II

Jurisdiction:	Jersey
Judge:	Bennett JA
Judgment Date:	29 June 2011
Neutral Citation:	[2011] JCA 126
Reported In:	[2011] JCA 126
Court:	Court of Appeal
Date:	29 June 2011

Text

[2011] JCA 126

COURT OF APPEAL

Before:

Dame Heather Steel, **D.B.E., President**; M. S. Jones, Esq., **Q.C., and**; Sir Hugh Bennett.

IN THE MATTER OF II

Between
A
APPLICANT/Petitioner
and
B
RESPONDENT/Respondent

The Applicant represented herself.

Advocate A. D. Hoy **for the Respondent**.

Advocate M. Haines **appeared as an *amicus curiae***

Authorities

Edgar v Edgar [1981] WLR 1410 .

MacLeod v MacLeod [2010] 1 AC 298 .

Court of Appeal (Civil) Rules 1964.

Crichton v Parker-Smith [2008] JCA 039 .

In The Matter of the Esteem Settlement and the No. 52 Trust C.A . [2001] JLR 169.

Baglin v Attorney-General [2005] JLR 180 .

Syvret v Attorney-General [2009] JLR 330 .

Application for an extension of time in which to appeal.

Bennett JA

1 This is the judgment of the court. This is an application to the full court by the applicant/petitioner for an extension of time to appeal against the order of the Royal Court of 21 December 2010 following the refusal by the Bailiff, sitting as a single judge of the Court of Appeal, with appeal to follow if the application is granted.

2 Between 11 and 13 October 2010 Commissioner Clyde-Smith and Jurats Le Cornu and Marett-Crosby heard the parties' respective applications for ancillary relief. Judgment was given on 18 November 2010. On 21 December 2010 the Commissioner and the Jurats gave a further judgment following hearings on 18 and 29 November.

3 The upshot of the litigation was an order of 21 December that:-

(i) the petitioner was to pay the respondent a lump sum of £37,073 within 3 months of the order,

(ii) the petitioner was to continue to pay the interest on the mortgage on the Winchester property and procure the release of the respondent therefrom within 3 months of the order

(iii) the respondent was to pay the school fees of the children and one half of the cost of their travel to and from school at the beginning and end of each term and half-term,

(iv) at the end of each child's schooling the respondent was to pay such sum for maintenance and further education as may be agreed or, in default of agreement, as determined by the court,

(v) the respondent was to pay the petitioner maintenance of £1 p.a.,

(vi) the costs of the amicus curiae were to be paid out of public funds.

4 In an apparently unsworn affidavit of 26 January 2011 the applicant/petitioner sought the leave of the Court of Appeal to extend the time for service of a notice of appeal. Her grounds for an extension of two weeks were that Christmas and New Year came within the period of one month permitted to file a notice of appeal and she was suffering from ill-health. She exhibited a medical certificate of 25 January 2011. No draft notice of appeal was appended to her affidavit and no grounds of appeal were set out in the body of her affidavit.

5 On 28 January 2011 Advocate Hoy, on behalf of the respondent, submitted that:-

(i) The court, when considering whether to grant an extension, should take into account the extent of, and explanation for, the delay, the prospect of success of an appeal, and the risk of prejudice to the other party

(ii) No reasonable explanation had been given for the (short) delay. The petitioner had had the judgment of 18 November for a period of 2 months, the draft of the judgment delivered on 21 December was sent to the petitioner on 8 December, and on or about 13 December the petitioner was advised by Advocate Haines, the amicus curiae, of the time for appealing,

(iii) The evidence of ill-health went nowhere; she had frequently cited her ill-health during the proceedings but produced no evidence,

(iv) The court could not assess the petitioner's prospects of success in the Court of Appeal because she had given no grounds of appeal,

(v) The proceedings had continued for a substantial period of time, significant costs had been incurred, and they should be brought to an end.

6 In his judgment of 1 February 2011 the Bailiff, who had read the judgments, and in the absence of any grounds of appeal being filed, found that there was no arguable case that the Royal Court was plainly wrong. The matter, which had gone on for a considerable time, needed to be brought to an end, bearing in mind the shortage of financial resources. No good reason had been given by the petitioner for the failure to comply with the time limit for appealing. The medical evidence was insufficient. She had had the main reasoning of the Royal Court for 2 months.

7 On 11 February 2011 the applicant wrote to the court but provided no further significant information, least of all any grounds of appeal.

8 On 11 February the Bailiff wrote that, having read her letter, his decision remained the same and that if the applicant wished to take the matter further she should apply to the full court.

9 We were alerted by the Acting Assistant Judicial Greffier to a potential renewed application for permission to appeal out of time albeit that the applicant had not made a renewed application. Accordingly the case was listed for hearing of a renewed application on 23 March 2011.

10 On 23 March the applicant appeared before us in person. She submitted that there were several grounds of appeal which she would wish to deploy if granted an extension of time. But for the first time, so far as the Court of Appeal is concerned, she put forward as a ground of appeal that the Commissioner ought to have recused himself. Having heard Advocate Hoy, we made an order adjourning her application, for transcripts touching on the issue of recusal before the Commissioner during the hearing in October and December 2010 to be made at public expense, for the applicant to lodge with the Greffe within 14 working days of 23 March any documents upon which she wished to rely together with draft grounds of appeal in relation to the issue of recusal only, and for the respondent to file any submissions in relation thereto within 14 working days thereafter. We indicated that we hoped to deliver a judgment on the application to extend time at the May sitting of the court.

11 On 7 April the applicant lodged with the Greffe two documents. The first is a letter of 16 July 2004 from Ogier's Head of Business Development to the respondent inviting him to a concert. The applicant says the respondent used to receive other such invitations from Ogiers. The second is a letter of 21 July 2002 from Mr Clyde-Smith to Guy Brown of Equity Trust for whom the respondent then worked. It enclosed a memorandum. The letter and the memorandum give certain legal advice. The applicant says that thereon are annotations in the respondent's handwriting showing that he and Mr Clyde-Smith had conversations about the subject matter of the letter and memorandum.

12 By 12 April no draft notice of appeal had been lodged. The applicant says that she believed that she had another 14 days in which to lodge her draft notice of appeal. She lodged her draft notice by 21 April. Contrary to the Act of Court of 23 March she did not confine her grounds to the issue of recusal but put forward her full grounds. On 5 May Advocate Hoy lodged his submissions on the recusal point only, as directed by us.

