P v Q

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	22 July 2014
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Text

[2014] JRC 146A

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Q.C., Deputy**Bailiff, **sitting alone**

Between
P
Applicant
and
Q
Respondent

Advocate M. E. Whittaker **for the Applicant**.

Advocate C. Hall **for the Respondent**.

Authorities

Children (Jersey) Law 2002.

Trusts (Jersey) Law 1984.

Children Act 1989.

Matrimonial Causes (Jersey) Law 1949.

Civil Partnership (Jersey) Law 2012.

Wills and Successions Law (Jersey) 1993.

Bankruptcy Désastre (Jersey) Law 1990.

International Covenant on Civil and Political Rights.

Benest v Le Maistre [1998] JLR 213 .

Housing (Jersey) Law 1949.

J v C (Child: Financial Provision) [1999] 1FLR 152 .

DE v AB [2011] EWHC 3792 (Fam) .

A v A [1994] 1 FLR 657 .

Re P [2003] EWCA Civ 837 .

Flynn v Reid [2012] (1) JLR 370 .

Family — preliminary issue of law arising from an application by the applicant in connection with jointly owned property.

Bailiff

THE DEPUTY

Introduction

1 I sat on 27th May, 2014, to resolve a preliminary issue of law which arises on an application by the applicant under Article 15 and Schedule 1 of the Children (Jersey) Law 2002 (“the 2002 Law”). The applicant's form C100 in its material part sets out the following:–

> *"My former partner, Q has instituted proceedings for licitation force the sale of the Property A currently held in the names of us both, where I and our daughter live.* He has not put forward any proposals by way of financial provision for our daughter.
>
> *I would like the Court to make an order for financial provision for our daughter and to make orders concerning the property to permit our child and I to continue living in the property for the time being, with an order for secured provision against Q's interest in the property."*

2 I am advised that a date has been set for the hearing of the application in October 2014.

Background

3 Both the applicant and the respondent were born in Jersey. They met in 2005 and commenced a relationship. At some point during that year, the respondent moved in with the applicant at her home, Property A, which had been owned by her grandparents from the mid-1970s, and was inherited by the applicant's father and his siblings in 1996. The applicant had been renting Property A since 1999. When the respondent moved in, he and the applicant paid rent of £450 per month.

4 The child of the union was born in November 2006. In January 2007, the applicant and the respondent entered into a co-owners agreement and purchased Property A for a consideration of £280,000. It has been purchased jointly and for the survivor of them. The purchase price was funded by a joint loan from Bank A of £190,000, of which there is a current outstanding mortgage of approximately £150,000, and a contribution, whether by loan or gift is currently in dispute on the affidavit evidence, of £70,000 from the applicant's father. The applicant put in £30,000 towards the cost of the property and ancillary fees. The agreement between the applicant and the respondent in connection with the property records that there was a bank loan of £190,000, a loan from the applicant's father of £70,000 (the "P loan") and that the applicant would contribute £30,000. The agreement records that the parties would be jointly responsible for all obligations under the bank loan and the P loan, and that if either the applicant or the respondent at any time in the future wanted the property disposed of, it would be placed on the open market for sale at the best available price or as agreed between the parties, and the net proceeds of sale after deduction of all sale costs and the repayment of the bank loan and the P loan would be applied, firstly in repayment of £30,000 to the applicant, and secondly as to the balance in equal shares between the applicant and the respondent. As at 3rd January, 2014, it is said that there is an equity of approximately one hundred and twenty thousand pounds (£120,000) available to the parties to these proceedings.

5 The respondent left Property A in or about February 2012. Although it appears that the respondent has subsequently notified the applicant that he wishes the property to be placed on the market for sale in accordance with the terms of the agreement, she has not

agreed to follow that course and, after the issue by the respondent of licitation proceedings, the applicant brought the current proceedings under Article 15 and Schedule 1 of the 2002 Law.

6 The two issues of law which are put to me are these:–

> (i) Can the Court have regard to a pre-existing agreement between the parties solely in relation to a property when considering what orders to make in a Schedule 1 application? If so, to what extent? I record that neither Advocate Whittaker nor Advocate Hall advanced the submission that the agreement could not be taken into account.
>
> (ii) Do the powers of the Court under Article 1(1)(a) or (b) of Schedule 1 of the 2002 Law for transfer or settlement of property include the power to order a deferred sale of jointly owned property if the Court considers that it is in the best interests of the child to do so? If not, what orders are possible to provide a settlement of property for a child?

