IN THE ROYAL COURT OF JERSEY

Matrimonial Causes Division

4th April, 1989

89/14A

52

Before: Mr. V.A. Tomes, Deputy Bailiff
Jurat P.G. Blampied
Jurat D.E. Le Boutillier

Between	V	Petitioner
And	O	Respondent

Advocate Mrs. S.A. Pearmain for Petitioner
Advocate G.R. Boxall for Respondent

It is necessary to summarise the earlier history of this sorry saga of matrimonial dispute.

Cross-summonses came before the Greffier Substitute on the 10th December, 1984, pending suit. He ordered, by consent, that D and N, the children, issue of the marriage between the petitioner and the respondent, remain in the joint legal custody of the petitioner and the respondent whilst remaining under the care and control of the petitioner; by consent, that the respondent have, from time to time, access to the children within the Island; and, by consent, that the respondent pay to the petitioner pending suit or until further order the sum of £14 per week towards the support of the petitioner and the sum of £18 per week towards the maintenance of each of the children. The respondent's application for staying access to the children was dismissed. The costs of the hearing in relation to the petitioner's application were to be costs in the cause and the costs of and incidental to the respondent's application were to be paid by the respondent. The Greffier Substitute noted that the respondent had undertaken to continue to be responsible for the payment of mortgage instalments due on the matrimonial home.

On the 27th February, 1985, the Court decreed that the marriage between the parties be dissolved by reason that the respondent had committed adultery with L, co-respondent. The Court also ordered that the

Order of the Greffier Substitute of the 10th December, 1984, should remain in force until further order.

On the 17th October, 1985, Mr. Commissioner Dorey made an Order to the effect that the petitioner should receive all the nett proceeds of the sale of the former matrimonial home, in St. Peter, in the event that such sale should become necessary as a result of the failure of the respondent to pay all the mortgage instalments due on it, in accordance with his undertaking noted by the Court on the 10th December, 1984; the Commissioner also decided that the respondent be ordered to transfer to the petitioner all his interest in the chattels situate in the said home, with the exception of certain specified items. Applications relating to a reduction of maintenance and the costs of the action were adjourned sine die.

The decree nisi of divorce was made final and absolute on the 3rd March, 1986.

On the 20th July, 1987, the Greffier Substitute dismissed, with costs, an application from the respondent for variation in the quantum of maintenance paid in respect of the petitioner and the children of the marriage.

The Court, as at present constituted, sat on the 13th October, 1987, to hear cross-summonses dated the 24th September, 1987. The respondent sought an order to vary that of the 17th October, 1985, so that the former matrimonial home, in St. Peter, might be sold and the nett proceeds divided between the petitioner and the respondent in such proportions as might be just and this notwithstanding the failure of the respondent to pay a mortgage instalment due on the property by reason of his inability to do so because of ill-health. The petitioner sought an order whereby the Court should nominate such person and on such terms as it might consider just to act for the respondent to effect the sale of the property following the respondent's failure to pay the mortgage instalments due on it and to pay the nett proceeds of sale

to the petitioner in order to enforce the Commissioner's Order dated the 17th October, 1985; and should order the respondent to pay the costs of the application and of the person nominated to act on his behalf.

Upon hearing the advocates of the petitioner and the respondent, the Court ordered 1) that the former matrimonial home be sold as soon as possible; 2) that the Viscount be appointed to represent the respondent in the matter of the sale and, if necessary, be appointed to pass contract on behalf of the respondent, but that it be open to the respondent to make any representations to the Viscount on the question of the sale price of the property or any other matters relevant thereto; 3) that out of the proceeds of sale the mortgage due to Associates Capital (Jersey) Limited ("Associates Capital") be reimbursed immediately; 4) that the costs of and incidental to the sale be paid immediately out of the proceeds of sale; 5) that out of the proceeds of sale there be an immediate payment to the petitioner of the sum of £5,000, the balance to be held by the Viscount until further order and to be placed on deposit on the most advantageous terms available on short notice; and 6) that the further consideration of other matters in the summonses be adjourned sine die. The Court stressed that both Counsel should co-operate about a date for the further hearing of the outstanding issues, but without prejudice to the right of the petitioner to argue i) that estoppel applied to prevent a variation of the Order of the 17th October, 1985; and ii) that the summons of the respondent must be dismissed by reason of the lack of a supplementary affidavit of means from the respondent. Failing either or both those grounds being pursued or succeeding, the Court would hear the application to vary the Order of 17th October, 1985, at large, and, of course, the question of conduct would be taken into account.

The Court sat again on the 1st February, 1988. Mrs. Pearmain took as her first preliminary objection on the petitioner's behalf, the second of the matters reserved to the petitioner in our decision of the 13th October, 1987, i.e. that the summons of the respondent must be dismissed by reason of the lack of a supplementary affidavit of means from the respondent.

The respondent's application of the 24th September, 1987, was not at that time supported by an affidavit. Subsequently, the respondent filed an affidavit dated the 17th November, 1987, which the petitioner presumed he wished to be used in support of the 24th September, 1987, application.

Mrs. Pearmain relied on Rule 52(2) of the Matrimonial Causes (General) (Jersey) Rules, 1979, as amended, ("the Rules"):-

"(2) An application for a modification order shall be supported by an affidavit of the applicant containing a detailed declaration of his assets and liabilities and particulars of all charges against such assets, together with full particulars of the grounds on which the application is made".

An exception is made in paragraph (4) of Rule 52 in the following terms:-

"(4) Notwithstanding anything in paragraphs (2) and (3) of this Rule, no affidavits need to be filed if the parties are agreed upon the terms of the proposed modification order."

Here, the parties were not agreed and Mrs. Pearmain submitted that the respondent's affidavit should not be admitted and that the respondent's application should be rejected as not complying with Rule 52(2). In short, that the provisions of Rule 52(2) are mandatory.

In the alternative, Mrs. Pearmain submitted that the only Rule dealing with filing documents out of time is Rule 20 of the Rules which provides that:-

"No pleading shall be filed out of time without leave after the Greffier's certificate has been granted under Rule 31."

If the affidavit was a 'pleading', which was not admitted, no such leave had been given and therefore the respondent's application should be rejected as not complying with Rule 52(2).

The Court can dispose of this alternative immediately. It is clear from a reading of the Rules that an affidavit under Rule 52 is not a 'pleading' within the provisions of Rule 20, which is an answer or other pleading consequent upon the filing of a petition in a matrimonial cause.

Mrs. Pearmain said that she was not one to rest on the niceties of pleading, but in this case justice demanded that the niceties be observed.

Further and in the alternative, Mrs. Pearmain argued that if there was authority in the Court to admit the affidavit out of time then such admission would be at the discretion of the Court and that such discretion should not be exercised as (a) the respondent had not issued a summons requesting the Court to allow him to file the affidavit out of time; (b) the respondent's affidavit gave no explanation as to why his application for a modification order, dated 24th September, 1987, was not supported by an affidavit complying with Rule 52(2); nor why, although the previous Court hearing was on 13th October, 1987, it took until 17th November, 1987, for the respondent to swear an affidavit in support of his application; and further or in the alternative, the respondent or his advocate failed to use due diligence to promote his application in that once his advocate received notification of the proposed sale of the property by the petitioner's advocate's letters of the 11th and 26th August, 1987, he should have taken effective steps to prepare and file the application for a modification order with the supporting affidavit which he failed to do; therefore the petitioner's rights under the Commissioner's Order of 17th October, 1985, should not be varied as a result of the petitioner's delay for which no explanation had yet been received.

