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C.A. L v L

MRS L v MR L

COURT OF APPEAL (Bailhache, Bailiff and Dorey and Harman, JJ.A.): January 24th, 1996

Family Law—domestic violence—ouster order—ex parte application appropriate in emergency or if in interests of justice or necessary to protect applicant or children—must be real immediate danger of serious injury or irreparable damage

Family Law—domestic violence—ouster order—factors to be considered —behaviour of parties, effect of presence or absence of respondent on children, personal circumstances of respondent, likelihood of injury to parties, physical and mental health

The appellant obtained an ouster order against the respondent.

The appellant began proceedings for judicial separation from her husband, the respondent, on the ground of cruelty. It appeared that tension between the parties had a detrimental effect on the mental health of the appellant and the children of the marriage, although the respondent was not alleged to pose any danger to them and indeed appeared to behave responsibly towards them.

The appellant obtained an ouster order *ex parte*, following which the respondent left the matrimonial home; in due course his unsatisfactory accommodation and personal misfortunes began to affect his health. There was expert evidence that strongly suggested that neither the appellant nor the children would be able to cope with his return to the matrimonial home.

The respondent subsequently sought to return and the Royal Court (Hamon, Deputy Bailiff and Jurats Vibert and Potter) vacated the ouster order, giving weight to the nature of the respondent's accommodation and suggesting that it would be possible either for the parties to share the same house or for the appellant and the children to rent accommodation elsewhere (these proceedings are noted at 1995 JLR *N*–15).

On appeal, the appellant submitted, *inter alia*, that neither of the Royal Court's alternative suggestions were appropriate, since either would cause both her and the children irreparable damage. The respondent denied this.

The court also considered the manner in which the ouster order had been obtained and the evidence upon which it had been based.

Held, allowing the appeal:

(1) It was not clear that the ouster order should have been made at all, since the evidence upon which the application had been based was

insubstantial; furthermore, it should certainly not have been granted *ex parte* unless there were an emergency or unless the interests of justice or the need to protect the appellant or the children required it. Such cases were extremely rare and it followed that a real immediate danger of serious injury or irreparable damage had to be shown (page 22, line 30 – page 23, line 5).

(2) However, in the light of the changed circumstances since the order was made, it was appropriate that it should now remain in place. The correct approach was for the court to consider whether in all the circumstances of the case it was fair, just and reasonable that the respondent be excluded from the matrimonial home; relevant factors included the behaviour of the parties, the effect upon the children of the respondent's presence or absence, his own personal circumstances, the likelihood of injury to either party and their physical and mental health. It was clear that in attempting to balance these factors, the Royal Court had given insufficient weight to the interests of the children and had it given this factor its proper degree of importance, it would have ordered that the injunction be continued. It would therefore remain in place until the judicial separation proceedings had been concluded (page 19, lines 5–24; page 21, line 37 – page 22, line 29; page 23, lines 23–32).

Cases cited:
(1) *Abdel Rahman* v. *Chase Bank (C.I.) Trust Co. Ltd.*, 1984 J.J. 127, considered.
(2) *Abidin Daver, The*, [1984] A.C. 398; [1984] 1 All E.R. 470; [1984] 1 Lloyd's Rep. 339, considered.
(3) *F (a Minor) (Wardship: Appeal), In re*, [1976] Fam. 238; [1976] 1 All E.R. 417; (1975), 120 Sol. Jo. 46, considered.
(4) *Hadmor Prods. Ltd.* v. *Hamilton*, [1983] 1 A.C. 191; [1982] 1 All E.R. 1042; [1982] I.C.R. 114; [1982] I.R.L.R. 102; (1982), 126 Sol. Jo. 134, considered.
(5) *Walker* v. *Walker*, [1978] 1 W.L.R. 533; [1978] 3 All E.R. 141; (1977), 122 Sol. Jo. 94, applied.

Additional cases cited by counsel:
Ansah v. *Ansah*, [1977] 2 All E.R. 638.
Baggott v. *Baggott*, [1986] 1 FLR 377.
Bassett v. *Bassett*, [1975] 1 All E.R. 513.
Clarke v. *Gledhill*, Royal Ct., December 10th, 1991, unreported.
Cutner v. *Green*, 1980 J.J. 269.
Elsworth v. *Elsworth* (1980), FLR 245.
Howard (née Fox) v. *Howard*, Royal Ct., October 21st, 1993, unreported.
Long v. *Flageul*, 1994 JLR *N*–9.
Myers v. *Myers*, [1982] 1 W.L.R. 247.
Pinson (née Nichols) v. *Pinson*, 1985–86 JLR 144.
Poignand (née Taylor) v. *Poignand*, 1991 JLR *N*–9.