Question 1 — The Agreement

7 In my judgment it is quite clear that the Court can have regard to an agreement in the context of Schedule 1 proceedings. Article 4(1) of the Schedule to the 2002 Law is in these terms:–

> ***"(1) In deciding whether to exercise its powers under paragraph 1 or 2, and if so in what manner, the Court shall have regard to all the circumstances including –***
>
> …" *(emphasis added)*

8 The direction in this Article to have regard to all the circumstances must include having regard to an agreement which the parties have made and which might bear upon the extent to which it would be right to exercise discretion to order a transfer of property, or a settlement of property by one party to another for the benefit of the child. The fact that a list then follows in respect of circumstances which should be taken into account does not detract from the generality of the opening language not least because it is expressed as an inclusive list as opposed to one which is exclusive.

Question 2 — The powers of the Court under Schedule 1(1)

9 It is only when one identifies precisely what type of order is likely to be requested that the potential construction difficulties in relation to Schedule 1 Article 1 become apparent. When I put the question to Advocate Whittaker as to what order she wanted, she said that she expected the structure of the order to include the grant to her client of occupancy rights in

respect of Property A until the child attained the age of 18 years or ceased full time education whichever is the later; with trigger events which would bring the right of occupation to an earlier conclusion if the applicant were to remarry or cohabit or if the child were to live with her father. Advocate Whittaker then went on to suggest that it might be appropriate to create a clearer situation for both parents if the Court severed the property interests in Property A to change them to ownership in common.

10 Advocate Hall's response to this was that to order occupancy rights would in effect to create a constructive trust in respect of Jersey real estate. To grant such an order would require the Court to hold that although it was not interfering with the ultimate legal ownership of the property, which remained in joint names, that legal ownership should be divided from the beneficial enjoyment of that property. The judicially granted occupancy rights essentially created a constructive trust. The parties would hold the freehold property on trust to permit the applicant and her daughter to live there for a period of years on the terms set out in the order and at the expiration of such period, would hold the property for themselves in equal or unequal shares, as the case may be, absolutely. This was contrary to the provisions of the Trusts (Jersey) Law 1984 ("the 1984 Law") the relevant provisions of which were these:–

> ***"11(2) Subject to Article 12, a trust shall be invalid –***
>
> ***(a) To the extent that –***
>
> …
>
> ***(iii) it purports to apply directly to immovable property situated in Jersey…"***

11 Article 12 deals with trusts for non-charitable purposes which is inapplicable here.

12 Also relevant to the respondent's submissions — because these are not matrimonial proceedings — is Article 59(2)(d) of the 1984 Law which is in these terms:–

> ***"Nothing in this Law shall derogate from the powers of the Court which exist independently of this Law… to make an order relating to matrimonial proceedings."***

13 It is apparent therefore that what is at the heart of the legal question on which I am asked to rule is the definition of the word "property" for the purposes of Schedule 1 of the 2002 Law. Is this word to be construed to mean all property whether movable or immovable, or is it limited to moveable and immovable property excluding immovable property situated in Jersey? The argument for the latter construction really rests upon the proposition that "property" should be construed to have the same meaning consistently in Article 1 of Schedule 1, and as it is impossible to have a settlement of Jersey immovable property, then for the purposes of Article 1(1)(b), the word "property" must have the more limited definition. Accordingly, so the argument runs, it must have a limited definition in Article 1(1)(a).

Schedule 1 of the 2002 Law is in similar but not identical terms to Schedule 1 of the Children Act 1989. Under paragraph (2) of the first section of that Schedule, the Court is given jurisdiction to make an order requiring a settlement to be made for the benefit of the child of property " ***to which either parent is entitled (either in possession or in reversion)";*** and likewise to make an order requiring either or both parents of a child to transfer to the applicant for the benefit of the child or to the child himself ***"such property to which the parent is, or the parents are, entitled (either in possession or in reversion) as may be specified in the order".***

14 Advocate Hall rightly points out that the language ***"either in possession or in reversion"*** clearly indicates that Parliament had in mind that the Courts would or could be dealing with English immovable property when exercising these powers.

