

HADJIMILITIS (TSAVLIRIS) v TSAVLIRIS

[2003] 1 FLR 81

Family Division

Alison Ball QC (sitting as a Recorder)

6 June and 17 June 2002

Costs – Defended divorce – Indemnity costs – Test to be applied – Whether conduct of case reasonable and whether making or accepting of offers reasonable

Divorce – Defended divorce – Terms of defence included allegations of adultery, unreasonable behaviour and drug taking – Whether irretrievable breakdown of marriage established

The wife petitioned for divorce on the basis that the marriage had broken down irretrievably and that she could not reasonably be expected to live with the husband because of his behaviour. The husband, in his answer, denied the alleged behaviour and that the marriage had broken down. The husband's defence included allegations that the wife had been unfaithful to him, that the wife had merely married him in order to obtain a substantial financial settlement, that the wife had not supported him either emotionally or practically, that the wife was a bad mother, and that she was a drug taker.

Held – granting the decree nisi on the basis of the wife's petition – the allegation by the husband that the marriage was effectively a charade by the wife from first to last was an allegation which so undermined the matrimonial relationship that no person could live with a person who made such an allegation, thereby making it unreasonable for the wife to live with the husband and well-nigh impossible for there to be any possibility of reconciliation. The wife's evidence of unreasonable behaviour had not been challenged by the husband's defence, but supported by it. The husband's own defence had pulled away every foundation and cornerstone of the matrimonial relationship (see paras [26], [35], [36]).

It emerged after the 5-day trial that the husband had accepted the irretrievable breakdown of the marriage in a *Calderbank* letter in May 2002, and there was evidence that it had been clear to him by November 2001 that there was no future in the marriage. The husband accepted that he should pay the wife's costs on the standard basis, but the wife asked for indemnity costs, for an interim payment of £65,000 and for interest on the outstanding costs. In relation to the test for the granting of indemnity costs, the wife argued that although r 2.69 of the Family Proceedings Rules 1991, as amended (offers to settle) did not specifically apply to defended divorce suits, being limited to ancillary relief claims, the provisions therein could be used by analogy in a defended suit, as could the similar provisions in Part 36 of the Civil Procedure Rules 1998.

Held – awarding standard costs until November 2001 and thereafter costs on an indemnity basis, interim payment of £65,000 and interest from the time of the wife's borrowing, at the rate charged by the lender –

(1) The costs regime for defended divorces was governed by Part 44 of the Civil Procedure Rules 1998. The provisions of r 2.69 of the Family Proceedings Rules 1991 did not apply to defended suits and were specifically limited to ancillary relief claims; CPR Part 36 did not specifically apply to family proceedings and could not sensibly be applied to the making of offers and acceptances in relation to the granting of a divorce (see para [4](g)).

(2) The law on awarding indemnity costs under CPR Part 44 was unclear. Two tests had been proposed: (a) 'a high degree of unreasonableness' (per Simon

[2003] 1 FLR 82

Brown LJ in *Kiam v MGN Ltd (No 2)* [2002] EWCA Civ 66); and (b) that the defendant had resisted sensible efforts to settle (per May LJ in *Reid Minty (A Firm) v Taylor* [2001] EWCA Civ 1723). In the absence of further guidance the test of reasonableness would be applied, using the actual words of r 44.3(4) and (5) without any extra gloss, both in relation to the conduct of the case in general terms and in relation to the making or accepting of offers (see para [4](f)).

(3) Although Part 44 gave no guidance as to when it was appropriate to make interim orders, r 44.3(1)(c) provided that the court had discretion as to when costs were to be paid and that it

might, under r 44.3(8), order costs to be paid on account before costs were assessed. The court therefore had power to make such an order and, applying *Mars UK Ltd v Teknowledge Ltd (No 2)*, should do so unless there were clear reasons why it would be unfair. The sum, if ordered, should be of some lesser amount than claimed 'being such as that party would almost certainly collect' (per Jacob J in *Mars UK Ltd v Teknowledge Ltd (No 2)*) (see para [4](i),(j)).

(4) Rule 44.3(6)(g) gave the court power to make an order for interest upon costs from or until a certain date, including a date before judgment (see para [4](k)). Once the husband had recognised the irretrievable breakdown of the marriage he should have started the process of seeking a compromise so as to avoid the inevitably painful and costly process of the defended divorce. The husband had conducted the case in an unreasonable manner, and, in his evidence relating to his state of mind concerning the future of the marriage, had bordered on the dishonest (see para [16]). An order against him for indemnity costs for part of the proceedings was appropriate.

Statutory provisions considered

Matrimonial Causes Act 1973, s 1

Family Proceedings Rules 1991 (SI 1991/1247), rr 2.51, 2.69

Civil Procedure Rules 1998 (SI 1998/3132), Parts 36, 43–48, rr 1.1, 36, 44.3,

Family Proceedings (Miscellaneous Amendments) Rules 1999 (SI 1999/1012), rr 2.51A, 2.69

Cases referred to in judgment

A v A (Costs Appeal) [1996] 1 FLR 14, FD

Ash v Ash [1972] 2 WLR 347, [1972] 1 All ER 582, FD

Baron v Lovell [1999] CPLR 630, CA

Buffery v Buffery [1988] 2 FLR 365, CA

Kiam v MGN Ltd (No 2) [2002] EWCA Civ 66, [2002] 2 All ER 242, CA

Lawlor v Lawlor [1995] 1 FLR 269, CA

Mars UK Ltd v Teknowledge Ltd (No 2) (1999) *The Times*, June 23, ChD

McPhilemy v Times Newspapers Ltd (No 4) [2001] EMLR 858

Petrotrade Inc v Texaco Ltd [2002] 1 WLR 947, [2001] 4 All ER 853, CA

President's Direction (Civil Procedure Rules 1998: Allocation of Cases: Costs) (22 April 1999) [1999] 1 FLR 1295

Reid Minty (A Firm) v Taylor [2001] EWCA Civ 1723, [2002] 2 All ER 150, CA

Stevens v Stevens [1979] 1 WLR 885, FD

Florence Baron QC and Kay Firth-Butterfield for the petitioner

Jeremy Posnansky QC and Timothy Bishop for the respondent

Cur adv vult

[2003] 1 FLR 83

ALISON BALL QC:

[1] These are defended divorce proceedings between Christiana Hadjimilitis (Tsavliris), who I shall refer to as 'the wife' and George Alexander Tsavliris, who I shall refer to as 'the husband'.

[2] The hearing took place over 5 days between 20 and 24 May 2002 and it was agreed that I would deliver judgment on 6 June 2002.

[3] The husband and wife were married on 9 July 1990, having met and started to cohabit in 1988. The husband is now 53 and the wife 42. The husband was married previously in 1974 and has two children by that marriage, a boy of 26 and a girl of 24. That marriage lasted until about 1984 and ended with a divorce based on the husband's adultery.

[4] There are three children of the present marriage, a boy born in October 1990, a girl born in January 1992, and a boy born in October 1993. They are being educated privately in Surrey.

[5] The family have always lived in Surrey, in a substantial and luxurious house and have spent their holidays on a large motor yacht moored near Athens with a crew of five. There are disputes between the parties as to the actual ownership of these residences, which do not need to be resolved at this point but it is clear that the husband has had full and exclusive use of them as his own throughout the duration of the marriage. There are other properties in London (Chelsea) and Athens which are available to the husband and family, the precise ownership of which are also in dispute.

[6] The husband was born in England to an English mother and a Greek father. He runs the London end of the family business, a substantial group of towing and salvage companies and also operates an underwriting and brokerage business from London. It is clear that these businesses have in the past been highly profitable and have enabled the husband and his family to live very well indeed. There is a substantial dispute as to whether, and if so, to what extent, the businesses have suffered financially since the end of the 1980s and/or since 11 September 2001. The husband says that this is so but the wife is extremely sceptical about the truth of it and if a decree is granted these matters may well be the subject of litigation in due course. The relevance of these matters is that the husband says that the wife's loss of interest in the marriage only came about as his wealth declined whereas the wife says that the husband's alleged loss of fortune only came to light when he feared that she might seek a divorce and make claims against his income and capital.

[7] The wife was born in Cyprus, one of two daughters of Cypriot parents, her father having been a career diplomat. She was brought up and educated in several different countries as a result of her father's profession. She later obtained degrees in Athens and studied in Paris and Switzerland but has never, save for some short-term work, been employed or commenced a career. She has no source of income or capital separate from her husband.

[8] The wife filed a petition for divorce on 26 March 2001 in which she sought a decree on the basis of the husband's unreasonable behaviour. The particulars are set out at para [11] and essentially consist of allegations of high criticism and low warmth, controlling and undermining behaviour, public humiliation and lack of respect, insight, sensitivity, understanding and sympathy, resulting in the wife suffering depression and nervous strain. The letter accompanying the petition, dated 27 March 2001, invited amendments to the petition so that it might be agreed and also sought interim maintenance.

[2003] 1 FLR 84

The parties have continued to live in the former matrimonial home in separate rooms since that time although the husband spends a considerable amount of time in Greece, as has been the case throughout the marriage.

[9] The husband filed a bare answer on 1 May 2001, in which he denied the allegations of unreasonable behaviour and denied that the marriage had broken down. The answer was followed by a letter from the husband's solicitors dated 14 May 2001 suggesting that the parties see a therapist and/or consider ways in which a reconciliation could be achieved. The wife's reply of 11 May 2001 simply requested that the answer be rejected. On 21 May 2001 the wife's solicitors wrote suggesting that the husband's defence of the petition and the delay thereby caused might be for financial purposes. The wife's solicitors specifically stated that she did not wish for a reconciliation and that as a result of his behaviour did not believe that the husband did either.

[10] There followed a series of letters between solicitors concerning financial matters, in which the wife complained that the husband was keeping her very short of money, stating that this was a continuation of his approach during the marriage whereby he had controlled her by failing to allow her any financial autonomy. During this period the wife again asked that the husband withdraw the answer and stressed that she simply wanted a quick and amicable divorce. In the absence of agreement as to maintenance

pending suit, an order was made on 31 August 2001 whereby the husband was to pay £3,475 per month, effectively for the wife and children, upon his undertaking to pay the outgoings on the home, school fees and health insurance. The district judge declined to include in that order any continuing obligation upon the husband to pay for the staff at the home and reserved the costs. Shortly after the hearing the husband dispensed with the services of the staff at the parties' home.

