Jacqueline Anne Calderbank v John Thomas Calderbank [1975] ADR.L.R. 06/05

BEFORE CAIRNS, SCARMAN LJJ AND SIR GORDON WILLMER**.** CA. 5th June 1975

Lord Justice Cairns : I will ask Lord Justice Scarman to give the first judgment.

JUDGMENT SCARMAN LJ : This is an appeal from an order made by Heilbron J awarding to an ex-husband a lump sum of £10,000 on his application after divorce, an application which was made pursuant to s 23 of the Matrimonial Causes Act 1973.

The facts are these. Mr and Mrs Calderbank (and I shall refer to them as husband and wife though they are now divorced and each of them has remarried) were married to each other in December 1956. There are three children of the family, two boys aged 15 and 14 respectively, and one girl aged 12. All three children are at fee-paying schools. The husband and wife are now about 42 years old. They lived together at a number of addresses over a period of 17 years. In January 1973 the wife left home and she has since remarried. After she left home the wife brought divorce proceedings. The husband filed an answer in those proceedings and a decree nisi of divorce on the ground of adultery and the fact that he found life intolerable thereafter with the wife was granted to the husband on his answer. That decree has been made absolute.

The matter came before Heilbron J in the following way. In the divorce proceedings the wife made an application under s 17 of the Married Women's Property Act 1882 seeking a declaration that the matrimonial home, a house in Gloucestershire to which I shall refer, was her property beneficially. The husband made application under ss 23 and 24 of the 1973 Act seeking financial provision or alternatively a property adjustment order. On those applications Heilbron J after a full hearing and a very careful judgment made the following orders. On 5 December 1974 she made the declaration that the wife was seeking on her application under the 1882 Act. On that day she gave a full judgment dealing with all the circumstances of the marriage but adjourned for further consideration the applications being made by the husband. On 13 January 1975 she made the lump sum order in favour of the husband which is now challenged in this court.

In the course of her judgment Heilbron J went through the whole of the marriage history so far as it concerned its property and financial aspects, and counsel for the wife in this court has very conveniently summarised in the course of his argument the financial position as it was when Heilbron J considered these applications. At that time the wife was possessed of net capital of about £78,000. This represented two inheritances, one from her mother when she died in 1964 and the other from her father when he died in 1969. The husband had no capital whatever save for whatever interest he might possess in the furniture in the matrimonial home. The income position when the matter was before Heilbron J was as follows. The wife had a gross income from dividends and so forth arising from her estate of no more then £1,100 a year. The husband had in view, and has since obtained, a job bringing the salary of £2,500 a year, plus a likely expectation of bonuses ranging between £1,000 and £1,500 a year. I have already mentioned that both husband and wife have since the divorce remarried. The wife has now married a husband who himself has an income of £2,250 a year, but he has three children of his former marriage to support. The husband has also remarried a lady who is able to earn and does earn about £2,000 a year. The care and control of the children has been granted to the wife who is making herself responsible as she always has done for their maintenance and for the expense of their education at fee-paying schools.

The history of the marriage so far as the finances are concerned was this. They began life at a house at Whalley Range which the wife had bought prior to the marriage for about £1,500. They lived in this house until 1960 when it was sold. They then moved to a house in Cheadle which was bought with the proceeds of the sale of the house at Whalley Range. The husband was at this time working but earning no more than £70 a month. In 1961 they were anxious to start a business in which they could work together. The husband gave up his job. They found a farmhouse in Wilmslow which they bought for £5,500. This money was found partly from the proceeds of the sale of the earlier house; but the transaction was largely financed by the wife's father, who at that time was still alive. At this house they set up a kennels business, breeding and selling dogs, and for several years the husband and the wife worked in the business. It is clear from the evidence that the husband did help to build a number of breeding blocks but the finance for the business was provided from the wife and the wife's father. As the years went by the business grew, staff were taken on and it reached its climax as a business in about 1972. Thereafter the business has declined and is now showing a loss.

