court of Appeal in December 2007, and make an order under Article 57 directing the Sergeant to execute the documents in his place. I would invite submissions on the precise form of the order – which should deal with the fact that the wife has been making contributions to the capital element of the mortgage loan since December 2007, when the Court of Appeal intended she should pay interest only - and about the costs in this court and below.
25. I wish only to add this. I have referred above to the strong sense of injustice and grievance felt by the husband about the orders made by the Court of Appeal in December 2007. It is inevitable in cases of this nature, where the Court is attempting to balance the conflicting interests and requirements of parties to a marriage which has failed, and to take into account the interests of their children also, that one or other party will feel that justice has not been done. But the husband had the opportunity to put his case before the Court of Appeal in 2007; and, although he may feel that his case was badly put or inadequately considered, it is not open to us to reconsider the matter afresh. Nor, for my part, would I wish to: it seems to me that the Court considered the matter fully and with

conspicuous regard to the competing interests. The time has now come for the husband to come to terms with the regime the Court put in place, and to accept that – however much he may dislike it – the reality of the position is that, unless he can interest the Privy Council in his complaints, he must live with the Court’s order.

Beloff JA: I agree and have nothing to add.

Jones JA: I agree and have nothing to add.