13 By the Act of Court of 12 May 2011 it was ordered by this court that the applicant's draft notice of appeal was to be treated as containing all of the applicant's proposed grounds of appeal, that the respondent was to file his submissions as to grounds 2 to 7 of the proposed grounds of appeal within 28 days, that Advocate Haines was invited to act as amicus curiae

and within 28 days to file his submissions on all the proposed grounds of appeal, and that the application was to be listed for hearing on 29 June 2011 as an application for leave to appeal out of time, with appeal to follow if granted.

14 We are grateful to Advocate Haines for accepting our invitation to act as amicus curiae before us as he had done before the Royal Court and for his submissions to us.

15 The history of this matter, including that of the hearing, is set out in the two judgments referred to above. It is unnecessary to set it all out again in this judgment. We summarise what we consider to be the essential findings of the Royal Court which underpin the order it made.

16 In 1993 the parties married and in 2007 separated. They have 2 children now aged about 17 years old and 15 years old. The children are being educated privately in England at a total cost of about £71,000 p.a. The applicant does not work. The respondent's net income amounts to just over £80,000 p.a., from which he is paying the school fees.

17 There are two properties, one in Jersey and one in Winchester in England, both in the name of the applicant. In its judgment of November 2010 the Royal Court found the combined value (gross) of the properties, based upon valuations made in 2008, to be £1.425m. With other assets the applicant was worth, gross, £1.433m. The mortgages on the two properties totalled £930,000. Together with other creditors and including unpaid legal costs, the applicant's liabilities were found to be c. £1.266m. Thus her assets exceeded her liabilities by c. £168,000. The annual payment required to service the mortgages and the commercial loans was £90,660.

18 The respondent's assets totalled £32,170. His liabilities, which included a judgment obtained against him for arrears of Jersey income tax of £37,073, totalled £135,331.

19 The applicant sought a lump sum of £265,000 made up of sums allegedly due under an alleged settlement agreement, the Le Cornu agreement, and by way of compensation for the sacrifices she had made during the marriage. She recognised that her claims could not be met from the disclosed assets of the respondent, but she alleged could be met from his undisclosed sources.

20 The respondent sought a lump sum of £55,000 reflecting his interest in the two properties which would enable him to discharge the Jersey income tax judgment and other liabilities.

21 The Royal Court found that the Le Cornu agreement, about which the court preferred the evidence of the respondent to that of the applicant, should be given no weight for the reasons set out in para 55 of its judgment. The court referred to authorities including the well known English decision of the Court of Appeal in *Edgar v Edgar* [1981] WLR 1410

approved by the Privy Council in *MacLeod v MacLeod* [2010] 1 AC 298. In short, the agreement was grossly unfair to the respondent, he had had no competent legal advice thereon, and it had been arrived at unfairly.

22 The Royal Court rejected the applicant's case that the respondent had not disclosed all his assets – see para 56 of the judgment.

23 The Royal Court also rejected the applicant's case that the Jersey and Winchester properties were non-matrimonial assets, for the reasons given in paras 57 to 60.

24 In the opinion of the Royal Court there were insufficient assets and income to meet the needs of the family. Thus, the children should be removed from their school thereby freeing-up the respondent's income. The two properties should be sold and all the liabilities discharged. The applicant should obtain employment.

25 However, the Royal Court was faced with the emphatic wishes of both the parties and of the children that they should not be removed from their school. Further, the applicant wanted to retain the two properties. The Jersey home was the home of the children.

26 Para 66 of its judgment is important. The Royal Court was of the opinion that fairness dictated that the respondent should receive monies out of the diminishing net equity of the two properties sufficient to discharge the Jersey income tax judgment and to make a small contribution to his other debts. In para 67 the Royal Court said that it was minded to order the applicant to pay the respondent a lump sum of £55,000 within 3 months and if not made, the Winchester property would be sold. The respondent would pay the school fees.

27 As to the issue of compensation, the Royal Court held that there was no place for it as there was no, or no substantial, surplus over what was required for the parties' needs, to compensate the applicant for any disadvantage, assuming one existed.

28 Whilst a clean break was desirable, the Royal Court found that the applicant needed a period of 2 years in which to become self-sufficient. At that point the respondent could apply to dismiss her claim for maintenance.

29 Further, the court also wanted realistic proposals as to how in the light of its judgment the applicant was to address the serious financial issues which faced her.

30 At the resumed hearing there were further valuations and also evidence from the applicant's brother which the court said was ***"helpful"***. The court was therefore persuaded to reduce its initial assessment of what would be a fair lump sum from £55,000 to £37,073 and not to order the Winchester property to be sold – see paras 11 to 14 of its later judgment.

31 Accordingly, the Royal Court made the order set out in para 3 above.

32 In considering the application for leave to appeal out of time, there are certain matters which we must take into account. Under Rule 3 of the Court of Appeal (Civil) Rules 1964 an appellant has one month in which to serve his notice of appeal. The power of the Court of Appeal to enlarge time is given in Rule 16(1) even though the time for serving the notice of appeal has expired. At para 19 of its judgment in *Crichton v Parker-Smith* [2008] JCA 039 the Court of Appeal said that "it is appropriate for the Court to take into account the extent of the delay, any explanation for it, the prospects for the Appeal and the risk of prejudice to the other parties." At para 26 the Court of Appeal also said that "it cannot be emphasised too strongly that in matrimonial matters – and, as here, in ancillary arrangements – the Court must be astute to facilitate expedition in the resolution of disputes; whether on a first hearing or on a supplementary application."

33 No grounds of appeal were served until 21 April. We consider that the applicant has not provided any explanation for her delay at least until 23 March when she made her application to the full court. The Bailiff was, with respect, correct in his judgment when pointing out that the medical evidence was insufficient and that no good reason had been given for the delay. Thereafter no notice of appeal was served and no explanation was given at the hearing on 23 March for the further delay. It was not until the hearing on 23 March, when the court itself enquired of the applicant what were her proposed grounds of appeal, were any grounds vouchsafed. It was then that the applicant alleged, for the first time, that the Commissioner should have recused himself. Although it would have been helpful if the applicant had thereafter served a notice of appeal, she can legitimately point out that the Act of Court of 23 March ordered her to serve draft grounds of appeal in relation to the issue of recusal only. But in any event the fact remains that the applicant has not given any reason for the delay up to 23 March 2011.