[11] On 19 and 27 September 2001 the wife's solicitors again asked the husband to withdraw his answer. On 2 October the wife's solicitors wrote complaining of abusive behaviour by the husband and putting him on notice that if the defended divorce proceeded the wife would be seeking indemnity costs. On 11 October 2001 the husband's solicitors replied saying that the husband was behaving in a correct and proper manner and it was the wife who had become abrupt and abrasive. On 15 October 2001 the wife applied for directions for trial and stated that she did not intend to call any witnesses. On 16 October 2001 the husband's solicitors wrote making it clear that the suit remained defended. There then followed an exchange of correspondence containing allegations by each party against the other relating to unreasonable behaviour. On 23 November 2001 the wife's solicitors again wrote stating that in the light of the recent allegations it was clear that a reconciliation was not possible and asked for the husband to agree to a divorce. Directions for trial were given on 3 December 2001 under which it was ordered that evidence in the suit by the parties and their witnesses was to be given by affidavit and a timetable was set out.

[12] As a result of this order all the evidence in this case has been provided in affidavit form and by way of allegations set out in correspondence. No point is taken as to this procedure and I have accordingly accepted the evidence in this form. I have read the following affidavits and unless otherwise stated I have heard the oral evidence of the deponents either in court or by video link.

[2003] 1 FLR 85

Wife and her witnesses:

- Wife 18 February 2002 and 13 May 2002
- Katerina Hadjimilitis (wife's mother) 13 February 2002
- Stephanie Pezeshkan (wife's sister) 4 March 2002
- Fred Pezeshkan (wife's brother-in-law) 4 March 2002
- Linda Walker Williams (children's teacher) 27 February 2002
- Amelie Pool (housekeeper on yacht 1989-1997) 2 April 2002
- Lydia General (maid on yacht 1998-2000)
- Bruce Dylan-Farley (friend of wife) 14 May 2002
- Steven Thompson (friend of wife) 15 May 2002
- Alison Hayes (wife's solicitor) 24 May 2002 not heard.

Husband and his witnesses:

- Husband 25 April 2002
- Manolis Karagiannakis (captain of yacht) 24 April 2002
- Mrs Bellou (friend of husband for 20+ years) 24 April 2002
- Kalliopi Kousthana (friend of husband for 35 years) 24 April 2002 not heard
- Frederick Hoffman (friend of husband for 25+ years) 25 April 2002
- Helen Malia (housekeeper to family April-September 2001 and babysitter December 2001 and March 2002) 19 April 2002
- Laurence de Mello (friend of husband for 5 years) 19 April 2002
- Lito Rocha (housekeeper/chauffeur for family 1996-1997 and 2001, now husband's personal servant) 19 April 2002

- May Concha (housekeeper to family 1996–1997 and February 2001) 19 April 2002
- Eleni Sotiriadou (lawyer/translator) 23 May 2002 not heard.

[13] During the time when these affidavits were being prepared there were several developments. First, further complaints about the husband's behaviour were made in correspondence on 7 and 18 March 2002 and secondly, by his affidavit of 25 April 2002, Mrs de Mello's of 19 April 2002 and Mr Hoffman's of 25 April 2002, it appeared that the husband was alleging that the wife had had affairs/liaisons/'things' with two unnamed men. On 30 April 2002 the wife's solicitors asked for the two men to be named. After a fluster of correspondence the husband's solicitors named the two men (in part) in a letter dated 14 May 2002, some 6 days before the commencement of the hearing. The wife denied adultery or any improper association with the men.

[14] Before dealing with the parties' respective cases I must set out the law that applies in this case:

- (1) The wife must prove on the balance of probabilities:
 - (a) that the husband has behaved unreasonably towards the wife;
 - (b) that the wife cannot reasonably be expected to live with him; and

[2003] 1 FLR 86

- (c) that the marriage has irretrievably broken down

(section 1 and 1(2)(b) of the Matrimonial Causes Act 1973 (MCA 1973)).

- (2) The test of whether the wife can reasonably be expected to live with the husband is a quasi-objective/subjective one, namely:

'Can this petitioner with his or her character and personality, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this respondent?' (per Bagnall J in *Ash v Ash* [1972] 2 WLR 347 at 351)

- (3) As to behaviour, any conduct, active or passive, constitutes behaviour and it may consist of individual acts or omissions or a course of conduct. All behaviour may be taken into account and the whole matrimonial relationship should be considered. On the question of the seriousness of the conduct required I remind myself of the fact that there is no category of behaviours which qualifies as unreasonable and to quote May LJ in *Buffery v Buffery* [1988] 2 FLR 365 at 367:

'... the gravity or otherwise of the conduct complained of is of itself immaterial. What has to be asked ... is whether the behaviour is such that the petitioner cannot reasonably be expected to live with the respondent.'

- (4) As to irretrievable breakdown s 1(4) of the MCA 1973 provides:

'If the court is satisfied on the evidence of any such fact as is mentioned in subsection (2) above, then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall ... grant a decree of divorce.'

In dealing with this issue and the question of the sufficiency of one party's view that the marriage had irretrievably broken down Bagnall J in *Ash v Ash* made it clear that the assertion of one party was not enough alone and stated at 352:

'What I have to do is to examine the whole of the evidence placed before me, including and giving not inconsiderable weight to the assertions of the

parties, and make up my mind, quite generally, whether it can be said that in spite of the behaviour of the respondent, and the reaction to that behaviour of the petitioner, the marriage has not broken down irretrievably.'

- (5) As to the timing of the behaviour I bear in mind that the behaviour in question may occur when the parties are already separated and the marriage has already broken down, thus there does not need to be a causative link between the breakdown of the marriage and the behaviour complained of – see *Stevens v Stevens* [1979] 1 WLR 885.

[2003] 1 FLR 87

[15] *The wife's case*

I have summarised the wife's complaints in para [8] above. In her petition she set out these matters in slightly more detail, gave particulars of two occasions (after the surprise fiftieth birthday party and the magazine article) when the husband behaved in the manner complained of and referred to the nervous strain and depression she suffered and that she sought medical treatment. Her counsel, in her opening submissions, described the petition as being drafted in a somewhat anodyne way in the hope that the matter would be resolved on an undefended basis. This is not an uncommon approach these days when most petitions proceed undefended and the petitioner simply seeks to obtain a divorce on the minimum basis of unreasonable behaviour. No one has taken any point on this and it would be inappropriate to do so. Once it became clear that the suit could not proceed undefended the wife expanded her case in her affidavit and described her marriage and her complaints about the marriage in more detail. She also gave a fuller picture of herself, her expectations of the marriage and reactions to her husband's behaviour. She exhibited to that affidavit various documents including the text of the magazine interview that she gave and which her husband had been so concerned about, her medical records, including letters from her GP (Dr Loxton) and the psychiatrist she saw in 1999. Further allegations were made in the course of correspondence after the petition had been filed and yet more were contained in her affidavit in reply and those of her witnesses and in her oral evidence. These accounts described a partnership which had started well but where the wife had increasingly realised and eventually faced up to the fact that her husband treated her as a second-class citizen, a person who should be satisfied with the comfort and, indeed, luxury of her life but should not assert herself in her own right and should always be under the control of her husband who was the giver and provider. She described how she wanted the marriage to succeed and that accordingly she subjugated herself to her husband but that in about 1997 she became more and more unhappy and attended her GP with symptoms of depression. The husband's behaviour as outlined in para [8] above continued and worsened until she came to the conclusion in the latter part of 2000 or early 2001 that the marriage had irretrievably broken down.

[16] The wife, in support of her case against the husband, relies on the husband's affidavit in reply and the evidence of his witnesses to demonstrate that his approach is in fact exactly as she has described, namely, one of criticism of and disrespect for her as a mother, stepmother, wife and person. She says, through her counsel, that the attack on her character in these proceedings was by and large unnecessary for the purpose of prosecuting the husband's defence and exemplifies his attitude to her. She also submits that the husband's description of her character and actions shows that the husband's motives in arguing that the marriage may still be viable are not genuine and that the marriage between this couple is beyond repair and the matrimonial relationship completely undermined.

[17] *The husband's case*

The husband says that he has not behaved in the manner described by the wife and that much of her evidence is either exaggerated or untrue. He states that on occasions

when he has become angry or irritable he has been justified because of the wife's behaviour and that he has done everything in his power to make her happy. He says that the wife's dissatisfaction stems from his

[2003] 1 FLR 88

declining financial ability to provide for her in the way she requires, that her reasons for wanting a divorce are possibly because she has had/is having an affair or affairs and that her mental unhappiness is nothing to do with his behaviour but due to the fact that she has a depressive character which has manifested itself at other times both before the marriage and after the birth of each of the children. He maintains that given a proper chance the marriage may be able to be mended through marriage counselling or therapy, that the wife has been unwilling to give it a try and that every effort should be made to see if the marriage could be saved for the sake of both parties and particularly the children. He stressed that he had strong views about the importance of sustaining marriage and that it needed to be worked at. He gave unsolicited oral evidence at some length about his parents' marriage in this context, to which I will return in due course since I believe this throws some light on the husband's approach and attitude.

[18] *Character, personality and disposition*

This is a case where the words of Bagnall J in *Ash v Ash* are particularly relevant. This is not a case where there are, for example, instances of violent or other reprehensible behaviour which, if proved, would lead one to immediately conclude on an objective basis that the wife could not reasonably be expected to live with the husband. This case is based on allegations that over time the husband has behaved in a way that has insidiously and gradually destroyed the relationship so that this wife has been unable to be happy within it and has lost her self-confidence and self-esteem.

[19] *The wife*

I accept that the wife was brought up in a socially adept family where relationships were mainly genial, where family members were polite and reasonable, calm and gentle, where aggression and argument were discouraged – in fact a diplomatic household. I reached this conclusion from hearing the wife's mother's and sister's evidence and from observing the wife herself and from reading her own account of her parents contained in Dr Greenwood's letter of 1 February 1999. I felt that this upbringing had shaped the wife and that she had probably wanted to replicate those secure, albeit perhaps over-controlled relationships, in her own marriage. I find that she had wanted her marriage to succeed and had tried very hard to ignore and excuse her husband's approach in the hope that if she pleased him then he would grow to appreciate her and treat her as an equal partner. Although intelligent and articulate, the wife I saw in the witness box did not seem to me to be in any way volatile but more a subdued and somewhat compliant individual with a rather sad demeanour. I also formed the view that she is quite a private person, not an extrovert and someone who would find it hard to admit to a failed marriage or allow others to know about her personal feelings. I accept that the witness box is not the best place from which to judge character but she gave no sign, despite quite intense cross-examination, that she was someone who would provoke her husband by her behaviour although I am sure that as with most people she can be irritating and has a breaking point. I do not discount the possibility that one of the attractions of the husband to the wife was his wealth, status and lifestyle. I accept that the wife has enjoyed both the security and pleasure that this has brought and that this has been important to her. I do not, however, find that this has been her

[2003] 1 FLR 89

overriding motive in her marrying, forming a family and now seeking a divorce. I take the view that as she has matured the wife has found the role that she was able to

accept at the outset was not one that she could continue to tolerate and that the lack of insight of the husband into his wife as an individual (as I find) has made it impossible for there to be any real communication or partnership between them.