Mrs. Pearmain submitted that it was only when the respondent realized that the petitioner and the children would be forced into a guest-house that he tried to act to resolve matters, but Mr. Boxall should have taken effective steps.

Mrs. Pearmain further submitted that if the Court should decide that the respondent's affidavit of the 17th November, 1987, was not admissible and the respondent then requested the Court to accept his affidavit of the 8th June, 1987, this should be rejected also because it did not give full particulars of the grounds upon which the application for a modification order was made; the affidavit of the 8th June, 1987, was filed in support of the respondent's application of the 18th June, 1987, to reduce or suspend either permanently or for such period as might be appropriate in the circumstances of the case the maintenance ordered to be paid for the petitioner and the children on the 10th December, 1984; that application was dismissed with costs on the 20th July, 1987. The affidavit of the 8th June, 1987, did not comply with the Rules.

Finally, Mrs. Pearmain submitted that it was because the Court would not reduce the maintenance that an application by the respondent for a share in the capital value of the property was made. The respondent claimed that the high mortgage payments were the reason but he simply did not pay. The affidavit of the 8th June, 1987, did not deal with the changed circumstances or reasons why the earlier Order as to the matrimonial home should be varied.

Advocate Boxall made the point that if Rule 52 were to be applied strictly then the petitioner's affidavit would likewise be rejected.

Rule 52(3) provides that:-

"(3) The respondent to the application may within fourteen days after delivery of the affidavit to him or his advocate or solicitor, file an affidavit in answer, but no further evidence shall be filed by any party without leave".

The respondent's affidavit of the 17th November, 1987, was delivered to Mrs. Pearmain on the 23rd December, 1987. The petitioner's affidavit in answer was dated the 25th January, 1988; thus it too was out of time. Mrs. Pearmain said that the latter affidavit was filed solely to assist the Court (and

thus, presumably, outside Rule 52(3)); the affidavit of the respondent, albeit delivered by letter dated 23rd December, 1987, had not reached her until early January, 1988.

We observe that Mrs. Pearmain did not cite a single authority to support her submissions about the late filing of the respondent's affidavit.

Mr. Boxall urged that the word "shall" in Rule 52(2) of the Rules does not mean that the affidavit supporting an application for a modification order must be filed simultaneously with the application; that "shall" is not mandatory, but merely directory. He referred the Court to Jowett's Dictionary of English Law, 2nd edition, at page 617:-

"Directory. A provision in an Act of Parliament, rule of procedure, or the like, is said to be directory when it is to be considered as a mere direction or instruction of no obligatory force, and involving no invalidating consequence for its disregard, as opposed to an imperative provision, which must be followed. The general rule is that the provisions of a statute relating to the performance of a public duty are so far directory that, though neglect of them may be punishable, yet it does not affect the validity of acts done under them; as in the case of a statute requiring an officer to prepare and deliver a document to another officer on or before a certain day."

Mr. Boxall's argument was that whilst rules are there to be observed and compliance is important, a procedural direction is not mandatory. If Rule 52(2) had been intended to be mandatory, it would have or should have required the affidavit to be filed "at the time of the making of the application". Rule 52(2) was not specific whereas Rule 52(3) was specific, requiring the filing of an affidavit in answer to be "within fourteen days". The latter provision is mandatory and the petitioner was out of time. There was nothing in Rule 52 requiring the issue of a summons in the event that an affidavit was out of time; if such were the requirement, the rule would have to say so very clearly. Rules 52(2) and 52(3) should be compared and read "in the round". The filing of an affidavit under Rule 52(3) arose "after delivery of the affidavit to him", but

"delivery" could take place after the application was filed; time would not run against the petitioner until the applicant (respondent) had delivered a copy to the petitioner. Article 52(4) relating to a consent order merely avoided mounds of unnecessary paper being exchanged. There was nothing on the face of Rule 52 to suggest that the respondent had defaulted.

As a fall-back position, Mr. Boxall argued that there was nothing to make the default such as to exclude the applicant totally thereafter. It would be a nonsense if the application were to proceed without an affidavit to assist the Court to do justice and here Mrs. Pearmain was making the even more startling submission not only that the application should proceed without an affidavit but that it should fall away completely. Mr. Boxall was unable to explain the five week delay between the swearing of the affidavit on the 17th November, 1987, and its delivery on the 23rd December, 1987, but the affidavit in answer was not sworn until the 25th January, 1988, and, if the respondent's affidavit was out of time, then, a fortiori, the petitioner's affidavit was out of time and should be excluded. The length of the delay was immaterial because distinctions of delay cannot count if the letter of the rules had to be complied with.

Mr. Boxall referred us to Rayden's Law and Practice in Divorce and Family Matters, 14th Edition at page 519, dealing with affidavit evidence; that passage deals with affidavit evidence at a trial and applications made ex parte for evidence to be given by affidavit and, in the Court's view has no relevance to the question now under discussion. Mr. Boxall also referred us to The Supreme Court Practice 1988 (the "White Book") Order 28 at pages 466 and 468; he conceded that the rules under Order 28 were not particularly in point but, he said, there is a dearth of authority. Order 28 deals exclusively with originating summons procedure and the Court does not find it of assistance.

Counsel also submitted that rules as to time are not such that if they are not complied with the next procedural step is disallowed and the whole action falls away; this would be a novel situation; if the other party felt prejudiced the correct action was a summons seeking a striking out; but on such

a summons the Court would not strike out but would issue a peremptory order, specifying the last date by which a particular step should be taken.

Finally, Mr. Boxall submitted that the petitioner had not suffered any prejudice; prejudice had been suffered as a result of the onerous mortgage arrangement into which the parties had together entered and the inability of the respondent to extricate himself from it because of the petitioner's perverse refusal to enter into a re-mortgaging and repayment arrangement.

The question which the Court has to decide is whether it is bound to nonsuit the respondent because of his failure to file an affidavit in support simultaneously with his application for a modification.

In Sayers et uxor -v- Briggs & Company (Jersey) Limited (1963) J.J.249 at p.251 the Court said:-

"We do not believe that to insist on the niceties of pleading serves any useful purpose in the administration of the law unless it can be clearly shown that any failure so to do would have for effect to take a party to the proceedings by surprise or to deprive him of a defence that might otherwise be open to him".

That statement was repeated in a second action between the same parties (1964) J.J. 399 at p.401.

In Jackson -v- Jackson (1965) J.J. 463 at p.467 the Court said this:-

"In our opinion, a Court is bound to enforce the substance of its own rules but not the letter if a failure to do so could have no real effect on the parties concerned."

That statement was approved by the Court of Appeal (1966) J.J. 579. The relevant extract of the leading judgment is at pages 584 and 585 as follows:-

"In the reasons for the judgment now appealed from, the opinion is expressed that a Court is bound to enforce the substance of its rules but not the letter if a failure to do so could have no real effect on the parties concerned. I see no reason to dissent from this opinion; it is supported by an extract from the work of Poingdestre (Lois et Coutumes - Chapter "Des Semonces ou Ajournements" p.159) which can fairly be translated as follows:-

> 'In addition to these matters we also add others that are of little weight and which are matters more of style than of necessity; which we could omit, without any risk, if we were dealing with Judges who were less attached to the form, and more interested in the substance of the law. But the evil is that our Judges allow the advocates to prate with regard to the spelling of words, and other ineptitudes of a similar nature, in order to establish that a summons is invalid, despite the fact that it is sufficiently valid in so far as its substance and essential requirements are concerned: Instead of which they should check all this chicanery, which is shameful; and only serves to multiply costs and lawsuits; and to waste time, which is so precious; and to give licence to imposters and (provide) amusement for sluggards; I say shameful, nay verily unbecoming in any Court; but much more so in a court of superior jurisdiction which derives its authority directly from Her Majesty's person, where nothing should be permitted that is trivial and which is not of a nature to be weighed with care and deliberation. And therefore I earnestly wish that this, amongst other things, should be the subject of reform'.

