

Judgment 43/2007

**E v E – Court of Appeal (Civil Appeal 369) – 7 December
2007 and 7 November 2007**

- (i) **Matrimonial Causes Law (Guernsey), 1939 (Articles 43 and 46) – husband’s appeal from the Royal Court – extension of time within which to appeal – principles to be applied – appeal from the order as to maintenance – appeal from the order as to the division of the capital assets – former matrimonial home to be revested in the parties in equal undivided shares with conditional usufruct awarded to the wife – the proceeds to be divided equally upon the ultimate sale of the home**

- (ii) **Application as to costs – application for extension of time - Advocate ordered to pay the costs of both parties, on the indemnity basis – limited means of both parties – no order as to the costs of the substantive appeal**

**Approved Final Judgment
7 December 2007**

**IN THE COURT OF APPEAL OF THE ISLAND OF
GUERNSEY**

CIVIL DIVISION – APPEAL NO. 369

Between

E (Husband/Appellant)

V

E (Wife/Respondent)

Before: Geoffrey Rowland Esquire, Bailiff of Guernsey, President
Sir Philip Bailhache, Bailiff of Jersey
J W McNeill Esq., QC

J E Roland, for the Applicant
F Haskins, for the Respondent
A Merrien, for the Respondent (at the Costs Hearing)

Hearing dates: 15th, 16th May and 17th July 2007

Judgment issued: 7th November 2007

Cases

Havilland Estates Ltd v Channel Islands Ceramics Ltd et al
[1992] 13 GLJ 48 (Cited at 15 GLJ 78), CA
Havilland Estates Ltd v Channel Islands Ceramics Ltd et al
[1993] 15 GLJ 78, CA

Van Stillevoeldt BV v EL Carriers inc [1983] 1WLR 207, CA
B v B (Royal Court 15th June 2004, unreported)
Lowe v Lowe (Royal Court 27th October 1998, unreported)
Price v Price [1988] 6 GLJ 86, CA (Civil Report 23)
White v White [2001] 1 AC 596, 605C
Elliott v Elliott [2001] 1 FCR 4773, CA

Texts

The Court of Appeal (Civil Division) (Guernsey) Rules 1964
Duckworth, Matrimonial Property and Finance B4 (1A)

Introduction

1. This is an application made by the Applicant who was the Respondent in proceedings brought in the Matrimonial Causes Division. The Respondent had applied to the Matrimonial Causes Division under the provisions of Part VII Article 43 of the Matrimonial Causes (Guernsey) Law, 1939, as amended, in respect of the care of her children including maintenance and under Part VIII Article 46 in respect of the vesting of the matrimonial property. The learned Deputy Bailiff delivered a judgment on the 27th October 2005.
2. The Applicant is seeking to have the decision of the Deputy Bailiff reviewed by this Court.
3. Advocate P. Allen, who represented the Applicant in the Matrimonial Causes Division proceedings and filed documentation for the purposes of this appeal no longer represents the Applicant. On the hearing of this application and appeal the Applicant was represented by Advocate J. E. Roland.
4. The Applicant's grounds of appeal stated in the Notice of Appeal when the appeal was set down on 16th March 2006 are as follows:

“The Learned Deputy Bailiff:

1. erred in ordering that the capital sum to be paid by the Respondent to the Appellant should be discounted for early payment instead of ordering that the said sum should attract interest from the date of the order until payment of the whole amount;
2. erred in setting the level of maintenance to be paid by the Appellant for the two children of the marriage at a level which it was clear from the evidence could not be sustained; and
3. such further grounds as may be considered appropriate upon further consideration of the judgment;”

Application for extension of time

5. The appeal has not been prosecuted expeditiously.
6. The Applicant applied to Carey J A sitting as a sole judge of this Court for an extension of time to file his case. The application was rejected. Carey J A detailed the reasons for his decision in a judgment handed down on the 5th January 2007. This Appeal was scheduled to be heard on 26th March 2007 but we considered it appropriate that the Applicant should be represented and the hearing was postponed until 15th May 2007 in the expectation that following our comments legal aid would be made available and that Advocate Roland, who had given limited advice to the Applicant on the subject of the appeal, would be instructed.
7. The Applicant now renews his application before this plenary sitting of the Court.

The Rules

8. The Court of Appeal (Civil Division) (Guernsey) Rules 1964 set down the procedural steps to be followed in pursuing an appeal.
9. The provisions of the Rules material to this application provide as follows

Rule 2 Notice of Appeal

2. (2) *Notice of appeal may be given either in respect of the whole or in respect of any specified part of the judgment or order of the court below; and every such notice shall specify the grounds of the appeal and the precise form of the order which the Appellant proposes to ask the Court to make.*

(3) *Except with the leave of the Court, the Appellant shall not be entitled on the hearing of an appeal to rely upon any grounds of appeal, or to apply for any relief, not specified in the notice of appeal.*

10. The Applicant in the statement of the Applicant's case prepared by Advocate Allen has confined his grounds of appeal to those filed on 16th March 2006.

Rule 3 – Time for Appealing

Every notice of appeal shall be served under paragraph (4) of the last preceding Rule within one month from the date on which the judgment or order of the court below was pronounced.

11. Notice of appeal was filed on 8th March 2006. Although the notice had been filed 12 days after the expiration of the one-month period the Advocate acting for the Respondent waived strict compliance with the Rule by signifying her consent to the appeal being filed out of time.

