

ROYAL COURT

31.

28th February, 1992

Before: F.C. Hamon, Esq., Commissioner, and
Jurats Blampied and Le Ruez

Between:

Mrs P

Plaintiff/
Petitioner

And:

Mr P

Defendant/
Respondent

Application by the Respondent in the Matrimonial Causes Division for variation of Order of the Matrimonial Causes Division dated 29th November, 1985.

Application by the Defendant in the Samedi action to set aside the Order of the Samedi Division dated 24th January, 1992, where an "acte à peine de prison" was confirmed.

Advocate A.D. Robinson for the
Plaintiff/Petitioner.

Advocate R.J.F. Pirie for the
Defendant/Respondent.

JUDGMENT

COMMISSIONER HAMON: There are two summonses before us today.

The first summons is in the Matrimonial Causes Division. It is a summons by a Respondent Husband and entirely concerns the variation of an Order of this Court dated 29th November, 1985.

The second summons is in the Samedi Division of this Court and is again made on the application of the Respondent Husband (now called "the Defendant"). It is a summons to set aside an Order of this Court made on 24th January, 1992, whereby the Defendant was arrested and imprisoned by reason of "saisie" proceedings for a civil debt.

The Plaintiff in the Samedi Division and the Petitioner in the Matrimonial Causes Division is the wife of the former marriage between the parties.

As the two actions are so inextricably intertwined and interdependent we will not attempt to write two separate judgments. We shall refer to the parties as "the Husband" and "the Wife".

THE FIRST SUMMONS

On the 29th November, 1985, this Court made an Order following the decree nisi pronounced on 28th October, 1981.

The Husband was ordered to pay a lump sum of £47,500 to the Wife within two months of the 29th November, and to pay £100 gross per week towards the Wife's support and maintenance of the children of the marriage. There were other orders made which are not relevant to the issues that we have to decide. That Order was unfortunate in two respects. It referred to

"children". There is only one child, M,
who is now aged thirteen. The Order makes no division
of the £100 per week between the Wife and M and does not,
in fact, limit the period of payment though of course any
payment to M would normally cease upon his obtaining the
age of 18 years or ceasing to be in full-time education,
whichever is the later.

When the former Matrimonial Home was sold, the
£47,500 lump sum was duly paid to the Wife's lawyers (this was
on 13th March, 1986). She also received (because there was a
lump sum available) arrears of maintenance from 13th December,
1985 to 14th March, 1986 - a total sum of £1,300. Since 21st
December, 1986, neither the Wife nor M has received one
penny of maintenance. The arrears as at 19th January, 1992,
amounted to £26,500.

It is only the question of the arrears and how we are to
deal with them that concern us today.

This Court has powers under Article 32 of the Matrimonial
Causes (Jersey) Law, 1949, to vary orders. Article 32 reads:

(1) The court may from time to time discharge or vary any order made under Article 17, 27, 28, [29, * * * or 30A] 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 to the marriage".

Mr. Pirie dealt with the question of retrospective variation by citing us a passage from In re de Sousa (1985-86)

JLR 379 at p.385. Although not referred to us we found the passage on p.386 more helpful and that reads:

"..... we have no hesitation in declaring that beyond any possibility of doubt the Royal Court, in so far as its own orders are concerned, has an unrestricted power to vary them retrospectively and that, in the case of periodical payments after divorce, the power to vary extends backwards to the date of the decree nisi. However, the power to vary orders retrospectively is not a power specifically to remit arrears of maintenance, albeit that retrospective variation may result indirectly in maintenance already accrued due being remitted. As we have said already, an express provision to the effect would be required".

