

COURT OF APPEAL

62.

8th April, 1992

Before: Sir David Calcutt, Q.C., President,
L.J. Blom-Cooper, Esq., Q.C., and
Lord Carlisle, Q.C.

Between:

Mr P

Appellant

And:

Mrs P

Respondent

Appeals by the Appellant:

- (1) from the Judgment of the Royal Court (Samedi Division), of 28th February, 1992, dismissing the Appellant's application that the Order of the Royal Court of 24th January, 1992, for his arrest and imprisonment be set aside; and
- (2) from the Judgment of the Royal Court (Matrimonial Causes Division) of 28th February, 1992, whereby it was ordered that: (a) the Appellant's application for retrospective variation of that part of the Court's Order of 29th November, 1991, relating to periodical payments be dismissed; (b) the Appellant shall pay to the Respondent a lump sum of £10,000, and to the child of the marriage a lump sum of £16,500; (c) payment of the above sums be suspended until the Appellant's financial situation shall, in the discretion of the Respondent's legal advisers, warrant the enforcement of whole or part of the said sums; and (d) with effect from 19th January, 1992, the Order for the Respondent's maintenance be varied to £1 per week, and for that of the child to £25 per week, until he reaches the age of 18, or ceases full-time education.

Advocate R.J.F. Pirie for the Appellant.
Advocate Mrs. S.A. Pearmain for the Respondent.

JUDGMENT

THE PRESIDENT: These are appeals by Mr P whom I will call 'the husband' against Orders of the Royal Court made on 28th February, 1992, and accompanied by a Judgment of that date which comprehended both matters. The Respondent to the appeals is Mrs P whom I will refer to as 'the wife'.

As in the Royal Court, it is convenient that I should deal with the two matters at the same time as they are inseparably interlinked.

There was one child of the marriage between the husband and the wife, that is a son called M who was born in 1978, so he is now aged 13 years.

The decree nisi in this case was pronounced on 28th October, 1981. On 29th November, 1985, the Matrimonial Causes Division in the Royal Court made the following Order:

"Upon hearing the oral evidence of the Petitioner and the Respondent and upon hearing the parties through the intermediary of their advocates it is ordered:

(1) that the Respondent do within two months of the date of this Order, pay to the Petitioner a lump sum of £47,500;

(2) that the Respondent do pay or cause to be paid to the Petitioner, the sum of £100 gross per week towards her support and the maintenance of the children of the marriage until further order".

And then there were further Orders totalling seven in all. They are not, of course, unimportant but there is no need for the purposes of this Judgment for me to read the whole of the Order which was then made by the Court.

On 13th March, 1986, the lump sum of £47,500 which had been ordered to be paid was indeed paid, and on 14th March, 1986, arrears of maintenance which by then totalled £1,300 were also paid.

21st December, 1986, was the last date on which any maintenance was paid either to the wife or to the child of the marriage. It was in May 1988 that an *Ordre Provisoire* in the sum, then, of £9,425 was obtained, but was not carried any further.

On 17th May, 1991, a second *Ordre Provisoire*, this time in the sum of £22,800, was obtained in respect of the arrears which had by then accrued, but once again it was not possible for that matter to be carried any further.

On 19th January, 1991, the arrears of maintenance under the Order of the Court stood at a sum of £26,500, and that is a figure which is agreed between the parties.

On 24th January, 1992, the wife filed an affidavit in support of the debt of the outstanding arrears in the sum of

£26,500. The *Ordre Provisoire* was made in the sum of £26,500, security being set at £10,000.

The husband was arrested and incarcerated into the debtors' prison. The husband was brought before the Royal Court; the arrest was confirmed; the husband was condemned to pay £26,500 being the arrears and in default of payment it was directed that the husband should remain in prison.

It is important for the purposes of this Judgment that one should look at the documentation which supports the outline of the facts as I have just given them.

First of all there is to be found in our bundle of documents, at No. 25, many of the documents relating to this particular matter.