[20] *The husband*

The husband is in many ways an honourable man. He has undoubtedly done much good in his charitable works, he is a loving father and he is generous and hospitable. In the witness box he was mainly calm and articulate and gave the strong impression that he believed that his actions and behaviour were generally beyond reproach. Despite the fact that he accepted that the wife had been unhappy at times, and in particular in the year or so before the petition was filed, he was unable to see that anything about the marital relationship had caused or contributed to this. He cited his alleged financial difficulties and the wife's materialistic approach as a cause, he cited the possibility that she had had affairs and he blamed her for being provocative by reason of her domestic, maternal and general character faults. He relied on her alleged depressive nature and above all he relied on the fact that the wife had planned and manipulated the divorce from the earliest days of the relationship for monetary gain. I formed the view that the husband was a man of limited emotional insight so that he could not recognise that his behaviour had anything to do with his wife's unhappiness.

[21] When listening to two apparently reasonable people give careful evidence it is often the small aside or explanation or the volunteered remark that gives the judge insight into their attitude and character. In this respect there were features of the husband's evidence which I felt revealed some of the otherwise unseen aspects of his normal approach. First there was the quite lengthy account of his own parents' marriage. When dealing with the importance he attached to spouses preserving their marriage, he described this marriage as having been very hard in physical and material terms and, although he did not say so, I believe also in emotional terms. He said 'If I had been a fly on the wall I could ask why they stayed together', and I believe that this was a reference to the fact that the marriage was at times almost at breaking point. He also said that it was 'very difficult for a woman to live under those circumstances, it was a different era, there were different guidelines'. Again I think that he was referring to more than the physical and practical difficulties of survival in those times but also that the marital relationship of his parents had been problematic. There is perhaps a further hint of these difficulties in the wife's first affidavit at para 7 where she quotes a remark which obviously left an impression on her but which is very much a matter of hearsay, namely that one of the husband's relations had commented after an outburst by the husband: 'and we thought he had changed and was not going to be like his father'. The relevance of this is that at the end of his account of his parents' marriage the husband said that his parents had been pleased that they had survived choppy times and stayed together and that in relation to his mother, 'she worshipped him, she worshipped him'. I think that the role model that the husband has always had in his mind is that of his parents, namely that his mother was prepared to put up with a very stormy marriage because her husband worked hard as a provider and because she

[2003] 1 FLR 90

worshipped him. I suspect that this is what the husband sees as good, right and normal in a wife, especially if substantial material comforts are provided by the husband in addition. I think that it is not his fault that the husband feels like this about marriage and behaves accordingly but he has overlooked the fact that we do now live in a different era with different guidelines, to use his own words.

[22] If this were all then I might not have reached the conclusion I have but there were other small asides and admitted behaviours which gave me pause for thought about the husband's approach to women almost as a breed apart rather than as individual human beings. This is the second of the deductions that I have made from the husband's oral evidence. He quoted the GP in support of his view that the wife's

dissatisfaction with the marriage stemmed from outside influences: 'she is 40 and women can go through a difficult period at this time'. He later confirmed that his wife was extravagant and interested in social cachet and added the remark 'most women are'. He later said that his wife was a bad timekeeper adding the remark 'like many women'. When asked why he had bid at an auction for some earrings which his companion wished to buy he replied: 'Women prefer not to do it'. It seemed to me to be illuminating that there should be four almost throw-away references of this sort and it struck me that these comments were not said in jest but in seriousness. The husband gave me the impression that he thought he knew what women wanted, what they were like and how he felt they should be and that he was thus too inflexible to adapt to what he saw as the inexplicable needs of his wife; a wife who wanted for nothing in material terms and terms of status. It is quite possible that much of this attitude is subconscious and is not an irritant to those soothed by the husband's charm and generous hospitality but may become intolerable within the more subtle business of a marital relationship especially where the other party is a person of some sensitivity and emotional frailty.

[23] The third aspect of the husband's behaviour which gave me another piece of the jigsaw puzzle is made up of two parts: first, that until 1999 the wife had no bank account and no credit card. The wife complained of this in these proceedings but the husband said that she only had to ask either himself or his secretary, if he was away, and she would be given what she needed. I suspect that this was largely true but I cannot think of any more obvious and clear way of telling a person who is in charge and who is the inferior partner than to make them ask every time they wish to spend any money. It is to my knowledge one of the most commonly expressed views of modern women, often given as the main justification for having a job or a career and often the sign of proper freedom within a relationship, that she does not have to ask for money and be beholden to another (or another's secretary). I do not accept the husband's evidence that the wife was content with this arrangement, but even if she made little protest, it is the attitude behind the arrangement which tells me most about the dynamics within this marriage. The second revealing thing about the evidence was the fact that the husband never, until the marriage broke down, had his own key to the matrimonial home. The wife says that this meant that whatever time of night (and sometimes it was very late) she would have to come downstairs and let him in. The husband said that this was not so since the staff would usually let him in and that he was proud of the fact that he did not have a key as it showed the wife that she was the lady of the house. Although I believe that on occasions the staff may have opened the door to the

[2003] 1 FLR 91

husband, they lived in the staff cottage or were off duty by this time of night and normally it would have been the wife who would have been expected to do so. I find the husband's explanation for this practice very hard to understand or accept except in the context of his wish to control his wife's movements. If he had no key the wife could not go out without him without risking him being locked out - in this way he could control her life and be sure she was always at home in his absence.

[24] It is instructive then to look at some of the other evidence in the context of my findings in relation to the husband's attitude and approach. The wife said she had not told the husband of her visits to the psychiatrist because the husband did not believe in her taking tablets and, having tried, she knew that he would not have listened to her problems. When asked in cross-examination he said that the clinical depression 'had nothing to do with me'. He said that when the wife was depressed in 1987/1988, he had told her to pull herself together and took her on holiday. This was a woman who had suffered post-natal depression or at least low mood after each of her confinements, as the husband well knew, and was thus fragile emotionally. He also knew of her depression in 1997/1998 and yet even now sees nothing in his own behaviour or the marital relationship which might have caused or contributed to it. His only solution was to tell her to pull herself together and to take her on holiday. In the autumn of 2000

the wife's sister Stephanie says she telephoned the husband after receiving a distressed telephone call from her sister and suggested marital counselling to him. She said she told him that unless he did something about the relationship, the marriage would be over. She told the court that the husband responded 'I don't have the problem, she has one. I am fine', and that he repeated this several times. Although Stephanie is close to her sister and might be expected to support the wife's evidence, I accept her evidence on this point. Accordingly I do not accept the evidence of the husband that he had raised the question of therapy with the wife as early as 1999 since it is clear to me that as late as autumn 2000 he did not feel that the wife's unhappiness had anything to do with him. Indeed I find that the question of therapy or counselling was only raised by the husband for the first time in the solicitor's letter of 14 May 2001, after the petition had been filed. I also find that the husband only really realised that in order to work, marital counselling had to involve both spouses, as late as a few months ago when he spoke to Mrs Patten, an experienced mediator, who explained this to him on the telephone. This aspect of the matter further indicates to me that the husband's attitude towards his wife was both lacking in insight and lacking in sensitivity.

[25] I now deal with the suggestion of the husband that the wife's petition should be considered in the context of her having manipulated the marriage and the subsequent breakdown of the marriage for purposes of greed and self-aggrandisement. I observed the wife at some length in the witness box and, having read and heard a great deal of evidence, I find that she married the husband because she loved him and that she did not plan from the outset to have children in order to trap him, although it is possible that she was somewhat careless as to whether or not she became pregnant since she almost certainly wanted a family and believed that she had met the man she was going to marry. I accept her evidence that before she became pregnant for the second time the husband had made a comment which led her to believe that this was the husband's intention too. Nor do I find that she told Mrs Bellou in

[2003] 1 FLR 92

late 1997 or at any time that she had become pregnant with their first child to force the husband to marry her or that her later children represented 'ships' for her after her divorce or that she had planned to force the husband to follow a lifestyle beyond his means in order to present to the court a false image which would mean a bigger payout for her after the divorce. I was unimpressed with the evidence of Mrs Bellou, who, together with her partner had clearly been a close friend of the husband for many years and who clearly disliked the wife. I think that it is almost inconceivable that the wife would have had such a conversation with Mrs Bellou, particularly if she had been planning a long-term deceit on her husband. Additionally I formed a firm impression that much of the evidence Mrs Bellou gave stemmed from conversations she had had with the husband and were unlikely to have come from her direct experience. For example, it is strange that she remembered the date at which the alleged conversation with the wife occurred; it seems extremely unlikely that the wife would have boasted to Mrs Bellou of having an affair in the context of Mrs Bellou's friendship with the husband; it is something of a coincidence that she made particular reference to the wife not taking the children to church and not speaking to them in their native language and that all the wife was interested in was social status - allegations that the husband has been keen to substantiate. I was also unable to accept her evidence about the wife smoking marijuana in the toilet of the restaurant since the account in her affidavit that she went to the toilet and 'saw that she was smoking marijuana' was quite different from her oral evidence when she said that it was only afterwards that she understood what she was smoking because her partner recognised the smell. The wife's account that she went to have a cigarette away from the restaurant is far more probable since, whether smoking was allowed in the restaurant or not, she may well have thought it inappropriate to smoke at the table among non-smokers and it also ties in with a remark made by the witness Lito Rocha who said that the wife often went to the staff cottage 'sometimes to smoke', suggesting that she did not want to be seen smoking by

others. Mr Hoffman gave evidence that the wife had allegedly said to his former wife that she would get pregnant to ensure that marriage to the husband would ensue (not, I note, that this was all a plan with the long-term aim of divorce). I also note that this is a hearsay remark allegedly made over 12 years ago. The former wife could have been called to give this evidence but was not and Mr Hoffman himself accepted in oral evidence that his former wife might have 'got the wrong end of the stick'. I take the view that if any such conversation did take place it is likely that with the passage of time it has become distorted and that in any event it is highly unlikely that the wife would have divulged such information to someone who was an old friend of the husband's so early on in their friendship.