Richards v. *Richards*, [1984] A.C. 174.
Richomme v. *Le Gros*, 1994 JLR *N*–6.
Samson v. *Samson*, [1982] 1 W.L.R. 252.
Summers v. *Summers*, [1986] 1 FLR 343.
Topf v. *Topf (née Lansing)*, C.A., September 20th, 1977, unreported.
Wiseman v. *Simpson*, [1988] 1 All E.R. 245.
Wooton v. *Wooton*, [1984] FLR 871.
Young (née Stratford) v. *Young*, Royal Ct., November 8th, 1993, unreported.

Text cited:
Bean, *Injunctions*, 4th ed., at 118 (1987).

J.D. Melia for the appellant;
R.G.S. Fielding for the respondent.

BAILHACHE, BAILIFF: This is an appeal from a judgment of the Royal Court given on July 28th, 1995, when the court ordered that an ouster injunction obtained by the appellant, Mrs. L on December 11th, 1992 be dismissed. The court further ordered that the husband, Mr. L might resume living at the matrimonial home after three months from the date of the order. On December 7th, 1995, we announced our decision to allow the appeal and indicated our intention to give our reasons at a later date. This we now proceed to do.

This case has a troubled history and has occupied a considerable amount of court time. The parties were married in 1973 and have three children. A, B and C. Mrs. L and the children continue to live at the matrimonial home, in St. Brelade, a house which belongs to Mr. L In March 1992, Mrs. L filed a petition for judicial separation on the ground of her husband's alleged cruelty, seeking joint custody of the three children with care and control to herself. She also sought maintenance pending suit and after decree a lump sum payment, transfer or settlement of property. The petition was defended, but it is clear that Mr. L has always shown a keen sense of his responsibilities, financial and otherwise, towards his children. In December 1992, the then Bailiff granted *ex parte* an interim ouster injunction on the wife's Order of Justice. Continuing tension between the parties was alleged to have had a serious effect on the health of the children and Mrs. L was said to have considered suicide. The husband was required immediately to vacate the matrimonial home. After pleadings had been filed in the Order of Justice action, the matrimonial proceedings and the ouster proceedings were consolidated by consent.

In February 1993, at the start of a substantial action before the Royal Court, an attempt was made by the court to achieve a compromise

agreement. It appears that 46 witnesses were available to give evidence for the parties. The negotiations which took place during the next two days produced an unfortunate result, namely an agreement which was afterwards challenged by Mrs. L as not being final. The relevant paragraphs of this agreement, prepared in draft by Mrs. Whittaker, then counsel for Mrs. L are set out in the judgment of this court, differently constituted, dated April 1995 and it is unnecessary to repeat them here. In February 1993, Mr. L issued a summons to stay or dismiss the petition for judicial separation and the Order of Justice on the ground that they had been compromised by the agreement. This summons was heard by the Royal Court in April 1993, when the court held that an agreement had been reached and remitted the proceedings to the original court for consideration as to whether it should be ratified. The matter was eventually heard in July 1994. Mrs. L opposed the ratification. The Royal Court held that the question of accommodation was of central importance and it expressed the view that the agreement was a sensible arrangement. Accordingly, it had no hesitation in ratifying it. The petition for judicial separation was stayed and the Order of Justice was struck out.

As we have stated, this court heard the appeal against this decision in April 1995. The court as then constituted found the Royal Court's description of the agreement to be "somewhat surprising" having regard to its effect on the interests of the children. It found that the Royal Court had approached the matter without giving to the interests of the children the degree of importance which in law it was their duty to give, and it held that the Royal Court had exercised its discretion upon wrong principles. It therefore allowed the appeal and set aside the order of the court ratifying the agreement. One consequence of this was that the Order of Justice was no longer struck out and the injunctions remained in force. This court emphasized that the position thus achieved was wholly unsatisfactory and should as soon as possible be resolved. The court gave two reasons, namely, the interests of all parties, particularly of the children, and the considerable hardship being suffered by the husband.

As mentioned in the opening paragraph of this judgment, the case came before the Royal Court again in July 1995 when Mr. L applied to lift the ouster injunction which continued to exclude him from the matrimonial home. The judgment of the court, which is dated July 1995, contains the following passages:

> "The granting of the ouster order which we would fairly describe as draconian, does not derive from any statutory power. The court is exercising its inherent jurisdiction.
>
> In our view, then, an *ex parte* ouster order should only be given in the most exceptional circumstances and, in future, if these exceptional circumstances do not apply, then the hearing should be *inter partes* with leave to abridge time if the exigencies of the case require it. It might be that in cases which were clearly brought for improper reasons, because such proceedings are an abuse of process, those who promote them might find themselves liable to pay the costs."