When the wife's mother died in 1964 she inherited about £30,000, and when her father died in 1969 she inherited another £50,000. The wife has shown herself throughout the family life alive to her responsibilities towards the family. It is to be noted that in June 1970 she bought a house at Alderley Edge and made it available for the occupation of the husband's mother. With the access of capital which came to her on the death of her two parents, the wife and husband thought the time was opportune to acquire a very much larger and more luxurious house than had been the matrimonial home in the past. Consequently in 1970 or thereabouts Rudford House, Gloucestershire, was purchased with the wife's moneys for some £16,500. Although the house was put into the name of the husband for fiscal reasons, it was purchased and its outgoings met by the wife's funds. The husband made no financial contribution whatever towards the purchase of Rudford House which on its purchase became the matrimonial home and in which the husband has lived ever since it was purchased and in which the wife also lived until she left home in January 1973.

I have mentioned that the husband gave up his job when they decided to go into the kennels business. In fact during the currency of the marriage the husband never thereafter did another job, though as I have mentioned he has obtained one since the breakdown of the marriage. The husband met his current expenses out of a joint account maintained by himself and his wife; that account was kept in funds to some extent (I suppose) from the profits of the kennels business, and, if the extent of those profits was not sufficient, by funds made available by the wife. When they moved from the farm which had the kennels to the house in Gloucestershire, they took much less part in the day to day management of the kennel business. Indeed it would appear that a manager was installed and they contented themselves with supervision at a distance and with regular weekly visits to the kennels. The husband did nothing other than live at home and pay those weekly visits.

Thus immediately before the breakdown of the marriage the situation was as follows. The husband and wife were living at their large establishment in Gloucestershire financed by the wife's money. Their children were being educated at fee-paying schools financed by the wife. The husband had no job other than such interest as he took in the kennel business which after 1972 began to ail. The wife was busy with her family life and the management of her property and the kennels, and had such income as was derived from her investments. I should add that the husband is not to be regarded as a layabout or as someone who has hung up his hat in the wife's house and made a decision there to live. The judge did not take that view of the husband at all. He had suffered early in life from poliomyelitis. One of the consequences of the disease, from which he made a remarkable recovery, was that he was physically weakened to some extent. The evidence indicates that he suffered from time to time from breathlessness and, if he was not careful, was subject to bronchitis.

So for 17 years they lived, basing their family finances on the funds belonging to the wife. The learned judge looked carefully at all matters to which I have referred and appreciated the degree to which the husband during the married life was financially dependent on the wife and also the degree to which the wife admirably fulfilled her financial responsibilities to the family. The learned judge also noted that since the breakdown of the marriage both the husband and the wife had acquired a greater source of income than they had had prior to the breakdown. The husband had got a job worth about £4,000 a year and married a lady who herself was earning. The wife had her capital resources and had married a man who had an income, though he had heavy commitments. It is plain from a reading of the judgment that the judge carefully directed herself along the lines set out in s 25 of the Matrimonial Causes Act 1973, and she bore in mind all the matters to which I have referred. Having done that, she expressed herself in these terms. She said she did not think it could seriously be contended that the provisions of the new legislation do not apply to husbands as well as to wives. She appreciated that the factors to be taken into consideration under s 25 were factors relating to both parties, but also realised that decision must be affected according to whether the party seeking the transfer of property or lump sum was the husband or the wife; and she bore in mind, and said so expressly, 'that the financial needs, obligations and responsibilities which the wife has for the family in the foreseeable future are extensive, the husband's are negligible'.

