[2003–04 Gib LR 149]

CARUANA v. CARUANA

COURT OF APPEAL (Glidewell, P., Staughton and Clough, JJ.A.): September 5th, 2003

Courts—recusation—apparent bias—test for bias—whether fair-minded informed observer, having considered facts, would conclude that real possibility of bias—judge demonstrating closed mind not open to persuasion equivalent to bias

Family Law—financial provision—trust assets—discretionary trust—if likely that trustees would exercise discretion in favour of beneficiary on genuine request, court may include beneficiary's estimated share in overall funds for purpose of making financial provision—improper for court to put pressure on trustees to make distribution for purpose of increasing family assets available

The wife sought the division of the former matrimonial assets in the Supreme Court following divorce.

The parties were married for 25 years and had no children. In about 1990, the husband was diagnosed with multiple sclerosis, and in 1992 he stopped work. Their only income after that was payments from medical insurance schemes, though in 1999 the family assets were increased by the husband inheriting £172,000.

Following their separation in 2000, the husband had sole control of the assets. The wife secured employment, but the difference in the parties' prospective income until retirement was in excess of £150,000.

The husband agreed to buy out the wife's share of the former matrimonial home, which funded the wife's purchase of a flat, and various maintenance payments were made.

The total value of the assets (including the value of the property) was determined by an accountant as being around £1,020,000 as of July 31st, 2002. The husband's future financial requirements were clearly altered by the fact of the multiple sclerosis, in that he needed to finance future nursing costs and suitable accommodation.

The wife sought 50% of the total family assets, and she solicited an offer from the husband but he made no offer of any kind.

At the start of the proceedings in the Supreme Court, the Chief Justice offered and the parties agreed that he should give an indication of the amount on which he thought they should settle. The husband thought the figure he suggested as payable to the wife was too high, questioned it, and

asked the Chief Justice to recuse himself on the basis that having given this indication, there was a risk that he had already pre-judged the issue and would give a biased judgment. The Chief Justice refused, heard the case and ordered the husband to pay the wife £146,000 (in addition to the money already paid for her share of the former matrimonial home) and costs. The proceedings in the Supreme Court are reported at 2003–04 Gib LR 15.

On appeal against both the judgment for the payment of the capital sum and against the costs order, the husband submitted that (a) the words used by the Chief Justice in suggesting the amount on which the parties should settle showed that he no longer had had an open mind on the case; (b) he had erred in the figures he had used for the total assets, as he had disregarded (i) the fact that the value of one investment fund had fallen by 10%; (ii) the likelihood that the value of other traded policies had therefore also dropped; and (iii) the fact that the husband's potential interest in a family discretionary trust, was not an asset realizable on demand, and so should not have been included in the assets; (c) he was wrong in concluding that the husband would not be liable to pay for any of the costs of medicine; (d) he should have calculated the wife's future needs, not the husband's, in order to determine how much of the sum inherited should have been retained by the husband; (e) he was wrong to have treated the lack of offer of settlement as conclusive on the issue of paying costs; and (f) he had failed to take into account the wife's conduct when assessing who should pay costs, as she had (i) grossly exaggerated the total assets; (ii) persisted in allegations that the husband had concealed some assets; and (iii) refused to accept the medical evidence as to her husband's condition.

The wife submitted in reply that (a) the Chief Justice was correct to take into account the husband's family discretionary trust in the evaluation of his assets; and (b) when the Chief Justice discussed the wife's future income, he was in effect considering her future needs.

Held, dismissing the appeal:

(1) The Chief Justice had not, in giving the indication of a possible figure for settlement, shown a closed mind on the case or given reason to believe that there was a real possibility that he would be biased. The test for bias was whether a fair-minded and informed observer, having considered all the facts, would conclude that there was a real possibility of bias. In the present case, the fair-minded, informed observer would conclude that the Chief Justice had formed a provisional view, but that it would be perfectly possible that he could and would, if necessary, be persuaded to change it, and he had not demonstrated a closed mind (paras. 46–47).