The court went on to say: "We believe that the affidavit filed in support of the ouster injunction contains flimsy evidence." The judgment dealt in some detail with the evidence which the court had heard before making the order.

On behalf of Mrs. L , it has been argued before this court (a) that the Royal Court misdirected itself in relation to the principles in accordance with which its discretion should have been exercised; and/or (b) that the Royal Court, in exercising its discretion, failed to take into account matters which it ought to have done, or took into account matters which it ought not to have done; and/or (c) that the decision of the Royal Court was plainly wrong. In particular, we have heard submissions on the scope of this appellate jurisdiction and the precedence which should be accorded to the several interests concerned. We have been referred to a number of cases including *Hadmor Prods. Ltd.* v. *Hamilton* (4), in particular, a passage from the speech of Lord Diplock ([1982] 1 All E.R. at 1046):

> "Before adverting to the evidence that was before the judge and the additional evidence that was before the Court of Appeal, it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no

erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

In *Abdel Rahman* v. *Chase Bank (C.I.) Trust Co. Ltd.* (1), it was stated that the Court of Appeal will not interfere with the discretion exercised by the Royal Court except upon grounds of law, unless it appears that on other grounds injustice will result from the manner in which it has been exercised. The Court of Appeal referred to *The Abidin Daver* (2) and a passage in the speech of Lord Brandon of Oakbrook ([1984] 1 All E.R. at 482):

"[The court] can only interfere in three cases: (1) where the judge has misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (2) where the judge, in exercising his discretion, has taken into account matters which he ought not to have done or has failed to take into account matters which he ought to have done; or (3) where his decision is plainly wrong."

We have also considered *In re F (a Minor) (Wardship: appeal)* (3) and in particular the judgment of Bridge, L.J., as he then was ([1976] 1 All E.R. at 439–440):

"The learned judge was exercising a discretion. He saw and heard the witnesses. It is impossible to say that he considered any irrelevent matter, left out of account any relevant matter, erred in law, or applied any wrong principle. On the view I take, his error was in the balancing exercise. He either gave too little weight to the factors favourable, or too much weight to the factors adverse, to the father's claim that he should retain care and control of the child.

The general principle is clear. If this were a discretion not depending on the judge having seen and heard the witnesses, an error in the balancing exercise, if I may adopt that phrase for short, would entitle the appellate court to reverse his decision [and Bridge, L.J. then cited authorities]. . . . The reason for a practical limitation on the scope of that principle where the discretion exercised depends on seeing and hearing witnesses is obvious. The appellate court cannot interfere if it lacks the essential material on which the balancing exercise depended. But the importance of seeing and hearing witnesses may vary very greatly according to the circumstances of individual cases. If in any discretion case concerning children the appellate court can clearly detect that a conclusion, which is neither dependent on nor justified by the trial judge's advantage in seeing and hearing witnesses, is vitiated by an error in the balancing exercise, I should be very reluctant to hold that it is powerless to interfere."

Some argument was addressed to us on the question whether in ouster proceedings the interests of the children are of paramount importance.

We have come to the conclusion that the correct approach is to apply the test as defined by Geoffrey Lane, L.J., as he then was, in *Walker* v. *Walker* (5) ([1978] 1 W.L.R. at 536–537):

"What seems to me to be the question which the court has to decide is this: what is, in all the circumstances of the case, fair, just and reasonable and, if it is fair, just and reasonable that the husband should be excluded from the matrimonial home, then that is what must happen. Before one can come to a conclusion, all the circumstances have to be regarded. First of all, the behaviour of the husband; the behaviour of the wife; the effect upon the children if the husband stays there; the effect upon the children if he does not; the husband's own personal circumstances; the likelihood of injury to the wife or to the husband, their health, either physical or mental. All these things must be taken into account. Read against that finding of fact of the judge, that life would be impossible for the wife and the children if the husband remained in the house, a very heavy burden is cast, it seems to me, on any person who says that in those circumstances the husband should still remain in the home."

Applying this test, we have examined the conclusion of the Royal Court that the ouster injunction should be lifted.

It is clear that there were only two possible results which could flow from the order of the Royal Court dismissing the ouster injunction. The first was that Mr. L would return to the matrimonial home to live with Mrs. L and the children, albeit in some kind of structured separate way. The second was that Mrs. L and the children would vacate the matrimonial home and find alternative rented accommodation while Mr. L returned to live in the home alone.