Rule 4 – Setting down

4 (1) *“The Appellant shall within seven days after service of the notice of appeal, apply in accordance with this Rule to set down the appeal”.*

12. The appeal was set down on the 16th March 2006.

Rule 8 – Documents for use of the Court and exchange of cases

8.(1) *The Appellant shall, before the expiration of four months after the day on which the appeal was set down under Rule 4 of these Rules, lodge with the Registrar four copies of -*

- (a) *the notice of appeal;*
- (b) *the judgment, order, decree or award under appeal;*
- (c) *the pleadings, if any, in the proceedings in the court below;*
- (d) *the official transcript if any;*
- (e) *such affidavits or depositions, if any, as are relevant to the matters in controversy on the appeal;*
- (f) *such exhibits or parts of exhibits (including correspondence) as are relevant to the matters in controversy on the appeal;*

(g) *a statement setting out the contentions to be urged and the authorities to be cited by the Appellant in support of his appeal (here-after in this Rule referred to as "the Appellant's case").*

13. The transcript was requested by Advocate Allen on 22nd March 2006 and was issued on the 13th April 2006.
14. The Rules required the Applicant to comply with Rule 8 by the 16th July 2006.
15. The Applicant made no application to this Court before the expiration of the four-month period. There was no reason to believe that the Respondent would consent to an extension of time.

Rule 9 - Abandonment of appeal by non-prosecution

9. *If the Appellant has not lodged with the Registrar all such documents and exhibits as he is required to lodge with the Registrar under paragraph (1) of the last preceding Rule –*

(a) *within the time limited for so doing under that paragraph; or*

(b) *where the time so limited has been extended or abridged by an order made under Rule 17 of these Rules, within the time limited for so doing under that order;*

he shall be deemed to have abandoned his appeal.

16. The Applicant was deemed by Rule 9 to have abandoned his appeal on 16th July 2006 and the proceedings can only be resurrected if the Applicant receives the relief he is now seeking.

Rule 17 - Extension of time

17. (1) *The Court or a judge thereof may, on such terms as the Court or judge thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules or by any order or direction, to do any act and may extend any such period although the application for extension is not made until after the expiration of that period.*

(2) *The period within which a person is required by these Rules, or by any order or direction, to do any act may be extended by consent in writing without an order of the Court or of a judge thereof being made for that purpose.*

(3) *Without prejudice to the power conferred on the Court or a judge thereof by paragraph (1) of this Rule, the period for serving notice of appeal under Rule 3 of these Rules may be extended by the presiding judge of the Court below upon application being made before the expiration of that period.*

17. On 5th October 2006, some 2½ months after the appeal was deemed to have been abandoned the Applicant lodged the appeal documentation but did not file a separate formal application for leave to appeal out of time nor an affidavit in support of it. On 14th October 2006 she filed a formal application for leave to file her client's case out of time. The Respondent's Advocate had written to HM Greffier on 18th October (copied to Advocate Allen) questioning the absence of an affidavit and a further letter of 7th November was also sent to HM Greffier noting its absence.
18. On 13th November 2006 the Applicant filed a skeleton argument and affidavit.

Strict Compliance with the Royal Court Practice Rules

19. This is not the first time that this Court has had to consider an application for extension of time in circumstances where there has been dilatoriness on the part of an Applicant or Applicant's Advocate in pursuing proceedings.

20. Calcutt JA in the case of *Havilland Estates Ltd v Channel Islands Ceramics Ltd et al [1992] 13 GLJ 48*, CA said this with regard to the necessity for compliance with time requirements –

“This Court would be very reluctant to say anything which would suggest to the practitioners in this Island, that the Rules of this Court, with regard to the lodging of documents, are to be disregarded with impunity ………

Rule 17 is there for the granting of extensions of time, and although that rule may be applied after the four months period has expired, it does not seem to us to be proper that practitioners should proceed on the basis that an extension of time is going to be granted for the mere asking, as a matter of course……

I would say that, while what I would call comity between the advocates in this jurisdiction is to be respected, and while we would not want to interfere with any conventions under which they operate, nevertheless, the expedition of appeals is not a matter simply for the parties; it is a matter in which the Court and the community at large have an interest.”

21. In that case the appeal had been set down but the transcript had not been prepared within the four-month period for the filing of the case. The successful defendant in the proceedings in the Royal Court eventually made application to the Court of Appeal for an order confirming that the appeal had been abandoned.

22. The Court on that occasion granted an extension of time requiring the Applicant to file documents in compliance with Rule 8 within 14 days of the receipt of the transcript.

23. Subsequently the Applicant, having received the transcript failed to comply.

24. A differently constituted Court of Appeal heard a further application [1993] GLJ 15 GLJ 78.

25. The Court, on that occasion, made the point that the Applicant's Advocate had had ample opportunity to prepare in draft the Applicant's case before receipt of the transcript and that on receipt of the transcript he could then have perfected the draft. The Court noted that the Advocate had intimate knowledge of the case as he had had conduct of it in the Royal Court. The Court in the exercise of its discretion did not consider it to be a proper case to grant an extension of time.

26. It was clear that in 1992 and 1993 the Court of Appeal was strict in requiring adherence to the timetable provided by the Rules. The Court of Appeal considered adherence to be essential for the orderly conduct of business. The profession was thereby warned in clear terms of the attitude of the Court of Appeal.

27. Carey J A, as a single judge of this Court, in a very thorough judgment which included a helpful chronology of events dealt with the law to be considered by this Court.

The test to be applied

28. Carey J A noted that, following the introduction of new Civil Practice Rules in England, the English Court had adopted a new test when considering whether to grant an extension of time. We understand that the Royal Court is presently reviewing its Civil Practice Rules with a view to modernising them taking into account changes in England.

29. In the absence of special Royal Court rules relating to applications for extension of time in family cases it is proper in this jurisdiction to apply the rules which exist in England in the case of civil proceedings. That test was propounded by Griffiths L J sitting as a single judge in the Court of Appeal (Civil Division) in England in *Van Stillevoeldt BV v EL Carriers inc* [1983] *IWLR* 207. Staughton J in an application made by C M Van Stillevoeldt under Sec 27 of the Arbitration Act 1950 for an extension of time for the appointment of an arbitrator had given judgment for the defendants E L Carriers Inc. He had given leave to appeal. Following service of a notice of appeal, the Plaintiffs were out of time for setting down the appeal. The Registrar of Civil Appeals had refused the Plaintiffs' application for leave to set down the notice of appeal out of time. The Plaintiffs had appealed. Griffiths L J sitting as a single judge gave consideration to the nature of the jurisdiction of a single judge of the Court of Appeal hearing an appeal from the Registrar. That issue is not relevant in this case because the Court of Appeal (Guernsey) Law provides that an aggrieved party can renew his application before a plenary sitting of the Court of Appeal. Stressing that it was for the benefit of all litigants that the business of the Court of Appeal is conducted in an expeditious manner he gave consideration at page 212 to the following factors, as had the Registrar, when approaching the determination of the application before him:

- firstly to the length of the delay,
- secondly to the reasons for delay,
- thirdly whether there is an arguable case on the appeal,
- fourthly the degree of prejudice to the defendant if time is extended.