(2) The Chief Justice was entitled to reach the conclusion he had reached as to the total value of the assets (about £1,020,000). It was not incorrect for him to include the husband's potential share in the discretionary family trust as part of the assets. Authority led to the conclusion

that where the husband could only raise further capital as the result of a decision made at the discretion of trustees, the court should not place improper pressure on the trustees to exercise that discretion so that the wife would ultimately be able to benefit. If on the balance of probabilities, however, the evidence showed that the trustees would be likely to exercise their discretion for the benefit of the wife, on a genuine request to do so, then the court could include the extra assets in the overall funds available. In the present case, the Chief Justice was entitled to conclude that an approach by the husband to the trustees would be likely to be met with a favourable response, and so he had been entitled to include the husband's hypothetical share within the total assets. He had the right to reject the submission that the traded policies had reduced in the same way as the investment fund, as there was no supporting evidence, and he was also not wrong in principle regarding the reduction in value of the investment fund, as it was included in his overall evaluation, and it was not for the appeal court to disagree (paras. 57–60).

(3) In evaluating the future financial needs of the husband, the Chief Justice was correct to disregard the potential future costs of medicine, as there had been no evidence supporting the submission that the husband would be liable to pay for any such medicine (para. 61).

(4) In considering what should happen to the husband's inheritance of £172,000, the Chief Justice had not erred by treating it as necessary to meet the husband's, not the wife's, needs. He had in effect considered the wife's needs by considering the disparity in their future income (likely to be in excess of £150,000), and even if he had not assessed her needs, it would not have been suitable for the husband to have received all the inheritance, as this would have left the wife with nothing at all, and it was therefore self-evident that there would not have been sufficient without the inheritance to meet her needs (paras. 64–65).

(5) The Chief Justice's decision to make the husband pay costs was not wrong in principle. He had not treated the lack of an offer from the husband as conclusive, but had treated it merely as very important, which it clearly was. The wife's conduct in not accepting the amount of assets declared or the medical evidence did not prevent the husband from making an offer, nor did it have an effect on the outcome of the case, as the Chief Justice chose to accept the medical evidence and the declared assets (para. 76; paras. 79–80).

Cases cited:

(1) *Gojkovic* v. *Gojkovic (No. 2)*, [1992] 1 All E.R. 267; [1991] 2 F.L.R. 233; [1991] F.C.R. 913, followed.

(2) *Medicaments and Related Classes of Goods (No. 2), Re*, [2001] 1 W.L.R. 700; [2001] H.R.L.R. 17; [2001] I.C.R. 564; [2001] U.K.C.L.R. 550, followed.

(3) *Norris* v. *Norris*, [2003] 1 W.L.R. 2960; [2003] Fam. Law 721; [2003] 2 F.L.R. 1124; [2003] 4 Costs L.R. 591, distinguished.

(4) *Porter* v. *Magill*, [2002] 2 A.C. 357; [2002] 1 All E.R. 465, followed.
(5) *Thomas* v. *Thomas*, [1995] 2 F.L.R. 668; [1996] 2 F.C.R. 544; [1995] Fam. Law 672, followed.
(6) *White* v. *White*, [2001] 1 A.C. 596; [2001] 1 All E.R. 1; [2000] 2 F.L.R. 981; [2000] 3 F.C.R. 555, followed.

Legislation construed:
Matrimonial Causes Ordinance (1984 Edition), s.32(1): The relevant terms of this sub-section are set out at para. 27 and para. 62.

H.K. Budhrani, Q.C. and *M. Turnock* for the appellant;
S. O'Toole and *Ms. J.A. Evans* for the respondent.

1 **GLIDEWELL, P.:** This is an appeal against a decision of Schofield, C.J., given on March 12th, 2003, in which, on the application of Mrs. Caruana, the respondent in the present appeal, for the financial arrangements of the parties to be settled, he ordered Mr. Caruana, the appellant in this appeal, to pay to the wife the sum of £146,000 within 28 days, with associated orders for the payment of maintenance if the sum were not paid by April 1st, 2003. He also ordered the husband to pay the wife's costs of the proceedings, to be assessed if not agreed. The appeal is against both the judgment for the payment of the capital sum and against the costs order.

2 The parties are Mrs. Amanda and Mr. Paul Caruana. They were married on July 13th, 1976 in Gibraltar. There are no children of the marriage. The husband is by profession a dental surgeon, who was obliged by ill-health to retire in 1992, when he was in his early 40s. He was then a Consultant Dental Surgeon at St. Bernard's Hospital, Gibraltar.