The first possible result was canvassed in evidence heard before the Royal Court. Dr. John David Jackson, Mrs. L 's general practitioner, when asked whether there was any real worry about suicide if Mr. L returned to the home, replied: "I think that that's a very difficult question to answer, but I think that it would represent Mrs. L 's worst nightmare come true, on the basis of what she has said to me." Dr. Jackson added that he had no doubt that it would precipitate a severe depression.

Dr. Peter Henderson, a behavioural psychotherapist consulted by Mrs. L , gave evidence that the husband's return home would place her in an impossible situation, not just for her but also by undermining her authority over the children.

Mrs. Karen Elizabeth Huchet, a health visitor, gave evidence of the emotional problems suffered by Mrs. L prior to the granting of the

ouster injunction and gave the opinion that she had sought help because she was desperate. Miss June Brately, a health visitor who took over from Mrs. Huchet in July 1992, stated that Mrs. L had a submissive type of personality and would not be able to cope with her husband's return home.

Most significant of all was the evidence of Mr. Michael Cutland, the divorce court welfare officer, who gave oral testimony as well as submitting a written report. He had discussed with the children the possibility that their father might return home. The youngest child C aged six, wanted her parents to be reconciled. The two boys did not think that it would be a good idea for Mr. L to return home as they feared it would lead to further arguments. Mr. Cutland's opinion was that any suggestion that the parents could live together in the same house was not a viable proposition. He thought that a return to the home would create an unrealistic expectation on the part of C that her parents were reunited; as Mrs. L had made it clear that the marriage was over, any cohabitation would provide a mixed and unhelpful message in the girl's adjustment to parental separation. Mr. Cutland went so far as to agree with the opinion expressed by a previous welfare officer that both parties remaining in the home would be a "catastrophic arrangement."

The second possible result (that Mrs. L and the children would vacate the matrimonial home) was, we imagine, the scenario actually envisaged by the Royal Court. Submissions were heard, though little by way of evidence, that it would be possible for Mrs. L to obtain a rent rebate which would reduce the cost of accommodation to £15 per week. No evidence was before the court as to the availability of any specific accommodation suitable for Mrs. L and the children.

In making its order, the Royal Court clearly placed some store by the difficult conditions in which Mr. L was living and working. It stated:

> "Nevertheless the ouster order was made and—we use the word advisedly—Mr. L was condemned to live in spartan accommodation through the charity of a Good Samaritan. He lives in one room, without any natural light and for this room he pays no rent. It measures 18 x 12 ft., has no central heating and no adequate cooking facilities. Misfortune has piled upon misfortune for the husband because in August 1994 he was made redundant from where he had worked the whole of his adult life. He is attempting freelance work. He cannot work from the accommodation that he has. The prognosis of his health given by Dr. Roger Porcherot is not good. His blood pressure is difficult to control and though he has shown great fortitude, there is an increasing possibility of depression. There was no evidence of alcohol abuse. Dr. Porcherot is disturbed about the husband's mental state. He pays and has always paid the expenses of the household. That includes all the domestic expenses, maintenance of £45 per week for each of the three children and school fees. He has staying access to the three children in his funk-hole accommodation."

As the Royal Court rightly stated, it was faced with a very difficult decision. However, having summed up the difficulties, it unfortunately did not give any indication as to its reasons for arriving at its conclusion. What it stated was this:

> "Each side now attacks the other. We must bring some sense to bear on an increasingly senseless scenario.
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> We order that the ouster injunction be dismissed. The husband may resume living at the matrimonial home but not until three months from the date of this order. This gives the wife ample time to find herself alternative accommodation with the children if the prospect of living with the husband is impossible. There is, should she not wish to leave, an opportunity to give the husband use of the spare bedroom and bathroom. Should she decide not to move within the three months then she is at liberty to inform us of that fact and we will make an order to attempt to divide or share the accommodation in such a way that they can lead separate lives and avoid each other as far as practicable for a time until their matrimonial affairs can be properly regulated. We do not wish this order to be regarded as a form of reverse ouster order. We were told that the wife is able under present housing regulations to obtain accommodation at a subsidized rent of £15 per week. We would ask counsel to refer this matter back to court at the end of two months so that, if necessary, we can implement the 'fall back' provisions with precision."

The first point to be made is that no mention is made by the Royal Court of the interests of the children and the desirability of ensuring the continuance of a peaceful and stable home in the midst of the clamour of parental battle. The court denied that its order should be regarded as "a form of reverse ouster." But it seems to us that the court did envisage that Mrs. L and the children would vacate the matrimonial home. A delay of execution of the order for three months was pronounced which would give Mrs. L the court stated, "ample time to find herself alternative accommodation with the children." A division of the matrimonial home so that the parties could lead separate lives was described as the "fall-back" provision.