34 The draft notice of appeal of the applicant does not set out what order/s should be made were this court minded to grant leave to appeal out of time and allow the appeal. During her submissions to us the applicant indicated that she would seek a retrial but was not able to tell us what orders she would seek at any retrial. We now turn to consider the prospects of success of the proposed grounds of appeal.

35 Ground 1. The applicant in effect submitted that when in private practice the Commissioner had a professional relationship with the respondent or C Trust, for whom he worked, such that he should have recused himself from sitting on the case —see para 27 above. In para 1 of her draft notice of appeal the applicant says the Commissioner did not openly acknowledge his *"existing"* relationship with the respondent and during exchanges during the hearing implied that they had never met. On 23 March the applicant told us that she had not *"found out"* about the relationship until the end of the hearing before the Commissioner and Jurats. So just before the judgment was handed down on 21 December 2010 she raised the matter with the court.

36 The relevant extract from the transcript of 21 December is as follows:-

"COMMISSIONER: [A] the Court has made its decisions, we're here to hand down our Judgment, it is too late for these submissions——-

[A]: And may I, may I ask something as well because it was suggested that recusal should have been operative here because my husband has told me that he worked closely with you when he was at C Trust and so he, apparently he should have, that should have been brought to the attention of the Court. Is, and may I ask if that's true, if you were indeed the lawyer at, one of the lawyer's representing C Trust at Ogiers when he was a lawyer, the lawyer at C Trust?

COMMISSIONER: The position, my position has been clarified before the start of this case [A] and no objection was taken to my presiding.

[A]: But I——-

COMMISSIONER: It is too late to raise that now.

[A]: Well but I was, that's why I am raising it now because I raised it with the amicus as soon as it became clear to me that you were the same Clyde-Smith and they said it was a ground for appeal but another lawyer has said you should raise it as soon as you are aware.

COMMISSIONER: [A] it's too late to raise that matter, I was very open with my position and no objection has been taken to my presiding——-

[A]: But I was told, I haven't, but as soon as I, I asked if I should raise it as soon as I was aware that it was the same Clyde-Smith. My husband said that he had a very close relationship with the lawyers at Ogiers whenever he was…, and the amicus has said that uhm, if you'll forgive me that——-

COMMISSIONER: A well you didn't raise it and it is now——-

[A]: But I didn't know——-

COMMISSIONER: Well——-

[A]: ——-as soon as I knew I raised it——-

COMMISSIONER: It is now too late. Do you have any other matters you wish to raise with the Court because we have a short period of time, we need to press on with our business?

[A]: So, so I'm asking for either a uhm——-

COMMISSIONER: You have an application to adjourn in order to provide the Court with further evidence and you are also applying to withdraw your Petition.

[A]: Well also may I, may I ask that the Court Welfare Officers are allowed to operate as Court Welfare Officers on behalf of the children?

COMMISSIONER: The Court Welfare Officer was withdrawn at your request.

[A]: She was withdrawn as guardian at my request.

COMMISSIONER: These are matters which we can't go behind now [A]. Thank you very much can you sit down please? Mr Hoy do you have any observations on the two applications that we've heard?

Extract ends at 09:50:45 and hearing continues."

37 The other reference in the transcripts is on 13 October in the evidence of the respondent as follows:-

"Extract from recording beginning at 10:18:47

[B]: Can I just say——-

ADVOCATE HAINES: Certainly.

[B]: ——-again after I'd started with Lovells, I did attend an interview at Ogiers because I have never discounted the possibility of being able to earn more, but again in that case I wasn't offered the job.

ADVOCATE HAINES: Let's move on [B] to the next area. Is it correct to say——-

COMMISSIONER: I think perhaps, [for the avoidance] of any doubt, you had no meetings with me did you [B]?

[B]: No, none whatsoever Sir.

COMMISSIONER: No. In case there's any——-

ADVOCATE HAINES: No I, I'd assumed Sir had there been an issue you would have raised it——-

COMMISSIONER: Yes. Right.

ADVOCATE HAINES: ——-at some point. I'm quite happy. It was your wish and intention to, for both boys to attend [the UK] School, wasn't it?

Transcription ends at 10:19:47 and hearing continues"

38. We have asked for an explanation from the applicant and Advocates Hoy and Haines as to what the Commissioner was referring when, on 21 December, he stated that his position had been clarified before the start of the case and no objection had been taken to him presiding.

39 Advocate Haines sets out in para 13 of his submissions that he recalls the Commissioner making a short statement that his position had been clarified before the start of the case but that he cannot now locate it. It was likely to have been made at a hearing before 11 October 2010 and its effect would have been that he could not recall or identify any past association with the respondent that would cause him to recuse himself.

40 The respondent's position is set out in the submissions of Advocate Hoy. First, the respondent and Mr Clyde-Smith sat at the same table at a wedding about 25 years ago. Second, in 2004 Mr Clyde-Smith, then a partner in Ogier, advised C Trust and had 2 meetings with the respondent at which two others were present. Third, in about 2006 the respondent was interviewed by Ogier for the position of head of compliance. Mr Clyde-Smith was not involved with the application or the interview.

41 Advocate Hoy has submitted that the law as to recusal is well settled. The test to be applied is whether all the material circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased, see para 21 of the judgment of Vaughan JA in *In The Matter of the Esteem Settlement and the No. 52 Trust C.A.* [2001] JLR 169, as endorsed (with the deletion of the words ***"a real danger"***) by the Court of Appeal at para 6 of its judgment in *Baglin v Attorney-General* [2005] JLR 180, and at para 12 of the judgment of Montgomery JA in *Syvret v Attorney-General* [2009] JLR 330. The test is an objective one and the subjective opinion of the party alleging bias should not be taken into account. He submits that the nature of the *"relationship"* between the Commissioner and the respondent was a fleeting one 25 years ago and 2 meetings in 2004 which were entirely in a professional context. He submits that no fair-minded observer with a measure of detachment would conclude that the Commissioner's previous contact with the respondent would have given rise to an appearance of bias or even to a potential for bias. Had the applicant made an application before the hearing for the Commissioner to recuse himself it would have failed and for good reason. Even if no application had then been made, had the Commissioner for any reason considered the question of whether or not he should have recused himself, he would rightly have concluded that he should not.