First of all there is the affidavit of the wife, sworn on 24th January 1992. After setting out her name and address, she says:

- "(1) that on the 29th day of November, 1985, the Royal Court ordered [the husband] to pay £100 gross per week by way of maintenance for me and our son M ... That Order is still in force and has not been varied".
- "(2) that the Defendant owes £26,500 by way of maintenance under the said Order from 21st December, 1986, to 19th January, 1992.
- (3) that on 17th May, 1991, my then lawyer obtained an *Ordre Provisoire* to the effect that the arrest of the assets of the Defendant for arrears of maintenance which at that date totalled £22,800, for the period 21st December, 1986, to 5th May, 1991, but this could not be served on the Defendant as he was out of the Island.
- (4) that I have repeatedly asked the Defendant to pay at least some of the arrears, but he has failed, refused, or neglected to do this.
- (5) that the Defendant presently resides : in London, but I do not know the exact address. I think he is looking after a house for a friend. He has no paid employment but he has some sort of business interests in that he told me that he went to Cyprus on business in 1991.
- (6) that it has come to my knowledge that he arrived in the Island on or about Monday, 20th January, 1992, and I believe that he could leave at any moment.

- (7) that to the best of my knowledge, information and belief the Defendant owns no immovable property in the Island of Jersey.
- (8) that my claim is well-founded to the best of my knowledge".

Then two pages earlier in the bundle one finds the record of service. It records in the name of the Viscount Substitute, dated 24th January, 1992:

"This twenty-fourth day of January, 1992.

In view of the attached Provisional Order of the Royal Court (Ordre Provisoire) I have arrested the person, Mr. P at the instance of Mrs. P for arrears of maintenance in the sum of £26,500. And as the said Mr. P has been unable to furnish the surety in the sum of £10,000 I have this day presented Mr. P before the Royal Court and this at the instance of the said Mrs. P"; and the Ordre Provisoire was attached".

Then one finds finally in the documentation, in addition to the Ordre Provisoire, the Order of the Court which records the matters which I have just recited making it plain that the outstanding sums are in respect of arrears of maintenance from the 21st December, 1986, onwards.

The defendant having appeared, the Court confirmed his arrest, condemned him to pay the amount claimed and costs, and directed that, in default of payment, he should remain in the debtors' prison.

On 21st February, 1992, the husband applied to the Royal Court for the saisie to be lifted. Also at that time he applied for a variation of the Order of 29th November, 1985. There were affidavits to support his applications.

On 27th February, 1992, there was a hearing before the Royal Court and a further affidavit, (all of which affidavits are before us) was filed with the Court.

On 28th February, 1992, the following day, the Royal Court made its Order which is in the following terms so far as they are material:

"Upon hearing the Advocates for the Petitioner and the Respondent, it is ordered:

- 1) that the Respondent do pay (a) to the Petitioner a lump sum of £10,000; and (b) to M the child of the marriage a lump sum of £16,500.
- 2) that the payment of the lump sums aforesaid be suspended until the Respondent's financial situation shall in the discretion of the Petitioner's legal advisers warrant the enforcement of the whole or part of these sums.
- 3) that the paragraph (2) of the Order of the Court of 29th November, 1985, be varied as follows, that is to say: "that the Respondent do pay or cause to be paid to the Petitioner as from the nineteenth day of January, 1992, (a) the sum of £1 per week towards the support of the Petitioner during their joint lives or until further Order; and (b) the sum of £25 per week towards the maintenance of the said child of the marriage until he has reached the age of 18 years, or ceases full-time education, whichever is the later, or until further order".

It is plain from that, that there was no variation so as to eliminate or to reduce the accumulated arrears; and it appears also from that, that the accumulated arrears were converted by the Court into lump sum payments as reflected in paragraph 1 of that Order.

The Court which heard this matter declined also to lift the saisie and the Judgment which was given in support of those Orders is to be found in our bundle of documents, at bundle No. 2. I shall refer to that Judgment later in this Judgment.

On 10th March, 1992, Notices of Appeal were filed against both of those decisions. On 18th March, 1992, the appellant's contentions were lodged in respect of both appeals. On 2nd and 3rd April, 1992, the wife's answers to the husband's case were lodged,

That is a brief outline of the history of this matter as it comes before us.

The first matter in logical order is the application to vary. The powers of the Royal Court and therefore the powers of this Court are in the widest of terms. Article 32 of the Matrimonial Causes (Jersey) Law, 1949 is in these terms:

- "1. The Court may from time to time discharge or vary any Order made under Article 17, 27, 28 of this Law or suspend any of the provisions thereof temporarily, or

revive the operation of any of the provisions so suspended.

- 2. In exercising the powers conferred by this Article, the Court shall have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties of the marriage".**

It is not necessary for us to review the evidence to which I have referred in outlining the history of this matter in any detail. It is sufficient if we summarise it in this way:

First, there is no evidence that the husband is presently in funds, or presently earning, quite apart, of course, from the fact that he is presently in custody. But equally - and this is our second broad conclusion - for the future it does appear - and this is so submitted by his own advocate - that the husband at least stands to make substantial sums of money.