Counsel for the wife attacks the award of a lump sum of £10,000 to the husband on the following grounds. He accepts that the 1973 Act confers power on the court to order a woman to make financial provision, be it by periodic payment or lump sum for her ex-husband, but he submits that on a proper construction of the

guideline section (ie s 25 of the 1973 Act) it would not be proper for the court, save in exceptional circumstances, to make an order on a woman for the financial support of her exhusband. His argument is in origin an historical one although it develops into an argument on the construction of the section. Historically he puts it in this way. He says, rightly, that at common law a husband was liable to maintain his wife but a wife was never liable to maintain her husband. He says that this common law still remains the basis of the financial responsibilities of a husband and wife, and he points to s 27 of the 1973 Act as indicating that the common law basis still remains so long as the parties are married. That section, which is a re-enactment of previous sections, provides that either party to a marriage may apply to the court for an order on the ground that the other party, if he be the husband, has wilfully neglected to provide reasonable maintenance for the wife, or, if she be the wife, has wilfully neglected to provide, or to make a proper contribution towards reasonable maintenance, for a husband whose earning capacity is for one reason or another impaired. In short, the section does enable the court only in exceptional and specified circumstances to make a financial order on the wife in favour of the husband. Counsel for the wife says that the section implicitly recognises the continuance of the common law principle that a husband must maintain his wife but that a wife is under no obligation to maintain her husband.

Whatever be the position today as between husband and wife while they are still married, it is abundantly plain that fresh powers have been given to the court to make financial and property adjustment orders on divorce, nullity or judicial separation. There is nothing in the relevant sections of the Act to indicate that the husband and wife are not for the purposes of those sections to be treated on an equal basis. The relevant sections are ss 21, 22, 23, 24 and 25. It will be observed that each of the sections refers to 'the parties to a marriage' and confers on the court precisely the same powers in respect of each party of the marriage, be it the husband or the wife. There is therefore nothing in the sections to suggest that only in exceptional circumstances may the court make a financial order by way of periodical payment or lump sum in favour of the husband. Basically the principle of the sections is that each spouse comes to the court on a basis of equality. But of course the court has to have regard to s 25, and the particular circumstances of the case. Counsel for the wife says, Yes; the court has the power to make an order in favour of either spouse, whether husband or wife; but, when one looks at s 25 it is clear, he says, that what really matters is to discover what are the obligations or responsibilities of the parties to the marriage, and counsel for the wife submits that where those words are used in s 25 they refer to legal obligations. He then reverts to his basic proposition that apart from statute there is no legal obligation on a wife to maintain the husband. I think that counsel for the wife's approach to the sections is misconceived and based on an erroneous construction of s 25. Really counsel for the wife is saying that we must read s 25 as stating impliedly, because it certainly does not say so expressly, that financial provision may be made for a husband only in exceptional circumstances. The section says nothing of the sort. The section requires the court to look at all the circumstances of the case and to make an order that is appropriate to the particular circumstances of the two spouses whose case is under consideration. I think the learned trial judge got it absolutely right when she said in the course of her judgment:

'The factors to be taken into consideration under s 25 are factors relating to both parties, but obviously considerations will vary according to whether the party seeking the transfer of property or lump sum is the husband or the wife.'

Of course the court has to take into account the fact that one party is the husband and the other is the wife. It has to take into account much else besides. It has to look to the income, earning capacity, property and other financial resources of the parties to the marriage. Who is the breadwinner, who the housekeeper? It has to look to the financial needs, obligations and responsibilities of the parties to the marriage both at the time that the matter is before the court and in the foreseeable future. It has to look to their standard of living, to their age, to any physical or mental disability and to contributions made by each to the welfare of the family, for example working in the home. Finally the court has to exercise its powers so as to place the parties, so far as it can and it is just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other. In the present case the judge came to the conclusion that there was a need of the husband for some capital to enable him to acquire, no doubt with the aid of a mortgage, a house suitable to his station in life and suitable for the accommodation of the three children when they came to stay with him.