42 Advocate Haines adopts and agrees with those submissions.

43 We have considered all the matters put before us including the excerpts from the transcripts above. We agree with the submissions of Advocates Hoy and Haines. In our judgment there were and are no grounds upon which it can be said that the Commissioner should have recused himself.

44 Grounds 2 to 7 inclusive contain suggestions that the Commissioner showed actual bias and/or made the wrong decisions. In so far as the applicant seeks to attack the exercise of the Commissioner's discretion in making his decisions during the hearing and in the reasons in his judgment, it is to be noted that this court is a court of review and for the

applicant to succeed on appeal she must show that a decision under challenge was “either wrong in law, or wrong in principle, or was plainly wrong”, see para 30 of *Crichton v Parker-Smith*, supra. In other words, the applicant must show that the Royal Court has misdirected itself or has taken into account irrelevant matters or has excluded relevant matters or that the decision was plainly wrong.

45 Ground 2 (a) and (b). The applicant has submitted that the Commissioner was wrong to exclude the evidence of certain witnesses, including that of the two boys. The evidence was relevant to those matters set out in ground 2 (a) and (b) of the notice of appeal. These grounds of appeal are answered by Advocate Hoy in paras 12 and 13 of his submissions and in paras 14 to 25 of Advocate Haines’ submissions. It is to be noted that in relation to the evidence of the witnesses D, E, F and G, Advocate Haines submitted to the Commissioner that most of their evidence was either hearsay or not relevant to the material issues before the court. At Bundle 8 page 32 are the reasons of the Commissioner for refusing to admit their evidence, namely hearsay or irrelevance. So far as the evidence of the children is concerned the Commissioner's reasoning for refusing to admit their evidence is to be found in paras 24 to 30 of the judgment of the Royal Court of 18 November 2010. Nothing is to be gained by repeating his reasons in this judgment. The matter was one for his discretion. He considered both sides of the argument in a detailed and careful manner and came to his conclusion.

46 The Royal Court also refused to admit the evidence of H, the applicant's brother on much the same grounds as put forward by Advocate Haines in relation to the witnesses above. The applicant wanted to put him forward as an expert. But even though his evidence was not admitted the applicant was able to use the information and documents prepared by him when cross-examining the respondent and in her submissions.

47 The final witness whom the applicant was not allowed to call was J, the applicant's mother. On 12 October the applicant applied to admit her evidence which the Commissioner refused after hearing submissions. The Commissioner refused, on the grounds that the evidence was hearsay, or irrelevant, or covered areas on which the applicant could herself give evidence.

48 We have carefully considered all the arguments put to us on this ground. We have to say that we find that no criticism can be made of the Commissioner in refusing to allow into evidence the testimony of any of the above witnesses. In the case of every witness, in particular the children, the Commissioner went into the matter in some detail and with great care when giving his reasons.

49 Ground 2 (c) is an allegation that the Commissioner conducted the hearing in a *“most irregular manner”* taking on the role of the respondent's lawyer and by providing the respondent with answers in cross-examination. The applicant in her notice of appeal gave no particulars or instances at all of such behaviour. Advocate Haines can not recall, either specifically or generally, any instance of the Commissioner conducting himself in the way

alleged by the applicant. We find nothing in this ground at all.

50 Ground 2 (d) is an allegation that the Commissioner so intimidated the applicant during her cross-examination of the respondent that she was unable to take further part in the hearing and was unable to follow the proceedings thereafter, thus prejudicing her and the children's interests. No particulars of the alleged intimidation are given. Advocate Haines in paras 28 to 30 of his submissions has set out the course of the respondent's cross-examination by the applicant. On the morning of the second day of the hearing the applicant started her cross-examination. At the end of the day the Commissioner said to the applicant that she had overnight to hone her questions but that he had to put a limit on how long he was going to allow the cross-examination to last. There was then an exchange between the Commissioner, the applicant, and Advocate Haines, out of which it can be seen that the applicant and Advocate Haines were to meet the next morning before the court sat for the applicant to inform Advocate Haines as to the areas and points she wanted the respondent further cross-examined on. The next day Advocate Haines, having met with the applicant, and with her agreement, then cross-examined the respondent. After he had finished, the Commissioner permitted the applicant to ask the respondent further questions. During her questioning the Commissioner did say that the applicant was going over old ground and on another occasion that the matter had been covered by Advocate Haines. It is apparent to us from reading the transcripts that the Commissioner was trying to draw the cross-examination to an end. He eventually said that he was going “to draw a close to your questioning. I think the court has heard quite enough now to be able to get on and deal with the case. I am very grateful to you.” The cross-examination ended at that point. The Commissioner then suggested that Advocate Hoy should make his submissions followed by Advocate Haines and the applicant, thereby allowing the applicant to have the last word. Advocate Haines has told us that he saw no intimidation of the applicant by the Commissioner. Having looked at the relevant parts of the transcript and considered the submissions of the parties we can see no grounds to criticise the Commissioner in this respect.

51 Ground 2 (e) is an allegation that the Commissioner and Advocate Hoy colluded in putting before the Jurats “what they knew would be a totally misleading valuation of the Winchester property”. Before this ground can be assessed it is necessary to look at the Royal Court's judgment. At paras 31 to 35 the assets and liabilities of both parties are set out. The applicant owned both the properties in Jersey and Winchester valued in 2008 at £800,000 and £625,000 respectively. There were liabilities secured on those properties of £509,370 and £420,500 respectively. When all the assets and liabilities of the applicant were taken into account, including the applicant's costs, there was a surplus of assets over liabilities of £167,643. By contrast, the respondent's liabilities exceeded his assets by the sum of £103,161. His liabilities included an income tax debt of £37,073.

52 The Royal Court concluded at para 66 that fairness dictated that the respondent should at least receive a sufficient share of the “remaining equity in the two properties to repay the judgment debt taken against him for Income Tax arising on the rental received from the Jersey property when the parties were together and a small contribution to his other debts.”

