

C -v- C

SMITH JA

1. This is the judgment of the Court.

THE BACKGROUND

2. The parties were married [in 1992]. There were no children of the family. They were divorced in 2000. The wife applied for orders under Articles 46(1) and 47(2) of the Matrimonial Causes (Guernsey) Law 1939 ("the Law"). Article 46 is entitled "Power of Court to Order Vesting or Division of Property" and, as its title implies, is concerned with the redistribution of property on divorce. Article 47 (which is entitled "Contributions for Support") deals with periodical payments by one spouse to the other or (to use a word not used in the Article) maintenance.
3. In July 2004, Mr. John Russell Finch, Lieutenant Bailiff, on a preliminary issue, ruled that as there were only liabilities available for distribution between the parties Article 46(1) had no application as it applies only to assets, and that Article 47(1) did not apply because "support" did not comprehend discharging debts payable to third parties incurred during the marriage. He gave judgment for the Respondent.
4. The Appellant appealed the Lieutenant Bailiff's ruling on Article 47(1) and in July 2005 this Court, differently constituted, ruled that the Lieutenant Bailiff had given an unduly restrictive interpretation of the provision. It remitted the case to the Lieutenant Bailiff "...to determine whether or not to order the Respondent to make periodic payments to the Appellant in discharge for debts." We mention for completeness that the Lieutenant Bailiff's ruling on Article 46(1) of the Law was not appealed and that the Court of Appeal remarked that that ruling "seems to us to be clearly correct."
5. The matter again came before the Lieutenant Bailiff, sitting alone, in January 2006. Having heard oral evidence and argument and having considered the documents before him he decided that the Appellant had failed in her application. From that decision she has appealed to this court.

THE EVIDENCE IN THE ROYAL COURT

[In paragraphs 6 to 11 of the Judgment the Court summarized the evidence as to the debts, income and expenditure of the parties]

THE LIEUTENANT BAILIFF'S DECISION

12. The Lieutenant Bailiff set out what he regarded as the applicable legal principles, including the guidance given in the decision of this Court to which we have referred, and said that he approached the case bearing upper most in mind the wording of Section 25 of the English Matrimonial Causes Act 1973 ("the 1973 Act"). He considered it to be his task to assess the factors set out in that provision, arrive at a provisional view and then compare that view with what the result would be on the basis of the equal division. He considered that if the provisional view did not equate with equal division the court should be able to set out reasons based on the Section 25 criteria as to why it should not do so. Where there were no such reasons equality should prevail. He then referred to a number of English authorities, including the decision of the House of Lords in White -v- White [2001] 1 A.C. 596. He directed himself that where the conduct of one party has had a clear detrimental effect on the fortunes of the spouses that factor can assume real significance. The word "reasonable" in Article 47(1) of the Law (which we set out in paragraph 18 below) is consistent with the overall concept of "fairness."
13. The Lieutenant Bailiff concluded that during the marriage both parties had been living beyond their means. Although it was right to contrast the respective positions of the parties and clear that the Respondent was earning considerably more than the Appellant he had made a real effort to deal with the debt problem, the Lieutenant Bailiff accepting that he had and would pay a total of £153,000. The Lieutenant Bailiff was unimpressed by what he described as the inertia shown by the Appellant in the disposal of [her] business and lack of any realistic return. The failure of the Appellant to engage more closely with the accountant and achieve some sort of repayment plan utilising the business did not appear sensible. It would be inequitable to disregard the Appellant's financial conduct particularly during the course of the marriage. The Appellant let her spending get out of control and the Respondent was not aware of the extent of the problem. He thought that the Respondent was correct in his view that the Appellant had not wanted the Respondent to know what the position was.
14. As to fairness, it appeared to the Lieutenant Bailiff that the determining factors were the way the debts arose, the steps taken by the Respondent to pay off the joint debts, and his finding that the Appellant was responsible for incurring the liabilities that she was now seeking an order against the Respondent for. The only reason that might subsist to justify an order as sought by the Appellant was the imbalance between the respective incomes of the parties but, taking account of all the circumstances, such an order would be unfair.

GROUND OF APPEAL

15. The Appellant's Notice of Appeal sets out the grounds as follows:

"The Learned Lieutenant-Bailiff:

1. erred in not giving any or adequate consideration to the difference in earning capacity of the Parties when considering whether the Respondent was entitled to maintenance;

2. erred in not giving any or adequate consideration to the difference in the standard of living of the parties when considering whether the Respondent should be paid maintenance;

3. such further grounds as may be considered appropriate upon further consideration of the judgment ... "

THE CONTENTIONS OF THE PARTIES

16. The Appellant was unrepresented before us. However, in preparing her case she had the assistance pro bono of a member of the English Bar, Mr. Peter Duckworth, who practises in family law. He furnished detailed written submissions which the Appellant supplemented orally as best she could. Advocate A. J. Ayres appeared for the Respondent. We are indebted to all three of those whom we have mentioned.