[26] I also take the view that the allegation by the husband that the marriage was effectively a charade by the wife from first to last is an allegation which so undermines the matrimonial relationship that no person could live with a person who made such an allegation thereby making it unreasonable for the wife to live with the husband and well-nigh impossible for there to be any possibility of reconciliation.

[27] As to the wife's allegations that the husband frequently criticised her, belittled her, made her feel that she was in the wrong and was verbally abusive, domineering and controlling towards her I find that this was largely true but that the wife kept her feelings to herself and put on a brave face to

[2003] 1 FLR 93

outsiders apart from her close family. She also spoke of her belief that she should show loyalty to her husband and try to preserve her marriage. She said that these events usually occurred either in the marital home or on the yacht and were therefore only seen or heard by staff and family and that for a long time she did not have the courage to confront her husband. I find that these occurrences became almost the normal currency of the marriage and as can be seen the husband's criticisms are repeated in these proceedings. The very fact that they are so repeated and deposed to by the husband's witnesses leads me to wonder whether the husband really understands what the wife is complaining about at all. At one point he said that he thought the petition said that the wife wanted a divorce because of his loudness and temperament but it only really said that he could be somewhat reactive when trying to look after his wife. Again I must wonder whether he understands what his wife is saying given this interpretation of the petition. Why was it necessary in the main for the husband to say that the wife was not supportive to him either emotionally or practically, was a bad mother, was neither a proper homemaker nor childcarer, was moody and irritable, temperamental and erratic, had an indifferent relationship with her stepchildren and was more interested in herself and her own pleasures than the family and was a drug taker and adulteress? These were just a few of the criticisms levelled at the wife in these proceedings where the husband is maintaining that the marriage has not broken down. I formed the impression that the husband felt that he was entitled to chide and correct his wife as he believed that there was much 'room for improvement' in her behaviour as a wife and mother. He said that 'on many occasions raising my voice was justified' and that when he did 'blow his top' it was justified because, for example, the wife had been continually forgetful and had to be reminded perhaps 'sometimes three, four, five, six - a dozen, two dozen times and I would become annoyed'. The husband said that it was necessary for him to raise the manifold complaints in the proceedings so as to respond to his wife's allegations. In cross-examination when asked why he felt it necessary to attack his wife he replied 'these papers (in court) are supposed to represent over 12 years of marriage. I have to answer these allegations, I do not consider it as an attack, I have to retain some form of aggressiveness this is my response to her unreasonable behaviour'.

[28] What evidence have I relied on to support the findings I have made in favour of the wife on these matters? I will not repeat my findings as to the husband's attitude and approach but that is the starting point which helps me to bridge the gap between the diametrically opposed accounts of the husband and the wife. I now turn to the

other witnesses.

Mrs Hadjimilitis

The wife's mother was a regular visitor to the family's Surrey home during the marriage, often coming to see her grandchildren and to assist her daughter in the home. She was an impressive witness particularly because it was quite apparent that she does not approve of divorce and is saddened by her daughter's predicament and wishes that the marriage could be mended. Despite this she gave clear evidence that she had witnessed the type of behaviour alleged by the wife on many occasions and that it was very bad. She said that she and her husband had ceased to visit the yacht since 1998 because of the husband's behaviour. She said 'there were so many times he

[2003] 1 FLR 94

was shouting and humiliating her in front of people', and 'I heard him many times criticising her', and that her daughter only spoke back to him in the last year or so, not before. She said that the husband 'always used to say it was her fault, it was something he continuously said that it was not his fault but hers. I believed it was his fault, not Christiana's'. She described her daughter as a very kind and polite person, never temperamental or argumentative and previously a happy person although more recently sometimes sad and not wanting to talk. She said that the relationship had become very bad in recent years particularly since the end of 1997. No alternative reason was put forward by the husband for why his in-laws no longer came to visit or stay on the yacht as they had done regularly in the past and I accept that these parents ceased to stay for the reasons the mother gave, namely because of the husband's behaviour towards their daughter in their presence or hearing. An additional piece of evidence from the mother was that after the petition was lodged the husband began to telephone his in-laws and tell them very derogatory things about the wife (about numerous pre-marital affairs, drug taking and being after his property) and that he also spread similar rumours amongst their friends who contacted them about it. As a result she said her husband sent a letter to the husband complaining of this behaviour. The wife's father was not called but I have seen the letter which is exhibited to the mother's affidavit. When asked about the letter the husband did not deny having told the father about his daughter's misdeeds but said, 'I've never said anything negative about my wife. Other people have said these things. I did not say these things to her father; I was passing on to him what I had heard'. I felt that this was dissembling of the worst sort and that there was no doubt that the husband was seeking to undermine the wife in the eyes of her parents in an unforgivable manner. Although the wife and her mother are close I felt that the mother was a truthful witness who would not have given the evidence she did if it had not been true since she was clearly opposed to the idea of divorce and would not have supported her daughter without good reason.

Stephanie Pezeshkan

I was particularly impressed by this witness who was outspoken where her sister was rather withdrawn and who gave her evidence with spirit and conviction. When put to her that she had once said to the husband that she was looking for a husband like him, she reacted with force that she had never said such a thing and that she couldn't have lived with someone like him for even 1 day. 'I would *never* have wanted to. He was disrespectful' (her emphasis). She said that she always knew the husband had a difficult nature and was imposing and demanding. She said she did not know how her sister coped, 'she did not complain and kept her problems within herself'. She said 'when she did come out with it, it was not so surprising after having witnessed many many scenes of irrational behaviour. He was disrespectful, small things upset him - yelling, very demanding. There were many such outbursts very often for very small things, very irrational, making small incidents into a big deal'. She described her sister as becoming more and more withdrawn and reclusive, feeling very stressed and that

she could no longer handle it herself. She dated the time when the wife began to talk about it as around 1997 and said that she changed; becoming closed within herself, stressed out, nervous and tense. Although the wife did not explain what was the matter at the time, she said that it was evident that she was having difficulties in her marriage. She

[2003] 1 FLR 95

confirmed she had spoken to the husband about counselling in autumn 2000 and had made a similar suggestion to her sister who had told her that the husband did not believe in it and was not interested. She believed that for a 'very long time' the wife had asked him about therapy and that she had tried for a long time to resolve the situation and had done everything she could. She said she had seen outbursts by the husband from the start of the marriage and had witnessed the behaviour so often that she thought it would be 'an extremely difficult thing for anyone to cope with him'. Stephanie described how she and her sister had been brought up in a loving family and that their father was a gentle, intelligent man who never raised his voice and she was therefore shocked to see someone behave like the husband. I again bear in mind that Stephanie is naturally close to the wife and may wish to be supportive to her. Despite this her evidence seemed to me to be very believable not only because of the words she used but because of her manner in giving it.

Mr Fred Pezeshkan

The wife's brother-in-law only joined the family in 1997 and he met the husband for the second time at the husband's surprise fiftieth birthday party. He said he was in the process of trying to get to know and understand the family he had joined. When asked to describe how the husband treated the wife he replied: 'Being as he is, a very demanding person, wanting everything for himself'. He described the wife as covering things up and trying to make the best of things although she was tense and upset. He said that he was concerned about the way he treated his wife as he (Mr Pezeshkan) was trying to understand the standards in the family and trying to find out what sort of woman he had married. After the party he described the husband as ordering the wife around saying 'do this' and 'why are you doing that?' and the wife was running around doing what she was told to do. He felt that the wife had arranged the party in order to try to please the husband. He also recalled a visit by the wife to his home in the winter of 2000 when the wife was very upset by repeated calls from her husband and that she was so upset and scared that she did not want to return and that he and his wife had to persuade her to go. Again I must be wary of a witness from the wife's family but I have to say that Mr Pezeshkan seemed to be an honest witness whose evidence as a new and inquiring member of the family rang true.

Lydia General

Ms General was an employee on the yacht between June 1998 and February 2000 and she gave evidence by video link from Greece. This witness was the most compelling and straightforward of the staff witnesses. She was direct and unwavering and spoke good English. I formed the view that she was a truthful witness. She supported the wife's account of the husband's behaviour and in particular she said that she heard the husband shout at the wife on one occasion saying 'This is my boat', then he screamed at her saying 'whatever I do and want, I can do because this is my boat'. She said that this sort of thing happened often and that it was the husband always shouting and that the wife did not shout. She described the wife as very calm and sitting quietly and that she never heard her answer back but afterwards she would enter the room and see that the wife had been crying. She said, 'of course the captain would have heard', but that the captain was on the husband's side. She

[2003] 1 FLR 96

reckoned to have seen the wife with tears in her eyes on a number of occasions – more than five times. She summed up one of the cultural differences rather perceptively when she said: 'As a wife you should respect your husband even if he treats you badly but she is also a human being ... I saw for 2 years the treatment of the wife by the husband'. She also gave evidence that she had seen the husband and a young woman called Effi kissing each other on the boat 'not just as friends'. She was sure that the husband and a young woman called Eleni, who was at some point the husband's secretary and was a very regular visitor to the boat when the wife was absent, were having an affair. She said that she could tell by the way they were acting, although Eleni did not spend the night on the boat. She said that the husband was a very good employer 'but as a husband I doubt it'.

Steven Thompson and Bruce Dylan-Farley

These gentlemen both denied having had affairs or improper associations with the wife, they having met her in May 1998 and spring/summer 1999 respectively at the polo club. Mr Dylan-Farley spoke of having met the husband who seemed to disapprove of the wife's interest in polo and had said that the wife was meant to be looking after the children. He thought that he was intensely jealous of the wife having an interest of her own. He described the wife as a doting mother and that her children always came first. He said that the wife had told him that she was unhappy in the marriage and that her husband was rude and aggressive and bullying. He said that she would telephone him whilst very upset on occasions. I took the view that these were truthful witnesses, and Mr Thompson said he was quite often 'in the firing line' of gossip because of his work as an instructor. There is quite insufficient evidence of adultery or improper association and I felt that Mr Thompson supported the wife's case insofar as he had become a friend and he had observed her unhappiness and heard her contemporaneous account of the causes of her unhappiness, namely because of her husband's behaviour.