Accordingly on the basis of the valuations then available the Royal Court was then minded to make an order that the applicant do pay the respondent a lump sum of £55,000. However, as can be seen from paras 76 and 77, during the course of the hearing the respondent produced an updated valuation of the Jersey property of £750,000 thereby reducing the surplus of assets over liabilities of the applicant to £117,643. At the end of the hearing on 13 October the court asked the applicant to produce an up to date valuation of the Winchester property which would involve a further inspection of the interior. The applicant agreed to do so. The court wanted to hear from the parties before deciding what (if any) lump sum should be paid by the applicant to the respondent and adjourned that matter. At the resumed hearing on 18 November 2010 the court had a “drive by” valuation dated 11 November from Belgarum, a firm of estate agents in Winchester on behalf of the respondent, of £650,000. The applicant produced a further valuation dated 29 October 2010 from Penyards, estate agents, of the Winchester property of £550,000, thereby further reducing the surplus to £42,643. Penyards noted that the internal property was in a poor state of repair and the bathroom and kitchen were incomplete. These valuations were the subject of further submissions. In its judgment of 21 December the court recorded that Advocate Hoy had submitted that neither party could afford to bring the valuers to court and the only way to arrive at a proper valuation was for the property to be sold and the amount of the lump sum could then be determined. The applicant's stance, apparently put to the court by her brother on her behalf, was that she and the children would live with her mother, both properties should be retained and let out but that that would leave the applicant with no funds to pay the respondent any lump sum.

53 The court rejected the submission that it should order the sale of the Winchester property for the reasons it gave in para 11 of its December judgment. At para 12 the court concluded that if the applicant wished to retain both properties, let them out, and live in her mother's house with the children, then she must make a reasonable contribution to the respondent's debts. The court concluded that “The difference in the two valuations of the Winchester property leads us however to conclude that we should reduce the lump sum payment we had in mind making from £55,000 to £37,073, so as to enable the respondent to discharge his obligation under the judgment taken for Jersey Income Tax.” The court declined to make an order for sale leaving it to the applicant to raise that sum with the assistance of her family or through the sale of one of the properties. It noted that depending on what the Winchester property sold for, the net proceeds of sale would be either £129,500 or £229,500.

54 We assume that the applicant's reference in this ground to a *“totally misleading valuation”* is a reference to that done by Belgarum in November 2010 on behalf of the respondent. However, the court correctly recorded that it was a “drive by” valuation. No internal inspection was made. The court had Penyard's valuation which was based on a full inspection, both outside and inside. In any event a fair reading of the court's December judgment shows that it did not accept the Belgarum report uncritically as it reduced the lump sum to be paid. There was no collusion. Accordingly there is nothing in this ground.

55 Ground 2 (f) submits that the *“children's property rights”* in the Winchester property were ignored. During the hearing the applicant asserted that it had been bought for the children

and it would be theirs in later life. She said the respondent had agreed to this arrangement. Accordingly she submitted that it was not a matrimonial asset. The court in its November judgment dealt with these contentions. At para 60 the court said:— ***"Mr Haines submitted that if the two properties, clearly acquired during the course of the marriage and before separation, were to be considered as non-matrimonial property then they would have to be regarded as having been brought into the marriage by way of gift.*** We could see no basis upon which they could be regarded as such. The petitioner did not expand on her submission that some kind of constructive trust existed in relation to the Winchester property but we saw no evidence that these properties should be considered as anything other than matrimonial property."

56 Advocate Haines rightly submits that the Royal Court did not order any transfer of the property or order that it should be sold. Thus the applicant is free to preserve it for the children or sell it forthwith.

57 In our judgment there is no substance at all in this ground. The fact is that the applicant did not establish that the Winchester property was not a matrimonial asset. The Royal Court was perfectly entitled to conclude as it did.

58 Ground 2 (g) says that the Jurats were misled *"as to the facts of the case"* including the existence of discretionary trusts appearing in the will of the respondent's late father. The respondent's father died in November 2006. By his will of 7 May 2003, which was before the Royal Court, he left a Legacy Fund consisting of the nil rate inheritance tax band upon a discretionary trust to the *"beneficiaries"* namely *"my wife my children and remoter issue"*. His residual estate was left to his wife absolutely if she survived him by one month, and, if not, in three equal parts to his children but in the case of the respondent if he was married to the applicant at the date of the testator's death then that share was to go to another of the testator's children. The will was executed in England and thus it was governed by English law. It is apparent that the respondent's mother did survive her husband by one month and so became entitled to her husband's residuary estate absolutely. As to the Legacy Fund, it was held on a discretionary trust of which the respondent was only one of the beneficiaries. It is apparent from the letter of 30 January 2009 from Mr John Elgee, a solicitor in the firm of Elgee Pinks (and it would appear the husband of Nicola, the respondent's sister and one of the executors) that the trustees had exercised their discretionary powers and appointed the whole of the Legacy Fund to the respondent's mother. Accordingly we cannot see how the Jurats were misled. The court was correct in its conclusions at para 56 (ii) of its November judgment.

59 Ground 2 (h) alleges that the Commissioner misled the applicant about the summary of the case provided by the Registrar in that it would not be before the Jurats whereas in fact it was and in it there were prejudicial comments against her. In that undated document it can be seen that the Registrar explains why he was referring the matter to the Royal Court, principally as we read his reasons because the applicant appeared to have lost confidence in the Family Court jurisdiction and would not accept any order made by him. In his reasons he stated, "Unpalatable though it might be, it may be for the Court above to consider

dismissing some or all of her claim for relief. “The ongoing dispute with her husband could, in my view, be described as a “vendetta””.

60 Neither Advocate Hoy nor Advocate Haines have any recollection of the Commissioner saying that the Registrar's summary would not be before the Royal Court. The summary was in the bundles for the hearing which were provided to the applicant about two weeks before the hearing in October 2010. No reference to it seems to have been made either in the evidence or in submissions other than on 13 October where at B8 page 133 the applicant referred to that document and complained it was on the court record. The Commissioner responded that nothing that went on in the lower court was in their minds or before them and that they were going to deal with the case solely on the evidence produced at the hearing before them. In any event at no time did the respondent seek to allege or place evidence before the court that the applicant was conducting a vendetta against him. We have to say that we cannot see that the Registrar's comments in his summary played any part whatsoever in the hearing before, or in the decision of, the Royal Court. We completely reject the implied suggestion in the penultimate sentence of ground 2 (h) that the respondent's lawyers had any hand in the compilation of the Registrar's summary. This ground of appeal is without foundation.