3 The husband and wife lived at first in a flat in London, then in a flat in Gibraltar and finally in a house which they built in 1987 at Sotogrande in Spain. There they had a maid and a gardener.

4 It is the great misfortune of both parties that in 1990 the husband was diagnosed as suffering from multiple sclerosis. As a result he was obliged to retire in 1992. His income since then has been derived from a small National Health Service pension and monthly payments from the Medical Sickness Society under two policies. At present the total of these payments amounts to £1,815 per month, but the smaller policy will expire on December 31st, 2011, when the husband will reach the age of 60, and the larger policy in 2016 when he is 65. He is at present 52 or 53, and the wife some two years younger. She had paid employment when they lived in London but not thereafter until the separation which led to these proceedings.

5 Mrs. Caruana left the matrimonial home in Sotogrande on May 3rd, 2000. Mr. Caruana still lives there. On July 5th, 2000 she issued a petition

for divorce, on which a *decree nisi* was pronounced on July 31st, 2001. I assume this has now been made absolute.

6 On July 28th, 2000 the wife made application for maintenance pending suit. On July 31st, 2000, by agreement, Pizzarello, A.J. ordered the husband to pay her interim maintenance of £135 per week. This remained the position until December 31st, 2001, when the Chief Justice increased the amount of the order to £1,125 per month from November 1st, 2001. That remained in force until the order which is the subject of this appeal. Shortly after she left the matrimonial home, the wife obtained employment and she is now employed at the modest salary of £650 per month. The Chief Justice held that "there seems no reason why [the wife] cannot remain in some sort of employment until she is of retirement age."

7 In his first affidavit in response to the wife's applications sworn on August 17th, 2000, the husband set out his present income, to which I have referred above. He estimated his expenses at £21,250 per annum (the affidavits and the judgment contain more precise sums, but since these are conversions from pesetas and later euros into Sterling, I think it right to round them).

8 His capital resources, as disclosed in that affidavit, consisted of the sums held in five bank accounts and nine traded endowment policies. In addition, he swore that in January 2000, he had inherited some €320,000, which was invested at that time in a Euro Cash Fund. He also had a holding in a Norwich Union Jersey Investment Plan. The former matrimonial home was held in the joint names of the parties. Not referred to in that affidavit was the husband's interest in a family discretionary trust. This is one of the items in issue in this appeal. Until the making of the order under appeal, the wife had no capital assets of her own, apart from her half share in the matrimonial home.

9 In his first affidavit and answer to the wife's original application sworn on August 17th, 2000, the husband said, *inter alia*:

> "I want to make my wife a suitable and reasonable offer of financial settlement. I consider that suitable and appropriate capital provision by way of a lump sum payment will enable her to invest the same to cater for her future income needs and enable her to purchase a flat of her own. My wife told me she wanted to buy a one-bedroom flat in Puerto Sotogrande and the value of it was approximately Ptas. 13,000,000."

And in the last paragraph of that affidavit he swore:

> "In the premises, I would ask that this honourable court reject my wife's claim for a periodical payment order and/or a secured provision order, and make a lump sum order in such terms as it thinks fit in settlement of my wife's claim for financial provision."

The proposition that the wife should have an order for a lump sum rather than periodical payments on maintenance was acceptable to her and the application has since proceeded on this basis but with the successful application by the wife for an increase in interim maintenance.

10 As the husband's affidavit said, the wife had made it clear that she wished to have funds to enable her to buy a home of her own. However, by the time of the wife's application for an increase in her interim maintenance, there had been no progress towards this aim. The husband's affidavit on that application of November 12th, 2001 says:

> "While I have been reluctant to vacate my home until the accommodation, which I have identified as suitable to my needs in a development called Euro Plaza (work on which is about to be commenced in Gibraltar) is ready, I accept that the sale of the matrimonial home without vacant possession would not be a practical proposition. My reluctance to vacate the matrimonial home at this stage is due solely to my health which cannot cope with the mental stress and physical exertions of a move to temporary accommodation now and a further move in about two years' time to my new permanent home at Euro Plaza."

