6 pages

ROYAL COURT
(Matrimonial Causes Division)

56

30th April, 1993

Before: The Bailiff, and
Jurats Orchard and Rumfitt

BETWEEN Mrs L **PETITIONER**

AND Mr L **RESPONDENT**

Advocate S. E. Fitz for the Petitioner
Advocate G. Le V. Flott for the Respondent

JUDGMENT

THE BAILIFF: This matter comes before the Court by way of a Summons issued on the 16th February, by the Respondent. The background may be stated shortly. The parties were married in 1973 and have three children, the youngest of whom is aged three. The matrimonial home is in St. Brelade, which is owned by the Respondent.

In March, 1992, the Petitioner served a petition on the Respondent for a judicial separation alleging cruelty. Just before Christmas in 1992 the Petitioner brought an Order of Justice against the Respondent ordering him to leave the matrimonial home. The action for a judicial separation in the Matrimonial Causes Division of this Court and the proceedings in the Samedi Division were consolidated and both actions were set down for trial on the 8th February, 1993. Five days were set aside for the hearing and there were some forty-six witnesses warned to give evidence for the parties.

At the close of the hearing on Tuesday, 9th February, 1993, the Court saw both counsel in chambers and suggested that in view of the financial circumstances of the parties it might be more appropriate if they could seek a compromise rather than continue

with prolonged and necessarily expensive proceedings. The Court was asked not to sit on Wednesday and Thursday, and negotiations were started. There was some discussion on the Wednesday between Advocate Fiott, acting for the Respondent, and Mrs. Whittaker, acting for the Petitioner, about the possibility of the Petitioner's acquiring a house, either by renting, or purchasing, and leaving the matrimonial home for the Respondent.

These discussions did not come to anything, mainly because a suitable property could not be found, but also because the Petitioner was worried about the security of a proper home for her children. On the Thursday morning, the Petitioner went to Court No.2 where the action was taking place, and met with Mrs. Hart, a Children's Officer, who had been asked to visit the family, in relation to the custody of the children. She was due to give evidence in the trial but was not aware that the Court had made the suggestion which we have mentioned. In the end, she agreed to assist the Petitioner who went into one of the adjacent rooms with her and the Respondent went into another room. Mr. Fiott and Mrs. Whittaker, with the assistance of Mrs. Linda Williams, a Solicitor who was one of the employers of the Respondent, discussed a possible settlement and, partly Mr. Fiott, but mainly Mrs. Williams, put the suggested terms to the Respondent and Mrs. Whittaker put them, in turn, to the Petitioner. The whole morning was taken up with these discussions until about 1.30 p.m. At that time a number of matters had been discussed, and it is said by the Respondent, agreed to, and all that remained to be done was for Mrs. Whittaker to set down in formal language the terms to which the parties had consented and which would be presented to the Court on Friday morning when it resumed.

The Summons before the Court is to stay the hearing, dismiss the Order of Justice and raise the injunctions contained therein and stay or dismiss the petition for a judicial separation. The grounds for this application are that the parties compromised the matters between them and that what had been discussed during the morning of Thursday, 10th February, constituted a binding agreement. If it did then, applying the principle *"La convention fait la loi des parties"*, the Court will enforce that agreement.

As was stated by the Court in Wallis -v- Taylor (1965) J.J. 455 at 457:-

> ***"It is an established principle of Jersey law that "la convention fait la loi des parties" and the Court will enforce agreements provided that, in the words of Pothier, (Oeuvres de Pothier, Traité des Obligations, 1821 edition, at p.91) "elles ne contiennent rien de contraire aux lois et aux bonnes moeurs, et qu'elles interviennent entre personnes capables de contracter". Where an agreement is freely entered into between responsible persons, good cause must be shown why it should not be enforced..."***

Although this case is in the Matrimonial Causes Division of the Court, and it could be argued that the powers of the Court to ratify agreements of the parties give a discretion to the Court, that is not a matter which we are called upon to decide today because such agreements normally follow the granting of matrimonial relief. Here, if we were to find that an agreement had been concluded, it would then be a matter for the earlier Court before which this matter came to receive that agreement and to decide how next to proceed.

For an agreement to be binding, it is necessary, first of all, that the parties intended that they should be bound, and secondly, that there were definite offers by one party and definite acceptances of those offers by the other party. The question the Court has to decide is whether the negotiations were concluded at about 1.30 p.m. on Thursday, 10th February, 1993, or whether they were to continue. On this point there is conflict of evidence.