61 Ground 2 (i) appears to us to raise two points which go to alleged financial/matrimonial misconduct of the respondent and to the applicant's health. On 1 September 2009 the applicant filed an affidavit pursuant to the leave of the court given on 19 May 2009 setting out allegations of matrimonial misconduct. On 21 October the Registrar decided that he would not consider matrimonial conduct as a relevant factor in the financial proceedings. On 14 September 2010 the applicant sought the Royal Court's leave to raise matrimonial conduct in the financial proceedings. On 17 September the court gave that leave but ordered that the affidavit was to be filed within 7 days and indicated that it was unlikely to consider that such conduct was relevant in financial proceedings. No affidavit of matrimonial conduct was in fact served. However, on 11 October the applicant filed an affidavit not of matrimonial misconduct but of the respondent's alleged financial misconduct. Leave was given for it to be admitted into evidence, see para 20 of the November judgment. It basically contains allegations that the respondent was deceitful about his finances and had far more money than he was willing to or had disclosed. These allegations were in fact not new ones. They were recurrent in the applicant's case throughout the proceedings. It is to be noted that the Royal Court dealt with all these allegations in its November judgment under the heading ***“Non disclosure”***.

62 As to the applicant's health, she complains that the court did not take sufficient account of her health problems and ignored letters to the court from her doctors. We are satisfied that the applicant was fully on notice before the hearing in October 2010 that it was up to her to produce the necessary evidence. Advocate Haines, we are satisfied, specifically raised this matter with the applicant prior to the October hearing. Further, in a letter of 8 December 2009, Advocate Hoy had warned the applicant that it was for her to produce medical evidence. In fact the applicant at no time obtained medical reports. So far as the letters are concerned they were in the bundles and we cannot see that the court ignored them. The

court was entitle to conclude, as it did at para 39 of its November judgment, that the applicant had produced no evidence that she was unable to work because of health grounds.

63 Ground 2 (j) is a submission that the Royal Court got the facts wrong in that what the court found ***"does not accord with the realities of the case"*** and that after the draft judgment was made available to the parties for corrections the court did not correct it in accordance with the applicant's submissions. We do not accept these criticisms. As Advocate Hoy has pointed out in para 21 of his submissions to us all the allegations made against the respondent by the applicant (in particular those set out in this ground of appeal) were considered by the court in its November judgment. This complaint by the applicant is no more than that the Royal Court did not accept her case. As to the corrections, having ourselves looked at the applicant's *"corrections"*, we accept the submission of Advocate Haines that the corrections put forward by the applicant went well beyond corrections of typographical errors etc. and were attempts by her to reargue her case.

64 Ground 2 (k) is an allegation that the Commissioner harangued the applicant over information which she had given to Advocate Le Cornu. We believe this allegation is related to the exchange between the Commissioner and the applicant in her evidence at Bundle 8, tab 3, page 414 et seq which we have read. It is correct that the Commissioner did press the applicant that she had told a lie, namely that her mother had not lent her £125,000 as it was the applicant's own money – see para 55 (iv) of the November judgment. We do not see the exchange as haranguing. The applicant was very reluctant to admit to having told an obvious lie. But if this ground relates to the settlement of £250,000 to the applicant by the Abbey National then it seems to us that it is indisputable that £125,000 was used to fund the purchase of the Winchester property and the remainder was paid into the parties' joint account. The further point made by the applicant that the court *"glossed over"* the respondent's non-disclosure is patently wrong as the court dealt with that exhaustively in para 56 of its November judgment.

65 Ground 2 (l) complains that the Commissioner showed *"an unacceptable level of prejudice"* by accepting the respondent's evidence where there was no supporting evidence or it was contrary to other evidence. The applicant does not particularise this ground. We find that there is no foundation for this assertion and again is simply a complaint that the court did not accept her case about the respondent.

66 Ground 2 (m) is a complaint that the Commissioner split the hearing into two parts and allowed the respondent thereby to obtain a "drive by" valuation of the Winchester property and pressurised her brother into defending the children against orders the court was considering making. We can see nothing in this ground. We have set out in para 51 above why the court adjourned the proceedings. The court was entitled to do that so that it could be sure that it would make orders which were fair to both parties. In any event it was the applicant herself who put forward her brother as a means of financial support for her. It was she who put him forward to give evidence on her behalf at the hearing on 29 November in relation as to how she was going to manage in the future.

67 Ground 2 (n) is a complaint that the Commissioner *"chose to ignore"* the income of the respondent and his dissipation of assets and that his bank statements did not support his case. This ground is also without foundation. Details of the respondent's income and expenditure were before the court as were his bank statements for the years 2007 to 2010. The respondent was the subject of extensive cross-examination by the applicant as to his means. The Royal Court dealt with his income and outgoings at paras 37 and 38 of its November judgment and at para 62 concluded that after payment of the children's school fees and certain living expenses of the applicant, the respondent had ***"barely sufficient income to support himself in London"***.

68 Ground 2 (o) is a submission that the applicant was ordered to pay over to the respondent monies which she could not afford to pay, whereas it is asserted that the respondent had or had had ample monies, and thus the order made for the lump sum was unjust. We do not accept that the court was wrong to find the assets and liabilities of the respondent as it did. There was ample evidence upon which the court could assess the real and current position of the respondent. However, Advocate Haines has submitted that the Royal Court may have fallen into error in one respect. We set out paras 66 to 70 of his submissions as follows:-

> *"66. Notwithstanding that this was a needs based case, the Royal Court had set out its duty to give first consideration to the children, and it had taken account of the evidence concerning the serious financial situation facing the Appellant, the Royal Court ordered the Appellant to pay the Respondent £37,073 to be effected within three months. At paragraph 14 of its judgment [B13, D7] the Royal Court said that the Appellant could sell her second home in Winchester and this would release equity of around £129,500 (before sale costs are deducted) or a greater sum, as much as £229,500 based on the "drive by" valuation of Belgarum.*
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> *67. At paragraphs 31 to 33 of the judgment [B13, D6] the Court said there was total net equity of £164,643 based on the sale price of £800,000 (Jersey property) and £625,000 (the Winchester property). Further on in its judgment and having taken into account the updated valuation of the properties —£750,000 (down £50,000) for the Jersey property and £550,000 (down £75,000) for the Winchester property —the Court concluded that the total net equity available was now £42,643 (Paragraph 76).*
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> *68. In its judgment at paragraph 2 [B13, D7] the Court stated that if it accepted in full the "drive by" valuation provided by Belgarum, then the total net equity would increase to £142,643. This valuation had not been ordered by the Royal Court and was qualified in a number of ways. Importantly on this valuation the value of the property had increased by £25,000.*
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> *69. When the Royal Court made its final order ordering a payment of £37,073 by the Appellant to the Respondent, it appears to have focused on the release of equity from the sale of the Winchester property as opposed to focusing on the total net equity available to the Appellant which it had done in other parts of its judgment. A sale at*

£550,000, and after payment of the outstanding mortgage on that property of around £420,500 may provide equity of £129,500, but it is the total net equity available to the Appellant that is the important consideration for the Royal Court. To put it another way, if the Royal Court accepted the updated property valuations which it had ordered, then that leaves a total net equity of £42,643 (with sale costs still to be deducted). The Royal Court then went on to order the Appellant to pay £37,073 of that to the Respondent leaving her with only £5,570 (13 per cent). This sum would be consumed by the sale costs. Such an award is not consistent with a needs based case where the Appellant has the residence of children.