30. Griffiths L J having in the exercise of his discretion in a case which he found to be a difficult one weighed each of the considerations in the balance allowed the appeal and granted a short extension of 48 hours.

31. Carey J A in his judgment referred individually to the four factors as propounded by Griffiths L J and expounded his view on the merits of the Applicant's case. We have derived benefit from his comprehensive reasoning and found little difficulty in addressing our own minds to the individual factors.

Consideration of the factors

32. The length of the delay was manifest as was the fact that the reason was the inappropriate conduct of the early parts of the Appeal by Advocate Allen. We therefore turn to the question as to whether there was an arguable case on appeal. On this matter it is important to emphasise that the test under this head is 'an arguable case' whilst, in considering arguments on appeal the test for interference with the decision of the Deputy Bailiff is that the Appellate Court is persuaded that he has been plainly wrong. For the reasons which will appear later we had no doubt that the test for allowing the application was met. Further, having regard to the high degree of importance of the issue of the sharing of matrimonial property to each of the parties involved, we did not consider that any prejudice to the Respondent in being able to rely on the decision below outweighed the interests of justice in our considering an important matter on which we were persuaded that there was an arguable case. We therefore allow the application for extension of time and thereby reinstate the Appeal and now propose to deal with it on its merits.

The Appeal

33. The following facts which are material emerge from the Deputy Bailiff's judgment and from oral argument before us.

34. On 7th January 2004 the Respondent issued a divorce petition against the Appellant. A Final Order of Divorce was granted on 7th May 2004 and the Appellant reluctantly vacated the matrimonial home that month.
35. The Appellant had applied to the Matrimonial Causes Division for a vesting order in respect of the former matrimonial home and for maintenance in respect of the children of the marriage.
36. [The ages of the parties and their children were set out]
37. The Court noting the consent of the parties ordered joint custody of the two children and care and control of both children to the Respondent. The Appellant was granted access to them.
38. The former matrimonial home, had been acquired jointly in June 2000 with the benefit of a substantial mortgage which they could just service jointly. The remainder of the purchase price, some £70,000, came from the net proceeds of sale of a flat which had been the previous matrimonial home of the parties. It had been purchased in about 1993, at the time of the marriage. The purchase price of the flat had been funded, as to capital, by the Appellant being able to provide about £17,000 of his own funds deriving from savings and legacies which he had received. Mortgage payments had come from the joint incomes of the parties. For the purpose of the hearing before the Deputy Bailiff the value of the matrimonial home with vacant possession was agreed at £346,500. As there was a mortgage debt jointly owed to Barclays Bank plc by both parties of £144,443.72, the net equity value was approximately £200,000. The terms of repayment provide for the repayment of both capital and interest. The monthly repayment to Barclays was £1,200.68 which the parties could only just manage to meet when living together. After the Appellant had left the matrimonial home, the Respondent had taken in lodgers in order to meet the repayments. In the Appellant's Case filed by Advocate Allen, dated 30th January 2007, she estimates that the matrimonial home was at that time valued nearer to £400,000. The Appellant had not contributed to the repayment of the mortgage since about May 2004. For the ensuing six months there had been a mortgage holiday in view of the matrimonial difficulties. Since then the mortgage repayments have been met by the Respondent, largely through the availability of income from lodgers, although we were informed by her Advocate that she was in arrears with repayments.
39. [In paragraphs 39 – 42 the Deputy Bailiff set out the income and outgoings of the parties]
43. There were no other significant assets.
44. On 8th February 2006 Advocate Haskins sent a fax to Advocate Allen indicating that the Respondent had managed to secure additional funding to pay to the Appellant the monies due to him that is to say £65,000, if one of the specified events had occurred. In the event that the Appellant would not accept early repayment then the Respondent would, in any event, be making arrangements to take out an alternative loan facility with Skipton Guernsey Limited which she intended would enable the debt to Barclays to be paid off. However in the event, as the Appellant, whilst agreeing to Skipton taking a first charge, did not accept early repayment, Skipton was not prepared to proceed. This was communicated to the Respondent by letter of 20th June 2006. Subsequently arrangements were made with the Bank of Scotland which would permit the Respondent to borrow £151,799 and thereby to reduce monthly mortgage payments from £1,200 to £831 per month although it would extend the term of the loan from 15 years to 25 years. The capital due to the Bank would need to be repaid and repayment might therefore be made only on a sale of the property. The facility provided for payments to be made to the Bank of Scotland on an interest only basis. The Bank of Scotland would require a first charge over the property in place of the first charge held by Barclays. We have calculated that the fees and duties payable by the Respondent on the registration of a legal charge in the sum of £151,799 would be £1,090.

Maintenance for the Respondent

45. It is appropriate to note that no application had been made by the Respondent for maintenance for herself. It would appear that the Respondent had taken the pragmatic view that the Appellant had insufficient income to pay maintenance to the Respondent in respect of herself. He had no investments, and hence income source, other than from his employment. Before us, the Respondent's Advocate also indicated that the Respondent wished the final result to be a clean break.