The medical evidence

I have seen Dr Loxton's notes and a letter written by him to the wife's solicitor dated 16 February 2001. In the letter he said that in his consultations with the wife she had told him that she felt the reason for her depression and unhappiness was related to her difficult marriage. She was clearly suffering symptoms of depression in the latter part of 1997 and again in the latter part of 1998. In early 1999 he referred her to the psychiatrist Dr Greenwood. In the first letter from Dr Greenwood the wife told her she was 'not sure about the marriage' and that her husband was a difficult person. She denied that she wanted a marital split. She described in some detail how her husband treated her, all of which complaints are consistent with the allegations she makes in these proceedings. I will not relate the second page of that letter but what she told the doctor was strikingly similar to what she told the court. She said that she felt worthless, useless and guilty and felt she was being punished, for no reason she could comprehend. The doctor concluded that she was depressed and prescribed antidepressants so that she could 'get back to her normal level of functioning so that she can deal with the current situation in a more appropriate manner', after which counselling could be considered. In March 1999 there had been some improvement and although her mood was still quite low she was no longer depressed. It is said on behalf of the husband

[2003] 1 FLR 97

that if the wife had overcome her depression at this time whilst still living with him it is very unlikely that his behaviour was at the root of it. I take the view that this is a far too simplistic analysis. This is a woman who has a tendency to depression, she responded to medication as was intended by the doctor and she was therefore more able to deal with the difficulties of her life. The husband knew she had this tendency and although she did not tell him of the visits to Dr Greenwood he was aware of her problems in 1997. This aspect of her personality made it all the more important that he

should be gentle with her and this I find he was not. He continued with his unpleasant behaviour which would undoubtedly have exacerbated her condition, whether it was causative of it or not. I suspect, although without medical evidence it is difficult to be sure, that once the wife faced up to the fact that she could no longer make the marriage work, that compliance and behaving to please her husband was ineffective and after she had removed the façade of a happy marriage, she felt relieved and mentally stronger. This may account for the fact that she has survived what must have been a very stressful period since filing her petition. Her mother commented that now her daughter seemed brighter and more her old self.

Mr Karagiannakis

This witness is the captain of the yacht and has known the husband since 1978. He clearly admires the husband and considers him to be a very good employer. I took the view that I could not accept his evidence as independent although there were some revealing parts of his evidence which went to support the wife's case. First, I did not think it likely, having seen the witness, that the husband would have confided in him about his reservations about marrying the wife and her pregnancy, as set out in his affidavit. In fact in evidence he stated that he was not a 'friend' of the husband and they only spoke about the boat together and that it was not the husband but someone else who had spoken to him about the pregnancy. Secondly, I do not think it at all likely that the wife would have told him 'pleasing George is the least I care' at the time of the fiftieth birthday party. Thirdly, the concept of the wife being concerned with her 'image' as the wife of a prominent businessman did not ring true and nor did several other aspects of his written evidence when compared with his oral evidence. In fact the affidavit was full of all the points that the husband wanted to make against the wife and were in places of a sophistication which did not fit with the man I saw. The captain did however say that the husband 'shouts at her (the wife) but not without reason' and that he had seen the wife crying sometimes on the boat but that he did not know why. I therefore do not accept this witness' evidence on matters of significance where it conflicts with the wife's case.

Mrs Bellou

I have dealt with her evidence at para [25] above.

Mrs Kousthana

I did not hear this witness although she has made an affidavit. She is an old friend of the husband's, she has known him since he was a young man and she said she looks on him as a son. She is an elderly lady and the husband described her as a simple island person. Again I found that her affidavit contained a level of knowledge and a degree of sophistication which it seemed

[2003] 1 FLR 98

very unlikely that she possessed. I felt very much that the husband's case was being paraded by this witness and that if I had heard her evidence I would have had reservations as to whether the substance of it was truly her own.

Mr Hoffman

This witness was again an old friend of the husband's and in oral evidence he very reasonably said that he did not know how the parties behaved in private but that he had not seen any of the behaviour complained of. He said he saw normal marital tiffs but did not know who had instigated the confrontations although sometimes the husband was a bit loud and a bit temperamental. He did not know that the marriage was rocky or that the wife had been depressed and the breakdown came as a big shock to him. I took the view that he had only a superficial knowledge of the marital relationship and did not really want to be drawn into any clear position on either side, particularly not against the husband who he described as an 'extrovert and has quite an

outspoken Mediterranean character which may be misinterpreted’.

Helen Malia

Ms Malia only worked for the family as a housekeeper for 5 months in 2001, during the months immediately following the presentation of the petition. She also did some babysitting in late 2001 and March 2002 for which she said the wife had not paid her. She saw the wife cry on one occasion and she saw the wife shout at the husband although she said the husband did not shout at her. I formed the view that this witness only had a very limited view of this family and that the dynamics concerning her having to leave were unclear and she almost certainly blamed the wife for this. I had the impression that she was very much on the husband’s ‘side’ and this may have been due in part to her relationship with Lito Rocha the other staff member who she described as her ‘companion’ and who, as I will set out below, was very much a supporter of the husband and had fallen out with the wife.

Mrs de Mello

This witness barely knew the wife at all and was effectively a regular confidante of the husband. I got the impression that the husband gave her very much his own interpretation of his unhappy marriage. She very fairly said that she did not know what went on in the household nor about how the wife reacted or felt or how the husband treated her at home. She said she could not speak of the dynamics of the marriage between them. She said that the husband knew that the marriage was in ‘big trouble’. It was this witness that relayed the rumours about the wife’s affairs to the husband but she accepted that the polo world was rife with tittle tattle. I did not feel that this witness’ evidence helped me either way save that it was clear from what she said that the husband was very much aware of his wife’s unhappiness from early 2000.

Lito Rocha

Lito was employed by the family for 10 months from the latter part of 1996 and again for 8 months from January 2001. Since then he has worked part time for the husband alone and has remained in the staff cottage. It is relevant to note that during the first period the family would have been in Greece for about 3 months of that time. His account of the wife’s behaviour (staying in

[2003] 1 FLR 99

the bedroom etc) coincided with the period of her depression. He said that it was the wife who was confrontational and treated the husband with contempt and that the husband was respectful to her. He said that normally he got out of the way if there were arguments. He had an unpleasant argument with the wife in the most recent period of employment but he denied being rude to her. He denied that it mattered to him who ‘won’ the divorce even though his accommodation and part-time work depended on the matrimonial home being retained. I took the view from hearing this witness that he was very much giving evidence for the husband who was now his personal employer and that he would not have been prepared to be open about what he saw or heard. He was in a difficult position.

May Concha

This witness worked for the family during 1996 and 1997 (as with Lito Rocha) and the family were away for 3 months of this time. She started cooking lunches for the family at weekends in February 2001 although I am not sure how long this lasted. She admitted that she envied the wife’s lifestyle and worldly goods. She said in oral evidence that she never noticed that the wife was unhappy and that she was always very happy, although quiet. This was either at the time when the wife was clearly suffering from depression or just before she filed her petition. In either case it seems unlikely. In her affidavit she had, however, said that the wife was irritable for a lot of the time and seemed to be depressed, which is itself difficult to reconcile with her oral

evidence. She said she did hear loud voices but the wife's voice was louder. She said that the husband was emotionally supportive, tender and understanding towards the wife. When re-called she said that she had cried once or twice because the husband shouted and that she blamed him for that. She said she was frightened of the husband's voice. She then went on to say, 'he is the person who always shouts, there is something wrong, he has a loud voice'. She told the court that the wife had asked her to make a statement and that the wife had wanted her to say that the reason for her leaving the family's employment was because of the husband's behaviour whereas this was not the reason although the wife might have felt it was. She said that the wife said she would 'look after her' if she made the statement, implying monetary payment. The wife said that this was untrue and that by the time this conversation was alleged to have occurred she had not intended to call Ms Concha as a witness to fact. This was backed up by her solicitor in an affidavit. I found this witness to be volatile and erratic and unimpressive in her recollection and I do not think that the wife offered any such inducement, nor do I find that she would have risked doing so knowing Ms Concha's personality and her close connection with Lito Rocha, who was at one stage her partner. There was however a ring of truth about the evidence about husband's shouting and the effect this had on her.

[29] As a consequence of my findings above I find that I prefer the wife's evidence in relation to the allegations of unreasonable behaviour.

[30] I now turn to some of the husband's complaints against the wife. Although there were undoubtedly times when the wife was feeling very low and may not have been the ideal wife and mother, I do not find that she was an incompetent or inactive mother as alleged. I accept her evidence that her children are very important to her but that when the husband was with the

[2003] 1 FLR 100

family she felt it right that he should have quality time with them and was happy that they should play and do sporting activities with him. I accept that she helped them with their homework, took them out for activities and attended the school regularly, keeping in touch with the teacher and attending parent evenings and events. According to the teacher she helped out in the classroom and went on school outings with the children. There may have been some lateness at school on occasions, especially when the wife was suffering from depression, had sleep problems and felt lethargic, but the school teacher did not raise this and it was the wife that she said she saw at school on most occasions. Perhaps surprisingly for a family of this sort there was no nanny except occasionally on holidays. It does not surprise me that the wife took the opportunity at weekends and when away on holiday with the family to allow the husband to be the main playmate since her maternal duties took place around the clock for most of the year, much of the time unobserved by the husband. I take the view that the husband's criticism of the wife as a mother is unfounded and unfair and demonstrates a lack of perception of her real role in the children's lives. The wife's mother described the wife as an excellent mother who loved and cared for her children very much, as did several other witnesses and so far as it is necessary to do so, I find that this was so.

[31] I take the view that the wife tried very hard to please her husband for a long time and that the surprise party and the magazine article were part of this behaviour. The former may not have been a very sensible thing to arrange bearing in mind the cost but I find that the husband was pleased and proud of the effort she made at the time and that it was only when these proceedings commenced that he chose to use it against her. As to the magazine article, this type of interview was clearly not unusual for members of the set to which the family belonged, to indulge in and I believe that the criticism was out of all proportion to the thing itself. Sadly it seems that the wife's last major attempt to please the husband backfired. I do not discount the possibility that the wife also enjoyed the social notice which these actions brought to her and her husband but I do not believe that this was the main reason for her becoming involved.

This was all part of the way of life in which these parties were involved and the photographs of the husband's brother's wife in her magazine article, surrounded by numerous carefully arranged pieces of silver perhaps makes the point.

