



Husband v Wife (anonymised judgment)
Royal Court
13th February, 2015

JUDGMENT
29/2015

Application to vary part of the terms of a judicial separation.

OFFICIAL TRANSCRIPT

Finalised per RJC 13.2.15

THURSDAY 12TH FEBRUARY 2015

IN THE MATRIMONIAL COURT OF GUERNSEY

(ROYAL COURT 3)

Before

Richard John Collas, Esquire
Bailiff

HUSBAND as APPLICANT

- v -

WIFE as RESPONDENT

Present: **Advocate R. Wherlock for the Applicant**
 Advocate N. Hopkins (on behalf of Advocate Brown) for the Respondent

JUDGMENT ON APPLICATION TO VARY PART OF
THE TERMS OF THE JUDICIAL SEPARATION

THE BAILIFF: This is an application to vary part of the terms of a Judicial Separation on the grounds either that the Judicial Separation was entered into under a misapprehension on the part of the Applicant or that its terms operate unreasonably.

Advocate Wherlock appears for the Applicant to whom I will refer as “the Husband” and Advocate Brown for the Respondent to whom I will refer as “the Wife”.

I have an affidavit from the Husband, a statement from the Wife adopted by her on Oath, in both cases with supporting documents; skeleton arguments on behalf of them both and I heard oral evidence from the Husband and the Wife.

The essential facts can be summarised briefly; the Husband is 65 years of age, the Wife is 54. They married in 1980. Towards the end of the marriage the Husband suffered from serious health problems, including a heart attack, a stroke and epilepsy.

In August 2011 the parties decided to separate.

The Wife instructed Advocate Brown and a Judicial Separation was entered into on 10th November 2011, followed by a final order of divorce on 14th May 2012.

There are two children of the marriage both of whom are adult and do not need to be considered in the context of this application.

The Husband did not instruct an Advocate at the time of negotiating and entering into the Judicial Separation; he says he could not afford to do so, although he had received nearly £150,000 shortly beforehand. He says he did not want to spend that money on legal fees because it was all he had and he had little or no prospect of obtaining employment. Any negotiations were therefore conducted between the Husband and the Wife directly, the Wife said mainly over the kitchen table as they were still in the matrimonial home.

The Husband met Advocate Brown for the first time immediately before attending in Court for the Judicial Separation. Advocate Brown produced to him a final version of the Judicial Separation documents which the Husband read and he then requested an amendment in relation to the provisions regarding costs. The fact that he requested that amendment shows, Advocate Brown said, that the Husband read the document carefully.

The principal asset was the former matrimonial home, a property in Alderney that had been placed quietly on the market in autumn 2011 and was advertised publicly after the granting of the Judicial Separation. The property is owned jointly for the Husband and Wife, for the survivor of them and the heirs of such survivor.

The Judicial Separation provided inter alia for the property to be marketed, for the Wife to live in it until it was sold and after the sale for the net proceeds to be split equally between the Husband and the Wife. More than three years later the property has still not been sold and no offers have been received. The application before me seeks a re-vesting of the property in undivided one half shares.

I will refer to further facts later in the judgment.

The Law:

The Judicial Separation was a Judicial Separation granted by consent under the Customary Law powers. It was consented to in the Royal Court even though both parties were Alderney residents at the time. Insofar as it may have been necessary they both consented to the jurisdiction of the Royal Court and certainly it is only the Royal Court that has power to entertain this application for a variation of the Judicial Separation as the application is brought under the provisions of the Matrimonial Causes (Guernsey) Law 1939 as amended, Article 45 of which provides:-

“45(1) The Court, after the making in the Island of Guernsey of a decree of divorce or nullity of marriage, may upon the application of either party to the marriage which is the subject of such decree or upon the application of any person beneficially interested

(a) cancel, vary or modify, or

(b) terminate the trusts of any marriage contract, marriage settlement, post nuptial settlement or terms of separation subsisting between the parties to such marriage in any manner which having regard to the means of the parties the conduct of either of them or the interests of any children of such marriage appears to the Court to be just.”

