

**Matrimonial cause – wife’s application for costs following judgment on ancillary relief (See Judgment 34/2004)**

**IN THE ROYAL COURT OF GUERNSEY  
MATRIMONIAL CAUSES DIVISION**

**Between:**

**E**  
**and**  
**E**

**Wife**  
**Husband**

**JUDGMENT OF THE BAILIFF ON APPLICATIONS FOR COSTS**

Date of Hearing: 1<sup>st</sup> June, 2005

Judgment handed down: 8<sup>th</sup> June, 2005

Advocate for the Wife: F. J. Haskins

Advocate for the Husband: P. T. R. Ferbrache

1. This is an application by Mrs. Haskins on behalf of the Wife for costs following the judgment handed down on the 12<sup>th</sup> August last when I awarded £105,000 to the Petitioner. I remind myself of what I said at the end of that judgment:

"In fact I go further to say that in my twelve years as a judge I cannot think of a case where there has been more unnecessary contention, more time wasted and more unnecessary expense run up than this one. I accept however that it is always difficult to apportion blame between parties to litigation and their Advocates because one simply does not know what advice is given and what instructions are given in the course of proceedings."

2. I do now have the benefit of being able to study the Calderbank offers that were made in this case and now that I see the relative moderation with which the Wife was putting forward her claim I have to say that I am even more astonished that this matter was let to develop in the

way it did. In talking about the Wife's moderation, however, I am not suggesting that the blame for what went wrong here rests with the one Advocate rather than the other. I do not intend to have a detailed review of the proceedings to try and identify where things went wrong at each stage. The Husband considers that he should have some costs because of the way in which the Wife conducted the proceedings and is also suggesting that I should look at visiting Mrs. Haskins personally for some of the costs because of the way in which she as counsel conducted the claim, particularly in the light of her persistence in pursuing the issue of conduct.

3. In her submissions Mrs. Haskins has quoted from Rayden and Jackson 17<sup>th</sup> Edition Section 23.35 and from Gojovic v. Gojovic (No. 2) 1 All ER [1992] at page 271 and 272. She has produced a Schedule of Calderbank offers together with the correspondence. Her offers start with a letter of 17<sup>th</sup> February, 2003, in which she offered to accept £100,000 in full and final settlement of all claims and to proceed by way of a judicial separation by consent. This original offer was adjusted in September 2003 and February 2004. The September 2003 offer was marginally greater as costs had escalated whereas the 24<sup>th</sup> February, 2004 offer came down to £75,000 plus £24,000 towards costs – virtually back to the 17<sup>th</sup> February, 2003 offer. There was a further offer on the 6<sup>th</sup> April, 2004, when the Wife proposed the lifetime interest in a property in England and a total lump sum payment of £16,500 and £12,000 towards maintenance.
4. The Husband offered a lump sum of £10,000 and a loan interest free of £100,000 to be repaid in ten years. This was made in response to the offer of 6<sup>th</sup> April, 2004. I interpose to remind myself that on the 18<sup>th</sup> March, 2004, in a wish to try and help the parties on their way I did make reference to the Husband lending money to the Wife to provide a home for her in England. This was at a stage that as far as I was concerned the Husband was arguing that he had no responsibility whatever towards the Wife and I did not feel able to form a judgement on that. This quite reasonably made the parties think about settling on that basis. Unfortunately for the Husband, when I had the full hearing I came to a somewhat different

conclusion mainly as a result of my consideration of the effect of the pre-nuptial agreement on this whole matter. The upshot of all this is that Mr. Ferbrache cannot get away from the fact that Calderbank offers dating back to the 17<sup>th</sup> February, 2003, had been all bettered by the eventual judgment of the Court.

5. Following the learning of the English Courts over Calderbank offers I am satisfied that it would be quite wrong to ignore what was proposed by Mrs. Haskins on behalf of the Wife when it comes to deciding where the incidence of costs in this case should fall.
  
