C (by His Delegate D) v B

Jurisdiction:	Jersey
Judge:	Sir William Bailhache
Judgment Date:	21 May 2021
Neutral Citation:	[2021] JRC 147
Court:	Royal Court

Text

[2021] JRC 147

ROYAL COURT

(Family)

Before:

Sir William Bailhache, Commissioner, sitting as a Single Judge.

Between
C (by his delegate D)
Petitioner
and
B
Respondent
Erinvale PTC Limited
Third Party
E
Intervenors

and

F

Advocate P. D James **for the Petitioner**.

Advocate R. A. Leeuwenburg **for the Respondent**.

Advocate B. J. Lincoln **for the Third Party**.

Advocate S. A. Franckel **for the Intervenors**.

Authorities

Matrimonial Causes (Jersey) Law 1949

Matrimonial.

THE COMMISSIONER:

Introduction

1 I sat as a single judge on 18 th May for a directions hearing in relation to these complex family proceedings. At the conclusion of the hearing I ordered that the dates set for trial in November should be vacated, but that two days would be reserved by the Bailiff's Judicial Secretary at the beginning of the vacated dates and a further two days at the end of the vacated dates for the purposes of other directions hearings and the parties are to keep themselves available during that time accordingly. The decision on the various matters raised with me was otherwise reserved and the judgment which is now given addresses those issues.

2 As a short procedural history, the Petitioner, who is eighty-seven and not in good health, issued his divorce petition on 30 th May 2017. The Respondent, who is in her late sixties, did not defend the petition as amended. A *Decree Nisi* was pronounced in August 2017, and a *Decree Absolute* was granted by Act of Court of 23 rd November 2020. What is left over is the question of the Respondent's application for financial relief consequent upon divorce.

3 The complexity of the financial provision proceedings is closely connected with some complex structures of which the Third Party is trustee. There are a number of holding and trading companies ultimately owned by the trusts in question; one or more of the trading companies are allegedly joint venture companies, part owned by the trust and part owned by the First Intervenor, who, with his sister, the Second Intervenor, are children of the Petitioner by an earlier marriage. The Petitioner and Respondent have one child of their union (J) who is of age but not a party to the proceedings.

4 The relationship between the Petitioner and Respondent began in 1987 and they commenced cohabitation at around that time. Indeed, the Respondent was cited in the Petitioner's first divorce. They were married [Redacted] in 1997 in the USA. The parties have thus lived together for over thirty years and had been married for over twenty years. They have lived at various addresses in Country 1, Country 2, Country 3 and finally in Jersey, to which they moved more recently.

5 At the heart of the delay in finalising the claims for financial provision ancillary to divorce lies the apparent difficulty in agreeing what the matrimonial property is for the purposes of the argument which is to take place. The Respondent's assessment of the matrimonial property is that it has a value of approximately £75 million. The Petitioner asserts that a number of the assets which the Respondent has identified as forming part of the matrimonial property are not in fact to be classed as such property at all. Furthermore, although valuations are very approximate, the main asset which the Respondent contends to be matrimonial property, namely the A Settlement, a Jersey law trust settled by the Petitioner on 17 th September 2012 with a value of some £55 to £61 million, is asserted by the Petitioner to include non-matrimonial property because it reflects the sale of the Petitioner's business in 1988 for approximately £18.5 million which, adjusted for cost of living purposes to 2021, gives a figure of approximately £50.3 million.

6 The remaining assets forming the matrimonial property are not of an insignificant value but are unlikely to give particular difficulty either as being identified as matrimonial property or in terms of valuation.

7 The likely parameters of the argument around the net value to be attributed to the matrimonial property therefore depends upon:

(i) Establishing what, if any, proportion of the assets of the A Settlement falls to be discounted as pre-marital property.

(ii) Arriving at a valuation of the assets within the A Settlement which do not reflect pre-marital property, if indeed any part of it does;

(iii) Establishing whether any of the other trusts are to be taken into account; and

(iv) Establishing what, if any, liabilities there are which need to be deducted from the net value of the assets in question.