The Deputy Bailiff's judgment

46. The Deputy Bailiff concluded that a clean break was appropriate. He considered whether the property should be sold but rejected that option on the ground that he attached great importance to preserving the family home for occupation by the children. On the basis that the Respondent was to continue in occupation with the children, and given the modest income of each of the parties in order to service the mortgage, the Respondent would have no realistic alternative but to continue to take in lodgers which would not be an ideal arrangement. Equally undesirably, the Appellant would be forced to continue to occupy rented accommodation too small to have overnight contact with his children. However, if the property were sold, the Respondent at that time might be unable to finance the purchase of another property and as a consequence would have to occupy rented property with her children. Having taken account of the bitterness, lack of trust and ill feelings that had existed and continued to exist between the parties, and their inability to communicate directly with each other, he concluded that the appropriate order was to vest the matrimonial home in the sole name of the Petitioner with a secured charge in favour of the Respondent.
47. Having ruled that the net equity value was approximately £200,000 as a starting point he assumed an equal split. He then went on to consider whether in the exercise of his discretion the Respondent should receive a higher proportion than the Appellant.
48. He concluded that the Respondent's earning capacity would be restricted during the years that she would be caring for the children and necessarily she would during these years require larger accommodation than the Appellant. She would have to bear the cost of maintaining and repairing the property which at the time was in reasonably good condition following works carried out by the parties.
49. The Deputy Bailiff concluded that there should be an apportionment "on the basis of equality" and ordered that the Respondent should have a charge over the property in the sum of £100,000, subject to a discount in the event of early payment. The secured sum would be payable [in 2014] being the date when the younger child will attain the age of 18, but that it should be postponed to 1st August 2015 if that child was still occupying the property and undergoing full time education in the Island.
50. The amount secured would be liable to early repayment on the happening of the following 'trigger' events, namely –
- (a) the Respondent's remarriage;
 - (b) the Respondent co-habiting for a period in excess of 12 months;
 - (c) if the Respondent ceases to reside at the property;
 - (d) if both the children cease to be ordinarily resident at the property;
 - (e) if the property is sold; and
 - (f) on the death of the Respondent.

51. In the event of early repayment he ordered that the sum to be paid should be discounted at the rate of 4% per annum simple interest. By way of example, if repaid on 26th November 2005 (nine years early) the sum would be discounted by 36%. The Appellant would be paid £64,000 and the Respondent would be left with £136,000. The Deputy Bailiff had directed his mind to the possibility of increases in property prices. He observed that whilst it was impossible to predict future inflation it seemed likely that house prices might not rise as dramatically thereafter as they had risen in the recent past. In effect the Respondent would have the interest free use of the family home, an outcome the Deputy Bailiff did not consider to be unfair given the fact that the Respondent would be caring for the children and would not be receiving any personal maintenance from the Appellant because there was no scope to order the Appellant to pay maintenance to the Respondent in respect of herself.
52. Miss Roland, who appeared for the Appellant, submitted that the Royal Court had been wrong to provide for a discount on the award in the event of early repayment, and in failing to provide for any increase in the award of £100,000 to take account of inflation between the date of the award and the date of payment. He had made a Mesher-style order deferring the date of sale of the matrimonial home in order to protect the interests of the children but had failed to protect the interests of the Appellant, having determined that the apportionment of the parties' capital should be "on the basis of equality".
53. Counsel was particularly critical of the provision for deducting a percentage of the award for early payment. This was not, she said, the replacement of an income stream that had been cut off (as in personal injury cases) nor the capitalisation of future income (for example in Duxbury calculations) or capitalised maintenance. As the Royal Court had determined that the Appellant was entitled to a particular capital award, but decided to defer its payment, there were no grounds for discounting the award for early settlement.
54. We agree with Miss Roland that the discounting of a capital award for early payment is not appropriate in family proceedings. The Deputy Bailiff does not explain the reasons for applying a discount; he appears to have relied on earlier decisions of the Royal Court where this practice was adopted.
55. In *B v B (15 June 2004, unreported)*, on facts not too dissimilar to the facts of this case, the Court decided to defer payment of the share in the equity of the former matrimonial home which it had determined ought to be awarded to the husband. In that case the youngest child was aged 4, and the deferred period was considerable. Having determined that the husband should receive "£115,000 at the end of the day", the Court provided for a discount of 4% per annum and acknowledged that, if the wife exercised that option during 2004, the husband would receive £32,500. The Court again provided for 'trigger' events for early repayment similar to those laid down by the Deputy Bailiff in this case.
56. In *Lowe v Lowe (27 October 1998, unreported)* a similar approach had been adopted in relation to a capital sum due by the wife to the husband, which was secured upon the home. These judgments contain no reasoning which might assist in understanding the rationale for the practice. It is possible to infer, but this may not be right, that the purpose was to encourage, sooner rather than later, a clean break: if the debtor (the wife) could be persuaded to borrow in order to pay off the debt, she should have a discount to encourage her to do so.
57. Whatever the rationale may be, this is not, in our judgement, an appropriate practice and it should not be followed in future. If the Court determines that a particular capital award is to be made to one of the parties to the marriage, but defers payment in the interest of preserving the family home for the children, there is no reason why that capital award should be discounted for payment at an earlier stage than that anticipated at the time of judgment. This is unfairly to penalize the party to whom the capital award is due, when the only reason that deferment has been ordered is to protect the interests of the children. Absent any children of the marriage, the capital award will generally not be deferred, and no question of discount will arise. We do not consider that the existence of children – and a

deferment of payment in their interests – justifies the ordering of a discount on the award. Indeed, the Court should be seeking to preserve the real value of the award, and it is that to which we now turn.