And then he produced a copy of a medical note from a Dr. Fitzpatrick concerning his condition. In the next paragraph he said:

> "However, in order to move forward on a permanent financial settlement with the petitioner, I am willing to agree to an immediate sale of the matrimonial home and to start vacating the same as soon as contracts are exchanged with a purchaser. To that end, I have instructed estate agents in Sotogrande—Andalucian Estates—to find a buyer at the asking price of Ptas. 120,000,000."

11 In his judgment, the learned Chief Justice said (2003–04 Gib LR 15, at para. 10):

> "Following the husband's agreement to sell the matrimonial home, the parties agreed to instruct a valuer to value the property and to share his fees. Although agreement was reached in this regard in early December 2001, it was only after much to-ing and fro-ing, with the involvement of the Registrar that instructions reached the valuer in early April 2002. On April 15th, 2002, an offer to purchase the property for €635,000 was received by the husband. Within a week this offer had been increased to €691,163. The wife agreed to accept that offer and an acceptance was communicated to the purchaser's agent on April 25th, 2002. On May 29th, 2002, Pizzarello, A.J. ordered, on the wife's application, that the husband sell the matrimonial home to the prospective purchaser or alternatively purchase the wife's half share in the home for the equivalent

of the offered price. The husband was given 21 days in which to comply with that order and the wife was given the costs of the application. On June 14th, 2002, the husband's solicitor notified the solicitor for the wife that the husband had opted to retain the property. A further order was made by Pizzarello, A.J. on June 20th, 2002, requiring the husband to pay the wife's half share of 345,581.50 into the Supreme Court by close of business on June 24th. I should add, for the sake of completeness, that there was further delay in the arrangements for the transfer of the wife's interest in the matrimonial home to the husband, and it took a further application to this court before the funds retained in court could be released to the wife. This was finally achieved in September 2002."

12 The value of the matrimonial home, £445,911.96, in Sterling terms, represents part of the family assets and the petitioner has had half of the value of the home of £222,995.98. In the light of what I said earlier, I am going to call that £223,000.

13 The wife thus received about £223,000 from which she has purchased herself a two-bedroom flat in Sotogrande in August 2002. Meanwhile, on June 1st, 2001, the wife made an offer to settle her claim for 50% of the value of the matrimonial home which she in due course received, plus 35% of the remaining balance. That offer was in the nature of a *Calderbank* offer, but privilege has been waived by both sides as far as it is concerned. There has never been any counter-offer.

14 I have already read the part of the judgment that details various applications the wife had to make to the court. Thus from the time that the husband knew that the wife wished to buy a home of her own, and appeared to agree that he would provide her with the sums to enable her to do so, two years elapsed before she achieved that.

15 On June 27th, 2002, the Supreme Court ordered that the husband instruct Mr. Hugh Drummond, a chartered accountant, to draw up and audit an account of the bank accounts held by the husband or jointly, and of his various investments and provide him, Mr. Drummond, with the necessary information. The parties agreed that this account/audit should be drawn as at July 31st, 2002 values, no doubt anticipating that it would be ready in a few weeks. As a result of the husband or his solicitor failing to supply some necessary information to Mr. Drummond, the account/audit was not prepared until January 2003, about three weeks before the hearing started.

The course of the hearing

16 It is necessary to consider this because it forms the basis of the husband's first (and I suspect major) ground of appeal, namely, that the Chief Justice failed to give the husband the fair trial to which he was

entitled under the Gibraltar Constitution. I have to refer for this purpose to various parts of the transcript of the hearing before the Chief Justice.

17 The hearing began on the morning of Friday, February 7th, 2003. After about half an hour, the Chief Justice said: "Are you content for me to take the material up [meaning to his room] for me to read through it for an hour and tell you what you ought to settle on?" Ms. Evans said: "Yes, My Lord." And then she made a point which I don't need to read, and the Chief Justice said: "Well, I'll have a look at this and when I come back I'll give you a global figure which you ought to settle. Now the problem is of course that if you then don't accept the figure that I give you." To which Mr. Budhrani, for the husband, said:

> "Well, My Lord, you'll certainly assist I hope, in assisting the parties by making them realize which way the court is thinking. If they don't settle, they'll do so at their own peril I suppose, but it would be helpful if Your Lordship expressed at least a view."

