4 pages.

ROYAL COURT
(Samedi Division)

28th July, 1995 152.

Before: **The Deputy Bailiff and Jurats Vibert and Potter**

Between: Mrs L **Plaintiff**

And: Mr L **Defendant**

Advocate J.D. Melia for the plaintiff.
Advocate R.G.S. Fielding for the defendant.

JUDGMENT

THE DEPUTY BAILIFF: This is an application by the husband to lift the interim Ouster Injunction granted *ex parte* by the learned Bailiff on the 11th December, 1992. The effect of the Order was to exclude the husband from the matrimonial home, in St. Brelade. The Summons before us today asks that "*the interim Injunction be raised in its entirety*". That is very imprecise because within the Prayer of the Order of Justice are four separate Injunctions. They are as follows:

> "*(i) Ordering his immediate vacation of the matrimonial home in St. Brelade, Jersey.*
>
> *(ii) Preventing him from visiting, entering or approaching the matrimonial home pending further Order of the Court.*
>
> *(iii) Preventing him from contacting, molesting, annoying, threatening or assaulting the Plaintiff or attempting to do so by any means whatsoever and at any place whatsoever.*
>
> *(iv) Preventing him from removing or taking any steps to remove the children B, A or C from the care and control of the Plaintiff pending further order of the Court."*

It is axiomatic to say that we operate in Jersey a system of justice which in general demands service of proposed proceedings on the opposing parties. An *ex parte* application is, however, a very necessary power to enable the Court, if the circumstances demand, to intervene with immediate effect and without notice. This power is obviously essential to the proper administration of justice but it must be used cautiously and we would suggest only in cases of real necessity. The clearest example where it will be properly used is where funds are about to be spirited away from the jurisdiction and in these days of technology real speed and some stealth is often necessary to prevent funds from being dissipated at the press of a button. We would, however, stress the word "caution" because when we come to matrimonial affairs and particularly where a disintegrating marriage is in question, there are often two parties charged with emotional tension. Sometimes passions will rule the head. It is often for these reasons that the Court, which has the extraordinary emergency power, will, while exercising that power dispassionately, move with great caution. There may be clear-cut cases where the immediate protection of children, or indeed the welfare of the applicant makes the exercise of the power obvious to anyone who is an *"homme avisé"*. We cannot better the words of Geoffrey Lane, LJ, in the case of Walker v. Walker (1978) 1 WLR 533, where he said (and the facts of the case are not relevant) at page 536, considering an Ouster Order:-

> ***"What seems to me to be the question which the Court has to decide is this:-***
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> > ***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."***

The Order of Justice before the learned Bailiff of the 11th December, 1992, alleged cruelty and a petition for divorce on that ground had been filed on the 17th March, 1992. There were particulars of the cruelty given in the petition and these were that the continuing tension between the parties was causing the youngest child to pull her hair out. She had been referred to a doctor at the Le Bas Centre. The youngest boy had suffered stress symptoms from the domestic situation and his unhappiness in

school. These were evidencing themselves in *"daily stomach upsets, headaches and refusals to go to school"*. The oldest boy also had disruptive problems. All of these were exacerbated by the fact that the wife was suffering from what was termed a "bad back" and had been advised to take bed rest by her doctor. The husband had refused to help domestically in any way and she had been forced to continue to look after the children herself and to do the household chores. She was having to be referred to to hospital for treatment. There then occurs this passage:-

> *"7. That as a result of all of the above the strain upon the Plaintiff has become intolerable, her depression has deepened and she has on at least one occasion in the last two months considered suicide rather than continue in the present situation. The Plaintiff has been able to pull back but fears that the stress and strain of living in the present domestic environment until the time of the divorce hearing in February 1993 will prove too much for her and will have further repercussions on her health and the health of the children."*

The short affidavit accompanying the Order of Justice says this at paragraph 3:-

> *"3. That I am presently under the care of my doctor who has prescribed anti-depressants for me but I feel that the strain is such that I have genuinely felt that it is too much for me from time to time. I am worried that I shall reach the stage where I shall do something serious as a better alternative to living in the present situation."*

The learned Bailiff gave the Order and on the 11th December, 1992, (two weeks before Christmas) the wife issued and served the Order of Justice ousting the husband from the family home.