15 This language in Schedule 1 of the Children Act 1989 is not replicated in Schedule 1 of the 2002 Law insofar as these important qualifying words are concerned. The absence of that language is all the more marked when one has regard to the language adopted by our own legislature in the Matrimonial Causes (Jersey) Law 1949. At Article 28(1), where the Court is conferred power to make an order for the transfer of property or settlement of property, the relevant language is this:–

> ***"Where a degree of divorce… has been made, the Court may, having regard to all the circumstances of a case… order… that one party to the marriage transfer to the other party to the marriage… any property whether real or personal to which the first mentioned party is entitled."*** (emphasis added)

16 A similar reference to real or personal property is to be found in Article 28(1)(b) in the context of making orders in relation to a settlement of property; and in Article 30 which confers a power on the Court to order a sale of property, paragraph (8) makes it plain that a reference to property is to be construed as a reference to property whether real or personal. None of that language is to be found in Schedule 1 to the 2002 Law. Similarly, in the Civil Partnership (Jersey) Law 2012, there is conferred on the Court power to order a transfer or settlement of property or a sale of property, where there is a qualification that in both cases "property" is to include both movable and immovable property.

17 The legislation to which I have just referred could be said to point in one direction, namely that the absence of any language to the contrary in Schedule 1 of the 2002 Law means that the powers which are conferred on the Court under that Schedule must be construed in accordance with what is otherwise the general law of Jersey, including the provisions of the 1984 Law which prevent the making of a trust in relation to Jersey real property.

18 This issue does not yet seem to have emerged in any previous case law before this Court, or if it has, my attention has not been drawn to it. What one can say, however, is that it is a situation which is liable to become increasingly commonplace. It is obvious from the

conveyances passed before the Royal Court each Friday that there is an increasing number of acquisitions by unmarried young couples where one might anticipate, in the ordinary course of things, the birth of children in due course. On the assumption that the fact of marriage is not the governing cause for its breakdown, it would seem reasonable to think that a number of the unmarried unions will also come to an end. The question is whether it is necessary for the legislature to tackle this particular problem, if it is so perceived, or whether it is legitimate for the Court to construe the existing provisions in such a way as allows flexibility in the kind of orders that might be made under Schedule 1 in the future.

19 Advocate Whittaker contended that the legislature has shown every sign of ensuring that legitimate and illegitimate children were treated the same. She pointed to Article 8C of the Wills and Successions Law (Jersey) 1993, as introduced by the amendment Law of 2010. As a result of that amendment, an illegitimate child has the same rights of succession as if he or she were the legitimate issue of his or her parents. Advocate Whittaker also relied on Article 12 of the Bankruptcy Désastre (Jersey) Law 1990, which when first enacted directed the Court, in considering the arrangements which had to be made regarding the matrimonial home, to give first consideration to the desirability of reserving the matrimonial home for the occupation of the spouse and any dependants of the debtor, having regard to all the circumstances of the désastre including the interests of creditors. When originally enacted, there was provision that the word ***"spouse"*** included a person to whom the debtor was alleged to be married by habit and repute, so it is clear that the reference to ***"dependants"*** in Article 12 of that legislation included illegitimate as well as legitimate children.

20 There seems to me to be no doubt that the purpose of Article 15 and Schedule 1 of the 2002 Law is to make provision for the welfare of children. That is the purpose of what is described as ***"financial provision for children".*** Financial provision is necessary for the child to be housed, clothed, schooled and fed, and to be provided with such other reasonable benefits as could be anticipated, having regard to all the circumstances. Accordingly, a purposive construction of the legislation would reach the conclusion that ***"property"*** ought to be given its natural meaning of all property, whether real or personal, and whether in the case of real property that property is situated in Jersey or elsewhere.

21 That is my primary reason for accepting the contention of Advocate Whittaker that the 2002 Law confers power on the Court to make an order for the transfer of Jersey real property or for the settlement of Jersey real property for the benefit of the child in each case. My conclusion in this respect is not affected by the existence of Article 59(2)(d) of the 1984 Law. It is true that that Article expressly mentions the Court's powers under the Matrimonial Causes (Jersey) Law 1949, but of course that is entirely understandable given that that legislation existed at the time the 1984 Law was passed. The fact that the 1984 Law has not been amended to include the Civil Partnership (Jersey) Law 2012 and the 2002 Law is not determinative of the position. Indeed, it is legitimate to infer that the legislature was aware of the provisions of the 1984 Law when the 2002 Law and the Civil Partnerships (Jersey) Law 2012 were passed and that accordingly the later legislation is, as it were superimposed on the 1984 Law.