And then later, before he retired to do exactly that, the Chief Justice said: ". . . [A]t the end of the day any view I take . . . must be a round view, even if you get a judgment from me." Mr. Budhrani did not complain about the Chief Justice making that suggestion or indeed doing as he proposed he should do.

18 Later in the morning of that Friday, after about an hour's adjournment, the Chief Justice returned to court and said:

> "On the basis that Mr. Caruana requires medical attention for the future and taking a broad look at the figures, I have more sympathy with Mrs. Caruana in terms of costs than I do Mr. Caruana. My own view is that Mrs. Caruana should settle for £180,000 which would include costs."

Mr. Budhrani asked: "That's £180,000 over and above the £220,000 we are talking about?" That presumably, was a reference to the half share in the sale price of the home. The Chief Justice said: "Absolutely, yes . . . And even on that, Mr. Budhrani, Mr. Caruana is, without wishing to, you know, trivialize it, getting the benefit of the small change." And the parties were asked to consider that indication of the Chief Justice, who said, a little further on: "I propose you go away and tell me that you've settled; if not, I'll give you an opportunity if you wish to further address me and I will go away and write you a judgment."

19 There was a further adjournment and then when he returned again (it still being the Friday) the proposal was made to the Chief Justice that the husband was willing to transfer to the wife securities which were valued, as at July 31st, 2002, at £180,000. He was not willing to put up £180,000 in cash.

20 During the course of the discussion which followed, the Chief Justice said:

> "I have to say, Mr. Budhrani, that when I was scribbling my figures upstairs in my chambers, I wrote down 200, 190 and then I came to 180 at the end of the day. In other words, my thoughts were upwards of 180 rather than downwards from 180. I don't think Mrs. Caruana should have a penny less than £180,000 which will include her costs. You either accept that or you to seek to persuade me out of it. You said 'the pot is one million.'"

21 Later, the Chief Justice said: "Now, if I write a judgment on it, Mr. Budhrani, does that put the whole issue at large?" And then he said:

> "I have come to a conclusion that it would be wise for the parties to settle at £180,000. That does not mean, I think, that I am bound to award £180,000. It could be less, it could be much more, but am I right in saying that Mr. Caruana has not made any offer of settlement at all?"

22 Mr. Budhrani then asked for, and was duly granted, an adjournment over the weekend to enable him to take proper instructions about that, and the hearing resumed on Tuesday, February 11th.

23 At that point, Mr. Budhrani asked the Chief Justice to recuse himself. In other words, to rule that because of what he had previously said and the indication he had given, he was no longer capable of inspiring confidence that he would be able to give an unbiased judgment in Mr. Caruana's case. Therefore Mr. Budhrani invited him, as it were, to retire from the case and to order the hearing to start afresh, which inevitably meant, or almost inevitably meant in this jurisdiction, in front of Pizzarello, A.J.

24 While the discussion about that was taking place, Mr. Budhrani said:

> "If I may go into this morning's matter, My Lord, the distinct impression I had was that there was a degree of hostility on the part of the court towards not only the respondent but towards me personally."

And then a little later, the Chief Justice said:

> "I am now beginning to feel, if I may say so, slightly manipulated into an adjournment situation. And this is a situation, Mr. Budhrani, which I think is most unfortunate and most unacceptable because this matter has been delayed. I formed a provisional view that the delay isn't on the part of the petitioner. I have formed a provisional view that the delay is on the part of your client and I think that view is not only my own. I think that this is a further delaying tactic. This

> matter ought to be settled and ought to be settled now. You are seeking an adjournment so your client can be here. I grant you that adjournment until 2.30 p.m. What is your view about the dealing with the matter?"

He declined the invitation to withdraw from the application. He then resumed, or perhaps it would be more accurate to say commenced, hearing the submissions of the advocates for both parties.