6. Mr. Ferbrache raises two issues on the other side. The first is that the costs on both sides have been escalated by the persistence in the complaint that the conduct of the Husband was such that it was inequitable for the Court to disregard it. Mr. Ferbrache relies on what I said in my judgment where I made it clear that I was wholly unimpressed with any argument relating to the conduct of the Husband as having any bearing on this matter. The second point raised by Mr. Ferbrache is separate but relates to the same issue. He complains of the way in which Mrs. Haskins conducted this matter on behalf of the Wife. Right from the outset Mrs. Haskins told the Husband that she was issuing a petition on the grounds of unreasonable behaviour. Mr. Ferbrache robustly responded and said that any such petition would be resisted, which it was.
  
7. A great deal of time and effort was spent on preparing the petition putting in an answer and preparing for the hearing. Mrs. Haskins had the temerity to suggest in argument that it was unreasonable for the Husband to defend the unreasonable behaviour petition and that he should have been like most Husbands faced with "thin" unreasonable behaviour petitions buckled under and let it go through. This is sometimes possible particularly where the petitioner is prepared to accept that whatever is said in the unreasonable behaviour petition will not result in any reliance by the petitioner on those allegations as conduct in an ancillary relief application. However, here Mrs. Haskins seems to have made it clear that this was going to be material to the ancillary relief proceedings and so the Husband in my view had

no alternative but to defend the proceedings, if he felt justified in doing so. In the event Mrs. Haskins desisted from proceeding with the petition at the last minute in the light of the Husband's willingness to provide evidence of adultery. The Husband had earlier accepted that the marriage had broken down and was proposing a divorce on two-year separation by consent.

8. The difficulty from the Wife's point of view was that she was left high and dry in Guernsey sharing a house with a Husband with whom she had had a total break down of relationship and she needed some money to get on her way. The Husband was advised that he had no obligation to provide any money for her in the light of the pre-nuptial agreement that the parties entered into. I have no doubt that the Husband genuinely felt that his position was secure as a result of that pre-nuptial agreement and it was perhaps not until we looked at the law on pre nuptial agreements at the hearing that the difficulty of his position in using that agreement and the circumstances in which it was negotiated as a shield against the Wife's reasonable claim was limited. It is particularly unfortunate that this was not considered more fully at the early stages of the matter because that refusal to treat, otherwise than by making derisory offers, in my view, contributed to the firm line then taken by Mrs. Haskins on behalf of the Wife.
9. The Wife's affidavit of the 23<sup>rd</sup> June identified fully her concerns as to whether she was to be fairly bound by the pre-nuptial agreement. She also made statements of fact, which might have been tested more effectively, had not Advocate Peter Ferbrache elected to go on representing the Husband throughout the ancillary proceedings. Other parts of that affidavit were not really of great assistance in progressing the case. I think she clearly overstated her involvement in, the problems she had with, the ill-health of the Husband's mother and son. Those allegations no doubt upset him unnecessarily.
10. The Husband's affidavit in reply was equally unhelpful. I take for example paragraph 23 where this is said by him "I am informed by my Advocate that it is a common ploy by her

Advocate to lengthen proceedings and add to expense by referring to conduct." Again at paragraph 33 "I have referred previously to the fact that she is willing to lie, it does seem a common theme that she is willing to make allegations of violence. I produce [a domestic violence injunction] against her former husband". What evidential value this was supposed to convey I know not. Then in paragraph 35 there is a whole lot of non-admissible evidence of what Advocate Ferbrache told the Husband that Advocate Robey had said to him.