Counsel for the wife says that such a need if it exists is not one which under the section should be met by the wife. But there is no prohibition in the section on the court ordering the wife to meet that need if in the light of all the other circumstances to which I have referred it is reasonable that she should do so. And here when one stands back and looks at the broad outline of the married life one sees this picture: that over a period of 17 years this family, that is the husband, the wife and the children, have looked to the wife's capital resources to finance them. The wife has done admirably by her family. She has made those resources available and the husband with her full consent has adopted his life style—working for a number of years at a business financed by the wife, living in a large and elegant house which the wife bought when she came into her family fortune, and dependent on her resources. So if one looks at the standard of life enjoyed by the family before the breakdown of the marriage, this is what it was—a high standard supported by the capital resources of the wife. Now on divorce the learned trial judge has thought that about one-eighth of those capital resources, that is to say £10,000 out of the sum of £78,000, should be made available to the husband so that, no longer able to live in the family house which by order of the court is now the property of the wife, he can at least have a home suitable to his way of life in which he can live and in which he can see his children. It is very difficult to fault the judge's conclusion except on the theoretical or conceptual basis advanced by counsel for the wife that really this Act does not provide that a wife should make financial provision for her husband save in exceptional circumstances. Such a provision cannot be found in the relevant sections; on the contrary, they make fresh provisions for regulating the financial arrangement between parties to a marriage which has broken down. It therefore becomes quite impossible in my judgment to fault the exercise of the discretion of the judge in making an order for a lump sum.

Counsel for the wife has further developed the point that in any event the lump sum order was too high. Certainly it was a very substantial order. One must bear in mind, as the judge bore in mind, that the wife is maintaining the children, is continuing to pay for their education and has a considerable burden of debt, secured of course on her considerable assets. One must also bear in mind that, with the questionable exception of the income now accruing to her by reason of her remarriage, she does not have a very healthy income position. It is reasonable to infer that she and, so long as the children are dependent on her, the children will have to depend much more on her capital resources than on her income; and of course capital resources, if not augmented by income, have, particularly these days, a disastrous habit of disappearing. Nevertheless her capital resources are considerable and, when she has sold Rudford House, her liquid resources will be very much more considerable than they are at present.

The judge took the view that resources of the order of £78,000, a substantial proportion of which will become liquid when Rudford House is sold, were such that it would be proper in all the circumstances to allow the husband £10,000 to meet the need I have described. I think that the order was one which it was well within the discretion of the judge to make and I cannot see that it was either so large that this court must interfere as a matter of law, or that the judge took into account matters which she ought not to or failed to take into account any matters which she should have done.

At the end of the day after a very careful judgment the judge came to a fair and sensible decision, and, speaking for myself, I rejoice that it should be made abundantly plain that husbands and wives come to the judgment seat in matters of money and property on a basis of complete equality. That complete equality may, and often will, have to give way to the particular circumstances of their married life. It does not follow that, because they come to the judgment seat on the basis of complete equality, justice requires an equal division of the assets. The proportion of the division is dependent on circumstances. The assets have to be divided or financial provision made according to the guidelines set out in s 25. Every case will be different and no case may be decided except on its particular facts. This is what the judge did in this case and for myself I think she came to a correct and fair decision and I would dismiss the appeal.

CAIRNS LJ. I entirely agree with the judgment Scarman LJ has delivered. In ***Wachtel v Wachtel*** ([1973] 1 All ER 829 at 840, [1973] Fam 72 at 95) it was held by this court that in considering any periodical payment or any lump sum to be awarded to a wife after divorce the starting point should be that she should have one-third of the joint income and one-third of the joint assets. It was recognised that this was simply a fraction which might be considered appropriate in the ordinary case where the husband has been the earner of the

whole or substantially the whole of the family income, where he will be making periodical payments to his wife and where he may be expected to have the greater call on future earnings.

No such starting point is appropriate where it is the husband who is the applicant for a lump sum because there is no ordinary or usual case in which the wife is in the position to provide a lump sum for the husband. Every such case when it does occur is exceptional and the courts must simply decide on the basis of the criteria laid down in s 25(1) of the Matrimonial Causes Act 1973 what is the right sum to award. I see no reason to suppose that Heilbron J overlooked any of the matters set out in paras *(a)* to *(f)* of that subsection, though it is true that she concentrated mainly on the needs of the husband. Insofar as she decided that the husband had the need, if the former matrimonial home were sold, for a sum of money to enable him to obtain a new house I think that her finding is quite unassailable.