22 In circumstances where there are two possible constructions of Schedule 1 of the 2002 Law, it also seems to me to be right to rely not only upon the construction of the legislation which most fits the purposes which I have identified but also upon the fact that the Island has, through the United Kingdom, signed up to the International Covenant on Civil and Political Rights ("the ICCPR"), Article 26 of which is in these terms:–

> ***"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.*** In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

23 The ICCPR is not part of our domestic legislation as is the European Convention on Human Rights, but unlike Article 11 of the Human Rights Convention, Article 26 of the ICCPR is freestanding, and does not need to be construed having regard to the other rights contained in the Convention. In *Benest v Le Maistre* [1998] JLR 213, the Court of Appeal was considering a submission that in the light of the European Convention on Human Rights (which at that time was not a part of the domestic law of Jersey) the ICCPR, and other treaties to which Jersey had acceded through the United Kingdom, the Court ought to develop Jersey law by abolishing the substantive right at that time to obtain an *acte á peine de prison*. In that connection, Southwell JA said this at page 218:–

> ***"None of the treaties has yet been incorporated into the domestic law of Jersey, although there are some proposals for the incorporation of the ECHR.*** Accordingly, their relevance for the purposes of Jersey law cannot be put higher than it was put by the English Court of Appeal in *Derbyshire CC -v- Times Newspapers Limited* [1992] QB 770 : ***(a) to resolve ambiguities and legislation; (b) in considering the principles on which the Court should exercise a discretion; and (c) when the common law is uncertain."***

24 I am fortified in my construction of Schedule 1 by the knowledge that the Island is also party to the International Covenant on Economic, Social and Cultural Rights, which contains a dependent non-discrimination right at Article 2.2 in these terms:–

> ***"The States parties to the present covenant undertake to guarantee that the rights enunciated in the present covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."***

25 This is followed by a substantive right at Article 10 the relevant parts of which are as follows:–

> ***"The States parties to the present covenant recognise that:–***

1) The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.

…

3) Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions."

26 In the light of the possible ambiguity as to the meaning of the word ***"property"*** in Schedule 1 of the 2002 Law, I consider that I am entitled to have regard to the international treaties to which the Island is a party in reaching the conclusion that the word ***"property"*** is to be given a meaning which has the same effect under the law as a whole where arrangements are being made for illegitimate children as for legitimate children. I recognise of course that the Schedule plainly does not contain any such discrimination, but the existence of the provisions to which I have referred in Articles 28 and 30 of the Matrimonial Causes Law indicates that in some respects wider powers would be conferred upon the Court in relation to legitimate children than would be conferred with regard to illegitimate children, if the position were such as that for which Advocate Hall contends, because on an application under the Matrimonial Causes Law the Court would be able to make an order, for example, in relation to the former matrimonial home, the governing purpose of which was to provide a home for the legitimate children of the dissolved marriage.

27 I should mention that Advocate Hall submitted that one possible reason for the absence of language in Schedule 1 clarifying that the Court's powers arose in relation to all real and personal property, lay in the concern that there would otherwise be permitted a possible breach of the Housing (Jersey) Law 1949. The theory is that the Court might sanction a transfer of real property to an unqualified person for the benefit of his or her child, using the powers conferred by Schedule 1. It seems to me there are at least two answers to that. The first is that if this were a perceived problem, it is surprising that it did not trouble the legislature when enacting Article 28 of the Matrimonial Causes (Jersey) Law 1949. The second is that the Court is not required to make an order for transfer to an unqualified person. It is conferred only a power to do so and it may be that the lack of housing qualifications in the transferee will be a ground for argument in a future case.

28 For these reasons I answer the point of law by holding that the Court does have power under Schedule 1 of the 2002 Law to make an order for the transfer or settlement of Jersey immovable property to or for the benefit of a child.