"Effect to the reform earnestly wished by Poingdestre was given by Articles 6 and 7 of the 'Règlement modifiant la procédure de la Cour Royale en matière de rédactions de depositions, etc', confirmed by Order of Her Majesty in Council of 29th December, 1853. The rectifications which the Court can allow under those provisions are strictly limited, but I am not prepared to say that the Court would not, in these days, go beyond those provisions in applying the spirit of Poingdestre's commentary, but one of the essential conditions would be that the rectification should not cause prejudice or embarrassment to the parties."

In In the matter of the Representation of De Sousa (1985-86) J.L.R. 379 the Court said (at p.386):-

"....we have no hesitation in declaring that beyond any possibility of doubt the Royal Court, in so far as its own orders are concerned, has an unrestricted power to vary them retrospectively and that, in the case of periodical payments after divorce, the power to vary extends backwards to the date of the decree nisi."

And at page 387:-

"....the Royal Court has, in our judgment, jurisdiction to back-date an order varying or discharging or suspending a maintenance order, even if that results indirectly in maintenance already accrued due being remitted."

In Lablanc Ltd -v- Nahda Invs. Ltd. (1985-86 J.L.R. N-4), a striking out action, the Court held that there was a matter fit to be investigated and the court should therefore be reluctant to deny the plaintiff the opportunity of presenting its case. Although the plaintiff had been guilty of breaches of rules, the worst that could be said of its conduct was that it amounted to tardy compliance with orders of the court. The delay was neither inordinate nor contumelious and the claim would therefore not be struck out.

The modern approach to non-compliance with rules is reflected in Order 2 rule 1 of the Rules of the Supreme Court (The Supreme Court Practice 1988 page 9) from which we quote:-

"1-(1) Where....at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

"(2)....the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit."

In our view that rule accords with common-sense and justice and it is to be regretted that there is no similar rule in the Matrimonial Causes (General) (Jersey) Rules, 1979, as amended.

The question here is not so much whether the rule is mandatory or directory as one of interpretation; we have no doubt that the rule is imperative in the sense that at the time of the hearing, the application must be supported by an affidavit of the applicant containing those matters specified in the rule and we would go so far as to say that in default of an affidavit the Court would have no jurisdiction to hear the application.

But the rule is silent as to time; as Mr. Boxall pointed out, the rule does not say that the affidavit is to be filed simultaneously with or at the time of the filing of the application. Although, no doubt the draftsman intended that the affidavit should be so filed, the rule as drafted is not imperative in that sense. Thus, the Court is not prevented from applying the other authorities to which we have referred, notably Jackson -v- Jackson; the overriding factors are prejudice and the "real effect" on the parties.

If we had rejected the respondent's application on the ground of non-compliance with rule 52(2) of the Rules he could have filed another application, supported by affidavit, (unless estopped from doing so, with which question we shall deal later), because Article 32 of the Matrimonial Causes (Jersey) Law, 1949, was amended specifically to enable variations of orders made under Article 29A of the Law (Power of Court to order sale of property).

In those circumstances the Court is not prepared to rule the respondent's affidavit as inadmissible; the paramount aim in matrimonial causes of this kind is that justice should be done to both parties and justice is more likely to be achieved if the Court is able to consider the application on its merits rather than have to decide it on procedural grounds. The overriding tenor of the authorities is that ancillary orders should always be subject to variation until after they have been fully implemented; in those circumstances, in the opinion of the Court, there is neither such prejudice to nor such real effect on the petitioner that the Court should interfere at this stage.

Because we have ruled that the affidavit dated 17th November, 1987, is admissible, we do not have to go on to consider the affidavit of 8th June, 1987. Nevertheless, we are of the opinion that that affidavit could never have been regarded as filed in support of a subsequent application.

Again, because of our decision, the petitioner's affidavit of the 25th January, 1988, in answer to that of the 17th November, 1987, is clearly admissible.

The first preliminary objection of the petitioner is dismissed.

We must go on to consider the second preliminary objection taken by Mrs. Pearmain on the petitioner's behalf. This was the first of the matters reserved to the petitioner in our decision of the 13th October, 1987, i.e. that estoppel applied to prevent a variation of the Order of the 17th October, 1985.

The petitioner claimed that the respondent was estopped by delay and by conduct from making his present application. The original intention of the parties had been that the matrimonial home should be protected for the petitioner and the children; hence the respondent undertook to be responsible for the payment of mortgage instalments. The respondent had been fully aware of the importance of making such payments. In September, 1984, and again in November, 1984, Associates Capital had threatened to foreclose. On the 30th

November, 1984, Mrs. Pearmain wrote to Mr. Boxall saying that the mortgage was in arrears and the petitioner had been threatened with eviction and she asked him to impress upon the respondent the importance of him paying the mortgage regularly. On the 10th December, 1984, when the Greffier Substitute made his Order in relation to maintenance he noted the respondent's undertaking to be responsible for the payment of mortgage instalments. The petitioner had not applied for an increase in maintenance for herself and the children since the Order of 1984 because, inter alia, the respondent had to pay the mortgage and she would be prejudiced if this Court were to alter the arrangements after more than three years of receiving relatively low maintenance. Mrs. Pearmain referred us to the several affidavits that had been filed in earlier proceedings between the parties. In his affidavit of the 8th February, 1985, the respondent included in his estimated annual expenditure the sum of £4,944.00 and stated: "....I have....a half share in the matrimonial home for which I still pay the mortgage instalments referred to above." The parties jointly purchased the matrimonial home on the 23rd June, 1978, for £14,000 with a States loan of £12,000. The States loan was replaced on the 4th May, 1984, by the loan from Associates Capital secured on the property in the capital sum of £23,500. The petitioner had no idea as to what had happened to the additional monies other than those used to repay the States loan. In his revised Affidavit of Means of 13th August, 1985, the respondent stated that "Since May 28th, 1985, I have been unable to work at all because I am receiving regular hospital treatment for my hip both as an in-patient and an out-patient." The respondent again included in his estimated annual expenditure the mortgage payments of £4,944.00 and made the same statement to the effect that he still paid the mortgage instalments. The revised affidavit also stated: "That as a result of the aforesaid illness and continuing hospital treatment for suspected cancer in my right hip I have not been working since the said 28th day of May 1985 as a result of which I have only been in receipt of my basic wage in the sum of £121.00 per week.... That I have been unable to pay to the Petitioner the sum of £50 per week by way of maintenance since the month of May 1985 and I am informed that the Petitioner is in receipt of such sum from the Welfare Department which sum I will be liable to repay in the future..... That I am liable to pay monthly mortgage instalments in the

sum of £412.00 after which I am left with the sum of £72.00 per month for my own personal living expenses. I have fallen into arrears with two mortgage instalments as a result of which I have been threatened with legal proceedings in the Royal Court by Associates Capital...."