70. The Court of Appeal may wish to consider whether the Royal Court has fallen into error by placing undue emphasis on the equity release from the sale of the Winchester property and failing to place due weight on the overall total net equity available. Secondly, by the Royal Court ordering the Appellant to provide a payment of £37,073, when it accepts that she was in serious financial difficulty."

69 Advocate Hoy's submissions in reply were as follows. He informed us that the sum of £37,073 due from the applicant to the respondent under the order of the Royal Court is currently registered as a charge on the Jersey property but that it cannot be enforced without leave of the court. He submitted that the lump sum was ordered in order for the respondent to be able to discharge the judgment obtained against him referred to above. The tax liabilities, the subject of the judgment, were in respect of the rental income of the Jersey property. Accordingly the court took into account, in considering what order to make, that one of the respondent's needs was to discharge that judgment. In answer to Advocate Haines' submission that the court should have preferred the valuation of Penyards to that of Belgarum's, Advocate Hoy argued that the court in para 13 of its December judgment was endeavouring to steer a middle course between the two valuations so as to arrive at a just result. However, Advocate Hoy conceded, rightly in our view, that if the court erred, as argued by Advocate Haines, in its December judgment, then it was difficult to see how the order as to the lump sum could stand.

70 In its November judgment, the Royal Court explained how it had approached its determination of the questions (a) whether a lump sum should be awarded and, (b) if so, how much that sum should be. The starting point was the applicant's insistence that she wished to retain both properties, in the hope that they would appreciate in value. In addressing the first question, at para 66, the court said this:-

"We see no fairness in the petitioner, with the assistance of her brother, retaining both properties and what is left of the equity when a sale of both would discharge all of their debts. In our view, fairness dictates that the respondent should at least receive a sufficient share of the remaining equity in the two properties to repay the judgment debt taken against him for Income Tax arising on the rental received from the Jersey property when the parties were together and a small contribution to his other debts."

71 The Royal Court sought to determine the size of what it described as ***"the remaining***

equity" by calculating the surplus of the applicant's assets over her liabilities, i.e. her net assets. It can readily be seen that in the court's estimation so much depended on the true value of the Winchester property. Its value critically affected the surplus of the applicant's assets over her liabilities. As the court pointed out, on the basis of the 2008 valuations the surplus was £167,643, see para 66 of its November judgment. But if the values of the Jersey and the Winchester properties were as per para 76 of its judgment then the surplus fell dramatically to £42,643. Plainly it was that dramatic drop that caused the Royal Court in November to pause and adjourn the matter for further consideration as we have set out.

72 According to the court's December judgment what caused it to reduce the lump sum payable from what it would have awarded, £55,000, to £37,073 was the difference in the two valuations of the Winchester property, i.e. between the "drive by" valuation and the latest valuation from Penyards. The court considered that the applicant could meet that lower lump sum with the assistance of her family or through sale of one of the properties. The court found that the sale of the Winchester property would realise net proceeds of sale (but before costs of sale) of either £229,500 or £129,500 depending on which valuation was taken. Thus, the court was saying that the applicant could afford to pay the (reduced) lump sum out of those net proceeds of sale.

73 Was the Royal Court right to so find? Looking at the matter on the basis of the approach which it adopted in its November judgement, which we have quoted at para 70 of this judgment, the correct question was whether a sale of both properties would discharge the parties' debts. Only if there were a balance remaining after the sale of both properties, and the discharge of the applicant's liabilities, could it be said that fairness would dictate that there should be any payment made towards the discharge of the respondent's debts. If there were no such balance, there would be nothing left for the applicant to share.

74 If one takes the latest Jersey valuation of £750,000 and the "drive by" valuation of £650,000 then the applicant's gross assets would be £1,408,468. If her liabilities are then deducted her net assets would be £142,643 less sale costs. If, however, the true value of her Winchester property is only £550,000, then her net assets are reduced to £42,643, but with sale costs of both properties still to be deducted. We were told by Advocate Haines that the costs of sale in respect of the Jersey property were likely to be 1.5% to 2%, i.e. in the region of £15,000. So far as the Winchester property is concerned we consider that the costs of sale in England are likely to be in the order of 3% i.e. £16,500, if the value of the Winchester property is £550,000. If the sale costs of both properties are deducted in a total of £31,500. Her net assets would be either £111,143 or £11,143 or somewhere in between. If her net assets did not then equal or exceed any lump sum which might be ordered, it is obvious that the applicant could not meet the award. Thus Advocate Haines has submitted that the Royal Court appears to have placed undue weight upon the sale proceeds of the Winchester property and to have failed to place weight on whether the likely net asset position of the applicant would permit her, consistent with her and the children's needs, to pay any lump sum to the respondent. In our view, in its December judgment the Royal Court failed to apply its mind to the question whether, on a sale of both properties, there would be anything left to be shared with the respondent. We shall return to this matter later

in our judgment.

75 Ground 2 (p) alleges that the Commissioner had no regard for the needs of the children. We see nothing in this ground. It is plain from both judgments that the court was entirely mindful of the needs of the children. Both parents insisted that the boys should remain at a very expensive private school whose fees absorbed 88% of the respondent's salary and the applicant refused to consider selling either of the Jersey or Winchester properties, despite there being substantial and onerous charges on both.