It is complained that the learned judge did not take sufficiently into account the husband's earning capacity or the expectation that he would not contribute to the maintenance of the children of the marriage or his occupation of Rudford House at the wife's expense for several years after the parting. The learned judge did refer to all these matters in the course of her judgment and I cannot see that it could be said that she gave insufficient weight to them. £10,000 is after all not a large proportion of £78,000.

The main attack on this judgment has been that the judge failed to consider whether the wife had an obligation to the husband to provide him with money for a new house. Insofar as obligations and responsibilities are referred to in s 25(1)*(b)* I am of opinion (and it is accepted by counsel for the wife that this is the right interpretation) that the obligations and responsibilities there mentioned are obligations and responsibilities to persons other than the other spouse. But the overall consideration which is contained at the end of the subsection is in these words: *"… and so to exercise those powers [that is powers to make financial provision in one way or another] as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.'*

If the learned judge did not direct her mind to this part of the subsection, and I would hesitate to hold that she did not although she did not refer to it expressly, I am quite satisfied that if she had done so she would not have and should not have awarded any smaller sum. I do not consider that in that passage the phrase 'obligations and responsibilities' means legally enforceable obligations and responsibilities. What falls to be considered in my view are the obligations and responsibilities which any reasonable spouse dealing with the other spouse and living in the circumstances of a normal family life would recognise as being owed to that other spouse.

In my judgment in all the circumstances of this case if the marriage had not broken down and each spouse had properly discharged his or her obligations and responsibilities to the other the financial position of the parties would have included a continuance of the situation of the husband living in a house for which he had not to pay. Since it is not now practicable that he should continue to live in that house I think it was quite right for the learned judge to award him such lump sum as would provide a suitable house for his needs. £10,000 could not be considered as an excessive sum for that purpose. It will not of course provide him with so fine a house as Rudford House, and on the other hand of course the wife's financial position will be somewhat worsened inasmuch as her capital will be reduced by £10,000. But it is hardly ever practicable to avoid some worsening of the financial position of one or both parties to a marriage when the marriage is dissolved. I do not think that the object of s 25 in this case could have been better implemented than by the award the learned judge made and I therefore agree that the appeal should be dismissed.

SIR GORDON WILLMER. I agree with both judgments delivered and I do not find it necessary to add any further observations of my own.

Christopher Hordern instructed by Eland Hore Patersons (for the wife);

W J K Millar instructed by Pothecary & Barratt agents for Leak, Almond & Parkinson, Manchester (for the husband).

COSTS HEARING.

CAIRNS LJ. The court has had before it an appeal relating to proceedings which came before Heilbron J relating to financial matters as between husband and wife, the proceedings having been based on an application by the wife under s 17 of the Married Women's Property Act 1882 and an application by the husband under s 24 of the Matrimonial Causes Act 1973. The result of the proceedings was that in respect of the house that had been the matrimonial home and which was the subject of the application under the 1882 Act, Heilbron J declared that the wife was entitled to the whole of the interest in that house. With regard to the application under the 1973 Act she found that the husband was entitled to a lump sum in payment by the wife of £10,000. She directed the sale of the house, which was one of the matters that the wife had applied for in the s 17 application, and the payment of the lump sum to the husband out of the proceeds of the sale of the house.

The wife appealed to this court against the lump sum order and judgment was given against her this morning dismissing that appeal. Apart from her appeal with regard to the lump sum she appealed against Heilbron J's order as to costs, which was an order that each party should pay his or her own costs of the proceedings before her. It is contended on her behalf that she had been wholly successful in the s 17 proceedings and that although the husband was awarded a lump sum in the s 24 proceedings nevertheless the wife should have the costs of those proceedings in the court below because there had been an offer by her which was equivalent to more than the £10,000 lump sum awarded to the husband.