58. The absence of any provision for ensuring the maintenance of the value of a deferred payment means inevitably that the sum awarded will have depreciated in value at the time when it is received. Leaving aside any question of discount, if £100,000 is awarded in 2005 but is not paid until 2015, its real value will have eroded to some degree by the time the payment is made. For the last 50 years at least inflation has, unfortunately, been an inescapable fact of life. The corollary to the depreciation in the value of money by inflation is the increase in the value of houses and land. We take judicial notice of the fact that house prices in Guernsey have increased considerably during the last 10 years. It is true that house prices can go down as well as up; but the general trend, reflecting the fall in the value of money, has been upwards.
59. The Deputy Bailiff clearly considered the likelihood that the value of the former matrimonial home would increase while the real value of the Appellant's cash share would go down. He stated expressly that he would make no provision for the cash sum of £100,000 to be increased in line with property prices or retail prices. He stated, correctly, that it was impossible to predict future inflation but that "it seems likely that we will not see house prices rise as dramatically in the future as they have in the recent past." Counsel for the Appellant put it to us that property prices in Guernsey had in fact risen during the last 18 months by some 12% - 15%. We have no evidence on that point. However, if one applies (say) 5% per annum compounded on an annual basis to the agreed value of the property (as at 2005) over a period of ten years, the resulting figure is over £550,000. If one deducts the mortgage of £150,000, the putative net value of the house in 2015 would be £400,000; of which £300,000 would go to the Respondent and £100,000 to the Appellant. On the basis that the judge had determined upon an equal division, this would not seem to us to be fair.
60. We acknowledge, of course, that the calculations in the preceding paragraph are based on speculation. However, the House Price Index published by the Policy Council of the States of Guernsey shows that the average annual increase for the past 6 years has been just over 10%, which might suggest that the calculations are apposite. This does not mean that the average annual change will be similar during the period 2005 – 2015. It is possible that the value of property in 2015 will be less than that which it was in 2005. In that event, the Respondent would be obliged to pay £100,000 to the Appellant while receiving a lesser figure herself. What the calculations do underline, in our judgement, is the difficulty of achieving fairness between the parties where specified capital sums are not to be paid for long periods, and no provision is made for inflation and changing property values.
61. The duty of the Court, when determining how the capital assets of the parties to a marriage are to be divided, is to achieve fairness. No distinction is to be drawn between the domestic contribution of a partner whose principal contribution is looking after the house and children, and the economic contribution of a partner who is going out to work and earning the money. As Lord Nicholls of Birkenhead put it in *White v White* [2001] 1 AC 596, 605C –

"But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles...As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so."

62. The principles laid down in *White v White* were considered for the first time in a 'small money' case in England by the Court of Appeal in *Elliott v Elliott* [2001] 1 FCR 477. There is a useful summary of that decision in *Duckworth, Matrimonial Property and Finance, B4 [1A]* to which we were referred by Counsel for the Appellant. It is in the following terms –

“The parties were married in 1980 and had two children. The husband was an ex-policeman who was drawing a police pension of £1,600 a month. Although his income was ‘not materially greater than’ the wife’s, he had a much better potential earning capacity.

The matrimonial home was purchased in 1995. Following the divorce in May 2000, a district judge directed that it be sold and the proceeds used to buy another house for the wife and children. The husband was given a 45 per cent charge over the new property, realisable on the earliest of a number of contingencies including the wife’s death, remarriage or cohabitation, and the younger child attaining 18 or later ceasing full-time education. There was a nominal periodical payments order in favour of the wife; child maintenance would, no doubt, regularise itself via the auspices of the Child Support Agency.

The wife appealed, seeking an outright transfer in return for a dismissal of her periodical payments. She was successful. The judge considered that:

‘To put the wife in a house which she will have to sell or remortgage cannot be right. I see a strong argument for deleting [the 45 per cent charge] ...The house is not capital but somewhere for the wife to live.’

This abbreviated reasoning drew criticism in the Court of Appeal from Thorpe LJ:

‘It seems to me that that is altogether too partisan a perspective. It ignores the husband’s reasonable entitlement to deploy capital to house himself at the end of a long marriage during which he has worked hard, mainly in the police service, and has contributed his earnings to the building of family capital. If the judge thought that the deletion was justified by the compensatory deletion of the nominal periodical payments order, I think he was plainly wrong. There are instances in which the interrelationship of capital and income orders justifies the increase of a wife’s capital share as compensation for the loss of an income claim. I do not think that this was appropriately one. The husband has a reasonable and discernible need for his share of the family capital at the earliest time that the needs of the children permit. As soon as the wife’s responsibilities as the home-maker for the children reach a point of natural termination, at that point clearly the husband is entitled to his capital share.’

In the light of White, there was an argument for increasing the husband’s share to 50 per cent. But as he enjoyed a better earning capacity, and the wife would suffer some disadvantage in terms of loss of pension by reason of the divorce, a 45 per cent charge was reasonable and so the district judge’s order was restored.”

63. We think that these principles should be applied in Guernsey too. In the present case there was a marriage of some 10 years’ duration. Although the initial financial contribution to the purchase of the flat in about 1993 was made by the Appellant, the equity which now exists in the former matrimonial home is substantially the result of the efforts of both parties. Both are on relatively low incomes and, like the Deputy Bailiff, we do not think that either has a significantly greater earning capacity than the other. The Respondent is currently obliged to restrict her working hours in order to look after the children; but before long she will be able to increase her earning potential. She is 11 years younger than the Appellant. We agree with the Deputy Bailiff that it is appropriate that the capital should be apportioned on the basis of equality. Unfortunately we do not think that the order which he made achieved that end. It must, accordingly, be set aside.
64. We turn to consider how best to achieve the equality of division of capital. The following three options were canvassed before us by Advocate Roland and considered in reply by Advocate Haskins without suggesting that there were others:

1. immediate sale;
2. re-vesting in joint names; and
3. some form of protective charge.

65. We have given each full deliberation and there follows our response.

Sale

66. Where there are children, still with some years schooling before them, and there is the realistic possibility of remaining with one parent in the former matrimonial home, a Court should be slow to feel obliged to adopt this option. Here, the option had not commended itself to the Deputy Bailiff; and we would feel driven to it only if no other viable option existed. That is not presently the case. We therefore proceed to consider the other options.

Joint ownership

67. The Deputy Bailiff expressed unease as to this option: a view repeated by Mrs Haskins. These views were cogently set out and entitled to respect. In deference to them we therefore proceed to consider the third option in the knowledge that we may have to return to the first and second options as our appraisal progresses.

