ROYAL COURT

1st July, 1988

Before: The Bailiff and
Jurats Vint and Orchard

BETWEEN	A	PETITIONER
AND	S	RESPONDENT

Advocate J.A. Clyde-Smith for the Petitioner
Advocate D.E. Le Cornu for the Respondent

JUDGMENT

BAILIFF: In this case the parties were married in 1961 and a decree nisi was granted on the 7th June, 1985. It was therefore a long marriage; the wife bore her husband five children. Divorce was on the grounds of two years' separation and therefore it can be said it was a divorce by consent. In the course of the pleadings leading up to this application there was some suggestion that the conduct of the defendant, or the husband, the respondent, ought to be taken into account, but that matter was not pursued and therefore the Court was only concerned with the financial arrangements.

At the time of the decree nisi the Court approved a memorandum of agreement. It was signed (but not dated) by the parties and witnessed by their advocates. As I have said, the Court today is only concerned with the financial matters in that agreement. Those matters were dealt with in paragraphs 3, 4, 5, 6 and 9, the effect of which was that the wife would have a lump sum of £70,000; £50 per week for her maintenance until D

reached sixteen or until she remarried or cohabited; £20 per week for D until he was sixteen or had completed his education; and the husband, the respondent, was responsible for the payment of school fees for J , D , for school clothing and equipment, and medical and dental treatment for D undertaken with his prior consent except in the case of an emergency.

There was also a clause which reads that: "Subject to the foregoing terms and arrangements the petitioner waives and abandons any claims she may have for the transfer of property or variation of a settlement or lump sum payment or any other transfer of payment of a capital nature, which said claims do stand dismissed".

In the meantime on the 21st May, 1987, the maintenance was increased by order of the Greffier Substitut to £150 per week backdated the 17th September, 1986. The wife has now applied to this Court for variations for the following matters: She wishes to have an increase in the lump sum awarded under the maintenance agreement; she wishes to increase the maintenance as from the date of the decree nisi; she wishes to increase the maintenance as from today; and she wishes for an increase in the maintenance payable for D.

To enable the Court to re-open the matters of financial agreement which were agreed by the parties, signed in an agreement and ratified by the Court, the Court has to be satisfied that there was not full and frank disclosure, first of all to Advocate Messervy who was then acting for the wife, before the agreement was signed, or to the Court itself. I say this because the Court is required to satisfy itself and have regard to all the circumstances of the case, even if the financial provisions are agreed. This is apparent from an important House of Lords case of Livesey -v- Jenkins 1985 1 All E.R. p.106. I read from a passage in that case on p.112 from the judgment of Lord Brandon, beginning at letter 'd': "In considering the questions from the point of view of principle, there are four matters which I think that it is necessary to state and emphasise from the beginning. The first matter is that the powers of a judge of the Family Division of the High Court or of a judge of a divorce county court to make orders for financial provision and property adjustment following a divorce are conferred on them, and conferred on them solely, by statute", (I interpellate here to say

that is exactly the position in Jersey), the learned Law Lord then goes on to say: ... "the relevant statute at the time of the proceedings out of which this appeal arises being the Matrimonial Causes Act 1973". (And again I interpellate it is of course our own statute). "The second matter is that there is no difference in this respect between a judge's powers to make such orders after a disputed hearing involving evidence on both sides and his powers to make such orders by the consent of the parties without having heard any evidence at all. The third matter is that the powers of registrars to make such orders, when delegated to them by rules of court, are exactly the same as those of judges, (that does not really apply here). "The fourth matter is that, when parties agree the provisions of a consent order, and the court subsequently gives effect to such agreement by approving the provisions concerned and embodying them in an order of the court, the legal effect of those provisions is derived from the court order itself, and does not depend any longer on the agreement between the parties: see de Lasala -v- de Lasala [1979] 2 All E.R. 1146 at 1155".