29 I wish to add the following comments in relation to the present case. They are, for the avoidance of doubt, *obiter* and nothing is decided. I make them only for the purposes of

assisting the parties who, I assume, will be having discussions with a view to a compromise of this case, or attempting other forms of mediation. The need for urgent consideration of settlement is marked. Already each party has incurred legal costs roughly approximating to one third of his or her equity in Property A.

30 The parties are not married. What would be a fair apportionment of their capital assets between them on a divorce, if they had been married is completely irrelevant to the test which the Court has to consider on a Schedule 1 application.

31 If the applicant has in mind (and she may not) that the Schedule 1 application is a mechanism by which she can personally obtain a benefit to which she may think she is entitled — if for example the purchase price was at a discount to the true value of the property reflecting an element of gift or advance on her inheritance from her father — she should disabuse herself of that immediately. That is not the test under Schedule 1.

32 The nature of the application under Schedule 1 is that the transfer or settlement must be to or for the benefit of the child. If the result of any contested proceedings were to be that either or both parents were insolvent, it is highly likely that the Court would not regard such a result as being in the best interests of the child. If the Court is of the view that the litigation is the driving reason for insolvency, that factor may well play a prominent part in the Court's thinking on an application such as the present.

33 I do not, as at present advised, consider that on a Schedule 1 application the Court must consider the child's welfare as the paramount consideration not only because the Court is not necessarily making any determination as the upbringing of the child but also because to do so would be to ignore the express language of Article 4 of Schedule 1. To the extent that a governing feature of the applicant's application is the securing of Property A as the child's home, my approach — and if the matter goes to a hearing, it will be a matter largely for the Jurats — would be that it was of paramount importance that the Court's order would ensure that the child had a home with her mother, but not necessarily in the house she has had so far. A Mescher style of order may be appropriate in matrimonial proceedings if the different components substantially point that way i.e:–

(i) Fairness of the capital division as between the father and the mother; and/or

(ii) The difficulty of providing a home for the children in any other way;

(iii) Any gross and obvious conduct as between the father and mother;

(iv) The needs of the father and mother as well as of the children.

34 These factors do not cease to be of relevance (other than conduct) simply because it is a Schedule 1 application, but in one sense the legal property rights of the parents carry a greater emphasis because the Court's statutory powers to interfere with them only arise in

the context of a solution which makes appropriate financial provision for the benefit of the child. In this context, what is appropriate financial provision must be considered against the financial resources of the parents and the need to ensure appropriate financial provision for them too as Article 4 of Schedule 1 expressly tells us. Children belong within a whole family structure in which all members of the family are important and it is in their interests that they appreciate that fact, whether sooner or later, in their upbringing. There is a resonance of this in the comment of Hale J, as she then was, in *J v C (Child: Financial Provision)* [1999] 1FLR 152 at p160 when she said:–

> ***"I also agree with His Honour Judge Collins in** H -v- P **that the child is entitled to be brought up in circumstances which bear some sort of relationship with the father's current resources and the father's present standard of living."***

35 I note also the approach of Baron J in *DE v AB* [2011] EWHC 3792 (Fam) where at paragraph 43 she said:–

> ***"The effect of the award was to leave the father with effectively little or no capital after his very significant contribution towards housing for C.*** That is unfair."

36 The present case is not a big money case such as *A v A* [1994] 1 FLR 657, or *Re P* [2003] EWCA Civ 837. The facts cry out for sensible settlement.

37 Where there is an agreement made by the parties in proceedings of the present kind, at a time when the child or children of their union is/are in existence, it might be thought that an applicant has to show some good cause why the agreement which he or she has made some years before should not hold good because the Court's starting point may well be that the parents were in a good position to decide at the time what was in the best interests of the child when making arrangements for the disposal of the property amongst themselves, and in practice an applicant may well be called upon in those circumstances to establish what has changed.

38 It is also right to note in passing that applications of this kind under Schedule 1 of the 2002 Law do not call for any enquiry to be made into the conduct of the parents in their relationship with each other. This is unsurprising. The application is for financial provision for a child and it must accordingly be a child focussed application. It is not an application, as in *Flynn v Reid* [2012] (1) JLR 370, for a transfer of property order between the parties to a common law ***"marriage"*** on the break-up of their relationship.