There is one other matter of legal importance. In Taylor -v- Hayter (1987-88) JLR Note 14, the Court of Appeal applied Cameron -v- Archdale (12th July, 1983) Jersey Unreported, which enabled the Court to approach the question of the fixing of the level of payments de novo. If we look at the full text of the Taylor-v-Hayter judgment (9th January, 1987) Jersey Unreported, (at p.6) the Court said:

"We have thought it right to admit and to take account of this new material. It is clear that the Court has power to do so pursuant to Rule 12 of the Court of Appeal Civil (Jersey) Rules, 1964, and, in our judgment, it is proper to exercise that power, subject to such safeguards as may be required in any particular case, to ensure that each party has had adequate opportunity to deal with new material, in cases of this nature. In so doing, we follow the approach adopted by this Court in Cameron and Archdale, appeal number 10 of 1983. It seems to us undesirable to embark on the exercise which we are required to carry out in the course of hearing an appeal against an order for financial provision under the Matrimonial Causes (Jersey) Law, 1949, without taking into account material which bears upon the true financial position of each party at the time that the appeal is heard; to do otherwise is to invite further litigation between the parties in the form of a further application under Article 32 of the law to vary an order which has been made on facts which are incomplete or which have been superceded.

In exercising its powers under Article 32 of the Matrimonial Causes Law, the Court must have regard to all the circumstances of the case, including any increase or

decrease in the means of either of the parties to the marriage. The purpose of the variation must be, as it seems to us, to make such provision, whether by way of periodic payments or by way of lump sum or otherwise, as the Court may think reasonable, having regard to the circumstances existing at the time when the variation order is made. Those circumstances must, of course, include the fact that an existing order has been enforced and the Court must take account of any transfers in property which have been effected by that existing order".

So it was that the Husband filed a very detailed but recent affidavit of means. He swore it before us at the trial.

The affidavit catalogues a series of financial disasters whereby an entrepreneur for a variety of reasons, has been reduced, according to the affidavit, to a state of penury. He is in no paid employment of any kind and has a credit balance of about £33 in his account with Lloyds Bank, Brook Street, London, W.1, and has no savings or other monies. His only realisable assets are his clothing and personal effects.

He has had two strokes of fortune (according to his affidavit) in a tale which were it set out in a work of fiction would stretch the credence of any reasonable man. That is not to say that we do not believe it. We merely say that it is an extraordinary story.

The Husband owns no realty anywhere. He lives and resides in London. He has a form of employer who owns the house in London and the Husband has the use of it in return for acting as a caretaker, looking after the dog and children when they are in London. The Husband is clearly held in some esteem by him. He was invited to that gentleman's apartment in Cyprus, as his guest:

and (we hold his affidavit) paid all expenses and the Husband's return air fare.

His second stroke of fortune is in his association with P who, until he moved in 1991, allowed the Husband to live with her at her flat in London.

For six years P (we have her affidavit) has lent substantial sums of money to the Husband. Loans totalling £18,000 have been made.

From mid 1988 to mid 1989 when he was working on a property deal in Bristol, she paid all his travelling and business expenses.

The Husband uses P's VW Golf motorcar as his own. This affidavit was sworn in London on 13th February of this year.

The Husband's business deals are set out in his affidavit. They read like a story from the Arabian Nights.

Companies with a turnover of £1.75 million dissipate their funds and leave the Husband penniless, property deals fold and fade like insubstantial pageants, Iranian merchants trick money from him, he has worked on a commission only basis - selling double glazing, potato ovens, water bottling equipment, telemesssage/fax facilities to sub-post offices, cellular phones. All these businesses have come to nothing. Then, just prior to Christmas, 1991, he began selling trailers for the largest trailer company in Europe. He was to be paid 10% of all trailers exported abroad, and he had begun working on this (apparently using the company's telephone and communication

facilities at no cost to himself), and had established contact with companies in the Middle East, Indonesia and Singapore.

He has obviously suffered the strain of his stressful life style. He apparently had a severe nervous breakdown in late 1984 or 1985. For two years he had to live with his parents under medication. He had another nervous breakdown in 1989 and was admitted to St. Mary's Hospital, Paddington. He was, again, taking medication for two months.

He has never paid taxes in England and makes no National Insurance contributions. He is 52. He cannot draw the unemployment (or dole) money. He has never, in fact, worked as an employee in the accepted sense of the word. He is a committed entrepreneur.

We have no doubt that he is fond of M. In his affidavit he deposed that he had bought his son clothes, a surfboard, a ski-ing outfit and a mountain bike, and given him some of his cast-off (and we were told that they were expensive) leather jackets. He has seen M for holidays. He obviously does not feel that he is able to pay voluntarily, any money whatsoever towards M's maintenance, and yet, as Mr. Robinson pointed out, he felt morally bound in 1982, when a business venture crashed, to repay fully his three business partners. His affidavit, again, refers to the sale of his business in 1986:

"Eventually in 1986 or thereabouts, we sold the business and came out with about £20,000 and I had lost my original investment and my £60,000 investment. I had to use my shares to pay off debts, including some money to my father to reimburse money he had lent me to pay off my overdraft".