This Court has to be satisfied and had to be satisfied at the time it made the order, though of course it was not asked to be satisfied, that there was full and frank disclosure to it before it gave its approval. It may well be that there is a gap in our law which may have to be filled by legislation or regulations, that where there are consent orders made, the Court may have to be satisfied that it is right for it to make the order and not merely accept the signature of the parties on the document. I say that in way of passing.

Mr Le Cornu has in fact accepted, by inference, that full and frank disclosure was not made and therefore he said that the Court should only change the order if it was satisfied that the Court, if it had had the facts which we now have before it, would have made an order substantially different or approved an order substantially different from the one that it did.

The Court, as I say, has accepted that full and frank disclosure was not in fact made at the time. The difficulty arose because Mr Messervy, as I say, then acting for the wife, the petitioner, was seen rather unusually by the husband, who handed him a number of documents, and there is some

dispute as to whether he actually handed Mr Messervy everything that he could. Certainly he handed him his bank statements of the company with which he was concerned, and I should say here that of course the whole of this case concerns the company which the husband owns and is the beneficial owner of A Limited which is a company manufacturing glass. He also owns the house, the value of which is now some £250,000 but at the time of the order, was between £140,000 to £170,000. He owned it through a company, but he was the beneficial owner of that company.

When the husband saw Mr Messervy, at least at two meetings on the 8th November and the 25th January, 1985, financial matters were discussed. There were other matters concerning the children which we are not being asked to consider. Mr Messervy made a note which he produced to the Court, which reads: "S £170,000 house not to be sold; Capital £35,000; company stock £30,000; profits £15,000 to £20,000; £3,000 investments; pay rent; maintenance to her and D plus rent £70 per week; lump sum £30,000 to £35,000; generous access". Subsequently, as a result of those discussions and the note which Mr Messervy took, which it is not disputed was in fact given to Mr Messervy, the agreement was entered into. We know that that was not a accurate description of the position of the company and therefore of the husband at the time. We know that because subsequently the Court has received and looked at a number of company accounts. Those company accounts date back to 1982 and 1983 and we come to the accounts for 1984 which show a very considerable increase in the assets of the company, not only as regards cash in bank, a reduction in the bank overdraft, but also an increase in reserves. It is said that that matter is exceptional. Be that as it may, it was not something that was available to Mr Messervy. We think it should have been; we think that if the respondent was really wanting to make full and frank disclosure, he should have seen to it that those company accounts were available. We have heard from his accountant, Mr Angus, that had he been asked, his firm could have produced those accounts within four to six weeks. It is extraordinary to us that the respondent did not see fit to produce proper accounts to Mr Messervy and indeed to his own advocate at the time the agreement was signed. As I say, we find there was not full and frank disclosure.

That being so, we are quite satisfied that we have the right to re-open the whole matter of the financial arrangements between the parties. We have come to the conclusion that we must look at the capital figures of the company as it was in 1984 and of course as it is today to see whether in fact if we do change the order, whether we would make any such order that would have the effect of crippling the company. It is perhaps right to say at this moment that the company obviously was doing very well in 1984 and it did not do quite so well in 1985 and 1986, but in 1987, emboldened perhaps by the fact that the company had been doing well over the previous years, and by the temptations offered to people to speculate on the stock market, the respondent indeed did speculate and bought some £405,000 approximately of speculative shares. He sold some, he made a small profit on others, but unfortunately, owing to the stock market crash in 1987, the holding of what in fact were the company's reserves, were considerably reduced. Be that as it may, we thought it right to look at the company's accounts and arrive at what we considered to be the average profits taken over three years, 1982, 1983 and 1984, which ought to have been before the Court and before the advisers of both parties, but particularly the adviser of the wife, because as Mr Messervy said, had he had the figures which were now produced and were shown to him, he would have asked for considerably more than he did at the time. Had the Court had the figures in front of it, it would have made a totally different order, of that we have little doubt. The average profits over those three years, taking into account 1984, and although it has been argued as having been exceptional, it is there and it is not a figure that can be ignored. Over those three years it worked out at something like £100,000. In order to arrive at the value of the company, that is to say the capital value of the company, (we know what the value of the house was between £140,000 and £170,000) we had to decide whether we adopted the suggestions of the accountant, Mr Edwards, for the plaintiff, or Mr Angus, for the defendant, or the petitioner and the respondent.