25 I turn to say something about the value of the family assets as at July 31st, 2002. Aggregating a variety of figures, each of which was agreed between the parties or their solicitors, although in relation to some with the reservation that the particular figure should not form part of the total, the total came (rounded) to £1,020,000. The value of the house at Sotogrande, which had been dealt with in the way I have already described, was £446,000 (the wife had received half of that) so the balance was £574,000. That was held by the husband in assets of various kinds to which I have referred plus a discretionary trust item which is in issue. It also included £172,000 which he had inherited from his mother. I have already referred to that in euro terms so the amount he actually inherited was slightly more in euros than £172,000.

26 Some, though by no means all, the constituent figures were contained in a report by a Mr. Drummond, the chartered accountant. This was not either a valuation or an audit of all the assets. It made valuation of some of the assets, for example the Norwich Union Plan, as at July 31st, 2002, but as a result of Mr. Drummond having difficulty in obtaining information, was not available until about three weeks before the hearing. I doubt whether the Chief Justice found this report of much assistance.

27 The Chief Justice correctly directed himself that the matters to which he must have regard were those set out in the Matrimonial Causes Ordinance at s.32. This is in similar terms to s.25 of the Matrimonial Causes Act 1973, except that s.32 of the Ordinance contains a qualification which used to be, but is no longer, part of the English legislation; that qualification is that the court is required—

> "so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."

It is agreed that in practical terms, this is not possible here, that is to say, to put either of the parties in the position they would have been if the marriage had not broken down. So the difference between the Gibraltar legislation and the English is of no significance in this case.

28 The Chief Justice's approach in reaching his decision was to direct himself first, that the authority which he should follow was that of the decision of the House of Lords in *White* v. *White* (6), and he cited passages from the speeches in that decision, to part of which I shall have to refer later. He then turned to the husband's medical condition. He said (2003–04 Gib LR 15, at para. 21): "Reports have been tendered from Dr. M. Maskill, a consultant physician whose patient the husband is, and Dr. R. J. Abbott, a consultant neurologist. Their reports are complementary." He then quoted passages from Dr. Abbott's report and accepted that as the basis upon which he would reach his decision. In particular he quoted Dr. Abbott as saying (*ibid.*):

> "If indeed Mr. Caruana does develop sufficient disability to require to live in a wheelchair he will be unable to live independently. He will not be able to drive himself around easily and will require an external carer. He may require to move into adapted accommodation with stair-lift, ramps, *etc*. Ultimately it is likely that he will become totally dependent upon others. This can happen within 5 to 10 years but it is more likely to be within 10 to 15 years."

29 The Chief Justice accepted that it is likely that, at a period which Dr. Abbott put at 10 or 15 years, the husband will need full-time nursing care and also medication. As to medication, he said: "There is no evidence from which I can conclude that he will be financially responsible for medication." That conclusion was accurate, it being the precise position that there was no such evidence before him. Then he went on (*ibid.*):

> "However, it is clear that there will be a substantial requirement for nursing care. From the evidence before me, it seems that he will require such care in about 10 years' time. If the husband is wheelchair-bound for the last 15 years of his life then by present-day costs he will require £270,000 and if he requires nursing care for 20 years the figure increases to £360,000. There must be an adjustment to the settlement to reflect this factor. This, and the question of the husband's inheritance, are the reasons why an equal division of the assets would be unfair."

30 I pause to say that that was based upon the Chief Justice's acceptance of what had been put before him, that at the present day, currently, the costs of such nursing care would come to about £18,000 a year, as the figures of £270,000 and £360,000 are of course simple multiplications of that sum by 15 and 20 respectively. Those figures do not make any allowance for the fact that any sum retained by the husband now would have to be discounted because it would be required in order to meet a need which, on the basis on which the Chief Justice was dealing with it, would not arise for 10 years, and then would be an annual cost spread over 15 or 20 years.

31 The Chief Justice then turned to deal with the husband's inheritance, and he said this (*ibid.*, at para. 25):

> "25 I also bear in mind that the husband brought into the family assets the sum of £172,000 by way of inheritance. The husband ought to be allowed to keep it. However, as there will be a substantial adjustment in favour of the husband to reflect his nursing requirements the inheritance can be absorbed into that figure. The value of the inheritance should be put towards the husband's future care, rather than the wife having too great a financial burden in that regard."