On the basis of those affidavits and after hearing the advocates of the petitioner and the respondent, Mr. Commissioner Dorey made his Order of the 17th October, 1985, that the petitioner should receive all the nett proceeds of sale of the former matrimonial home in the event that such sale became necessary as a result of the failure of the respondent to pay all the mortgage instalments due on it in accordance with his earlier undertaking.

Thus, the respondent, who was legally represented throughout and had pleaded the health grounds, did not appeal against the Commissioner's Order. The Court heard Advocate A.D. Robinson who had represented the petitioner at the 1985 hearing and he made his notes available to us. Mr. Boxall had argued that the matrimonial home should not be sold until the younger child was eighteen years of age; but he had conceded that if the respondent failed to keep up with the mortgage repayments it would be open to the petitioner to apply for a transfer. Mr. Robinson had stressed that it was unlikely that the respondent would keep up with the mortgage repayments. It is clear from the notes that the Commissioner was fully informed as to the respondent's health and that the question of "gross and obvious" conduct was fully canvassed before him.

The principal ground upon which the petitioner claimed estoppel was to be found in a letter, dated the 25th February, 1986, written by Mr. Boxall to Mr. Robinson. Mr. Boxall said this:-

"As a result of the above (statement of expenditure and financial difficulties) O has indicated his intention to cease paying the mortgage instalments for the property. He appreciates the consequences of this decision in the light of the decision of Advocate Dorey on 17th October, 1985."

Thus, argued Mrs. Pearmain, the respondent was not saying that he could not pay on grounds of ill-health; he was stating an intention not to pay, and his acceptance of the consequences thereafter estopped him from seeking a variation of the Order.

Mrs. Pearmain proceeded to review further correspondence exchanged between the legal representatives of the parties. We shall comment on the correspondence at a later stage. But, on the 18th March, 1986, Mr. Boxall informed Mrs. Pearmain that the respondent had written to the Trustee Savings Bank instructing them to cease the mortgage payments as from April, 1986. Mrs. Pearmain told us that her client had taken steps to find alternative accommodation for herself and the children and had started to pack up her furniture and effects and generally prepared to leave. We were invited to consider the distress caused to her.

In the event, the respondent attempted to negotiate a mortgage for the former matrimonial home with the Trustee Savings Bank. That attempt came to nothing. Nor did the respondent do anything to try to re-open the Order of the Court of the 17th October, 1985. But he did resume payment of the mortgage instalments because, Mrs. Pearmain claimed, he was shamed by the effect on the children of the potential loss of their home. However, in 1987 he again stopped the payments.

Mrs. Pearmain conceded that she had some difficulty in producing authority for her claim that 'estoppel' operated to prevent the respondent from proceeding with his application. She sought to rely on Pirouet -v- Pirouet & ors. (1985-86) J.L.R. 151 which deals with the question of equitable estoppel. At page 156 et seq. the Court said this:-

"In several recent Jersey cases the Court has applied equitable principles. In York Street Pharmacy Limited -v- Rault (1974) JJ 65, the Court held (at p.69) "We believe that equitable remedies have always been available to the Royal Court" and proceeded to grant specific performance, in

part, of an agreement for a lease. In the later case of Symes -v- Couch (1978) JJ 119, at p.141, after referring to a statement of Mr. Bailiff Hammond to the Commissioners of 1860 (at para.103): "There are many matters which may be brought before our Court by means of a special writ, instead of a remonstrance, which has very much the character of an equity case. An action may be in the form of a special writ for matters of equity as well as of law", the Court commented "We think he meant that in appropriate cases the Royal Court would apply equitable principles". Finally, (at p.149) the Court stated "To leave the plaintiff without a remedy would be to set at naught the equitable jurisdiction which is inherent in the Royal Court".

"We turn now to the development of equitable principles by the English Courts. Advocate D.F. Le Quesne for the plaintiff set before the Court a number of cases dealing with equitable estoppel, some relating to part performance as a means of giving effect to a contract that would otherwise be rendered unenforceable by the Statute of Frauds 1677, and others dealing with a promise where the promisee had acted to his own detriment by relying on the words of the promisor. It is this latter group of cases that is most relevant to the present action.

"In Dillwyn -v- Llewelyn (1862, 4 De G. F. & J.517) the plaintiff's father had given him a farm. A memorandum to this effect was signed by father and son. The plaintiff obtained vacant possession, built a residence there and laid out and planted the grounds at a cost of £14,000, all with the father's knowledge and approbation. The farm was never formally conveyed to the plaintiff and on his father's death it passed with his estate. Lord Westbury, L.C. ruled (at p.523) "I propose therefore ..... to declare, by virtue of the original gift made by the testator and of the subsequent expenditure by the Plaintiff with the approbation of the testator and of the right and obligation resulting therefrom, the Plaintiff is entitled to have a conveyance from the trustees of the testator's will".

"In Ramsden -v- Dyson (1866) L. R. 1 HL 129 Lord Kingsdown said (at p.170): "The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in Gregory -v- Mighell (1811) 18. Ves.328, and, as I conceive, is open to no doubt".

"This principle was approved in Plimmer -v- Mayor of Wellington (1884) 9 A.C. 699 at p.710. It was more recently followed in Inwards -v- Baker [1965] 1 All E.R. 446. In this case a son was encouraged and assisted by his father to expend money on building a bungalow on land owned by the father. He did so under the expectation that he would be able to stay on there as long as he wished it to remain his home. His father, however, never made the necessary alterations to his Will to give effect to that expectation. In an action brought by the trustees of the father's will, judgement was given for the son, who was held to be entitled to remain in occupation of the bungalow. Lord Denning M.R. said (at p.448): "Even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable to do so". Dankwerts L.J. said at p.449: "It seems to me that this is one of the cases of an equity created by estoppel, or equitable estoppel as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetrated".

"This principle was applied in Jones -v- Jones [1977] 2 All E.R. 231, a case involving similar facts. As Lord Denning, M.R. said at p.235: "Old Mr. Jones's conduct was such as to leave (sic) the son Frederick reasonably to believe that he could stay there and regard 'Philmona' as his home for the rest of his life. On the basis of that reasonable expectation, the son gave up his work at Kingston upon Thames and moved to Blundeston. He paid the £1,000, too, in the same expectation. He did work on the house as well. It was all because he had been led to believe that his father would never turn him out of the house. It would be his family's home for the rest of his life. He and the rest of the family thought that the father would alter his will or make over the house to the son. The father did not do it, but nevertheless he led the son to believe that he could stay there for the rest of his life. It is clear that old Mr. Jones would be estopped from turning the son out. After his death, his widow, the step-mother, is equally estopped from turning the son out".

"The principle was re-stated by Oliver J. in Taylor Fashions -v- Liverpool Victoria Trustees Co. Ltd. [1981] 1 All E.R. 897 at p.909: "If A., under an expectation created or encouraged by B. that A. shall have a certain interest in land, thereafter, on the faith of such expectation and with the knowledge of B. and without objection by him, acts to his detriment in connection with such land, a court of equity will compel B. to give effect to such expectation". In this case, and also in the almost contemporaneous Amalgamated Investment & Property Co. Ltd. -v- Texas Commerce International Bank Ltd. [1981] 1 All E.R. 923, emphasis was placed on the flexibility of equitable estoppel. Although the distinction between proprietary estoppel or estoppel by acquiescence and promissory estoppel or estoppel by representation was noticed, it was accepted that they were facets of the same principle. The necessity of satisfying all the "probanda" of Fry J. in Willmott -v- Barber (1880) 15 Ch.D. 96, was questioned and the view was approved that the real test was whether it would be conscionable in any particular case for a person to enforce his legal right.