[32] I must now deal with the note that the wife wrote in 1997, which was found by the husband 'on an address book that was lying on the table' in 1999, which she threw away at the husband's suggestion and of which the husband kept a copy which he produced in these proceedings 'because he was compelled to produce it'. The note is one of purple prose and consists of a description of sexual relations with a man, who is not the husband, in a somewhat lurid style. The wife told the husband it was fiction written at a time when she was depressed. She said she had written it because she had heard that her husband was seeing other women and she thought that if he read it he would realise her pain. She then thought better of showing it to him. The husband kept it and points to it as evidence of adultery. I do not think it is possible or necessary to make a clear finding on the document. It was obviously written at a time when the wife was feeling unhappy, lonely and unsatisfied in her marriage and it may have been pure fantasy. It may have been written about someone she had met and was attracted to. I do not find that it proves adultery. The wife was obviously not so concerned about it that

[2003] 1 FLR 101

she threw it away and indeed she appears to have been quite careless about whether the husband saw it. It obviously did not refer to either of the men who have recently featured in the case since she did not meet them until some time later. The production of it does, however, indicate to me that the husband is prepared to demean his wife for his own ends. He must have known how degraded she would have felt by the production of this note and yet he maintains that the marriage may be able to be mended. I have to remind myself that he is not seeking to prove a cross-prayer on unreasonable behaviour or adultery and a degree of discretion by him in relation to this might have shown true chivalry and respect on his part. He was not compelled to produce it. His action in this regard underpins my view that despite his fervently expressed wish for a reconciliation and his preparedness to 'forgive' his wife, these are not genuine and he simply wishes to 'win'. So far as it is necessary to do so I find on the evidence before me that this wife has neither committed adultery nor carried on any improper associations.

[33] As to the husband's assertion that the wife's discomfort in the marriage was due to his declining wealth, I have heard practically no evidence relating to this. One might have expected there to have been examples of occasions when the wife had railed at not being allowed to buy certain clothes or that trouble had blown up over the sale of motor cars or the yacht or that holidays had been curtailed or expenditure at charity auctions had been reduced, but very little evidence has been given to support this allegation. In fact there does not seem to be evidence of economies being made until after the interim maintenance hearing when the staff in the Surrey house were laid off. The evidence which I have read seems to relate to the wife having to ask for money from the husband, a situation that is directly connected to the failure of the husband to give any financial autonomy to the wife. In the circumstances I do not find that there is any or any sufficient evidence to sustain the husband's assertion nor do I believe that the wife's concerns centred on this aspect of the marriage.

[34] As to the evidence relating to the husband's alleged associations with other women, these are not pleaded as adultery and I do not find it necessary to make findings in relation to them.

[35] It follows from all that I have said above that, having taken into account all of the evidence, including the nature of the husband's defence to the suit, I find on the balance of probabilities that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him.

[36] This judgment is long and I will not lengthen it unduly in dealing with irretrievable breakdown in any detail. I am of the firm view that both as a result of the

behaviour outlined above and more particularly the manner in which the husband has defended this suit, there is no chance of this marriage being mended through therapy or otherwise. The husband has in his defence pulled away every foundation and cornerstone of the matrimonial relationship and it says much about his attitude towards his wife that he can even begin to think that after this there could be a reconciliation.

[37] I therefore find the petition proved, reject the prayer of the answer and subject to formalities will grant a decree nisi of divorce on the prayer of the petition.

[2003] 1 FLR 102

COSTS JUDGMENT

[1] On 6 June 2002, following a 5-day hearing between 20 and 24 May 2002, I granted the wife a decree nisi of divorce on the basis, pleaded in her petition, that the marriage had broken down irretrievably and that she could not reasonably be expected to live with the husband because of his behaviour. The husband had in his answer denied that the marriage had broken down and denied that he had behaved in the manner alleged.

[2] On 6 June 2002 after a full day's argument on costs I reserved judgment.

[3] The husband accepted that he should pay the wife's costs on the standard basis. The wife asked for indemnity costs, for an interim payment of £65,000 and interest on her outstanding costs pending assessment. Although the wife asked the court to consider making a *Leary* order for summary assessment of costs to be paid forthwith she did not pursue this application and I take the view that this was a correct approach in the circumstances. The husband's position was that there was no justification for an order for indemnity costs, that although he objected to making an interim payment, if one were to be ordered it should be in the sum of £28,000 only and that there was no basis for the award of interest on outstanding costs.

[4] *The law*

- (a) There is no dispute that the Civil Procedure Rules 1998 (CPR) Part 44 and the relevant President's Direction of 22 April 1999 (*Civil Procedure Rules 1998: Allocation of Cases: Costs*) [1999] 1 FLR 1295 apply to divorce proceedings and I will set out the relevant rules in due course. It is argued by the wife that although the Family Proceedings Rules 1991 (FPR) r 2.69 as amended (offers to settle) do not specifically apply to defended suits and are limited to ancillary relief claims (r 2.51A) the provisions contained therein, in particular r 2.69B–D (indemnity costs), can be used by analogy in a defended suit as can the similar provisions in CPR Part 36. The relevance of these arguments is that the test for the granting of indemnity costs may be different where the matter is being considered under Part 44 as opposed to under FPR 2.69C and D or under CPR Part 36.
- (b) *Indemnity costs*
Under Part 44 it seemed from the notes to the White Book (CPR) that the award of costs on the indemnity basis was normally reserved for cases where the paying party's conduct of the case deserved a mark of judicial disapproval and that such a basis for assessment should not simply apply where that party had proceeded with a case which was unlikely to be successful or where that party had failed. This was a somewhat different test from that applying under r 36 where it was said that such an award bore no stigma or implied disapproval of the defendant's conduct.
- (c) In this context the case of *Reid Minty (A Firm) v Taylor* [2001] EWCA Civ 1723 was cited in the notes. It was referred to in support of the proposition that unlike Part 36 cases the indemnity basis costs award under r 44 'is normally reserved to cases where

[2003] 1 FLR 103

the court wishes to indicate its disapproval of the conduct in the litigation of the party against whom the costs are awarded'. I have now read that case which was not before me at court and is reported at [2002] 2 All ER 150. The leading judgment of May LJ is well summarised in the headnote and reads as follows:

'A party could be made subject to an order for indemnity costs under CPR 44.3 even though there had been no moral lack of probity or conduct deserving of moral condemnation on its part ... If costs were awarded on an indemnity basis, in many cases there would be some implicit expression of disapproval of the way in which the litigation had been conducted, but that would not necessarily be so in every case. Litigation could be conducted in a way that was unreasonable and which justified an award of costs on an indemnity basis, but which could not properly be regarded as lacking moral probity or deserving moral condemnation.'

May LJ at para [19] quoted at some length from the judgment of Lord Woolf MR in *Petrotrade Inc v Texaco Ltd* [2002] 1 WLR 947, a case in which the application for indemnity costs fell to be dealt with under Part 36 rather than Part 44. He concluded that that dicta made it clear that an award of costs on an indemnity basis 'was not intended to be penal and that regard must be had to what in the circumstances is fair and reasonable'. He went on to quote at para [21] the words of Brooke LJ in *Baron v Lovell* [1999] CPLR 630, which again he said put the emphasis on what was reasonable. In the same case May LJ usefully set out at para [37] his understanding of the position in relation to Part 44 costs awards as follows:

'The approach of the CPR is a relatively simple one: namely, if one party *has made a real effort to find a reasonable solution to the proceedings and the other party has resisted that sensible approach*, then the latter party puts himself at risk that the order for costs may be on an indemnity basis.' (my emphasis)

- (d) Thus, although the note in the White Book is not incorrect, on superficial reading it is somewhat misleading, leaving one with a degree of uncertainty as to the test to be applied in deciding whether or not an award on the indemnity basis is appropriate where the case falls under Part 44 rather than Part 36 of the CPR. Upon reading *Reid Minty (A Firm) v Taylor* I felt that there was now greater clarity and that the test was nearer to the one set out in a Part 36 case, *McPhilemy v Times Newspapers Ltd (No 4)* [2001] EMLR 858, in which Chadwick LJ said (3E) that the purpose of the indemnity order (under Part 36) was to address:

'... the perceived unfairness which arose from the fact that an award of costs on the standard basis would, almost invariably, lead to the successful claimant recovering less than the costs which he had to pay to his solicitor.'

[2003] 1 FLR 104

- (e) The last case to which I refer on this topic is *Kiam v MGN Ltd (No 2)* [2002] EWCA Civ 66, [2002] 2 All ER 242. In that case Simon Brown LJ examined the dicta in *Reid Minty (A Firm) v Taylor* in the context of indemnity costs and settlement offers under r 44(3). At para [12] he gave his interpretation of the decision in *Reid Minty (A Firm) v Taylor* as follows:

'I for my part, understand the court there to have been deciding no more than that conduct, albeit short of misconduct deserving of moral

condemnation, *can* be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be *unreasonable to a high degree*; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under r 44 (unlike one made under r 36) does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory.' (my emphasis)

- (f) I conclude from my reading of the above cases that the law is unclear. In Part 44 cases does there need to be 'a high degree of unreasonableness' (per Simon Brown LJ in *Kiam v MGN Ltd (No 2)*)? Or is the test that the defendant has resisted sensible efforts to settle (per May LJ in *Reid Minty (A Firm) v Taylor*)? Or are they one and the same thing? In the absence of further guidance I will simply apply the test of reasonableness (the actual words used in r 44.3(4) and (5)), without any extra gloss, both in relation to the conduct of the case in general terms and in relation to the making or accepting of offers. I of course bear in mind in exercising my discretion in making costs orders the overriding objective of dealing with the case justly as described in CPR, r 1.1.
- (g) I take the view that the costs regime for defended divorces is clearly governed by Part 44 as applied by the Family Proceedings (Miscellaneous Amendments) Rules 1999 and that I cannot bring the provisions of FPR, r 2.69, which effectively codify the *Calderbank* procedure and are specifically limited to ancillary relief claims, in by the back door. As to the Part 36 procedure, I note from the President's Direction of 22 April 1999 (*Civil Procedure Rules 1998: Allocation of Cases: Costs*) at (b) that although Parts 43–48 of the CPR apply to family proceedings, the following is said:

'References to procedural steps and other parts of the 1998 Rules which have not yet been applied to family proceedings are to be read as referring to equivalent or similar procedures under the rules applicable to family proceedings, as the context may permit.'

Part 36 does not specifically apply to family proceedings and in my view it cannot sensibly be applied to the making of offers and acceptances in relation to the granting of a divorce. It is a very detailed procedure set up to deal with money claims or claims which include a financial element. It seems to me that such a

[2003] 1 FLR 105

specific regime is inapposite where the issue is one of status and where the granting or refusal of relief depends upon questions of the states of mind of the parties, their behaviour towards each other and other emotional and behavioural issues. If a similar procedure had been considered appropriate for the resolution of costs issues in such family proceedings I would have expected it to have been brought into existence. It was not. Part 44 was applied to family proceedings and under r 44.3(4) and (5) I am specifically directed to consider offers to settle and the conduct of the litigation and I will apply the words of those rules and my interpretation of their meaning as set out above.