17. We do not think it necessary to set out the contentions advanced on behalf of either party in detail. Put shortly, the Appellant's contentions focussed on the obligation on the court to arrive at a fair outcome and relied on the principles articulated by Lord Nicholls of Birkenhead and Baroness Hale of Richmond in their speeches in Miller -v- Miller [2006] UKHL 24, a decision of the House of Lords which had not been reported by the date on which the Lieutenant Bailiff delivered his judgment. The nub of the Appellant's argument was that the Lieutenant Bailiff's decision was plainly wrong and that we should substitute an order in favour of the Appellant. Not surprisingly, Mr. Ayres sought to support the Lieutenant Bailiff's decision, arguing that insofar as the principles in Miller were applicable, the result should be the same.

OUR DECISION

18. It is important to put this case into its correct legislative context. As we have said, the applicable provision is Article 47(1) of the Law. This reads as follows:

"Where a decree for divorce, judicial separation, restitution of conjugal rights or nullity of marriage has been granted, the Court may, if it thinks fit, having regard to the circumstances of the case, including the financial position and conduct of the parties, order that one party shall pay or make provision for the other party during any term not exceeding the life of such other party for such annual or other periodic sum of money for or towards the support of such other party as the Court may deem reasonable, and that the party against whom such order is made shall secure the payments to be made under such an order in manner directed by the Court."

19. Articles 46 and 47 of the Law have not been altered since their enactment in 1939. At the time they were introduced they were similar to equivalent provisions which applied in England and Wales. However, in 1970 a process of change began and the relevant provisions there are now to be found in Part II of the 1973 Act. These have never been enacted in Guernsey. In the absence of legislative action the courts here have interpreted Article 47(1) in a more modern way by seeking to apply Section 25 of the 1973 Act which sets out a list of matters to which the courts in England and Wales must have regard in deciding how to exercise their powers under Sections 23 and 24 (which deal with financial provision and property adjustment orders respectively). Section 25(1) of the 1973 Act provides that it is the duty of the court to have regard to all of the circumstances of the case, first consideration having to be given to the welfare of any child of the family under the age of eighteen. Section 25(2) provides that, as regards the exercise of the powers in relation to a party to the marriage, the court shall have particular regard to -

- "(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;

- (e) any physical or mental disability of either of the parties to the marriage;
 - (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
 - (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
 - (h) ... the value to each of the parties to the marriage of any benefit ... which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring."
20. Bearing in mind that they reflect modern attitudes it is right that the factors set out in Section 25 of the 1973 Act (the so-called "check list") should inform the courts of this jurisdiction in the exercise of their powers under Article 47(1) of the Law and that the English authorities as to the application of that section, particularly those emanating from the House of Lords, should be carefully considered here. After all, the social conditions in Guernsey are similar to those pertaining in the United Kingdom and the financial problems posed by divorce are much the same. But at the end of the day it has to be borne in mind that it is the legislation prevailing here and not that of England and Wales which is being administered and that the legislation in the respective jurisdictions is not identical.
21. Perhaps the most striking difference is in relation to conduct. Section 25(2) of the 1973 Act requires the English court to have regard only to conduct which "... is such that it would in the opinion of the court be inequitable to disregard ... " whereas Article 47(1) of the Law, whilst making reference to the court having regard to the circumstances of the case including conduct, contains no such qualification. And care must be taken not to assume that the English legislation is to be applied here lock, stock and barrel. For example, Mr. Duckworth referred in his submissions to Section 25A of the 1973 Act which applies when a court in England or Wales is considering whether to enforce a clean break. While it may or may not be appropriate to seek to apply the principles implicit in that provision, insofar as this may be possible in Guernsey, never having been enacted here it cannot be deemed to impose duties on the courts of this jurisdiction.
22. Care must also be taken in considering the English jurisprudence. As we have said, Mr. Duckworth relied on principles enunciated by Lord Nicholls and Lady Hale in Miller (cited above). However, the circumstances with which the Law Lords were dealing (there were actually two cases under consideration) were very different from those prevailing in the instant case.