In our judgment, this arrangement gave little weight to the interests of the children and undue weight to the interests of Mr. L . It appears in essence to bear considerable similarity to the agreement reached between the parties and ratified by the Royal Court, but subsequently struck down by this court in earlier proceedings between the parties to which we have referred. In delivering the judgment of this court in April 1995, Le Quesne, J.A. stated:

> "However, the agreement provided that in April 1993, that is, 2½ months after an agreement was made, the appellant and the

children were to leave the matrimonial home in order that it might be occupied by the respondent who, as far as we have been told, has no responsibility to provide living accommodation for anyone but himself. On leaving the house the appellant was to receive £30,000 and another £5,000 a year later. The effect of this was that under the provisions of the agreement, after a short time, the appellant and the children were to leave the house, which was the only home the children had known, receiving as they did so a sum of money which would not go very far towards the provision of alternative accommodation. This obviously involved a risk that under the provisions of the agreement the appellant and the children might have to get out of the house with nowhere suitable to which to go. It is interesting to observe, when one is considering the consequences of this, one passage in the report provided to the court by the Court Welfare Officer. This is the report which we have already mentioned which was prepared in April 1993 by Miss Bridget Ahier. At one point in that report she says this with reference to the children: 'Presently the family home is providing them with a degree of stability and continuity. They see it as part of their lives and are not aware that this may be liable to change.'"

In our judgment, the Royal Court approached the matter without giving to the interests of the children the weight which should have been given. Neither a return by Mr. L to the matrimonial home nor the vacation of the matrimonial home by Mrs. L was in the interests of the children. It seems to us that undue weight was given by the Royal Court to the nature of the accommodation occupied by Mr. L while apparently accepting that no other options were available to him. It follows that there was in our judgment a failure in the balancing exercise by the court below, which exercised its discretion upon wrong principles.

Before parting with this case, however, there are two things which we wish to add. The first relates to the way in which the ouster order which is the subject of this appeal was obtained. An ouster order is a drastic weapon in the armoury of the law. Bean, *Injunctions*, 4th ed., at 118 (1987) states:

> "Ouster injunctions may be granted ex parte, but only in an emergency when the interests of justice or the protection of the applicant or a child clearly demand immediate intervention by the court. Such cases should be extremely rare (*Ansah* v. *Ansah* [1977] Fam. 138). An ex parte application for ouster should not be made or granted unless there is real immediate danger of serious injury or irreparable damage. . . ."

We endorse those remarks. We agree with the Royal Court that in this case the evidence in support of the application for the ouster was insubstantial. We think that the ouster order issued against Mr. L *ex parte* in December 1992 ought not to have been granted. Had we been

considering the matter at that time, the result might well have been different. We have, however, been obliged to examine the matter in the light of current circumstances. Three years have now passed since the order was made. Numerous hearings have taken place in the interim. In our judgment, the balance has shifted.

The second thing which we wish to record is an echo of the closing remarks of Le Quesne, J.A. in the earlier proceedings before this court in April 1995. The current position is highly unsatisfactory. The ouster order preventing Mr. L from enjoying possession of his property subsists. Proceedings for judicial separation instituted in 1992 have not been brought to a conclusion and we were told by Miss Melia that there is no intention to prosecute them. Although the court below—and indeed nearly all the professional advisers involved in this unhappy matrimonial saga—believe that the marriage between the parties is finished, that is not accepted by Mr. L It is not for us to express a view on the matter other than to state that a continuation of the status quo is in the interests of no one. It is high time that this dispute was laid to rest. Mrs. L will be entitled to a decree of divorce after five years' separation in December 1997. It will be for Mr. L to consider whether an earlier decree by consent would not lead to a more satisfactory resolution both of his own difficulties and of the continuing uncertainty afflicting the rest of his family.

We accordingly set aside the judgment of the Royal Court and allow the appeal. The ouster injunction is therefore reinstated but with the limitation that it will expire on March 1998 or upon the determination by the Royal Court of ancillary matters following any pronouncement of a decree nisi of divorce or a decree of judicial separation if that shall occur at an earlier date. The chosen dates are likely to bring all outstanding matters together so that, as the Royal Court wished, they can be regulated at the same time. However, we authorize a single judge to extend the period of validity of the ouster injunction if that is considered just and reasonable at the time of any application to that end.

Appeal allowed.