And we are not concerned with Article 45(2).

Article 45(1) therefore confers a wide discretion on the Court but it is a discretion which as ever much be exercised judicially.

Guidance as to how to exercise the Court's discretion was given by the Court of Appeal in A v. A (2003/04) GLR 123; Sumption JA, delivering the judgment of the Court upheld the customary nature of the Court's power to grant Judicial Separations by consent as different from Judicial Separations by petition under the provisions of Article 27 on a ground which might otherwise justify petitioning for divorce.

In paragraph 13 of the judgment he said-

“In these circumstances, the Court is simply providing a facility to the parties to enable them to regulate their financial and other affairs in the new situation in a manner which will be enforceable. The main function of the Court's intervention is to ensure that they do so in a way which truly represents their wishes, in a context where there are obvious dangers that the will of one or other of them may be overborne. It should be pointed out that the parties, by obtaining the Court's sanction for their agreement, do not oust the ordinary jurisdiction of the Court to ensure, where appropriate, that a party to the marriage or children of the marriage are financially supported. A judicial separation by consent does not in itself prevent the Court from making vesting orders in respect of property of the parties (Article 46 of the 1939 Law), or ordering reasonable financial contributions to be made by one party to another for the latter's support (Article 47). Nor does it prevent the Magistrate's Court from making orders under the Domestic Proceedings and Magistrate's (Guernsey) Law 1988, Article 2(1) for the maintenance of a spouse or child while the marriage continues. Nor does it prevent the Court from setting aside the consent order if it should subsequently appear that the consent had been procured by undue influence or some other vitiating factor.”

He went on to say at paragraph 14, that in that case-

“The basis of the Husband's complaint is the suggestion that it was incumbent on the Deputy Bailiff in 2000 to satisfy himself that the terms were not only acceptable to the parties, but objectively reasonable in the sense that they corresponded to what the Court would have imposed on them if the issue had been disputed.”

The Court of Appeal rejected that submission.

The Court affirmed that the parties may agree terms that are acceptable to them but substantially different from any terms which the Court would impose following a dispute. Sumption JA said in paragraph 15-

“Of course the Court must be satisfied that the proposed terms reflect the genuine desire of both parties but there is no reason for it to insist on more than that and of course the terms of an agreement may be so unfavourable to one party that the Court may infer that that party's will has been overborne.”

In A v A as in this case the Husband had been unrepresented at the time of the making of the Judicial Separation; in relation to an unrepresented party the Court said the following at paragraph 16-

“Does it make any difference to the Court's function that one party is not legally represented? In our judgment it makes a difference only when it happens in circumstances which suggest that there has been no true agreement. Classically, when a party who is unrepresented is a party in respect of whom a presumption of undue influence arises.”

On what grounds then may the Court vary the terms of a Judicial Separation obtained by consent under the provisions of Article 45 of the 1939 Law? In A v A, Sumption JA said the following at paragraph 17-

“The fact that the parties have themselves agreed certain arrangements as reasonable is strong evidence that they are indeed reasonable, at least as between the parties

themselves. Unless the agreement was unfairly procured or made under some misapprehension or unless circumstances have changed in some material respect but even strong evidence may be displaced by other evidence that the terms operate unreasonably, in which case a variation will be made. Secondly, in many cases the Respondent to an application to vary will have organised his or her affairs on the basis of the agreement in a way which would make some variations unfair. The Court needs to be sensitive to this.”

In the present application it has not been submitted that the Husband’s will was overborne at the time of the making of the Judicial Separation nor is it being suggested that there has been a change of circumstances that would justify a variation save that there are circumstances namely, the depressed nature of the Alderney property market, that render the terms unreasonable in their operation.