"In Taylor Fashions -v- Liverpool Victoria Trustees Co. Ltd., Oliver J. in commenting on Shaw -v- Applegate [1978] 1 All E.R. 123, said at p.918: "So here, once again, is the Court of Appeal asserting the broad test of whether in

the circumstances the conduct complained of is unconscionable without the necessity of forcing those incumbrances into a procrustean bed constructed from some unalterable criteria", and quotes with approval the words of Lord Denning M.R. in Moorgate Mercantile Credit Co. Ltd. -v- Twitchings [1975] 3 All E.R. 314 at 323, who is cited as saying: "Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and equity. It comes to this: When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so"."

Mrs. Pearmain submitted that because the respondent did not appeal against the Order of Mr. Commissioner Dorey, because some two and a half years had since elapsed, because the petitioner had prepared herself to move out of the former matrimonial home (we observe that she would have had to do this whether or not she receives the whole of the nett proceeds of the sale), because the petitioner had not applied for increased maintenance, because she had done her best to manage on her very limited finances, and because, when the respondent applied to have the maintenance reduced, he failed to disclose the non-payment by him of the mortgage payments, it would be unconscionable for her share of the proceeds of sale under the 17th October, 1985, Order to be reduced.

Mr. Boxall relied primarily on Article 32, as amended, of the Matrimonial Causes (Jersey) Law, 1949, (the Law) and Rule 52 of the Rules.

Article 32, as amended, of the Law provides as follows:-

"(1) The Court may from time to time discharge or vary any order made under Article 17, 25, 27, 28, 29, 29A or 30A of this Law or suspend any of the provisions thereof temporarily or revive the operation of any of the provisions so suspended.

(2) In exercising the powers conferred by this Article, the court shall have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage."

The Order of the 17th October, 1985, although it does not so specify, was clearly made under Article 29 of the Law and our Order of the 13th October, 1987, although it does not so specify, was clearly made under Article 29A of the Law, with the effect that Article 32, as amended, of the Law operates and this Court has the power to discharge or vary those orders.

Rule 52(1) of the Rules provides as follows:-

"(1) A petitioner or a respondent if he has given notice of intention to defend or has applied to be heard on ancillary matters may at any time apply for a modification order."

The remainder of Rule 52 is procedural. Rule 1(1) provides that a modification order has the meaning assigned thereto by Rule 3(4)(c). Under Rule 3(4)(c).....the discharge or variation of any order made under Article 17, 27, 28, 29 or 30A of the Law, or the temporary suspension or the revival of any of the provisions thereof is to be referred to as a "modification order".

Mr. Boxall said that the petitioner's claim relied on one statement of intent made by the ~~petitioner~~ respondent, i.e. the letter of the 25th February, 1986, and that the respondent was thus estopped for evermore. He did not accept this to be a proper use of the doctrine of estoppel. The respondent was not estopped from denying that he intended that consequence. What happened subsequently was that the parties resumed their previous arrangements completely. The Associates Capital mortgage continued to be paid for some seventeen months after the respondent's statement of his intention to cease the payments. His true intentions were contained in the penultimate sub-paragraph of paragraph 6 of his affidavit of the 17th November, 1987, (which we have ruled to be admissible):-

"During the period of February, 1986, my financial situation was becoming increasingly strained as a result of the liabilities I had in particular relating to the mortgage maintenance and arrears of income tax. In a state of some despair I indicated an intention at that time to cease paying the mortgage instalments on the property. I subsequently withdrew that intention and resumed payments on a regular basis. The property was not sold and the petitioner and I resumed the arrangement which had previously obtained. I do not believe that the expression of my intention at that time ought to be used against me in relation to my present inability to pay for the mortgage. If anything I believe that it is the petitioner who having accepted the resumption of payments and taken no action in relation to the expression of my intention in February, 1986, should be prevented from invoking the provisions of the Commissioner's Order of 17 October, 1985".

Thus, Mr. Boxall submitted, the argument should be "turned on its head" and it was the petitioner who should be prevented by estoppel from claiming that she was entitled to rely on the letter of the 25th February, 1986, which had been written 'without prejudice' and was elicited into the open only in October, 1987, notwithstanding that she had acquiesced in and agreed to the resumption of the previous agreement.

Mr. Boxall referred us to Osment -v- Parish of St. Helier (1974) J.J.1. But that case revolved upon the existence of a contract and promissory estoppel which, as the Court said in Pirouet -v- Pirouet is a facet of the doctrine of equitable estoppel. The question in the instant case is not whether the respondent had made a promise which prevents him from insisting on his strict legal rights when it would be unjust to allow him to do so. The letter of the 25th February, 1986, does not contain a promise; it merely acknowledges a state of affairs resulting from an uncontested and unvaried Order of the Court and acceptance of it. The question in the instant case, therefore, is whether by reason of the delay and his conduct it would be unjust to allow the respondent to seek a variation of the Order. As Lord Denning L.J. said of equitable estoppel in Combe -v- Combe (1951) 1 All E.R. 767, cited at page 14 of Osment -v- Parish of St. Helier:-

"It only prevents a party from insisting on his strict legal rights when it would be unjust to allow him to do so, having regard to the dealings which have taken place between the parties".

And, says Mr. Boxall, the Court must consider not only the dealings between the parties culminating in the letter of the 25th February, 1986, but also the dealings which have taken place between the parties since that time, with the result that the petitioner by not insisting on a sale then and subsequently allowing the mortgage to be paid is herself estopped from relying on the letter of 25th February, 1986.

Mr. Boxall invited us to consider the correspondence which had passed between the legal advisers of the parties and to find that the parties had, by tacit consent, agreed that the property should be retained. Mr. Boxall, also, reviewed the correspondence which had been exchanged between the legal advisers of the parties. He drew our attention to a number of letters that had not been referred to by Mrs. Pearmain. Again, we shall refer to this correspondence later.

Eventually, on the 1st December, 1986, Mr. Boxall proposed a re-financing arrangement whereby there would be an interest only mortgage. This was refused by Mrs. Pearmain on the 17th December, 1986, in the following terms:-

"Obviously my client is not prepared to agree to your client taking out a new loan which does not include repayments of capital if he still expects to retain a half share in the property, as this would obviously affect the Order of 17th October, 1985. If the current payments are too great then we revert to the situation which occurred earlier this year that, if he fails to meet the payments, then my client shall receive the nett proceeds of sale".

Mr. Boxall argued that from then onwards the parties became completely "bogged down" by the petitioner's refusal to a re-financing free of capital payments. He submitted that the Order of the 17th October, 1985, did not concern itself with the merits or demerits of capital repayments: its basis was

that the children should have a roof over their heads; but Mrs. Pearmain's letter of the 17th December, 1986, was the first clear indication that the interest of the petitioner was not merely in protecting the accommodation but was commercial, despite previous protests otherwise. The petitioner wanted the proceeds of sale and this constituted a change of circumstances. The respondent relied on the fact that, on the 17th October, 1985, the Court did not do what the petitioner wanted, which was an outright transfer to her of the respondent's interest in the former matrimonial home.