- (h) Under r 44.3(4) the court in deciding what order to make about costs is directed to have regard to all the circumstances including:
- (a) the conduct of all the parties;
 - (b) whether a party has succeeded on part of his claim, even if he has not been wholly successful; and

(c) any admissible offer made by a party.

Under r 44.3(5) the conduct of the parties includes:

- (a) conduct before, as well as during, the proceedings;
- (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- (c) the manner in which a party has pursued or defended his case or a particular allegation or issue;
- (d) whether a claimant who has succeeded in his claim, in whole or in part, has exaggerated his claim.

Under r 44.3(6) the court is given a broad discretion as to how the costs order may be divided up in terms of amounts proportions and periods covered.

(i) *Interim payments*

Although Part 44 gives no guidance as to when it is appropriate to make interim orders, I note that r 44.3(1)(c) provides that the court has discretion as to when costs are to be paid and that it may under r 44.3(8) order costs to be paid on account before costs are assessed. I have also read the short report of *Mars UK Ltd v Teknowledge Ltd (No 2)* (1999) *The Times*, June 23 in which this matter (under r 44) was considered and in which Jacob J said:

'As to whether an interim payment should, in general, be ordered, the rules give no guidance. Approaching the matter as one of principle, the only reason why a successful party who had won with costs, did not straightaway get his money was the need to await a detailed assessment: to make an interim order for some lesser amount, which he would almost certainly collect, was a closer approximation to justice. In general an interim order should be made. However in exercising its discretion the court had to take into account all the circumstances, one of which might be an unsuccessful party's wish to appeal; others, the

[2003] 1 FLR 106

relative financial position of each party and the court's overriding objective to deal with cases justly.'

- (j) In these circumstances I take the view that I have power to make such an order and should do so unless there are clear reasons why it would be unfair. Guided by the words of Jacob J in the above case, the sum, if ordered, should be of some lesser amount than claimed 'being such as that party would almost certainly collect'.

(k) *Interest on costs*

Rule 44.3(6)(g) gives the court power to make an order for interest upon costs from or until a certain date, including a date before judgment. Miss Baron QC on behalf of the wife argues that by analogy with r 36.21(6) the court may award interest up to 10% above base rate. There is no guidance under r 44 in relation to this.

[5] *The costs in this case*

I have been provided with a detailed schedule of the wife's costs in the suit up to and including 6 June 2002, which amount to £130,145.50. As to the husband's costs I was given a rough verbal estimate during the hearing (on, I believe, the third day) which amounted to some £148,000 of which 70% (£103,600) was said to be costs of the suit. To the end of the 6 June the total would therefore have amounted to somewhere over £120,000 in broad terms. In fact when we came to court on 6 June the husband's one-page costs estimate for the suit amounted to £86,314. I was told that the initial

estimate had been done in the corridor and that when the files were looked at in more detail it was decided that the proportion attributable to the divorce suit was less than had been thought. The wife's counsel is sceptical about the fact that the husband's estimate has been reduced significantly from a figure which had not been dissimilar to her own costs. She fears that this might be because on a standard taxation the question of proportionality would arise, the wife having the onus of showing that the costs are reasonable and that the discrepancy between the husband's and wife's costs as they now stand would be prejudicial to the wife's arguments on such assessment. It is also notable in this context that the husband's current calculation of a reasonable interim order uses, as a basis, the husband's lower estimate of costs, thereby producing a figure of £28,000, being one half of two thirds of the husband's figure of £86,000 (to be paid over 9 months). On 19 April 2002 the wife's solicitors warned the husband's solicitors that counsels' briefs were deemed delivered on 22 April 2002.

[6] *The wife's financial position*

My understanding is that the wife has no capital or none of significance. Her costs have been funded by a loan from SG Hambros and I have seen a letter dated 5 June 2002 which shows that the total borrowing limit is £150,000 and that the loan is currently drawn to the extent of £126,690. Interest is being charged at 3% pa over base rate. I understand that it will be difficult, if not impossible, to extend this limit and that the full £150,000 has already been used up by reason of the combined costs of the ancillary relief application and of the suit. It is argued on behalf of the wife that if no interim order is made she will be in very considerable difficulties in properly contesting the

[2003] 1 FLR 107

ancillary relief proceedings, a position, it is said, the husband has deliberately brought about. It is also necessary to mention the continuing cost to the wife of the borrowing, which is being funded from the maintenance pending suit order (made in a lesser sum than was sought by the wife) on 31 August 2001. Thus, she says that without interest being paid, her and the children's position will continue to deteriorate whilst the ancillary relief hearing is pending, which hearing may well not take place until the early part of 2003.

[7] *The husband's financial position*

It is said that the husband has had major losses at Lloyd's and as things stand he will have to pay, in due course, £918,000. He has also failed his recent solvency test for Lloyd's and I have seen a letter in this regard. I have not investigated his finances nor indeed reached any clear view of his overall financial position. It is complicated in the extreme; there is very considerable dispute on the subject and it will probably be minutely examined at the ancillary relief hearing. In evidence the husband said that the family's businesses are in fragmented ownership, that in the past a buyer had been sought in the sum of £100m and when asked if there was a great deal of wealth in the family he replied 'overall in the group, in its entirety, yes'. Added to this I remind myself that the husband (or perhaps his family) own the very luxurious house in Surrey upon which about £2m was apparently spent in the recent past and of which he and the wife and children have sole use, the luxurious yacht near Athens, with four or five permanent staff, together with flats in Chelsea and Athens and a valuable art collection. The husband flies back and forth to Greece on a frequent basis and until quite recently was able to spend substantial sums at charity auctions. The children's school fees amount to some £25,000 pa and there were, until the maintenance pending suit proceedings, two resident staff members at the Surrey house. I accept that the husband must have very high outgoings but then people who have the lifestyle described to me do have such outgoings and there did not seem to me to be much of a change in the parties' lifestyle until the wife filed her petition. In evidence, when asked whether he was defending the divorce so as to prevent the wife from proceeding against him for ancillary relief, he said that to have his wife living with him would cost

more than if she was living away from him and that in the event that the divorce was refused he would continue to provide her with the matrimonial home, the yacht and the flat in London, the latter so far as he was able to do so by the company. On 6 June I was told that the husband will now be seeking a variation downwards of his interim maintenance obligations.

[8] In the circumstances I must ask myself whether a man of business who is allegedly in such dire financial straits could really be so imprudent as to participate in a 5-day defended divorce with witnesses being flown in from abroad, presumably whilst having some idea of the level of cost of such an operation and the risks he faced in relation to paying the wife's costs, without having some way of funding it? It would be seriously irresponsible for him not to have provided in some way for this, bearing in mind that his wife does not have any assets. Failing all else, one must assume that even if he has no way of raising the money from liquid capital at present he would be able to borrow against his assets for these purposes. Accordingly I am not impressed by the husband's assertions that he will not be able to pay an interim order or that on financial grounds he cannot pay costs on the indemnity basis or interest on

[2003] 1 FLR 108

costs. If at the end of the financial proceedings it is found that the husband is as badly off as he protests, then the order made at that stage will properly reflect that position. In the light of the evidence of which I am aware, as summarised above, I do not think that it would be right or sensible for me to make any finding which might prejudice that issue.

[9] *The conduct of the case and the offers*

It seems to me that I can look at this case in two alternative ways. The first is on a micro basis whereby I examine all the offers and developments in detail during the period from March 2001, when the petition was filed, up to and including the hearing and then decide what was and was not reasonable in the conduct of the case at each stage. Alternatively I can consider it on a macro basis whereby I examine it on a broader and larger basis. Having considered the matter carefully I do not think it is possible to analyse it in minute detail and that justice will be served if I look at the position on the broader basis.

[10] The first point concerns whether this matter could or should have been settled and who was responsible for the fact that it did not. The wife succeeded in showing that the marriage had broken down irretrievably and that she could not reasonably be expected to live with her husband. The husband had denied that the marriage had broken down irretrievably and that he had behaved unreasonably. The case of *Lawlor v Lawlor* [1995] 1 FLR 269 had been cited in correspondence and in the husband's opening submissions as authority for the proposition that a spouse who disagreed that a marriage had broken down and disputed that she had behaved unreasonably should not be forced to agree to a divorce even if on an objective consideration of the merits, it appeared she might lose and that her view of the possibility of a reconciliation was misguided. In that case Butler-Sloss LJ said at 272C:

'The fact that, at the end of the day, the wife may lose and that her view of a reconciliation may be misguided, and she has made admissions which may in themselves amount to support for the petition, is not a good reason at this early stage of the proceedings to prevent her side of the case from being heard, or to deny her the chance to oppose the petition which the Matrimonial Causes Act 1973 allows her to do. This was a fault based petition and she is entitled to defend serious allegations of behaviour which, from the beginning, she has indicated she has wished to defend ...'

The learned judge went on to say at 272F:

'In all jurisdictions ... a respondent is entitled to be heard in response to allegations made by those bringing proceedings. The fact that nearly all divorces are nowadays undefended does not mean that there no longer remains the right of a respondent to a petition to defend, even though that respondent chooses not to cross-pray.'

The learned judge after observing that the judge below had considered the merits of the answer on paper and considered its prospects of success and refused leave to file the answer out of time said at 272G:

[2003] 1 FLR 109

'It was not the right approach at such an early stage of the pleadings.'

I refer to this case in some detail because one must remind oneself that this was a case where the wife was a few days out of time with her answer and, upon applying for leave to file it, the district judge and then the judge refused leave on the basis that she had little prospect of success in defending the petition. It was in this context that the decision was made. In two of the quotes above, Butler-Sloss LJ qualifies what she says by adding 'at such an early stage in the proceedings'. I wonder whether the learned judge intended her words to be used to allow a person to continue to defend proceedings to the bitter end and at enormous expense when, as I find, the petitioner had from the start offered to amend the particulars of behaviour in the petition so that it could be an agreed document (27 March 2001 and repeated 22 November 2001). Furthermore I wonder whether this case was intended to be authority for the proposition that even where the respondent accepted that the marriage had broken down irretrievably (in this case unbeknown to the court because the acceptance was in a *Calderbank* letter) that he should be entitled to contest the case from beginning to end on the basis that it had not, and thereafter seek to avoid an order for costs on the indemnity basis using the argument that he had a right to contest the case without attempting to reach any realistic compromise.