11. I could prolong this judgment by drawing attention to inappropriate correspondence and conduct on both sides and it was in the light of the general poor state of relations both between the parties and apparently their Advocates that I suggested at one of the directions hearings that both Mrs. Haskins and Mr. Ferbrache should consider passing the case to one of their competent associates and see whether they could not effect some settlement. That invitation seems to have been ignored.
12. Despite my reservations over Mrs. Haskins' persistence in alleging conduct I do not think that her behaviour was such as to visit her with any personal liability for costs. This is not the kind of situation which arose in C. v. C. [1994] 2 FLR 34 to which Mr. Ferbrache referred me.
13. Mrs. Haskins has suggested to me that the Husband deliberately refused to make an appropriate offer to the Wife because he was in so much stronger financial position than she was. I have listened to the parties at length and I am not going to suggest that the Husband deliberately conducted himself in this way. My conclusion was that he was deeply hurt by what had happened and felt tricked. The whole way in which Mrs. Haskins went about presenting the Wife's case did not assist in endeavouring to get him to see reason and it is also a matter of regret that his Advocate did not try and address the position more realistically. However to an impartial observer who has not had the benefit of hearing the evidence of the parties I accept that the situation might look as if the husband was using his undoubtedly stronger financial position to try and short change the Wife.

14. At the end of the day I am not persuaded that this is a situation where Calderbank principles should not be invoked. The effective date on which the Wife had made her offer of settlement was the 17<sup>th</sup> February, 2003, when she asked for £100,000 and proposed a judicial separation by consent with divorce to follow on the grounds of two year separation by consent in due course. There was no response to this and the Wife continued with her petition on the grounds of unreasonable behaviour. That was withdrawn in April 2003. The first offer from the Husband was 22<sup>nd</sup> July, 2003, which was not an adequate response in the light of my subsequent judgment.
  
15. I now return to the costs of the abortive divorce proceedings which the Husband felt in duty bound to defend. Costs were reserved when they were withdrawn by agreement. In my view the Husband should have his costs of defending the unreasonable behaviour petition including the filing and answer thereto. The Wife's responsibility for these costs should be restricted to the actual answer and not for work in preparation of defence to ancillary relief proceedings or financial settlement. In her affidavit the Wife made complaint of certain failures on the part of the Husband to comply with certain orders and uses the emotive word "flout" to describe the conduct of the Husband. I have not explored the detail of these matters. In my view the Wife is to be responsible for Husband's costs in defending the unreasonable behaviour petition, but obviously he should not be entitled to claim costs in respect of applications which were necessitated by his failure to comply with court orders, if indeed there were such costs.
  
16. The Wife therefore will pay the Husband's costs up until the 15<sup>th</sup> April, 2003. So far as the Wife's costs are concerned I cannot see that there could have been substantial work done on the ancillary relief proceedings until such time as the unreasonable behaviour petition was out of the way and although strictly speaking the seminal date for the Calderbank offer was the 3<sup>rd</sup> February, 2003, I propose to order the Husband to pay the costs of the Wife in connection with the ancillary relief proceedings and also the undefended divorce proceedings with effect from the 15<sup>th</sup> April, 2003.

17. I have considered carefully whether I should make any allowance for the fact that the Wife continued in her complaint about conduct and that costs were run up wholly unnecessarily. Both sides were aware that the futile litigation in which they were pursuing was being funded for part of the time by the States of Guernsey under the Legal Aid Scheme. I regard it as inappropriate that legal aid was granted in this case. In the circumstances I am very anxious that the legal aid fund is fully indemnified in respect of the costs that it has paid. Therefore I am not persuaded that this is a case where I should try and apportion allegedly unreasonable costs incurred by Mrs. Haskins between those that were reasonably incurred. It is always difficult in retrospect to criticise Advocates for the way they have chosen tactically to conduct proceedings and it is for that reason as much as any that I think such an exercise would be futile and not fair to anybody. Therefore the Husband must pay the whole of the Wife's costs incurred after the 15<sup>th</sup> April, 2003.
18. In all cases the costs will be taxed if not agreed and will be paid at the recoverable rate and not on an indemnity basis. In my view both Counsel have a responsibility for what has happened in this case. They have not sensibly addressed the issue of the escalating costs and have simply blamed the other side for the situation that arose but my powers are limited to the costs which I award and in any event I am not privy to the advice they actually gave their respective clients. That would have a bearing on their entitlement to fees at the full rate from their clients.