Thirdly, it is perfectly plain that since 1985 the husband has been able to raise, albeit by way of loans, considerable sums of money and he has thus been able to pay substantial debts.

Fourthly, it is plain that the husband has not always enjoyed good health; but one gets the overall impression from the evidence that for much of the time he has somehow been able to live reasonably comfortably, albeit at other peoples' expense.

Fifthly, so far as maintenance is concerned, it is quite plain that the husband has paid nothing either to his wife or to his son, **M**, since 21st December, 1986, by way of maintenance. As I have said it is an agreed fact between the parties that as at 19th January, 1992, he owed £26,500 by way of arrears of maintenance.

From those five matters, on the evidence, there is no reason why he could not have chosen to pay the debt which is owing to his wife and to his child, or at least part of it with the monies which he has been able to raise to pay other debts.

Alternatively, he could, as it appears to us, have incurred other debts in order to be able to raise sufficient sums either to pay the whole or at least a part of some of the monies which are owing under the maintenance orders.

In the view of this Court there is no reason for varying the Order so far as it sought to deal with the arrears of maintenance and to treat them as lump sum payments to the wife and to the child. And we see no reason for interfering with

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paragraph 1 of the Order as made by the Royal Court. Nor do we see any reason why it should not be converted into lump sums and apportioned as it was between the wife and the son, M. Indeed, in our view it was right that the Court should take that course.

The second paragraph as numbered in the Order of 28th February, 1992, is a paragraph which has, however, caused us more difficulty.

Neither side in the appeal before us regarded the Order which had been made by the Royal Court as satisfactory in its terms. On behalf of the husband it was submitted that the Order should have been that the lump sum payments made under paragraph 1 should be suspended until further Order of the Court.

On behalf of the wife it was submitted that she did not understand what was meant by the Order. In her submission the use of the word "suspension" was meaningless. She accepted that there was no action on her part under this Order as made, but says that, since the husband was and remained in prison, no further action was called for on her part.

It appears to this Court that the Royal Court must have intended to suspend immediate payment of that total sum of £26,500. But the Order appears to us to have been odd for two reasons. First, it appears to us odd to say the least that the trigger for bringing paragraph 2 of the Order into operation should lie in the hands of the wife's advisers' discretion.

Secondly, it appears to this Court to have been odd to have suspended the Order, whilst refusing at the same time to lift the *saisie* which of course as I have indicated from the documentation was itself based upon the arrears.

There are two passages in the Judgment to which I would refer at this stage. The first is at p.9, where it is said:

"We can see no reason to discharge the Order. The husband may, one day, make some money. He may even, as an only child, inherit some money. We just do not know".

The other passage which is relevant for our purposes is at p.15. This relates to the point about the Order being made for the suspension of the payment of the lump sum, but at the same time the continuation of the *saisie* and therefore the continued incarceration of the husband. If one searches at p.15 it does not appear that this particular connection of these two matters was considered and dealt with by the Court. Having noted at p.15 that the husband was unwilling to make cession the Court concluded at the end of the paragraph:

"We cannot compel the husband to make cession. If he does not then the Law must take its course".

But as I say, as far as we can see, there is no link between that matter and the earlier matter of the suspension of the lump sum payments ordered as the result of the arrears of maintenance.

In our view, the Order which should have been made by the Royal Court and which will be made by this Court in respect of paragraph 2 is that the payment of the lump sums aforesaid shall be suspended until further Order of the Royal Court and this will be substituted for paragraph 2 of the Order as it presently stands.

Before I go on to deal with paragraph 3 of the Order made in the Matrimonial Causes Division, I should consider the second matter which falls for our consideration, that is the appeal against the refusal of the Royal Court to lift the *saisie*.

It is quite plain as I have already indicated that *saisie* was based upon the existence of the debt for £26,500, being the accumulated arrears. The Royal Court converted the arrears into a lump sum so that, thus far, the debt would remain. But, and as I have already indicated, it appears to us that it was the intention of the Royal Court that it took the view that payment of the debt should be suspended. But whatever view the Royal Court may have taken, we now take the view that that payment of £26,500 should indeed be suspended. The result is that, although he was at one time condemned to pay the amount claimed, the payment of that amount has now been, either by the Act of the Royal Court, or alternatively by this Court, suspended, so that there is no debt which is presently due and owing.