When pleadings had been filed in the Order of Justice action, the matrimonial proceedings and the Ouster proceedings were consolidated by consent. The unusual events which occurred thereafter and which led to the parties appearing before us today are to be found in the unreported Judgment of the Court of Appeal of the 5th April, 1995. Briefly, the facts are these.

On the 9th February, 1993, (the day after a protracted action had commenced) the Royal Court attempted to broker a compromise. Counsel agreed to this unusual course. The unfortunate events thereafter and their unforeseen consequences are set out in the judgment of the learned Court of Appeal. We do not need to report them here except to say that at page 20 of their judgment the Court said this:-

"It follows from what we have said that in our view the Court approached this matter without giving to the interests of the children the degree of importance which in the law it was their duty to give. It follows from this in giving its approbation to the agreement, the Court was exercising its discretion upon wrong principles and it is abundantly settled by authority that when that has happened an appellate Court is justified in intervening. In our judgment, therefore, we are compelled to conclude that because the discretion was exercised upon wrong principles, the decision of the Court must be set aside and this appeal must be allowed. The practical effect of that will be that the order of the Court ratifying the agreement will be set aside. With that order must also fall the Order staying the petition for judicial separation and the order striking out the Order of Justice and the position will therefore be that the petition for judicial separation remains, as it always has remained in being but is no longer stayed, the Order of Justice is no longer struck out and the injunctions contained in it therefore remain in force."

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.

We have had the benefit of medical witnesses. One of these, Mr. Peter Henderson, a Behavioural Psychotherapist, had been seeing Mrs. L from July, 1992. He, like everyone else who gave evidence as to her well-being just prior to the injunctions being taken out, spoke of the stress and anxiety that she was suffering.

She had spoken of fleeting ideas of suicide but towards the end of the year, while she was very upset, he was not worried about any suicidal tendencies. We cannot believe, with the advantage of hindsight, that there was any real immediate danger of serious injury or irreparable damage. The Ouster Order granted appears to be open-ended. The effect of it is that, now that the Order of Justice is revived, the injunctions have effectively kept the husband from his house for nearly three years.

On the question of suicide, we are convinced that her "overdose" on the 16th September, 1975, was not a serious attempt at suicide and it was treated by the judicious use of prescribed anti-depressants.

We believe that the affidavit filed in support of the Ouster injunction contains flimsy evidence.

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, Mr. O. He lives in one room, without any natural light and for this room he pays no rent. It measures 18 foot by 12 foot, 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 the law firm where he has worked the whole of his adult life. He is a conveyancer and 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 £45.00 per week for each of the three children and school fees. He has staying access to the three children in his funk-hole accommodation. That was criticised by Mrs. D the mother of Mrs. L , but we regard the criticism as unfair. We have no doubt that the children enjoy staying with their father and the accommodation is not relevant to their well-being. Mr. M.J. Cutland, the Divorce Court Welfare Officer, agreed that all the children enjoyed access to their father, whom they loved, and they had fun with him.

We are in an unenviable position. It is not helped by the fact that Mr. L really cannot accept that the marriage is over. He said as much to us: *"I still love my wife and children. When she sees that I am genuine and back in the home, she will come round."* Contrary to that, we have Dr. John Jackson who is Mrs L's General Practitioner. He used a graphic phrase which has remained in our minds. *"Everything"*, he said, *"has been killed inside her"* and it would be her worst nightmare if the husband came home. It could lead to severe depression. Mrs. L told us that there would never be a reconciliation and she could not understand why Mr. L thought that there was any hope of saving the marriage.

We have listened patiently and carefully to all the evidence given as to the reasons why the marriage has broken down.

When it was put to Mrs. L that, with the family looking forward to Christmas, she had ejected him from the house without any notice and that it might have been cruel to do that at that time, she looked surprised. *"I had very little choice,"* she said. *"It never occurred to me that I should give him a chance."*

The report of Mr. Cutland tells us what we had deduced and what makes the case so difficult. Both parents genuinely love their children and want what is best for them. Neither can be described as unfit. Each has complementary qualities but their constant feuding will, unless something is done quickly, lead to even greater difficulties for the children in adjusting to a separation which we have no doubt will eventually have to follow.