Misapprehension:

I will deal first with the ground relied upon that the Judicial Separation should be varied on the basis that the Husband’s consent to it was given under a misapprehension on his part. I considered what kind of misapprehension could lead a Court to grant a variation. Misapprehension may arise in many ways. It must be more than a failure to consider the meaning and effect of the provisions of a Judicial Separation before the Court will interfere. It requires proof that a term was considered by the party, that the term was understood to mean something which later turned out to be incorrect. Or, in some circumstances the misapprehension may arise from the giving of wrong advice. Here, that is not alleged. In the situation where a party is legally represented and enters into an agreement under incorrect legal advice, the remedy may be against the Advocate concerned. There may be other circumstances perhaps where representations might have been made by the other party or Counsel acting for the other party; that is not alleged here and indeed the Husband would have difficulty in doing so because in paragraph 23 of the Judicial Separation he declared-

“23. The Husband hereby declares and confirms that he has been advised of his right to seek independent legal advice and has been given the opportunity to do so and further that he enters into this Judicial Separation of his own free will and not in consequence of or in reliance upon anything said by or on behalf of the Wife or any other persons and that the Husband fully understands and agrees to the terms and effect of this Judicial Separation.”

In my view in the present application the Husband must show that he thought about the effect of the term he seeks to have varied and that he misunderstood it. He did not have legal representation as he confirmed both in paragraph 23 of the Judicial Separation quoted above and also in similar terms in paragraph 10 of the Memorandum of Judicial Separation produced to the Court in which he also confirmed he had been given opportunity to seek legal advice. He had chosen not to do so and he declared that he understood the terms and effect of the agreement. I also asked questions in Court to similar effect and he confirmed that he understood and was happy to proceed. In my view there is absolutely no doubt that on 10th November 2011, when the Husband attended in Court he thought he understood the document; he now says he was mistaken.

The Court must be wary about allowing people to come along and simply say they misunderstood the agreement they entered into. Otherwise that would provide an easy basis for parties who later are dissatisfied with the terms of an agreement to apply to the Court to seek a variation in order to avoid the effects of the Judicial Separation they had consented to. Indeed, it might encourage persons not to take legal advice on the terms as it would clearly be more difficult for somebody to avoid the terms of a Judicial Separation if they had taken legal advice.

In this case did the Husband properly consider the effect of not altering the vesting of the property pending its sale? The Wife says that was discussed between them before coming to Court for the Judicial Separation, the Husband denies that was so. The Wife also says it was discussed immediately after their attendance in Court when they went together to Advocate Le Marquand’s offices at Carey Olsen in order to take advice on changing their wills; again, the Husband denies there was any such discussion at that meeting.

The effect of a survivorship vesting was specifically explained by Advocate Le Marquand in an e-mail to the Wife dated 15th December 2011, however that e-mail was not copied to the Husband and there is no evidence that he saw it or that he received an e-mail in similar terms. In fact, the Husband said that he received nothing in writing from Carey Olsen because he changed his lawyers. The Wife says that is incorrect because she saw some misdirected correspondence that showed that Carey Olsen had in fact drawn up a will for the Husband. There is therefore a dispute as to what was or was not said at the meeting at Carey Olsen immediately after the Judicial Separation.

I believe both are giving a truthful recollection as they recall matters. It may well be that the Husband has forgotten details of that discussion, quite possibly because they did not appear significant at the time. In any event, what may have been said after they had been to Court to consent to the Judicial Separation is irrelevant in terms of establishing what was in the Husband's mind when he came to Court. The Husband said that he only became aware that the property remained vested in them on a survivorship basis in 2013, after he had remarried and when he spoke to the Alderney Court Office about possibly changing his will to reflect the marriage status and the new name of his second Wife.

In my view the significant and telling evidence was given by the Husband when he said that at the time of entering into the Judicial Separation he thought that the property would have been sold by the time of their subsequent divorce and that by then the proceeds of sale would have been divided between them. The Wife also said in her evidence that no one envisaged that it would take such a long time to sell the property.