A protective charge

68. The viability of this option had been explored as part of the assessment of the single judge, Carey JA. His preliminary view reflected the fact that the laws of Guernsey do not permit what are elsewhere referred to as floating charges; namely either (i) charges on property where the property subject to the charge may vary from hour to hour, crystallising only when the charge takes effect on the property of the granter of the charge or, perhaps more colloquially, (ii) charges where the amount covered by the charge can vary upwards or downwards (to any extent at all) from day to day as the indebtedness of the debtor (not necessarily the granter of the charge) to the creditor (not necessarily the chargee) varies.

69. With the benefit to this Court of exploring this option with Advocate Roland in oral argument in greater detail, it became clear that the option envisaged not so much a 'floating charge' of the possible natures indicated in the preceding paragraph. Rather it envisaged a fixed charge where the charge would attach to a defined property. However it envisaged a charge where the amount chosen by the Appellant – or by the Court on his behalf – to cover his eventual entitlement on sale or repayment would be, if not arbitrary, a shot in the dark. We have reached the view that such an option, whilst possibly legally and commercially feasible, is not one which should be readily acceptable to a Court seeking to achieve equity and finality between parties to a matrimonial dispute for the following reasons.

70. In the first place, it would proceed upon the assumption that the value of the Appellant's entitlement would not be known until the date of sale or proposed repayment; a scenario which produces problems under this option. In seeking to attempt to predict the eventual entitlement, either the Appellant or the Court would have to choose a sum for the charge which would, almost inevitably, be too high or too low: and this predicament will be exacerbated the greater the length of time before the payment date.

71. If the sum decided upon turns out to be lower than the Appellant's entitlement, the Appellant's protection will be limited in the event of the Respondent's insolvency. (In a matrimonial case we hasten to explain that using such a test as a potential event does not mean that we have reached the view that possible insolvency is an inference to be drawn from the circumstances set before us; rather the possibility of insolvency is regularly used to test whether a claimant has achieved a right of property or an effective security). This

limitation will have arisen, inevitably, through the impossibility of making an accurate prediction as to house prices.

72. If too high, again through the impossibility of making an accurate prediction as to house prices, it will have imposed, unnecessarily, higher costs on the Appellant in registering his charge. Of at least equal importance, his prudence in registering a charge based on an annual potential increase of, say, 10% compound over ten years may, in the final analysis, have precluded the Respondent from having the financial flexibility of using her eventual share of the net equity to borrow further, should her means otherwise permit that.
73. Accordingly, even assuming (a) that such a charge is permissible under Guernsey law and (b) that a formulaic approach can be achieved for an order directing sale and apportionment of assets at a specified later date, the concerns which we have just mentioned seem to us such that it is proper to consider further the earlier options to see whether, upon a proper and systematic analysis, either might closer achieve the Deputy Bailiff's goal of equality between the parties. Consistently with our views set out above – that sale should be a last resort in circumstances such as the present – we return to the second option, split ownership. Split ownership does have the great advantage of preserving the real value of each party's entitlement as established by the Court until such time as sale takes place.
74. As stated above, we agree with the Royal Court that the home should be preserved for occupation by the children during their minority. There is an unusual facet to this case in the sense that the former matrimonial home, the sole capital asset of the parties, is a large property which is capable of providing accommodation for the wife and children as well as providing an income sufficient to meet the interest on the outstanding mortgage.
75. Regrettably, neither in written argument nor when the substantive hearing in this appeal took place was this Court addressed as to an earlier decision of this Court, *Price v Price* [1988] 6 GLJ 86, CA Civil Report 23. The decision was drawn to our attention, after a draft of this judgment had been circulated, by Advocate Merrien who appeared only at the costs hearing. We have noted that, on pages 6 and 7 of the report that Chadwick JA, delivering the judgment of the Court said:-

“In our view the reason why such an order cannot be made in this jurisdiction is that there is no power under Article 46, or elsewhere in the 1939 law, either to impose a trust for sale on the property or, more importantly, to make an order to the effect that the property be not sold for a limited time. It appears to us that if the Court were to make an order directing that the property be divided between the parties in specified proportions the effect of that order, without more, would be that either party would be entitled to apply to the Royal Court for a sale of the property in order to enable him to realise his or her interest forthwith.

We are unable to find in Article 46, or elsewhere, any power which would enable this Court, or the Royal Court exercising its matrimonial jurisdiction, to make an order that such a sale should not take place for a specified period of time. In those circumstances, with some regret, we come to the view that it is impossible to apply in this jurisdiction the practice which has been developed in English authorities for the purpose of dealing with the problem of children in occupation of the former matrimonial home in circumstances of steeply escalating house prices. We have to deal with the matter as best we can under the powers conferred by Article 46.”

76. Whilst not disagreeing with that statement, it seems to us that Article 46 leaves it open to the Court to make an order that the property be divided on a date other than the date of the Act of Court. When that date arrives, it will be a matter for the parties how they then deal with the property.
77. We propose, therefore, to vary the orders made by the Deputy Bailiff on 27 October 2005 and on 24 January 2006 in the following respects.