We have to say that Mr. Cutland, in interviews with the children, made two telling points. Neither of the boys felt that it was a good idea for the father and the mother to resume cohabitation as this would lead to further arguments. Secondly, C would welcome her father coming home but Mr. Cutland felt that *"any cohabitation would provide a mixed and unhelpful message in the girl's adjustment to parental separation"*.

As long ago as the 23rd April, 1993, Miss Ahier, Mr. Cutland's predecessor, said this:-

> *"At one stage, Mr. L suggested that the house be adapted to allow them as parents to lead fairly separate lives but have easier access to the children. In my view, this would have been a catastrophic arrangement as Mr. L , in particular, needs to have a complete physical separation from Mrs L to enable him to fully accept that the marriage is over."*

We do not need to analyse the evidence that we have heard in any greater detail. There was much in that evidence to disturb us. Mrs. L is coping, after a fashion, in a large house which appears to be deteriorating from lack of maintenance. There was evidence of excessive telephone bills, and this was explained away by the children using *"competition numbers"*. Allegations were made that the boys (each child has a television set in the bedroom) watch television until the early hours of the morning. C sleeps with her mother, while a spare bedroom and bathroom remain locked and unused. The school attendance records are very bad - described by Mr. Martin Hebden, the Deputy Headmaster of De La Salle College, as *"in the higher range of absenteeism"*. The children have problems at school but they are reasonably happy and integrate well.

If Mr. L came back home, Mr. Cutland felt that the atmosphere would not be happy. Any cohabitation would be bound to fail with potential disastrous consequences for the children. The relationship has finished which could sustain three children in a

happy environment. But it cannot be in the interests of the children that a property should be allowed to continue to deteriorate while the sole breadwinner, under increasing strain, is unable to work efficiently.

The ominous note continued to be struck when Mr. L asked why he did not bring a two year separation in order to resolve the ancillary matters, said words to the effect that "he did not want a divorce".

We must not shirk our responsibility in this most difficult matter. Whatever we decide will affect someone in this situation adversely. There is clearly no easy solution.

We remain convinced that the marriage is at an end. We have examined the possibilities open to us. The future, until Mr. L accepts that he has lost his wife's affection, is not good.

In Pinson v. Pinson (1985-86) JLR 144, the Court said at 147 (this was a case of Ouster proceedings):-

> ***"We are satisfied that we have to take into account"*** (the 17½ year old son's) ***"interests as well as the interests of the parties but they are not necessarily paramount."***

The Court went on to say:-

> ***"We have had regard to the wording of the Matrimonial Homes Act, 1983, an English statute, which provides in s.1(3):***
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> > ***In an application for an order under this section, the court may make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case ...."***
>
> ***Now that of course is not binding on us in any way but we think by analogy we can adopt it as being a sensible set of principles which would govern the exercise of our inherent jurisdiction in matters of this sort and accordingly we have considered the evidence in the light of the principles as set out in that statute."***

Again, in Richards v. Richards, (1983) 1 AC 174 at 205 the Court said:-

> ***"(5) I would venture to add that whether one treats the "needs" of children as a relevant factor or their "welfare" as paramount, the court ought not to confine***

itself to a consideration of purely material requirements or immediate comforts. These may have to be given priority in a given case either owing to their urgency or the seriousness of denying them. But is not necessarily for the interests of children that either parent should be allowed to get away and be seen to get away with capricious, arbitrary, autocratic, or merely eccentric behaviour. It may well be difficult for a court to exercise control. But the difficulty is not rendered less if it is prepared to throw its hand in so readily."

We do not think that Poignand v. Poignand (7th February, 1991) Jersey Unreported, helps us. That, like Clarke v. Gledhill (10th December, 1991) Jersey Unreported, turned very much on its own facts.

Each side now attacks the other. We must bring some sense to bear on an increasingly senseless scenario.

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 subsidised rent of £15.00 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.

Authorities

David Bean: "Injunctions" (4th Ed'n) (1987) pp.115-119 and 78-79.

Richards v. Richards (1984) 1 AC p.174.

Pinson v. Pinson (1985-86) JLR 144.

Poignand v. Poignand (7th February, 1991) Jersey Unreported.

Clarke v. Gledhill (10th December, 1991) Jersey Unreported.

Walker v. Walker (1978) 1 WLR 533.