23. It is clear beyond dispute, and was not disputed before us, that the objective in a case like this is fairness, albeit that it was described by Lord Nicholls in Miller as "an elusive concept" (at para. 4). Relying on the approach of Lord Nicholls and Lady Hale, Mr. Duckworth focussed on the principles of needs, compensation and sharing. Dealing with needs first it will be noted that Lord Nicholls referred to needs generated by the marriage (at para. 11) and that Lady Hale, after stating that "there has to be some sort of rationale for the redistribution of resources from one party to the other" said that the most common rationale is that "the relationship has generated needs which it is right that the other party should meet." (at para. 138).
24. On the basis of the Lieutenant Bailiff's findings in this case it is difficult to describe the Appellant's indebtedness as having been generated by the marriage or relationship as distinct from simply arising in the course of the marriage from the Appellant's own profligacy. Nevertheless, needs the Appellant undoubtedly has in the sense that, as matters stand at the moment and as far as can be foreseen, she does not have the means to meet her debts. We return to the issue of needs below.
25. Turning to the principle of compensation, this was described by Lord Nicholls in Miller as "... aimed at redressing any significant prospect of economic disparity between the parties arising from the way they conducted their marriage" (at para. 13) and Lady Hale referred to "compensation for relationship-generated disadvantage." (at para. 140).
26. Once again there is difficulty in applying this principle in this case. The Lieutenant Bailiff did not find that the Appellant's indebtedness arose from any inability to earn or develop her earning capacity arising during the marriage and caused by it. And he did not hold that the Appellant had become saddled with debt which is really joint debt although incurred in her name. Nor did he decide that she had incurred her debts on the basis of some sort of undertaking or indication that the Respondent would meet her debts.
27. Lord Nicholls' third principle was sharing derived "... from the basic concept of equality permeating a marriage as understood today" (at para 16) and His Lordship went on to speak of marriage as being a partnership. Lady Hale (at para. 141) referred to "the sharing of the fruits of the matrimonial partnership", marriage "being a partnership of equals." According to Lord Nicholls the sharing principle meant that when their partnership ends each partner in the marriage is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary - "Fairness requires no less." (see para. 16). But, of course, the difficulty in this case is that there are no assets.
28. Some of the remarks of Lady Hale may, at first blush, appear to assist the Appellant in this case. For example, her statement that "Too strict an adherence to equal sharing and a clean break can lead to a rapid decrease in the primary carer's standard of living and a rapid increase in the breadwinners'"(at para. 142). But the Lieutenant Bailiff did not make any finding to the effect that the Appellant was "the primary carer" and, indeed, his findings suggest that if this marriage was a partnership it was not a very

effective or complete one. The Lieutenant Bailiff preferred the evidence of the Respondent and his evidence was that the [.....] business was that of the Appellant alone. And he made no finding that whatever the purchases were which created the Appellant's indebtedness they inured in any way for the benefit of the Respondent. Insofar as Mr. Duckworth, in preparing his submissions, proceeded on the basis that the Lieutenant Bailiff made any finding to the contrary we believe him to have been mistaken.

29. But even if we leave compensation and sharing out of account as having no meaningful application in this case we still come back to the issue of need and the contrast between the lifestyles of the parties. It is true that the Respondent's wife makes a not insignificant contribution to the family income, that capital from the sale of her former home has made things easier for the Respondent and that he still has debts totalling some £28,000 to address but, nevertheless, he is obviously on his way to clearing those debts and can look forward to a relatively comfortable life financed by his high earnings. The Appellant, on the other hand, lives in very modest circumstances and, as we have said, is saddled with debt which she cannot pay. Thus the question remains: Should the Lieutenant Bailiff have ordered the Respondent to make payments to the Appellant out of which she could defray that indebtedness?
30. In our view "equality" is not really a factor in this case. If all of the debts had been joint debts and the high earning Respondent had been ordered to pay only 50% this would not have been a fair result. But this is not what has happened. The Respondent has paid or taken responsibility for all of the joint debts. Does fairness dictate that he should also make payments to enable the Appellant to discharge her debts? The Lieutenant Bailiff thought not. In so deciding he relied heavily on his findings as to the Appellant's conduct. There were three aspects: Her inability to control her spending; the disposal of 75% of her business "and the lack of any realistic return"; and her failure to plan repayment of the debts from the income from the business.
31. Mr. Duckworth contended that the Lieutenant Bailiff's conclusions in relation to the business lacked an evidential basis, but we do not agree. The business was still trading at the date of the hearing and it was reasonable to deduce that it must be capable of generating an income. He also relied on the English jurisprudence as to the circumstances in which conduct can be taken into account. As we have said this, strictly speaking, does not apply in Guernsey but, in any event, we consider that in the circumstances of this case the conduct in question was such that it was permissible, not to say inevitable, for it to have been held to have a major bearing on what was decided. We would point out that when we speak of the Appellant's "conduct" in incurring debts we are not speaking of the kind of conduct which, by reason of its discreditable character, might be thought to affect the distribution of assets and liabilities. We are speaking of the circumstances in which and the purposes for which the debts were incurred which must be relevant to the fairness of any particular distribution of them after the marriage has ended even in English law. It is certainly relevant in Guernsey. Furthermore, we do not accept that the Lieutenant Bailiff failed to address, or to address meaningfully (as Mr. Duckworth put it), the relevant factors in Section 25 of the 1973 Act. In our

opinion he addressed them adequately although it is true that, as a result of doing so, he did not find in the Appellant's favour.

32. At the end of the day we have come to the conclusion that the decision to which the Lieutenant Bailiff came was one that was open to him. This was a difficult and unusual case and one in which different people could take different views. However, we cannot accept that in the circumstances the Lieutenant Bailiff erred in concluding that it was unfair for the Respondent to be required to make payments to enable the Appellant to discharge her debts. We appreciate that this almost certainly means that they will not be discharged. However, it does not follow from this that the Respondent should be required to make provision for their discharge. Accordingly, the appeal must be dismissed.