Before Heilbron J the wife's application for costs was based on a letter which had been written by the wife's solicitors to the husband's solicitors offering something substantially more than £10,000. Heilbron J, despite that letter being drawn to her attention, made no order as to costs. Immediately after the hearing before her it was discovered that that was a without prejudice letter and very properly at the opening of this part of the appeal counsel for the wife asked for the court's guidance whether in those circumstances he was entitled to rely on that letter. We formed the opinion that he was not. The letter was written without prejudice. The without prejudice bar had not been withdrawn and therefore we took the view that it was a letter which could not be relief on either before the judge at first instance or before this court. Counsel for the wife then indicated the difficulty that a party might be in in proceedings of this kind when he or she was willing to accede to some extent to an application that was made and desired to obtain the advantages that could be obtained in an ordinary action for debt or damages by a payment into court, that not being a course which would be appropriate in proceedings of this kind.

There are various other types of proceedings well known to the court where protection has been able to be afforded to a party who wants to make a compromise of that kind and where payment in is not an appropriate method. One is in proceedings before the Lands Tribunal where the amount of compensation is in issue and where the method that is adopted is that of a sealed offer which is not made without prejudice but which remains concealed from the tribunal until the decision on the substantive issue has been made and the offer is then opened when the discussion as to costs takes place. Another example is in the Admiralty Court where there is commonly a dispute between the owners of two vessels that have been in collision as to the apportionment of blame between them. It is common practice for an offer to be made by one party to another of a certain apportionment. If that is not accepted no reference is made to that offer in the course of the hearing until it comes to costs, and then if the court's apportionment is as favourable to the party who made the offer as what was offered, or more favourable to him, then costs will be awarded just on the same basis as if there had been a payment in.

I see no reason why some similar practice should not be adopted in relation to such matrimonial proceedings in relation to finances as we have been concerned with.

Counsel for the husband drew our attention to a provision in the Matrimonial Causes Rules 1968 (SI 1968 No 219) with references to damages which were then payable by a co-respondent, provision to the effect that an offer might be made in the form that it was without prejudice to the issue as to damages but reserving the right of the co-respondent to refer to it on the issue of costs. It appears to me that it would be equally appropriate that it should be permissible to make an offer of that kind in such proceedings as we have been dealing with and I think that that would be an appropriate way in which a party who was willing to make a

compromise could put it forward. I do not consider that any amendment of the Rules of the Supreme Court is necessary to enable this to be done.

Putting aside altogether this without prejudice letter, counsel for the wife says nevertheless he is entitled to the costs in the court below because of an offer which was contained in an affidavit sworn by the wife on 10 August 1974. His contention applies of course only to costs incurred after that date. The offer was in this form: *'I am willing, and have always been willing, to make over to the [husband] the house at Alderley Edge'*. That was not the matrimonial home. It was a house which had been in the occupation of the husband's mother but was in fact the property of the wife. It was common ground before the learned judge that the value of that house was about £12,000.

I have reached the conclusion that that was an offer which in the circumstances of this case the husband ought to have accepted and that, as he persisted in these proceedings and recovered a lump sum of a smaller amount than the value of that house, the right order would be that he should have the costs up to 14 days after 14 August and thereafter that the wife should have her costs of the proceedings in the court below.

So far as the costs of this appeal are concerned clearly the husband is entitled to those. The appropriate order will be that there should be a set-off of one set of costs against the other. If on balance costs are payable by the wife to the husband that will be an end of the matter, but if on balance costs are payable by the husband to the wife the court then has to take into account the fact that the husband is legally aided. It is not at this stage possible to say how the court should exercise its discretion under the Legal Aid and Advice Act 1949, and because he is legally aided he cannot in respect of the period during which he was in possession of a legal aid certificate (which I take it was from some date before the hearing before Heilbron J), have an enforceable order for costs made against him until an assessment has been made under the 1949 Act. Such an assessment can only properly be made after it has been ascertained what balance if any would apart from such an order be payable by the husband and therefore I would direct that the order for costs should not be enforceable without further order of the court, if on balance a sum is payable by they husband and not by the wife.

SCARMAN LJ.

I agree.

SIR GORDON WILLMER.

I also agree.

Appeal against order as to costs allowed.