8 In connection with sub-paragraph (iv) above, there is a significant issue with regard to taxation. It appears that the Petitioner has a domicile of origin in Country 1. There is a potential argument that when he went to live in Country 3 with the Respondent (or possibly earlier) he abandoned his domicile of origin and obtained a domicile in Country 3. There is also a potential argument that when he left Country 3, if not lost earlier, his domicile of

origin revived. The Respondent, as a recipient of any assets in the A Settlement, might be the subject of significant tax assessments from Her Majesty's Revenue & Customs (HMRC) depending upon any conclusion reached as to where the Petitioner was domiciled at the date of the various settlements. That is an important issue which potentially affects all of the parties to these proceedings and all have agreed that it is a matter which requires attention. That attention may involve discussion with HMRC and potential agreement over any tax liability; and it may lead to a mistake application being made to the Royal Court in relation to some or all of the settlements or transfers into trust. If the parties were to take no further action, the United Kingdom resident beneficiaries would always be at risk of an assessment from HMRC themselves – this in particular affects the Respondent, J, and the Second Intervenor – and doubtless there would be assertions from them that they were entitled to an equitable right of indemnity from the Trustee with whatever difficulties which the assertion of such an equitable right might potentially bring with it.

9 Because the domicile and tax questions are so important in the context of valuing the matrimonial property, there was a general consensus that the hearing dates in November had to be vacated, although Advocate Frankel was keen to indicate that vacating the dates was not a matter which he either opposed or consented to. His clients' approach was that the question as to when the hearing should take place was essentially one for the Petitioner and Respondent.

10 I was satisfied that the tax position is one which ought to be clarified if possible, and therefore that a vacation of the dates in November would be in the best interests of delivering justice on the Respondent's application. In saying that, I wish to be clear with the parties that the Respondent's application will not be adjourned indefinitely. It will be unfortunate if the Royal Court has to resolve the application without having a clear statement as to what liabilities there are towards HMRC, if any, but my present view is that if that has to be the case, the Court will do the best it can with the position put before it. I am hopeful that fresh hearing dates will be settled at the next directions hearing.

11 Advocate Lincoln submitted that on vacating the trial dates, the Court should also re-fix fresh trial dates to which the parties can work. I decline to make that order now. At the final hearing there will be a need for valuation evidence in relation to the assets within the A Settlement and possibly other assets too. These valuations are likely to be expensive to conduct and while I accept that there is an inevitable probability that the figures will change from time to time, it is desirable that the valuations are effected as close to the hearing date as can reasonably be arranged. I would therefore prefer to have more certainty as to what the domicile position is before re-fixing trial dates, although I may well be open to doing so at the next directions hearing which I propose to hold at a convenient date in September.

12 I take this opportunity of adding that one of the matters canvassed before me was the question as to whether there should be a single expert valuer, jointly instructed, or whether the parties should instruct their own valuers. The parties before me all seem to agree that for various reasons it would be inappropriate to appoint joint experts. In those circumstances I accept that the parties should instruct their own experts. My current view is

that the instructions should be agreed by the Court, not least because it would be highly undesirable to have the experts approaching the questions which the Court has to consider on a wholly different basis. For this reason, I direct that at the next directions hearing in September, there should be provided to the Court the instructions which are to be made available to the experts to be appointed together with an identification of who the experts will be and what their qualifications are.

13 Advocate James submitted it would be helpful to the Court and to the parties if a Schedule of Issues was prepared. This would identify the issues in schedule form and contain, with a maximum of two to three sentences on each point, the position of the parties. His submission was that the Respondent should complete her responses to his client's schedule, subject to the same word limit, and add any additional issues that on her case needed to be determined within fourteen days. In response, Advocate Leeuwenburg agreed that a Schedule of Issues might be a sensible way forward and would be helpful, although he considered that disclosure should be completed first. In my view, a Schedule of Issues would also enable a focus to be applied to outstanding discovery issues. I have reviewed, if only briefly, some very extensive documentation put before me, and I recognise that that is only a part of the documents which the case has generated so far, but I agree a direction about the production of a schedule of issues now, albeit with a slight variation in the timetable.

14 I will return to the question of discovery shortly.

15 The Schedule of Issues should also enable the parties to address their attention to the evidence which will be necessary at the final hearing. At the next directions hearing in September, I shall expect the parties to produce a list of the witnesses whom they intend to call at trial. I anticipate the Court will then make an order that witness statements should be produced to stand as evidence in chief. The timetable for producing such statements can be determined in September when there will be perhaps a better idea as to when trial is likely to take place. I do not currently expect the Third Party to be raising issues of its own but rather to be responding, as a neutral trustee, to the issues raised by others.