[11] I remind myself here that the only ground for divorce under the Matrimonial Causes Act 1973 is irretrievable breakdown. In my view once the husband had recognised that the marriage had broken down irretrievably he should have started the process of seeking a compromise so as to avoid the inevitably painful and costly process of the defended divorce. He should not have defended it, as he did throughout, on the basis that it had not broken down. He should have tried to find ways to ameliorate the position, most obviously by offering to cross-pray on the wife's unreasonable behaviour, many examples of which he in fact relied on in the defended suit. I do not say he should have been forced to do so, but that if he did not make any proper effort to do so and allowed the case to proceed as he did then he was being unreasonable and should not be surprised that the wife should obtain her costs on the indemnity basis. In this context I am reminded of the words of Singer J in *A v A (Costs Appeal)* [1996] 1 FLR 14 (an ancillary relief case) at 25E:

'While one can never say that this or any other case would have settled if the *Calderbank* door had been kept open by timely and reasonable reply, the critical point is that to slam the door through inactivity, lack of objectivity, indecision or for whatever reason makes potentially avoidable litigation inevitable.'

[12] My concern as to the husband's motivation in defending this suit is underlined by the fact that in his *Calderbank* letter of 2 May 2002 not only was it said: 'Our client has decided reluctantly that there is no future in the marriage', but also 'In those circumstances he is prepared to divorce your client for adultery with an unnamed man'. It cannot therefore be argued by him that he was not prepared for a divorce to take place and should therefore be entitled to contest it despite the breakdown. Why did he not suggest that the divorce be granted on the wife's behaviour as an alternative, since

he clearly thought he had grounds and was not afraid to raise them in the

[2003] 1 FLR 110

proceedings? The only answer can be that he was prepared to obtain a divorce but only on his terms, namely adultery. Furthermore there is no reasonable explanation for his insistence on adultery as a 'ground', unless it was a matter of pride, since, when asked in evidence whether if the wife had committed adultery this would mean, to him, the end of the marriage he said 'No!' It is also of note that on 1 May 2002 the wife's solicitors had written in open correspondence (by fax) expressing some confusion as to why as late as 24 April 2002 the husband had for the first time raised the issue of the wife's alleged adultery and asking whether he was now suggesting that he would cross-petition on the basis of the wife's unreasonable behaviour. In that letter the solicitors invited the husband's solicitors to send them a draft schedule of allegations for their consideration. Thus the husband was aware by the time that his *Calderbank* letter of 2 May was written that the door was open to negotiation on the basis of a cross-prayer based on the wife's unreasonable behaviour. On 3 May the wife's solicitors wrote saying that the wife denied adultery or improper association (indeed, as I found, the evidence for this was quite insufficient). On 13 May in a *Calderbank* letter the wife offered various alternatives including cross-prayers on unreasonable behaviour with indemnity costs and on the same date in her sworn statement she said at para 4: 'I would be prepared to accept cross-decrees, or, in the final analysis, a divorce by the respondent on accepted behaviour ... in order to bring a dignified end to our marriage'. Accordingly it seems plain to me that the wife would have been open to negotiation in relation to cross-decrees or even to the husband obtaining a decree against her on behaviour if only he had acted sensibly in his negotiation.

[13] The husband argues that the wife's proposals of 13 May were unacceptable because they were premised on the payment by him of indemnity costs. I do not think that this argument avails the husband for the same reasons as set out above, namely, he did not even try. It is impossible to know how the wife would have reacted to the suggestion of a compromise (in relation to behaviour) on the basis of standard costs (or even no order) at any given time. Bearing in mind her efforts throughout to try to avoid a contested suit and the concession in her final sworn statement, it is more than possible that she would have been prepared to concede on costs, at least in agreeing an order on the standard basis.

[14] I now turn to the second main point, namely the conduct of the case itself, under r 44.3(5). The wife says that the conduct of this divorce by the husband was really a campaign to wear her down and make her behave as he wanted and was an example of the very bullying and controlling behaviour that she complained of during the marriage. I will concentrate only on what I consider to be the important aspects of this. First, the husband in his counsel's opening submissions and throughout the hearing asserted that this marriage had not broken down irretrievably. This was one of the main planks of his argument to justify the continuation of the proceedings to the bitter end and a great deal of evidence was devoted to this theme. To my surprise and indeed horror I discovered after having given judgment that on 2 May 2002 in *Calderbank* correspondence he had expressed his view that the marriage had no future – in my view a clear description of his state of mind. This was in my view hypocrisy if not dishonesty. The letter did not say, as it could have done, that, for example, the husband would agree to a divorce on certain grounds so as to avoid the unpleasantness and costs of defended proceedings or that he

[2003] 1 FLR 111

would do so because he recognised that the wife was not now prepared to reconcile. He said in terms that he accepted that there was 'no future in the marriage'. He then proceeded to tell me at length that there was. I should add that on the second day of the hearing the parties attended another judge on the wife's application for this letter

to be disclosed in the proceedings but that that application was refused.

[15] Secondly, as I said in my judgment, I found it difficult to understand why it had been necessary for the husband to defend these proceedings and assert that the marriage had a future by means of such a violent attack on the wife as a mother, wife and person. I will not go into the details but a more fundamental assault on a person's character I have seldom seen and never where a party is trying to show that a marriage has a future. The attack was made all the worse by the calling of a number of witnesses to support his arguments. The husband said that it was necessary for this evidence to be given so that he could defend himself and explain why the wife was seeking a divorce. I do not agree. The allegations went far beyond what was necessary and indeed completely undermined the husband's argument (at the hearing) that this marriage had a future. The allegations relating to adultery with the polo instructors were brought in at the last moment, I fear to unsettle the wife, when the husband had been aware of the rumours, according to one of his witnesses since some time in 2001. It took nearly 3 weeks for the wife's solicitors to extract the names of the men involved from the husband's solicitors and then they were incomplete. The husband's solicitors had said in their letter of 2 May, 'He has evidence that your client has committed adultery'. The evidence in fact amounted to no more than hearsay tittle tattle and got nowhere near establishing either adultery or improper association. The production of the note written by the wife in 1997 added nothing to the forensic exercise and only served as a means of degrading the wife and possibly deterring her from continuing with the proceedings. I have had to wonder whether counsel for the wife is right when she says that the husband's purpose in contesting the proceedings in this manner was a form of bullying of the wife so as to make her submit and withdraw the proceedings and that the real motivation was to avoid the financial consequences of a divorce. I do not need to make findings on this but I also note that on 14 May 2002 the husband's solicitors were declaring that all the husband's witnesses would be attending court, yet when it came to it two of the witnesses had longstanding medical conditions which prevented them from attending so that one had to give her evidence by video link (arranged at the last minute) and the other did not give evidence at all. The witnesses' medical/travel problems must have been known to the husband before 14 May so one is left wondering whether it was really ever intended that all the witnesses would come to court and whether the letter of 14 May was more a form of sabre rattling.

[16] In conclusion I find that for the reasons set out above the manner in which this case was conducted by the husband was unreasonable and, in the case of his evidence relating to his state of mind concerning the future of the marriage, bordering on being dishonest. In my view this finding together with the views I have expressed above as to the unreasonableness of his stance over settlement give me good grounds to make an order for costs against him on the indemnity basis.

[17] I now consider whether under r 44.3(6) the order for costs on the indemnity basis should be made for the whole of the proceedings or for part. I

[2003] 1 FLR 112

have looked again at the correspondence to try to find some indication of when it must have been clear to the husband that there was no future in the marriage and when it became incumbent on both parties to make every effort to find a mutually acceptable way of bringing it to an end. I believe that the key period was the early part of November 2001 when the husband's wish to defend apparently turned into a wish to defeat. Although I did not need to make specific findings in my judgment in the suit relating to the events of that period, I find that the type of arguments and abuse set out by the wife in her letter of 8 November 2001 did take place. The husband admitted in evidence that he might have said to the wife that if she left she would get nothing, in a moment of fury. I believe that there were indeed times when he said things in fury and rather more often than he liked to remember. I will not try to summarise the letter of 8 November which consists of five tightly typed pages outlining patently abusive and threatening words and behaviour by the husband. Page 2 is, however, significant as it

bears a striking resemblance to some of the matters that later appeared in his sworn statement, in particular that the wife never took care of the children and that it was his view that she had only married him and had children so as to trap him financially and that the divorce was planned by her from the very beginning of the marriage. If this was said in early November, as I find it was, it seems to me that here is plain evidence that the husband must have believed that from his own point of view the marriage was and always had been a sham and that it had not merely irretrievably broken down but that it had never properly existed as a loving and trusting partnership in the first place. It may well be that his view of his wife and the marriage was in place some time before this, but on this point I will give him the benefit of the doubt and assume for the purposes of the costs exercise that he had some genuine if misguided view that the marriage was capable of being 'mended' prior to this point and he was therefore entitled to test out, by defending the proceedings, whether the wife really intended to continue with her petition or not.

[18] No efforts were in fact made by the husband to settle the matter after this point until 2 May 2002 (as referred to above) when the preparations for trial were almost complete and the briefs for the wife had been delivered. In the meantime the husband unreasonably cranked the case up into a full-scale attack on the wife as above set out. In these circumstances I will order the husband to pay the wife's costs of the suit on the standard basis until 16 November 2001 and thereafter on the indemnity basis (that date being 2 weeks from the date upon which the argument of 2 November 2001 described in the letter of 8 November took place).

[19] As to an interim payment, the wife asks for one half of the amount set out in her schedule of costs, namely £65,000. I believe that on the indemnity basis she will certainly obtain such a sum on assessment and see no reason to give her less. To enable the husband to raise the money I will order that the sum be paid as to £35,000 by 18 July 2002 and the balance by 18 September 2002. Interest will be payable upon any sum unpaid at the rate of 6% pa above base rate.

[20] As to interest upon her costs I will order that the husband do pay interest at such rate as is/has been at any time payable by her to SG Hambros or to any such other lender as may lend her money for the purposes of funding the costs of the suit. The interest will run on the interim payment of £65,000 from the commencement of the borrowing until payment by the husband and

[2003] 1 FLR 113

will be payable together with each tranche of the interim order when such tranche becomes due. The interest on the remainder will run from the commencement of the borrowing and will be payable after assessment or agreement and at the same time as such assessed or agreed sums become due.

Order accordingly.

Solicitors: *Levison Meltzer Pigott* for the petitioner
Sears Tooth for the respondent

PHILIPPA JOHNSON
Law Reporter