78. First, we order that the former matrimonial home, be revested into the names of the Appellant and the Respondent, as owners in common in equal undivided shares. The costs of the revesting are to be borne by the parties equally. The mortgage will continue to be secured on the property and the Respondent will continue to have sole liability in respect of all interest due to Barclays Bank plc in respect of that mortgage. We order the Appellant to co-operate in the execution of any documents which may require to be executed to enable the refinancing of the loan with any other lender of the Respondent's choosing. The Respondent is to continue to enjoy the sole and exclusive occupation of the former marital home until that right is terminated pursuant to paragraph 80 below. Until the property is sold, however, she will be entitled to all and any income which may be derived from the letting of part of the property, and will be responsible for all the outgoings in relation to the property which would ordinarily be the responsibility of a usufruitière.
79. It was put to us by Mrs Haskins for the Respondent that the relationship between the parties was such that an ownership in common would give rise to continuing friction. We hope that the final settlement of these ancillary matters will help improve relations, but we do not believe, in any event, that the arrangements set out above will involve the need for anything other than occasional contact. Both parties will be responsible for any structural repairs which may be necessary, but the obligations of the usufruitière will embrace nearly all the obligations of ownership of the former marital home which has been put in good structural condition in recent years. We would not expect the Appellant to have any immediate need to inquire into the state of the property. We do however direct the Respondent each year within one month after the renewal date of the house insurance policy to serve the Appellant with a copy of the relevant renewal notice certifying that the premium has been duly paid. We have noted that the Respondent is confident that rooms in the property can be let to lodgers, thus providing the necessary income to meet the interest on the loan outstanding and other expenses. Of course, if that expectation is not met, there seems little alternative to a sale of the property.
80. We further direct, subject to the other provisions of this paragraph, that the Respondent's usufruct (that is, the right to enjoy the sole and exclusive occupation of the former marital home, conferred by paragraph 78 above) shall come to an end [when the younger child reaches the age of 18 unless that child] is still occupying that home and is in full time education at an educational establishment in the Island; in which case the usufruct shall continue until 1 August 2015. The Appellant shall have no entitlement *to licitation* until either the relevant date is reached or any of the following events occurs –
- (a) the Respondent ceasing to reside in the property;
 - (b) both the children ceasing to reside in the property;
 - (c) the death of the Respondent.
81. We have not, despite the submissions of counsel for the Appellant, included the remarriage of the Respondent, or any cohabitation for a period exceeding 12 months, as factors bringing forward this postponement of the entitlement of the Appellant to require an earlier *licitation*. One of the purposes of seeking to achieve a clean break is to enable the parties to a failed marriage to obtain closure. The formation or development of new relationships will often follow. The purpose of a deferred right to *licitation* is different; it is to protect the children of the marriage. The formation of a new relationship by the spouse having care and control of the children does not bring to an end the need to protect the children. We do not therefore think it appropriate to reproduce those elements of the Deputy Bailiff's order.
82. Notwithstanding the provisions of the foregoing paragraph, the Respondent is not disentitled at any time prior to 1 August 2015, from placing the property on the market for sale if she chooses at her discretion to do so. We are conscious that it is impossible to predict every eventuality. Circumstances may arise in which the Respondent no longer wishes to live in the property and she should not be compelled to do so. She might, for

example, remarry and desire to live elsewhere. While the property offers a home for the children, and the Respondent wishes to live there, she should have the right to do so. In the event of such a sale, the net free proceeds will be divided between the parties in equal shares as provided for in the ensuing paragraph. In the event of the Respondent wishing to purchase a replacement property following such a sale, there would be no fairness in requiring the Appellant to be an owner in common in a different property.

83. When the time comes for the property to be sold both parties are to co-operate with each other in achieving the best possible price for the property. In the event that the Respondent should wish to acquire the Appellant's share in the property, the property should be valued and agreement reached accordingly. The costs of any sale, including estate agent's and legal fees, are to be borne by the parties in equal shares. The capital of the loan outstanding at the date of this judgment is to be deducted from the gross proceeds of sale and the balance divided in equal shares.

Maintenance for the Children

84. The Deputy Bailiff took into account that by the time of the hearing the debt incurred in respect of the installation of the central heating system had been repaid and life assurance premiums taken out to cover the debt owed to Barclays had ceased to be paid. The total saving to the Appellant was £93.50 per month. As observed earlier the Appellant had indicated to the Deputy Bailiff that this total saving on those two items of expenditure would enable him to allocate that saving as maintenance for [the two children].
85. Advocate Allen, on behalf of the Appellant had invited the Deputy Bailiff to calculate maintenance for the children by reference to 20% of the Appellant's net income but also taking account of his housing costs. The Deputy Bailiff found his net income to be £329 per week and that 20% of that figure is £65.80 per week. Noting the Appellant's housing costs would be on the high side he ordered that the Appellant should pay £30 per week maintenance for each child increasing annually in line with the States of Guernsey Index of Retail Prices (or equivalent). Maintenance should continue to be payable in respect of each child until he or she shall attain the age of 16 years or, if later, cease full time education. [.....].
86. Before us, Advocate Roland for the Appellant submitted that the Deputy Bailiff had been plainly in error in failing to give due weight to the fact that the Appellant's income fluctuated greatly and that, although earning tolerably significant amounts in some weeks, those weeks were balanced by others where he had less than he required for his ordinary outgoings. We have no hesitation in rejecting this part of the appeal. It is the duty of every father to pay reasonable maintenance for his children. The Deputy Bailiff set the maintenance for the children at a modest amount, at a level which was in accordance with the Appellant's own evidence, and in line with the submissions made on his behalf. He must pay £30 per child per week and must make arrangements which will enable him to pay the arrears of maintenance.
87. Finally we give leave to both parties to apply to a single judge of this Court in the event that any difficulties arise in the implementation of this order and delegate to the President the power to settle the terms of the Act of the Court resulting from this Judgment. Counsel are directed to submit a draft Act to HM Greffier within seven days of receipt of the perfected Judgment.