Mr. Boxall also referred us to Sternberg -v- Sternberg (1963) 3 All E.R. 319. In that case the husband had left the matrimonial home in July, 1957 and in August, 1957, the wife obtained an order for maintenance for herself and two children on the ground of the husband's desertion. In 1961 the husband told the wife that he wished to marry another woman and, according to the wife, asked her if she would divorce him and said that he would keep up the payments under the order. The husband presented a petition for divorce on the ground of the wife's constructive desertion and in the petition he set out his proposals for the care and upbringing of the children, viz., that they should continue to reside with the wife and be supported by her from her earnings and from the money sent by the husband in pursuance of the order. A divorce followed. The husband remarried and in April, 1963, the justices heard an application by the husband that the order should be discharged in so far as it concerned maintenance for the wife. The justices refused to discharge that part of the order, though they reduced the amount of the wife's maintenance. On appeal, the Probate, Divorce and Admiralty Division held that the finding of the High Court that the wife had constructively deserted the husband destroyed the factual basis of the maintenance order and was inconsistent with the wife's continued right to support; the husband was not precluded from asserting this and the provision in the order for the wife's maintenance was discharged. The leading judgment was delivered by Sir Jocelyn Simon, P. At page 321 he said this:-

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"Counsel for the husband argues that the justices were wrong and that they were bound on the facts proved before them to have discharged the order. He put forward four propositions. First, a divorce supervening on a magistrates' order does not automatically determine it. Secondly, a magistrates' court retains a general jurisdiction to revoke, revive or vary its order, apart from the specific cases of a resumption of cohabitation or the commission of adultery by the wife, where (unless the adultery has been condoned or connived at or conduced to) there is no discretion except to discharge the order. Thirdly, a decision of the High Court contrary to and inconsistent with the decision of the magistrates is evidence of a conclusive character. Fourthly, if a finding of the High Court destroys the basis on which the order was made and on which the wife's right to maintenance while living separate must subsist, then the provision for the wife must be discharged.

"Those propositions constitute, in my view, an accurate statement of the law as laid down in the authorities."

At page 322 the learned Judge continued:-

"Counsel for the wife, indeed, did not dispute counsel for the husband's propositions; but he sought to add a rider to the last one. He argued that the husband might preclude himself from applying for a discharge of the magistrates' court order: he might bind himself contractually not to apply to discharge it; he might give an enforceable undertaking to the court not to do so; he might be estopped from doing so. In Russell v. Russell ((1956) 1 All E.R. 466) a wife was in possession of a maintenance order made in a magistates' court. The husband then brought a suit for divorce against her. The wife defended the suit, but asked for no relief and was not represented by counsel. At the suggestion of the court she amended her answer to cross-pray for a decree of divorce, on the husband giving an undertaking that he would not in the future apply to have her maintenance order reduced. The wife was granted a decree nisi. The husband's undertaking which was addressed to the court and to the wife, was noted on the file and incorporated in the formal decree. After the decree had been made absolute the husband re-married and a child

was born of that union. The husband fell into arrears with his payments under the maintenance order, and on being summoned in relation to them he applied for the reduction of the maintenance order. The justices refused his application in view of the undertaking given to the High Court. The husband then applied to the commissioner to whom the undertaking had been given for its discharge, but the commissioner rejected his application. The husband's appeal to the Court of Appeal was dismissed. Jenkins, L.J., said (at p.469):-

"He [the husband] said that the undertaking now in question should be held to be void as contrary to public policy because it purports to oust the jurisdiction of the justices. I cannot accept that argument. I find it impossible to hold that it is not open to a husband, against whom an order has been made by justices, to agree with his wife, for reasons that seem good to him and her, that he will not apply to have the maintenance payable reduced below a specified sum."

"I think that supports counsel for the wife's proposition that it is possible for a husband by agreement or by undertaking to preclude himself from applying for the discharge of an order by the magistrates' court, even though it may be that there has been a subsequent order of the High Court which on the face of it destroys the basis on which the wife's right to continue separate was based. I have also no reason to doubt, although the matter has not been fully argued, that the husband might in certain circumstances be estopped from applying for the discharge of an order.

"Nevertheless, I do not think that any of these matters assist the wife in the present case. It is not argued that there was anything here that could amount to estoppel, either by way of record or in pais. It is true that the wife gave evidence that suggests an agreement that, if the wife would allow the husband to divorce her, he would not apply to reduce the maintenance payable under the order of Aug. 8, 1957. There is no finding by the justices whether they preferred the evidence of the husband or the wife on this point. But in

my view it is unnecessary to refer it back to the justices, because it is quite clear, and indeed accepted by counsel for the wife with his usual candour, that any such agreement would be collusive and unenforceable.

"But counsel for the wife relies on the statement in para. 9 of the petition that the children will be supported from the respondent's earnings and the sums of money sent by the petitioner in pursuance of the order of Aug. 8, 1957, as constituting an undertaking to the court not to seek to reduce maintenance. That order made provision both for the wife and for the children. But, in my view, first, para. 9 of the petition set out a proposal, not an undertaking: see Matrimonial Causes Rules, 1957, r. 4 (i) (ii): to test the matter, it is inconceivable that the husband's action in seeking a discharge of the order could be held to be a contempt of court, as being in breach of an undertaking given to the court. Secondly, the wife in her memorandum of appearance indicated that she wished to make application on her own account in relation to both her maintenance and that of the children: that again seems to me to be inconsistent with either an agreement or an undertaking. Thirdly, para. 9 of the petition set out proposals made in relation to the children, and thus in any event limited to the infancy of the children; it was, therefore, inherently unsusceptible of being an undertaking that in no circumstances would the husband apply to discharge the order made in favour of the wife. Lastly, it would have at least to be subject to the proviso that if the wife committed adultery the husband could apply to discharge the order, and, therefore, could not be in the unequivocal terms needed to support the undertaking alleged.

"For all those reasons, although I am prepared to accept the proposition of law as put forward by counsel for the wife, I do not think that it avails her in the circumstances of this case. In my judgment, the finding of the High Court that the wife had constructively deserted her husband on the day that he left her destroys the basis of the order of Aug. 8, 1957, and was inconsistent with the wife's continued right to support, and there was nothing which precluded the husband from asserting this. This appeal must be allowed, and the provision for the wife's maintenance in the order of Aug. 8, 1957, must be

discharged. I feel less reluctance in coming to that decision because it seems to me that there is nothing to stop the wife applying to the High Court for maintenance. It is undesirable that I should say anything about how her prospects strike me; but she might not necessarily be limited to the reduced order that the justices have made in the present case."

At page 324 Ormrod, J, who concurred, added this:-

"This case is one of the latter type in which the finding of the High Court that the wife was, in fact, in desertion, destroys the whole basis of the justices' order made in August, 1957, when they, as one must now regard it, wrongly held that the husband was in desertion. In those circumstances, the basis of their judgment having gone, I cannot, for my part, see that there is any residual discretion left in the justices as such.

"Counsel for the wife has submitted that there are circumstances in which a man might be precluded from asking for them to exercise their discretion either by reason of some agreement between the parties or estoppel and undertaking. That may be so. But at the moment I prefer to express no concluded view about this because, in the present case, on the facts, any agreement which could be suggested must be collusive and, therefore, cannot be relied on and I entirely agree with all that my lord has said in relation to the submission that the husband gave an undertaking to maintain the order. I do not think it possible to spell out from para. 9(ii) of the petition an undertaking. I think that it is, on the other hand, possible - I say no more - to spell out of para.9 (ii) an expression of intention to continue the payments under the order. That is a matter that may have to be considered by another court, when it comes to consider the wife's application for maintenance, if one is made."