16 The provision of the Schedule of Issues should enable the parties to identify the witnesses they need for the presentation of their respective cases. I expect to give in September a direction as to the filing of witness statements to stand as evidence in chief.

17 I turn next to the question of the identification of matrimonial property. There is nothing unusual about a party in matrimonial proceedings, especially in what I may call the *'big money'* cases, to asserting that particular trust or corporate structures are a mere façade concealing the true facts and accordingly contending that what is in those structures should be treated as the assets of the other spouse. In the present case, that issue does not arise, at least directly, with the A Settlement because although there is a potential argument about pre-marital property, which is a factual question with legal aspects to it all of which need to be resolved, there appears to be no real dispute that the assets of that settlement are to be

considered as assets available to the Petitioner as a matter of theory. Indeed the Third Party is present in these proceedings as trustee and it has been confirmed, one way or another, that it will give effect to any Court order out of the assets of the A Settlement. For the avoidance of doubt, I have not overlooked that that settlement may also contain assets which are beneficially those of the Intervenors, a factual issue that will need to be determined.

18 As far as the other non A trusts (the 'Other trusts') are concerned, the Respondent advances a variety of claims:

(a) The settlements can be varied by the Court under Article 27 of the Matrimonial Causes (Jersey) Law 1949 as amended.

(b) The settlements should be struck down on grounds of public policy as having been made for an improper purpose, namely the purpose of defeating any claims which might be made by the Respondent on divorce.

(c) The Petitioner has effective control over the Other trusts and their assets.

(d) The Petitioner has continued to make transfers from the matrimonial property into these trusts which ought to be taken into account in calculating the division of matrimonial property.

19 The first two of these points are essentially legal points; the second two also require an assessment of the facts.

20 I have not heard argument on the legal points and I do not decide them. Nonetheless, it may be helpful if I were to give an immediate reaction to them because that may assist in the preparation of a Schedule of Issues. For my part, I cannot see at the moment how Article 27 can possibly apply. It is in these terms:

"27. Power of court to vary settlements, etc .

(1) Where a decree of divorce or of nullity of marriage has been made, the court may, upon the application of either party to the marriage which is the subject of such decree, or upon the application of any person beneficially interested, cancel, vary or modify, or terminate the trusts of, any marriage contract, marriage settlement, post-nuptial settlement, or terms of separation subsisting, between the parties to the marriage, in any manner which, having regard to the means of the parties, the conduct of either of them insofar as it may be inequitable to disregard it or the interests of any children of the family, appears to the court to be just .

(2) The court may exercise the powers conferred by this Article notwithstanding that the marriage was contracted, or the marriage contract, marriage settlement, post-nuptial settlement or terms of

separation was made or entered into, in an extraneous jurisdiction."
(emphasis added)

21 This Article is concerned with varying marriage contracts, settlements or separation agreements between the parties to the marriage, where the third party interests are unlikely to be engaged. It is not evident at present that the Respondent was a party to any of these settlements, whether as settlor, economic settlor or as trustee, and she is not a beneficiary. As at present advised, I am not able to see how the power in Article 27 could therefore be exercised to vary the settlements. In so saying, I emphasise I have not been addressed on the matter, nor have any authorities been put before me. It may be helpful however to identify the immediate reaction as one which will need attention by the Respondent at some stage.

22 Similarly, while I can well see the argument that, in assessing what award ought to be made in favour of a party, the Court should take account of assets transferred into a trust by the other spouse, perhaps especially so after the divorce proceedings have commenced, it does not seem to me on the face of it that, unless the trust in question is demonstrably a façade which enables the fiduciary or corporate veil to be pierced, any decision would be taken by a Court which strikes down the essential validity of that trust where third party interests are engaged. Those would be hostile trust proceedings and not matrimonial proceedings. These legal points are matters which could conveniently be decided in November this year and might help to frame the area where factual evidence might be necessary and/or appropriate.

23 Advocate Leeuwenburg submitted that the Respondent might argue that the Other trusts other than the A Settlement should be struck down on policy grounds. It may be helpful to the Respondent for me to indicate that, without deciding the matter, it seems to me that the probability of a decision on the facts in favour of the Respondent on that ground is low – the trusts were made several years before the A Settlement and even longer before the breakdown of the marriage if that is measured in terms of the commencement of proceedings; and it seems clear that the A Settlement, which contains far more by way of assets than the Other trusts, was intended when made to provide some benefit for the Respondent. So it might be hard to reach the conclusion that the earlier Other trusts were made for the purpose of defeating the Respondent's claims when the A Settlement was not. The Respondent should thus be aware that any argument on this contention is likely to face an uphill battle and if it is continued with and fails, it will likely result in a significant costs penalty.