76 Ground 2 (q) attacks the findings of the Royal Court about the Le Cornu agreement. In essence it is a complaint that the court preferred the evidence of the respondent to that of the applicant. This issue was gone into at great length in the evidence and submissions. The court dealt at some length in its judgment in November between paras 44 and 55 with this issue. It preferred the evidence of the respondent. There were serious factual matters for the Jurats to determine, as the Jurats are the arbiters of fact. They cannot be faulted for their decision. This ground is without foundation.

77 Ground 2 (r) is an unparticularised allegation that the applicant did not get a fair hearing from the Commissioner. This ground fails.

78 Ground 3 states that the court took no account of the respondent breaking into the Winchester property and removing the belongings of the applicant and children. The respondent admitted breaking in to the property. However, we do not see that such an incident was relevant to the determination of the parties' financial claims against the other.

79 Ground 4 alleges that no account was taken of the breach of the lower court's orders re prohibited steps and failing to pay a sum of money for one Christmas. We have to say that we do not see this as having any relevance to the issues before the Royal Court.

80 Ground 5 is a bald assertion that the court failed to consider the factors which customary and Jersey matrimonial law required it to consider. We see nothing in this ground. A reading of the judgments of the Royal Court shows that the court did apply the relevant law and authorities.

81 Ground 6 is another bald assertion. The court, it is said, conducted an unfair hearing and the judgment was manifestly wrong. Subject to Advocate Haines' point under ground 2 (o), there is nothing in this ground.

82 Ground 7 is no more than a general statement and is not a ground of appeal.

83 We now return to ground 2 (o) and in particular to Advocate Haines' submissions. Having carefully considered Advocate Hoy's response, we consider that there is force in what

Advocate Haines has submitted. We consider that the court did fall into error in that it failed to consider what the net asset position of the applicant would be on the sale of both properties, and was overly influenced by the possible net sale proceeds of just one, namely the Winchester property. Furthermore, we do not think that the court should have placed any reliance on the “drive by” valuation or should only have placed minimal reliance on it, in the light of the inspection of the property by Penyards. Penyards were in a far better position to assess the value of the property accurately. As the court has fallen into error it is open to the Court of Appeal to remit the matter to the Royal Court or to decide the matter itself. We do not consider that we should remit this matter to the Royal Court but should decide the matter for ourselves. To remit it would add to the cost and the delay.

84 We now turn to consider a very late application of the respondent, dated 23 June 2011, for leave to admit fresh evidence, namely an affidavit of the same date sworn by the respondent which exhibits official copies of Land Registry entries in respect of the two adjacent properties. These entries show that on 21 and 20 December 2010 the above properties were sold for £720,000 and £800,000 respectively.

85 The relevance of this evidence, it is submitted, is that it supports the “drive by” valuation of Belgarum of £650,000 and undermines the valuation of £550,000 by Penyard. Accordingly it is submitted that there is sufficient net equity in both the Jersey and Winchester properties to enable the court to conclude that the lump sum ordered was appropriate.

86 The test for admission of fresh evidence before the Court of Appeal is well known. It must be shown first that the new evidence could not have been discovered before the final hearing with reasonable diligence, second that it is credible and third that, if admitted, it would probably have an important effect on the outcome of the case.

87 We note from para 3 of the respondent's affidavit that he does not particularise precisely when he learned of the sale of the properties. However, whenever the respondent learned of the sales, it seems to us that it must have been public knowledge for some time prior to the sales that the properties were on the market. Either estate agent signs would have been displayed at the properties and/or they would have been advertised in the local media and/or a trawl on the internet would have revealed that they were on the market. Thus, the asking prices could have been ascertained, and if thought to be of assistance could have been put before the Royal Court and both Belgarum and Penyards could then have been asked for their comments.

88 It must be remembered that the issue in this regard before the Royal Court was the value of the Winchester property in its then condition. The only reliable evidence before that court was that of Penyards. The respondent did not call anyone from Belgarum, it is said on the ground of cost, but the fact is that Belgarum were not really in any position to challenge Penyards’ evidence as they had made no inspection. So far as we are concerned we have no evidence that either of the adjacent properties was in the same or better condition than the Winchester property as at November or December 2010, or as to what were the

circumstances of either sale, or as to what, if any, of the contents of either property were included. Thus, although the properties may be of the same size and in the same road, their sale prices do not undermine Penyards valuation of the Winchester property.

89 In any event, were we minded to admit the new evidence, the applicant could submit, with some justification, that she would wish to instruct Penyards to advise again on the value of the Winchester property and submit another report. That in turn might lead to further evidence being sought to be admitted on behalf of the respondent. Thus the applicant's application for leave to appeal would have to be adjourned to a further hearing before us which would lead to further delay in a case which in our opinion absolutely cries out for closure.

90 Having considered the respondent's application we are not minded to allow it in all the circumstances of the case. Indeed Advocate Hoy conceded, rightly in our view, that without knowing the details of the sales of the adjacent properties, they were of no help in determining the value of the Winchester property. We therefore return to consider what should be the outcome of ground 2 (o) of the draft notice of appeal.

91 In our judgment the value placed on the Winchester property by Penyards is much more likely to be accurate than that of Belgarum for the simple reason that the former conducted an inspection of the property whereas the latter did not. There is no reason to prefer Belgarum's valuation to that of Penyards and every reason to prefer Penyards to that of Belgarum's. Furthermore, in our opinion, if the Royal Court adopted a valuation somewhere in the middle of the two valuations, it was in error. Had the Royal Court accepted the valuation of Penyards, and had it then considered what the applicant's net asset position would have been on a sale of both properties, it would not have ordered the payment of a lump sum of £37,073. The very most it could have ordered by way of a lump sum would have been £11,143. In a needs based case, bearing in mind the children's needs, we doubt that the court would have made any order for payment of a lump sum by the applicant to the respondent.

92 In these circumstances it would not, in our opinion, be just to order the applicant to make any payment to the respondent. As to the failure of the applicant to file a notice of appeal in time, despite there being no reason why the notice of appeal was not served in time, Advocate Hoy conceded that the delay was not particularly long and that the respondent had not altered his position and was not therefore prejudiced. It is our opinion that the applicant succeeds in persuading us that she has good prospects of success under ground 2 (o) as set out by Advocate Haines. Accordingly we grant an extension of time in respect of ground 2 (o), leave to appeal to the applicant, allow the appeal to that extent, and quash that part of the order of the Royal Court ordering the applicant to pay the respondent a lump sum. We also order that the charge upon the Jersey property be vacated.