Every year he visited Jersey. Not once did he apply for a variation of the Order. His argument here is that he was never

advised by the lawyers then acting for him, to apply for such a variation. That may well be so.

One of the apparently strong arguments made by the Husband in his affidavit, was that the Wife had received the lions share of the sale of the house (he suggested about 90%).

The last two paragraphs of the Husband's affidavit read:

"That I verily believe that, shortly after the making of the Order the Petitioner moved into a house at Bel Royal, and that she has cohabited there ever since with a Mr. B.

My son told me recently they are engaged. In the light of this and the fact that the Petitioner received a much greater share of the proceeds of sale of the house and the contents thereof, I request the Court discharges that part of the Order in her favour, and varies it retrospectively to eliminate as much as possible of the arrears so that if and when I am able to pay anything it is paid for. M's benefit which I submit is of greater importance as he has received no capital payment as the Petitioner has. On the various occasions the Petitioner has contacted me asking for money and I have explained my inability to pay she has always stated that she only wants money for M, not for herself. There is now produced and shown to me marked "RP5" a true copy of a letter by the Petitioner confirming the same".

"That if I had been able to pay maintenance I would have done, particularly for M and I have always done for him whatever I could although perhaps not in the right way. I confirm that I will pay for him what I can when I can but at the moment I have nothing and no income. I therefore request the Court to vary the order in respect of M retrospectively to a purely nominal sum on my undertaking to advise the Court if and when my financial position improves so in that event it can be immediately increased".

Mr. Pirie, at our request, researched the matter during the luncheon adjournment. Not only was a loan of £61,885.62 repaid to the Jersey Savings & Loan Corporation but also £50,000 due to National Westminster Bank Plc. This amount was nothing to do with the matrimonial assets, but was the result of a business related guarantee given by the Husband to the Bank. Of that

£50,000, the Bank required £30,000 to repay a guarantee to ~~the~~ **business**, £10,000 cleared a private borrowing and £10,000 is not, as yet, accounted for. It appears, therefore, that the Wife got less than 50% of the sale proceeds.

However, the wife stressed that she is not pressing for maintenance for herself, she is essentially looking for maintenance for **M**.

The Husband has two possible potential assets in the form of two actions. One concerns a property,

C Limited and is for the recovery of shares. He believes that, if this action is successful, the value of the shares could be "substantial".

His second action is for the recovery of two paintings and that could mean, if those assets are recovered that there is a value of not less than £11,000 and perhaps more than £16,000. Both these actions have been commenced in the Samedi division of this Court.

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.

In making this Order, however, we note what the Wife says in her Affidavit.

"My own financial situation is not good and I comment on it as follows:-

*Following the payment of my legal costs consequent on the divorce settlement I believe that to the best of my recollection I had a lump sum of approximately £45,000. £30,000 was paid by me to my brother who has allowed me to live at my present address rent free. It is a three bedroomed semi-detached house where I reside with my co-habitee of five years' standing, a Mr. **B** and **M**.*

I share all household expenses with Mr. B on an equal basis. I am responsible for maintaining M although Mr. B helps out with school trips and outings for M and pocket money. Mr. B works as a porter. The balance of my divorce settlement was expended on equipping my home and on subsequent expenses.

I am employed three days a week at a boutique in St. Brelade earning £81.60 per week. I have tried to get full time employment without success. I am trained as a hairdresser but had to give up owing to partial paralysis of my left hand resulting from a brain illness. I also receive Child Allowance of £33.30 per week.

I have a current account with Barclays Bank Plc. According to my most recent statement dated 11th February, 1992 it shows a nil balance. My overdraft facility has been withdrawn and £147.95 was transferred from my bonus savings account held with the same bank on 7th February 1992 to put my current account in funds. I have no savings left in that savings account. I have no other bank accounts.

I owe £699.83 on my Barclaycard according to my statement dated 17th February, 1992. I have a limit of £700.