24 I make these remarks in the hope that it may contain some of the argument in the future, and because also a decision on these particular points may be relevant for the purposes of any disclosure decision, to which I will now come.

25 It is fair to say that all the parties before me complain about the disclosure arrangements so far. The Petitioner, Third Party and Intervenors complain that the Respondent has in

colloquial terms thrown the kitchen sink at the claims which she wishes to bring and that she has had disclosure of an inordinate amount of material as a result of which the costs of the litigation have been very substantially increased. The Respondent, on the other hand, asserts that the other parties have failed in their disclosure obligations time and again, resulting in a serious lack of trust on her part in the ability or desire of the other parties to deal fairly with her. I can readily identify with the sentiments advanced by all the parties, and at the same time I do not feel I am able to adjudicate upon them without a very intensive exercise in studying all requests for disclosure and the manner in which they had been dealt with. It does not seem to me that this is a profitable way forward, whether for me or for the parties who would obviously have to address me in detail on those matters.

26 It is said by Advocate Leeuwenburg that there will need to be electronic disclosure. No doubt the parties will consider whether that will be necessary. It is a matter which can be argued in September after the Schedule of Issues has been presented. It would not surprise me if some very focused disclosure questions might properly be put by the Respondent. On the other hand, a wholesale production of documents is one which may well be difficult to justify. I am not willing at present to make any order for further disclosure but I anticipate that further disclosure requests will be made between now and September, and if not agreed will be adjudicated then. The Court should be given at least two weeks notice of the particular disclosure requests outstanding.

27 I turn finally to the question of costs. The costs of all parties have so far been made out of the A Settlement and I understand the total involved to be in excess of £5.5 million. This is a significant figure. It is all the more significant because there is clearly a long way to go to trial, and, if the argument is not contained, the trial itself will be a very substantial and costly exercise. It is likely that there will be a costs order in favour of one or other of the parties to these proceedings, and the result of that costs order could have a significant impact, given the figures spent so far, on the ultimate entitlements. It is essential that the Petitioner and Respondent – and to a more limited degree the Intervenors – are aware of their potential liabilities in this respect. For that reason, I expect in September to direct the early provision of a costs budget which will address the Schedule of Issues and provide for the likely expenditure of each party with his or her own lawyer on each issue up to and including trial together with a summary of the costs incurred to date. The parties should address their attention to this over the coming months.

28 There is liberty to apply in relation to all these procedural directions, which are listed in the schedule attached to this judgment.

Schedule

The following directions are given:

(1) The dates reserved for trial from Monday 8 th November to Friday 3 rd December are vacated, save that two days at the beginning and two days at the end of that

period are reserved for further argument if necessary.

(2) The parties are directed to attend on the Bailiff's Judicial Secretary within the next 7 days to fix a further directions hearing on or after 17 th September, with a one day listing.

(3) The Petitioner shall provide to the other parties a Schedule of the outstanding Issues between the parties by 18 th June 2021 with his stated position in no more than three lines on each issue. The Intervenors shall complete and serve on all other parties their responses within 21 days setting out their stated position in no more than three lines and adding any issues which they contend require attention. The Respondent shall complete and serve on all other parties her responses within 21 days of receiving the Intervenors' responses, and has leave to add any issues which have not been identified by the other parties, in each case setting out in no more than three lines her stated position. The Petitioner and the Intervenors shall respond to the Respondent's additional issues within 21 days, again in no more than three lines. The Third Party has leave to file its stated position within 21 days of the last response of the other parties being received.

(4) All further disclosure requests, if not agreed, will be considered at the next directions hearing in September.

(5) The parties are directed to set out any draft orders they will seek at that hearing no less than three days in advance of the hearing.

(6) The parties are directed to prepare a draft witness list for the attention of the Court at the next directions hearing. This will include the identification of any expert witness whom they intend to call, together with the qualifications of such witness to be treated as expert. The parties are directed to seek to agree a draft of the instructions to be given to the expert witnesses.

(7) Liberty to apply generally.