**IN THE COURT OF APPEAL OF THE ISLAND
OF
GUERNSEY**

CIVIL DIVISION – APPEAL NO. 369

Between

E	(Husband/Appellant)
V	
E	(Wife/Respondent)
AND	
ADVOCATE PAULINE ALLEN	(Second Respondent)

Before: Geoffrey Rowland Esquire, Bailiff of Guernsey, President
Sir Philip Bailhache, Bailiff of Jersey
J W McNeill Esq., QC

Advocate J E Roland for the Appellant
Advocate A Merrien for the First Respondent
Advocate P Richardson for the Second Respondent

Hearing date: 17th July 2007
Judgment issued: 7th November 2007

Cases

Havilland Estates Ltd v Channel Islands Ceramics Ltd et al
[1993] 15 GLJ 78, CA
Norris v Norris; Haskins v Haskins
[2003] EWCA Civ 1084, [2003] 2 FLR 1124 Court of Appeal

Texts

Articles 13 & 18(1) of the Court of Appeal (Guernsey) Law, 1961
Rule 48(1) of the Royal Court Civil Rules, 1989

1. On 11 June 2007 we handed down a draft judgment in the above cause by which we indicated our intention to allow the Appellant's appeal and vary in certain respects the decision of the Deputy Bailiff. We now consider certain applications for costs arising from that judgment.
2. The application may be considered in two parts. First, we consider the costs to both parties occasioned by the necessity for the Appellant to seek an Order of this court extending the time within which the documentation relating to this appeal could be filed. It is unnecessary to repeat in extenso what is stated in our judgment in relation to the delays preceding the application for an extension of time. At para 32 of the judgment we stated:-

“The length of the delay was manifest as was the fact that the reason was the inappropriate conduct of the early part of the Appeal by Advocate Allen” [then acting for the Appellant].

3. We ordered that the Court's judgment and related papers should be served upon Advocate Allen, and we indicated that we were considering the making of a 'wasted costs' Order against her in relation to the costs of and incidental to the application for

an extension of time. Before us Advocate Allen has been represented by counsel who has very properly and realistically conceded that an Order for costs on the indemnity basis could not be resisted. Counsel furthermore relayed a gracious apology on behalf of Advocate Allen. There is no doubt, following a decision of this Court in *Havilland Estates Ltd v Channel Islands Ceramics Ltd Court of Appeal [1993] 15 GLJ 78,CA* that there is jurisdiction to make such an Order where the Court is satisfied that there has been a sufficient dereliction of duty on the part of an Advocate to make it appropriate to make such an Order. This Court has vested in it all the powers which previously resided in the Cour Des Jugements et Records (see Article 13 of the Court of Appeal (Guernsey) Law 1961), and has the power to order an Advocate or her firm to pay personally any costs in a matter before the Court.

4. We express ourselves satisfied that there has been a serious dereliction of duty on the part of Advocate Allen, and we order that she should pay personally the costs of both the Appellant and the Respondent of and incidental to the application for an extension of time so that the appeal against the judgment of the Royal Court could be pursued. Those costs will be subject to taxation in the usual way.
5. Secondly, we turn to the substantive costs of the appeal. Counsel for the Appellant contended that her client had “won”, in that the Royal Court’s Order in relation to the division of capital was set aside, and that costs should accordingly follow the event, and be paid by the Respondent. Mr Merrien for the Respondent submitted that there should be no Order for costs. Counsel relied upon comments made by Butler-Sloss LJ in *Norris V Norris, Haskins v Haskins [2003] EWCA Civ 1084, [2003] 2 FLR 1124 Court of Appeal* for the proposition that in England the general approach in family cases was now that no Orders as to costs should be made. She referred to a letter received from the senior costs judge of 20 January 2007 in the following terms:-

“The purpose of this letter is to suggest that it may be worth giving serious thought to doing away with fee shifting in family proceedings. The Family Proceedings (Miscellaneous Amendment) Rules 1991 disapply CPR 44.3 (2) (costs follow the event). It is therefore a relatively short step to providing that in family proceedings no order for costs will be made unless a particular party has behaved in such an unreasonable manner that the court feels a sanction should be imposed. I would suggest that if this idea were to be adopted, the court making such an order should decide what amount should be paid by way of costs there and then. The level of venom in detailed assessment in family proceedings is such that I am firmly of the view that the removal of costs as an area of conflict would have an overall beneficial effect. If costs were never an issue the heat would be taken out of the situation far more quickly and any incentive to legal representatives to pursue remedies over vigorously in the hope of recovering greater costs would also disappear.”

Dame Elizabeth Butler-Sloss had continued:-

“I am extremely grateful to the senior costs judge for his timely warning as to the adverse effect of the costs assessment process on family financial litigation. His sensible proposals require urgent consideration and provide a spur to taking action to introduce a radical approach to costs in all ancillary relief of similar disputes.”

Counsel submitted that an amendment to the Family Proceedings Rules in England was likely to follow, and that there would be a general rule that the court would not make any orders as to costs, in family proceedings.

6. For our part, we do not find it necessary or appropriate to anticipate developments in England, nor to lay down any such general rule in Guernsey. It is sufficient to reiterate that the Court has a general discretion as to the award of costs. Rule 48(1) (a) of the

Royal Court Civil Rules, 1989 states that the Court may make such order as to costs “*as the Court thinks just*”.

7. Article 18 (1) of the Court of Appeal (Guernsey) Law provides that in civil cases “the cost of and incidental to all proceedings in the Court of Appeal ...shall be in the discretion of the Court, and the Court shall have power to determine by whom and to what extent the costs are to be paid.”
8. The fact of the matter in this case is that neither party can afford to pay the costs of the other. Both have very limited incomes, and an order that they should pay the costs of the other would cause extreme hardship and could not in any event be done other than over a long period of time. It cannot be said, in our judgment, that in this case either party has conducted himself or herself unreasonably or oppressively. The Royal Court reached a decision in accordance with Royal Court precedent which we have decided it is no longer appropriate to follow. The fairness of the situation requires that we should, in our judgment, make no Order as to costs.
9. We think it desirable to add a postscript. The Appellant obtained legal aid with which to conduct his appeal on the basis that the Guernsey Legal Aid Service should pay 80% of his costs. The Respondent did not obtain legal aid, presumably on the basis that the Order of the Royal Court had vested in her the previous matrimonial home. We have varied that Order and vested the property in both the Appellant and the Respondent in equal undivided shares. We express the hope that, in the interests of fairness, the administrator of the Guernsey Legal Aid Service might give sympathetic consideration to any retrospective application for legal aid by the Respondent so that she might be granted the same assistance as that enjoyed by the Appellant.