I own a BMW motor car (I believe registered in 1981 and received in the divorce settlement) worth approximately £2,500 which is expensive to maintain. I have a diamond pendant insured for £3,950 and worth perhaps £2,000. I have two diamond rings insured for £485 and £465 respectively. I have a Cartier watch but it is old and I do not know its value which I do not imagine to be great. I have sold my other jewellery over the last six years to cover expenses.

M is thirteen and I find the cost of maintaining him is getting harder especially the cost of clothing and shoes both for school and at home. He is also becoming involved in more activities outside the home with his friends which cost money. I am not concerned with maintenance for myself henceforth but do require maintenance for M".

That part of the Order dated 29th November, 1985 which refers to maintenance, is varied as follows:

The Husband shall pay to the Wife a lum sum of £10,000 and to M £16,500, payment to be suspended until the Husband's financial situation shall, in the discretion of the Wife's legal

advisers, warrant the enforcement of the whole or part of those sums.

With effect from 19th January, 1992, the Order for maintenance for the Wife shall be varied to £1 per week for her support and £25 per week for the support of M, such payment to continue to M until he reaches the age of eighteen or ceases full time education.

THE SECOND SUMMONS

On the 24th January, 1992, the Wife obtained an *Ordre Provisoire* for payment of the sum of £26,500 and, (as the Husband was unable to furnish security) he was incarcerated in the debtors' prison.

He appeared before Court and the Court confirmed his arrest and directed that in default of payment, he should remain in the debtors' prison.

There was much persuasive argument by Mr. Pirie on the Wife's motives. The suggestion was that the Husband was put into prison in order that his elderly mother, with whom he stays when in Jersey, and who had paid his fare, would pay for him to be released. If we thought that then the Wife would be in no better position in the Court's eyes than a Lebanese highjacker. We are not convinced that this is the motive.

Mr. Pirie said that other steps should have been taken first. The fact that they were not was indicative of the misuse of this most draconian of remedies.

By the Maintenance Orders (Facilities for Enforcement) (Jersey) Law, 1953 it was now a simple matter to have the Order

of the Royal Court enforced in England. This had not been done. Mr. Robinson said that to have done that would have been to have incurred quite useless expense to no possible end.

We have carefully examined this aspect and the interpretation put by the Husband on Counsel's address to the Court of the hearing of 24th January, where it is alleged that Mrs. Pearmain, for the Wife, told the Court that there was a possibility of satisfying the claim not only "*by forcing the Husband to disgorge monies that he might have hidden away but also monies that might be made available to him*".

The Court is not satisfied that the Wife has any improper motive. So what remedy is available to the Husband? He can make *cession*. This is a time-honoured and comparatively easy way for a debtor incarcerated for debt to liberate himself from prison.

As Le Gros says in his *Droit Coutumier de Jersey* at p. 297:

"Il faut donc:

1. **Que le débiteur soit malheureux...**
2. **Qu'il agisse de bonne foi...**
3. **Qu'il soit détenu en prison à l'instance d'un créancier".**

Surprisingly, the Husband has told the Court that he does not wish to make *cession*. His reasoning appears to be on the basis that to do so would lose him the choses in action which are the two potentially valuable claims: one for the shares, the other for the paintings. That, in the argument of Counsel, would not be for the benefit of anyone. It may well be that the true interpretation of that argument is that it would not be for the benefit of the Husband.

Mr. Pirie went on to say that this Court has a unique flexibility in order to do justice.

The difficulty that Counsel saw with a successful application to make *cession* was that it would have, for effect "*...in respect of the surrender of all the debtor's assets*" for him "*to be entitled to an absolute discharge of all debts incurred prior to the cession*" [Norris v. Emprunt (Jersey) Ltd., (24th January, 1990) Jersey Unreported, C. of. A.]. That would include the maintenance payments. The Wife, however, wants the Husband to make *cession*. Mr. Robinson told us this several times.

Counsel went on to remind the Court that in the Norris case, the Court of Appeal (upholding the judgment of the Royal Court) released the debtor from prison, even though refusing him leave to make *cession*. It did so because the circumstances merited it.