It seems to me that that is what was in the parties' minds at the time; the property had been placed quietly on the market and was to be fully marketed, they expected it to be sold in a relatively short period of time and for the proceeds of sale then to be divided equally. There was no need to them to consider in detail what might happen to the property if one of them were not to survive to see it sold. In short, the Husband has failed to persuade me that he entered into the Judicial Separation under such a misapprehension that the Court should interfere with the provisions regarding the vesting of the property pending its sale.

The term “Operate Unreasonably”:

I turn now to the second ground, namely, that the terms of the agreement operate unreasonably. Whenever the Royal Court is asked to vary a Judicial Separation on the ground that its terms operate unreasonably it must act with extreme care; that is both because the parties may have arranged their affairs relying upon the terms of the Judicial Separation as Sumption, JA, said in A v A but also the Court needs to consider carefully what the word “*unreasonably*” means in this context and by what measure it is to be judged.

In A v A the Court of Appeal envisaged that the terms of a Judicial Separation may be objectively unfair. It follows that one could read objectively unreasonable in the sense that no Court would impose such terms. Objective unfairness is not therefore the sole test, although it seems to me it is a factor that would need to be established: Some further proof is required. In my view reasonableness or otherwise must be judged by reference to the bargain made by the parties at the time they entered into the Judicial Separation agreement.

If the terms of the Judicial Separation operate differently than they agreed or intended, and if they are objectively unreasonable, then the Court may interfere. The effect of the current vesting of the parties' former matrimonial home on a survivorship basis is that if one of them dies the survivor will own the entire property. That is not what they anticipated in November 2011 when they expected the property to be sold and for the proceeds to be divided for each to deal with as they wished. They did not envisage that more than three years down the line if one of them was to die the other would have the sole benefit of the property.

Is it relevant that the Husband is in poor health and older than the Wife and hence that he may die first? He may not die first; none of us know the date of our own deaths. What they agreed was a clean break between them. The Court encourages clean breaks so that parties can move on with their

lives. In this present matter each of them suggests that the other asserts to seek a degree of control; each of them alleges that the other has not fully complied or has ignored some or all of the terms of the Judicial Separation. It is not necessary for me to form a view on those matters, all I will say is the fact that such issues are being raised illustrates the consequences of what can happen when parties separate and do not achieve a clean break.

As it is, the Husband has remarried, as I have said. The Wife has a partner with whom she says she does not cohabit and who she would not want to benefit under her will. She said the only people she would wish to benefit would be the parties two children and other members of her own family. But why should she not be free to cohabit or remarry and deal with her share of the property as she wishes in the event of her death? If the house had sold as they expected at the time of the Judicial Separation they would each have received half of the net proceeds of sale a long time ago and would have been free to deal with those proceeds as they wished.

In my view it is unreasonable that more than three years later neither of them knows whether they will live to see anything from the house, neither of them can make plans with any certainty for their own wills; that to my mind is unreasonable both objectively and when viewed in relation to the terms of the bargain that they struck when entering into the Judicial Separation agreement in 2011. It is within my discretion under Article 45 of the 1939 Law to order a re-vesting of the property and for the reasons I have given I do so order and I order that it be re-vested in undivided one half shares.

Advocate Brown was concerned that any order for variation would open the floodgates for further applications from parties to Judicial Separations by consent. I do not believe that will be so; the facts of this case are unusual; in my view it is a straightforward application of the principles laid down by the Court of Appeal in A v A, that decision back in 2003 did not open the floodgates for variations of Judicial Separations and there is no reason to believe that the decision I have given in this matter will do so either.

So the application is granted.

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I, Suzanne Margaret O'Neill, hereby certify the foregoing to be a correct and complete extract, prepared to the best of my skill and ability from the audio recording of the proceedings in this case.

Suzanne M. O'Neill
Friday 13th February 2015