Accordingly, as it appears to us, the basis for the *saisie* has - at least for the time being - gone. There may be again in the future a basis for a fresh *saisie* when and if the suspension is lifted, or if further immediately payable arrears accrue. But, that being so, it appears to us that the present *saisie* lapses and the orders made under it go with it. Accordingly, the subsidiary questions which would have arisen, namely whether in the absence of an application for *cession* the Court has jurisdiction to grant an application for the release from imprisonment, and if so, whether the Court ought to exercise that jurisdiction, do not arise in the present case for our determination.

In the light of that part of our decision, I now return to consider paragraph 3 of the Order of 28th February, 1992.

It appears to us that, save with regard to one ancillary matter, we see no reason to vary this Order as set out in paragraph 3. The Order, as I have said, is in terms which I read for the sake of completeness:

"Paragraph (2) of the Order dated 29th November, 1985, be varied as follows: that is to say that the Respondent do pay as from 19th January" (and I summarise) "£1 for the wife, £25 for the son".

It appears to us that that is an Order which is appropriate, having regard to all the circumstances of this case.

The husband is about to be released from custody and the opportunities which, it was submitted on his behalf, he has been denied because he was in custody will once again be open to him. There was drawn to our attention in evidence a letter from
C T Ltd. which is in these terms:

- "1. I would confirm that we wrote to Mr P on 10th March, 1992, agreeing that we would pay 10% commission on any business that he introduced to
C T Ltd.
2. This arrangement still stands.
3. To date no business has been introduced by Roger Porteous to C T Ltd".

So there at least is the possibility that he may in the months to come earn something by way of commission. But, since he has been in prison arrears have built up since 19th January, 1992, and in our view it would be unrealistic to expect him to begin earning immediately, although he is about to be released from custody.

Accordingly, the present obligation to make the payments of maintenance for the wife and M as set out in paragraph 3 of the Order of 28th February, 1992, will be suspended for 28 days. This will not prevent arrears continuing to accrue if no maintenance is in fact paid during the next 28 days, or insufficient maintenance, but it is the intention of this Court that those arrears should not be enforceable by fresh *saisie* proceedings until at least 28 days have elapsed.

Accordingly, in the light of this Judgment, the appeals will be allowed to this extent: in respect of the appeal against the Order made in the Matrimonial Causes Division on 28th February, 1992, paragraph 1 of that Order will stand; paragraph

2 will be amended in the way in which I have indicated in the course of this Judgment; likewise there will be the ancillary matter added to the provisions of paragraph 3.

Secondly, since the *saisie* has now lapsed, the Orders as I have already indicated which were made under the *saisie* will also lapse and will be set aside. The effect of that is that the husband will now be released from custody.

Authorities

In the Appeal from the Judgment of
the Samedi Division of the Royal Court.

Loi (1862) sur les saisies en vertu d'Ordres Provisoires.

Le Gros: "Traité du Droit Coutûmier de l'Ile de Jersey" (Jersey, 1943): "De La Cession des Biens": pp.297-305.

Norris -v- Emprunt (Jersey) Limited (24th January, 1990) Jersey Unreported.

Bianchi -v- Gentili (12th July, 1990) Jersey Unreported.

Pelido (CI) Limited -v- Leighton (20th February, 1991) Jersey Unreported.

Hemery & Dumaresq: Report to the Privy Council, 1789: pp.42-49.

Finance & Economics Committee -v- Bastion Offshore (28th June, 1991) Jersey Unreported CA.

In the Appeal from the Judgment of
the Matrimonial Causes Division
of the Royal Court.

Matrimonial Causes (Jersey) Law, 1949: Article 32.

In Re de Sousa (1985-86) JLR 379.

Taylor -v- Taylor (née Hayter) (9th January, 1987) Jersey Unreported.

Maintenance Orders (Facilities for Enforcement) (Jersey) Law, 1953.

Maintenance Orders (Facilities for Enforcement) (Jersey) Act, 1962.

N -v- N (1928) 138 LT 693 (see extract from Rakusen & Hunt (3rd Ed.) p.32.

J -v- J (1955) 2 All ER 617 CA.

W -v- W (No. 3) (1962) 1 All ER 736.

Ette -v- Ette (1965) 1 All ER 341.

Brett -v- Brett (1969) 1 All ER 1007 CA.

Macey -v- Macey (1982) 3 FLR 7. (Wood J.)

Hardy -v- Hardy (1981) 2 FLR (see extract from Rakusen & Hunt
(3rd Ed.).

Ostroumoff -v- Martland and Sims-Hilditch
(1979) JJ 125 at pp.129 and 131.