We came to the conclusion that we should take the most favourable view from the point of view of the respondent. Therefore we multiplied the average profit of £100,000 by three times and we arrived at £300,000. We added to that the lowest value of the house (£140,000) and we arrived at £440,000, a third of which is £110,000. Having regard to previous decisions of this Court which have approved of the English decision in Wachtel -v-

Wachtel (1973) Fam. 72, 80, (1973) 1 All E.R. 113, 119, and there are a number of Jersey cases in point, we can see no reason to reduce that figure below the amount we have arrived at. Of course it would be reasonable to allow something for the fact that 1984 was perhaps exceptional, or rather higher and we think, therefore, it would be fair to reduce it to, say, £100,000 which we have done. She has already received £70,000 and therefore we think we should give her a further award of £30,000 plus £9,000 interest. We note, incidentally, that the overdraft which was standing at over £70,000 at the end of 1987 has now been reduced to something like £35,000. As I have said, the present value of the respondent's house, which is unencumbered except for an unregistered charge of £30,000, is £250,000. We cannot find, looking at that position, for him to find a further sum of £39,000 would cripple the company. Looking at the company accounts and having it explained to us by Mr Angus and even taking a most favourable view, there is still some £83,000 in the company which are reserves which could be used for this purpose, if necessary. But it need not, of course, be necessary, it should not be difficult for the respondent to raise a mortgage on his house to cover this additional amount. It is a very substantial property. We quite understand, and we have considered the fact, that there are three matters that the company has to have regard to and so does the beneficial owner in managing it. One is of course to provide for stock, taxation and running costs, but also replacement of the premises, the lease of which is due to expire in two years or so. However, having said that, we cannot think, examining the present position of the company, that it would require the beneficial owner, the respondent, to find £39,000 of capital now is going to cripple the company at all.

We now come to the question of maintenance. We have no doubt, having regard to the figures which we have been given, that the proper figure of maintenance would have been, if the Court had had all the figures we now have before this Court, in the sum of £10,000. That would have lasted for three years and therefore there would have been a total of £30,000 less tax, making a sum of £24,000 to come. However, from that must be deducted the amount the wife has actually had which we calculate to be £15,800, leaving a figure due to her of £8,200 which we accordingly award as regards arrears of maintenance. We come to what we consider an appropriate figure of maintenance, not withstanding the husband's affidavit

in which he shows that he is contributing something like £17,000 to the maintenance of his family; we stress again that this was a long marriage; that the wife had borne him five children; that conduct was not in issue between the parties, and was not raised today, and that she is entitled to something which reflects the standard of living which she enjoyed during her marriage. We therefore award her, as from today, the sum of £12,500 maintenance per annum. As regards D , we think that the present figure is too low and we award the sum of £1,500 per annum.

Mr Clyde-Smith has asked for the full costs. We think that because there was not full and frank disclosure, these proceedings have been forced, so to speak, upon the wife, and we also award costs to her on a full indemnity basis.

Authorities referred to in the judgment:

Livesey -v- Jenkins 1985 1 All E.R. 106 at p.112.
Wachtel -v- Wachtel (1973) Fam. 72, 80, (1973) 1 All E.R. 113, 119.

Other authorities referred to:

Mitchener -v- Clarke J.J. 1987/80.
F -v- W J.J. 1987/27.
H -v- T J.J. 1987/5.
A -v- B J.J. 1979/125.
Billot -v- Perchard J.J. 1977/33.
Urquhart -v- Wallace J.J. 1974/119.