There are, in fact, many cases in the Tables des Decisions over the past one hundred years where the Court, while refusing an applicant to make *cession*, still liberated him from prison. We would give, as an example, (the case was not cited to us by Counsel) the case of Mauger (1880) 195 Ex 37, where the Court said this:

"Mr. John Mauger demande d'être admis à faire cession générale de tous ses biens-meubles et héritages et ce faute de moyens pour satisfaire ses créanciers."

Il y eut intervention admise et opposition faite à cette demande.

La Cour, entre autres considérants: "Que le bénéfice de cession est un privilège que la loi accorde dans certains cas à un débiteur malheureux et de bonne foi, incarcéré pour dettes."

"Qu'il résulte des termes mêmes de la Loi sur les Décrets, que la cession ne s'obtient pas de droit, et que par la pratique de cette Cour le débiteur frauduleux en est exclu."

"Partant, rejetant sa demande (la Cour était d'opinion que ledit Sieur Mauger avait agi frauduleusement) et faisant droit à la prétention desdits Intervenants, la Cour a jugé qu'il n'y a pas lieu de l'admettre à faire cession."

"Mais considérant que les créanciers à l'instance desquels ledit Sieur Mauger a été réduit aux petits dépens ne s'opposent pas à ce qu'il soit élargi de prison; que lesdits Intervenants n'étant porteurs d'aucun acte de prison contre ledit Sieur Mauger ne peuvent le retenir en prison, et ne paraissant pas qu'il se trouve aucun autre créancier détenant, la Cour, sous ces circonstances, a libéré ledit Sieur Mauger de prison."

Now, Mr. Pirie's argument is cogent. He says that his client has made the fullest affidavit possible. Any attack made upon it by Mr. Robinson has been met. The Court can have no doubt that his client is in good faith and to keep him incarcerated while he goes through the procedure laid down by the Loi sur les Décrets, when the result is inevitable is totally counter-productive. In effect he is saying that the saisie has yielded nothing, the barrel is empty, so why continue with these draconian measures. In fact he attacks the actions taken by the Wife on five grounds:

1. The Court has an inherent jurisdiction to release his client and will eventually do so.
2. The Wife has improper motives in imprisoning the Husband.
3. She has failed to make a full and frank disclosure in her affidavit.
4. The present proceedings are counter-productive. Every day that passes means that the Husband could lose his valuable job (if it still holds).
5. He is in good faith. The purpose of incarceration was to compel those in bad faith to make disclosure.

On the question of failing to make a full and frank disclosure, the Wife has given a satisfactory explanation of why she stated in her supportive Affidavit that she did not know the Husband's

exact address. We do not, in any event, find that the omission is in the least material.

On the other points raised, Mr. Robinson says that if the Husband applies to this Court to make *cession* then he will have the opportunity to investigate more fully and forensically the claims and statement made in the Affidavit. He can talk to former business colleagues of the Husband; he can satisfy himself on the *bona fides* of the Husband and perhaps, more importantly, he can investigate the two claims made by the Husband in this Court.

If the Husband makes *cession*, the Court will hear both parties (if the wife is indeed the only creditor) and can then adjust the scales in whatever balance will most benefit

M. The Court will have the opportunity to instruct its officer to take over the two claims of the husband if they seem likely to be productive. What the Court is not prepared to do is to fetter those options. We cannot compel the Husband to make *cession*. If he does not, then the law must take its course.

The application to set aside the Order of the Royal Court for imprisonment is refused.

AUTHORITIES.

On the application to vary the maintenance order made by the Matrimonial Causes Division of the Royal Court on 29th November, 1985.

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

In the matter of the representation of de Sousa. (1985-86) JLR 379 at pp. 385-6.

Taylor-v-Hayter. (9th January, 1987) Jersey Unreported; (1987-88) JLR N.14.

Cameron-v-Archdale (12th July, 1983) Jersey Unreported.

On the application to set aside the Acte à peine de Prison of 24th January, 1992.

Le Gros: "Traité du Droit Coutûmier de l'Ile de Jersey. (Jersey, 1943): "De la Cession des Biens": pp. 297, 302.

Mauger (1880) 195 Ex 37.

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

Re Désastre Overseas Insurance Brokers, Ltd. (1966) JJ 547.