Mr. Boxall conceded that where there is an undertaking there are circumstances where it is possible that the Court might hold the husband to his undertaking. But, in the instant case, he argued, neither the letter of the 25th February, 1986, nor any other conduct on the part of the respondent, had the status of an undertaking.

In Russell v. Russell, (1954) P.D. 283 cited in Sternberg -v- Sternberg (supra) the husband had given an undertaking, during the divorce proceedings, that he would not, in the future, apply to have an existing maintenance order, made by justices in favour of his wife, reduced unless he was out of work and unable to earn anything. The wife was then granted a decree nisi. The husband's undertaking, which was addressed to the Court and to the wife, was noted on the file, incorporated in the formal decree; and was duly filed, indorsed by his solicitors, in the divorce registry. Subsequently, the husband remarried and a child of the second marriage was born. Later, the husband who had fallen into arrears under the maintenance order was summoned before justices to whom he applied for the reduction of the maintenance order. The justices refused to entertain the matter on the ground of the undertaking given to the High Court. The husband then applied to the Commissioner, to whom the undertaking had been given, for its discharge, which application was refused. From this refusal the husband appealed. The Court of Appeal held that there was nothing contrary to public policy in a husband, against whom a justice's order had been made, agreeing with the wife not to apply to have the order reduced below a specified sum, a fortiori when the promise was given by way of an undertaking approved by the court and, therefore, capable, in the proper circumstances, of being discharged by it. The undertaking given by the husband was valid and, in the absence of any change in circumstances giving rise to hardship, the appeal against the refusal to discharge the undertaking should be dismissed.

Jenkins L.J., who delivered the leading judgment, is reported at p.291, as having referred to the absence of evidence whether the woman the petitioner had married....was the one for whom he had left his wife, and as having said that it did not greatly affect the case except that the fact that, at all material times, he had a woman to keep, whether his lawful wife or not, would tend to weaken any case he might seek to make in reliance upon his remarriage and the birth of the child as a change of circumstance rendering it difficult or impracticable for him to pay the maintenance to his first wife which he had undertaken to pay.

And at page 292, as having said:-

"It therefore seems difficult to resist the conclusion that the wife did irretrievably alter her position on the faith of this undertaking. That being so, I would for my part be reluctant in the extreme now to hold, at the instance of the husband, that the undertaking should be discharged, at the very time, as the commissioner pointed out, at which an event has happened of the kind against which the respondent may very well have been most anxious to guard, and against which the undertaking was very likely designed as a protection."

And at page 294:-

"An undertaking given to and accepted by the court must be taken to have been approved by the court. Furthermore, any undertaking given to the court is capable of being discharged by the court whenever it appears to the court that circumstances have arisen which make that course a proper one in the interests of justice. It could not, therefore, be said, where an undertaking to the court is concerned, that a husband by giving the undertaking has irretrievably deprived himself of any opportunity at any time of procuring a reduction in the amount of maintenance, however widely different his circumstances may become...."

And at page 297:-

"....it is always competent to the court to discharge an undertaking given to it, if in its discretion the Court comes to the conclusion that that is the proper course in the interests of justice. But, as to the present case, while the principle to which I have just referred undoubtedly applies, so that the court would in a proper case discharge the undertaking given, there is no question in my view, of the undertaking not being a perfectly valid undertaking, and it is plain from the evidence that the petitioner has wholly failed to show any such change in circumstances as would warrant the court in discharging the

undertaking. I think, in order to obtain a discharge of the undertaking, he would have to show a real case of hardship, some essential change in his circumstances, beyond the mere fact of his remarriage and the birth of a child; for, after all, he did voluntarily give this undertaking to the court when it suited him to do so. If he could make out a sufficiently strong case, it would be open to him to apply, and it would be open to the court, if satisfied with the case he made out, to discharge the undertaking. As matters stand at present, he has, in my judgment, wholly failed to make out a case. Accordingly, I think the commissioner arrived at a right conclusion, and I would dismiss the appeal."

Mr. Boxall submitted that in the present case, the petitioner had not suffered any prejudice, that the purpose of the original undertaking was that the matrimonial home would continue to be available for the children and that the petitioner's position was protected so long as she had (a) the matrimonial home rent free and (b) the amount of maintenance ordered to be paid. It was possible that she would have received an increased maintenance if the house had been sold, but only because she would have needed it because of the absence of rent free accommodation. For that reason she would have required a compensating sum. But the compensation would have been in an amount commensurate to the value of the home to her. It would have been a benefit of a different kind but of equivalent value. Therefore, no prejudice to the petitioner arose from the fact that the respondent continued to pay the mortgage. At any time the status quo could be brought to an end if the circumstances changed. It would be wholly unjust not to take into account any change of circumstances. If, for example, the petitioner had won a large sum of money on the football pools and the respondent was penniless as a result of ill-health it would be wholly unjust to enforce the Order of 17th October, 1985. Russell -v- Russell showed that the doctrine of estoppel did not 'bite' on an undertaking in every case. This was a case that fell within Article 32, as amended, of the Law which made every order subject to variation and the Court should go on to consider the case on its merits.

In her reply Mrs. Pearmain reviewed further correspondence exchanged between the legal advisers of the parties and not previously placed before us, which, she said, demonstrated that the petitioner had not wished to move out of the matrimonial home and that she had been willing to co-operate but could not tolerate the uncertainty of the situation.

We must comment on this vexed question of the correspondence between the legal advisers of the parties. In her first address Mrs. Pearmain sought to rely on one bundle of correspondence, which she handed up. Mr. Boxall relied on another bundle of correspondence including letters that he complained had been omitted by Mrs. Pearmain. In her reply Mrs. Pearmain produced yet another bundle of "omitted" letters. Thus, we have had to contend with three separate bundles, neither the correspondence nor the speeches addressing that correspondence being in chronological order. It should not be beyond the ability of counsel to prepare an agreed dossier of correspondence in correct chronological sequence or, if agreement cannot be reached, to produce the whole of the correspondence in similar order. Instead, both Counsel were guilty, each in turn, of withholding relevant correspondence from the Court.

Both Counsel placed considerable reliance on different parts of the correspondence and, of course, the petitioner's case on estoppel relies almost entirely on the letter of the 25th February, 1986.

In the view of this Court the correspondence in this case is not impressive; some of it is muddled, there are long unexplained gaps in time, and it is clear that there were several changes of mind. It is fair to say that Mrs. Pearmain and Mr. Robinson were very tardy in seeking to treat the letter of the 25th February, 1986, as an estoppel. The initial response was to ask the respondent not to carry out his threat to cease paying the mortgage instalments. Then application was made to the Housing Department for a loan in the petitioner's sole name to avoid a sale of the property, presumably with the intention of asking the Court to vary the Order in order to transfer the property to her. The respondent continued to pay the mortgage instalments, firstly until April, 1986, and subsequently until 1987. He too, attempted to

negotiate alternative mortgage finance; each of the parties blamed the other for a lack of co-operation in this respect. It seems to us that there was a sad lack of any real attempt at conciliation in the correspondence.