If the continued negotiations disclosed an agreed rescission of the agreement, then the position is different. See Foskett: "The Law and Practice of Compromise, (3rd Ed'n), para. 3-10. It is trite law that if the terms are too vague then there can be no agreement, nor is an agreement to agree in the future, a contract. At paragraph 3-23, Foskett cites a passage from Von Hatsfeldt-Wildenburg v. Alexander [1912] 1 Ch. 284 at p.288 per Parker J. The passage is as follows:

> ***"....it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored"***

Was, therefore, every requisite present for an agreement between the parties at the conclusion of the negotiations on the 10th of February? The matters that were discussed and alleged by the Respondent to have been agreed were set out in an affidavit by Mrs. Williams which she confirmed during her evidence. It is not necessary for the Court to recite them because they were all agreed by the Petitioner as being those matters which were discussed. The Petitioner, in fact, agreed all thirteen except the question of a capital payment to her and, she said she could not remember the two last matters discussed, namely the transfer by her of an insurance policy to the respondent and a clause saying that each party would pay their own costs.

Mrs. Whittaker, who gave evidence for the Petitioner, said that she felt it necessary at the end of the negotiations to add words to the effect that what had taken place was subject to a final agreement. She said that she had hoped that they had reached a basis for finalising matters during the Thursday afternoon, but that neither party would be bound until an agreement had been signed. Her instructions were that the Petitioner, who confirmed this during her evidence, required time for reflection on the financial implications and to assess the effect of her leaving the matrimonial home which she was reluctant to do because that would deprive her children of a secure home.

Mr. Fiott, who appeared for the Respondent, did not give evidence but Mrs. Williams said that when Mrs. Whittaker made the observation we have mentioned, Mr. Fiott replied that they had reached an agreement and that Mrs. Whittaker merely smiled in reply to that observation. The question, therefore, the Court has to ask itself falls into two parts: 1. was there an agreement before Mrs. Whittaker said something at 1.30 p.m.; and 2. if there were, was her remark such that it could and did qualify that agreement.

There was obviously some pressure on the parties but the Court is satisfied that that pressure was not such as to prevent an agreement's being reached. Mrs. Whittaker agreed that she and the Respondent had discussed fully the implications of each of the matters discussed and that negotiations had taken place in a calm atmosphere. The Court is satisfied that the main heads of agreement had been reached before Mrs. Whittaker attempted to qualify what had been agreed, notwithstanding that the Petitioner said that she had not committed herself. Mrs. Williams and the Respondent were under the firm impression that an agreement had been reached and that Mrs. Whittaker's task was merely to give it legal form and to include such additional matters as were necessarily incidental to it. It is worth remembering that the proposals were examined minutely, even to the extent of discussing whether training shoes should be provided by the Respondent.

The second question is slightly more difficult: did Mrs. Whittaker, subsequent to the terms' being agreed, qualify them so unequivocally as to make them dependent on the Petitioner's agreeing the written document. If it is true that this was a term and was not fulfilled, the agreement could not be binding. The Petitioner said that after taking advice from her brother-in-law (whom she did not call) she decided that she could not accept the capital offer, again because of her fear that she would not be able to provide a secure home for the children. Mrs. Whittaker, nevertheless, agreed that although the capital sum of £35,000 was on the low side, having regard to the circumstances of the parties, and the conditions under which they were negotiating, she felt she had got the best possible deal for her client. It is important to note that this was not a case where the lawyers were

negotiating at arm's length on behalf of their clients, but really acting as go-betweens as each point came up. It is unfortunate that Mr. Flott was not called as a witness, but even so, we are satisfied that Mrs. Whittaker's remarks at about 1.30 p.m. did not have the effect of changing a binding agreement into a conditional one. Accordingly, the Court finds that there was an agreement, that it is enforceable according to the law of Jersey and remits the matter to the Court before which the consolidated actions came on 8th February, 1993.

Authorities

Foskett: "The Law and Practice of Compromise" (3rd Ed'n): para. 3-10.

Von Hatsfeldt-Wildenburg -v- Alexander [1912] 1 Ch. 284 at 288.

Edgar -v- Edgar (1980) 3 All E.R. p.888 at 899.

Neale -v- Gordon Lennox [1902] A.C. 465.

Shepherd -v- Robinson (1919) 1 K.B. 474.

Hyman -v- Hyman (1929) A.C. 601.

Conlon -v- Conlon Ltd (1952) 2 All E.R. 462.

Wallis -v- Taylor (1965) J.J. 455.