The Court has no doubt that the doctrine of equitable estoppel forms part of the law of this Island. In Moser -v- Walden (1971) J.J. 1927 the Court considered the question of estoppel through delay and decided that delay could not deprive the plaintiff of the ownership of an article which had never ceased to be hers, albeit it had been in the possession of the defendant. In Osment -v- Parish of St. Helier (supra) the Court considered the principle of promissory estoppel but found it not to be applicable in the particular case. In the Trustees of La Rocque Methodist Chapel -v- States of Jersey Sewerage Board, (1974) J.J. 71, the Court considered estoppel by conduct and decided that the defendant, which had offered compensation by way of an ex-gratia payment, was not estopped from pleading prescription in a subsequent action. Estoppel by conduct was again considered in Channel Hotels and Properties Limited -v- Rice (1977) J.J. 111 but again the Court decided that the plaintiff was not estopped by conduct - receipt of a sum of money in full and final settlement of certain claims - from proceeding with a claim based on misrepresentation. And in Pirouet -v- Pirouet (supra) the Court decided that it has a general equitable jurisdiction which allows the application of the English principles of promissory estoppel in a flexible manner to prevent injustice even if no other cause of action exists.

The petitioner effectively claims that the respondent's acknowledgment, in the letter of the 25th February, 1986, that he appreciated the consequences of his decision not to pay the mortgage instalments, amounted to an agreement that she should receive the whole of the proceeds of sale of the former matrimonial home.

We have referred to Rayden and Jackson on Divorce, 15th Edition, Vol. 1, p.919, para. 63:-

"As stated, agreements between the parties cannot oust the jurisdiction of the court. But to decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties.... There may well be other considerations which affect the justice of the case; the above list is not intended to be an exclusive catalogue."

As Jackson's Matrimonial Finance and Taxation 4th Edition at p.134 para. 83 puts it:-

"The object of variation proceedings is for the court to achieve justice between the parties with a minimum of technicalities and maximum flexibility."

The Court accepts that it has a general equitable jurisdiction to apply the doctrine of equitable estoppel in an appropriate case, including a matrimonial case regarding ancillary relief. However, a strong case has to be made out. The starting point is Article 32 of the Law which gives to the Court the power from time to time to vary any order made under Articles 29 and 29A, having regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties. Therefore, the presumption is in favour of a general right to apply for variation at any time and it requires a strong case to displace the intention of the legislature.

It follows that the burden must be upon the petitioner to show that she has so acted to her own detriment by relying on the letter of the 25th February, 1986, that she would suffer prejudice and injustice if the respondent were to be heard upon his application; in other words that the injustice that would be perpetrated is such that the Court should not hear the application on its merits.

In the judgment of this Court the petitioner has failed to discharge that burden. On the 10th December, 1984, the Court noted that the respondent had undertaken to continue to be responsible for the payment of mortgage instalments due on the matrimonial home. That was an undertaking 'inter partes'; it was not an undertaking to the Court. Even if it were, the respondent would not be precluded from applying for a discharge from the undertaking; there is no evidence to show that he bound himself contractually not to apply to discharge it. The Order of the 17th October, 1985, is a contingent one. It was ordered that the petitioner should receive all the nett proceeds of the sale of the former matrimonial home in the event that such sale became necessary as a result of the failure of the respondent to pay all the mortgage instalments due on it. That is a contingent Order. If the respondent should fail to pay all the mortgage instalments the parties and, if asked, the Court, would have to consider whether the sale had become necessary. Only then would the property be sold and the petitioner receive all the nett proceeds. That the parties themselves did not consider a sale to be the only consequence is evident from the correspondence which shows that several other avenues were explored. In those circumstances, the Court is quite unable to regard the Order of the 17th October, 1985, as a final one; it was always subject to review and variation.

Therefore, we come to the letter of the 25th February, 1986, and the all important paragraph: "As a result of the above (a recital of the respondent's dire financial straits) ○ has indicated his intention to cease paying the mortgage instalments for the property. He appreciates the consequences of this decision in the light of the decision of Advocate Dorey on 17th October, 1985."

There is no promise in that paragraph; nor is there an undertaking; thus no question of promissory estoppel arises. As to conduct and delay, after a careful examination of the whole of the correspondence in chronological order and of the other documentation, including the affidavits that we have found to be admissible, we are of the opinion that the conduct of both parties, although we understand the problems, left much to be desired and that both parties contributed to the delays. We cannot find that it would be unconscionable for the respondent to enforce his legal right to seek a variation or that it would be unjust or inequitable for him to do so.

The Court prefers the approach described in the extracts from Rayden and Jackson on Divorce and Jackson's Matrimonial Finance and Taxation to which we have referred. It is not necessary to think in formal legal terms such as estoppel; the object of variation proceedings is for the Court to achieve justice between the parties with a minimum of technicalities and maximum flexibility; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage.

Accordingly, the petitioner's second preliminary point is dismissed. The Court will go on to consider the application for a variation on its merits; this is not to say, of course, that we shall award to the respondent any part of the proceeds of sale of the former matrimonial home; that is an open question upon which we are ready to hear submissions and, if the parties wish it, evidence, although we would be prepared to decide the matter on the facts and affidavit evidence already before us. The law to be applied is already well settled; the principles are set out in some detail in Faiers -v- Faiers (née Winter), 8th June, 1987, (as yet unreported) and in O'Connell (née Huish) -v- O'Connell, 30th November, 1988, (also as yet unreported) always bearing in mind that in the instant case the former matrimonial home has been sold and the Court is concerned only with the distribution of the nett proceeds of sale.

The issue of costs is reserved until the final Order is made.

authorities referred to:-

Jowett's Dictionary of English Law (2nd edition), at p.617-the definition of "Directory"

Rayden's Law and Practice in Divorce and Family Matters (14th edition), at p.519-re. affidavit evidence

The Supreme Court Practice (The White Book), Order 28 (at pp. 466 and 468) - 1988 edition

Sayers et Uxor -v- Briggs and Company (Jersey) Limited (1963) JJ 249, at 251, (1964) JJ 399, at 401

Jackson -v- Jackson (1965) JJ 463, at 467, (1966) JJ 579, at pp.584, 585

In the matter of the representation of De Sousa (1985-86) JLR 379, at pp 386, 387

Lablanc Limited -v- Nahda Investments Limited (1985-86) JLR N-4

The Supreme Court Practice 1988 (The White Book), Order 2, Rule 1 (at p.9)

Pirouet -v- Pirouet & Ors (1985-86) JLR 151, at 156 et seq.

Osment -v- Parish of St.Helier (1974) JJ 1

Combe -v- Combe (1951) 1 All ER 767

Sternberg -v- Sternberg (1963) 3 All ER 319, at pp. 321, 322, 324

Russell -v- Russell (1954) PD 283, at pp. 291, 292, 294, 297, 466

Moser -v- Walden (1971) JJ 1927

The Trustees of La Rocque Methodist Chapel -v- States of Jersey Sewerage Board (1974) JJ 71

Channel Hotels and Properties Limited -v- Rice (1977) JJ 111

Rayden and Jackson on Divorce, 15th edition, Vol. 1, p.919, para 63

Jackson's Matrimonial Finance and Taxation, 4th edition, at p.134 (para 83)

Fairs -v- Fairs (née Winter), 8th June, 1987 (as yet unreported)

O'Connell (née Huish) -v- O'Connell, 30th November, 1988 (as yet unreported) JJ