32 A question had also been raised about a possible benefit that the wife might obtain from the will of her mother. The Chief Justice rejected that as a matter to take into account, since there was no evidence that any inheritance from the wife's mother would inevitably find its way to her, giving reasons for that. There is no challenge to that in this appeal.

33 He then turned to the disparity between the parties in terms of future income, to which he said he must have regard, and he said (*ibid.*): "The wife earns £650 per month and there is no evidence that she has the capacity to earn more. Presumably she can continue to work until retirement age." I break off to say that I am not sure what age he meant, but I assume he meant 60, but he may have had in mind a later age than that. And then he said (*ibid.*, at para. 26): "When maintenance from the husband ceases, on present figures the wife will have to dip into capital to the tune of £800 per month."

34 He then set out the amounts which the husband received from his National Health Service pension and the Medical Sickness Society policies, as I have set them out, and then he said: "Assuming that the wife can work for a further 15 years, I have calculated that the disparity in income between the parties over that period is in excess of £150,000."

35 His conclusion was in the following terms (*ibid.*, at para. 29):

> "29 Taking all the above matters into consideration and being as fair as I can as between the parties I consider that if I make an order which, on Mr. Drummond's figures, gives the husband £150,000 for future accommodation and £500,000 capital it meets the justice of the case. This leaves the wife with £369,000, or £146,000 of the balance of capital remaining, and means that the husband receives the sum of £281,000 more than the wife."

36 I should comment that the sums of £150,000 for future accommodation and £500,000 for capital, including future nursing needs, were figures which Mr. Budhrani had earlier suggested would meet the husband's needs, or would be needed to meet the husband's needs.

Although this was his submission, it was made on the basis that the total assets were appreciably less than the £1,020,000, which was the global sum. In other words, Mr. Budhrani put forward that that was the husband's needs, but did not accept that the total sum available included all the assets to which reference had been made.

37 The Chief Justice then made orders that the husband pay the wife £146,000 within 28 days, with maintenance payments to continue until the capital sum is paid.

38 He also ordered that the husband pay the wife's costs and, as I have said, there is an appeal against that order also, but I propose to consider this when I have dealt with the appeal against the substantive order.

That appeal, Mr. Budhrani, Q.C., for the husband, argues under two broad headings. The first is that the Chief Justice showed apparent bias, and thus was wrong to continue to hear the wife's application. This arises from what he said at the commencement of the hearing on Friday, February 7th, 2003, and the resumption on Tuesday, February 11th. I have already quoted the relevant passages.

39 At one time, a court allowed parties to conduct their litigation at their own pace subject to the rules of court, and regarded it as their function to resolve disputes without regard to costs incurred on the way. Now, any judge has to be much more conscious of the desirability that a monetary dispute should be settled, if that is possible. The reasons include saving the parties' costs, particularly in a matrimonial dispute, where (as here) the total funds of both parties are limited, and saving judicial time. Judicial time is a scarce resource.

40 It is clearly for those reasons that the Chief Justice, on the morning of Friday, February 7th, offered to give the parties an indication of what he regarded as a suitable figure for settlement of the dispute, after reading the papers, while still giving them the opportunity to address him if there were no agreement. The papers which he had available and which he read, included not merely the pleadings and the various reports that had been made, but also skeleton arguments prepared on behalf of both parties. I remind myself that Mr. Budhrani did not object to this and indeed said at the time that it would be helpful.

41 His complaint is that some of the words the Chief Justice used later when seeking to persuade the parties to settle indicated that he no longer had an open mind as to the correct amount the wife should receive.

42 The matters to which Mr. Budhrani particularly refers, in his helpful skeleton argument, are these:

> "11. In response to the husband's offer to transfer to the wife (in settlement of the sum of £180,000) assets valued at £180,000 (which

the wife found unacceptable) *in specie*, the learned judge indicated that he considered £200,000 and £190,000 as possibles, but concluded that £180,000 was appropriate and that he did not think that the wife 'should have a penny less than £180,000' to include her costs.

12. The court's attention is also drawn to the learned judge's remarks: 'Now, I can write you a judgment on that, you can seek to persuade me out of that and I'll still . . . write you a judgment.'

13. The learned judge did indicate that if he were to write a judgment that [would] put the whole issue at large and reiterated his view that it would be wise for the parties to settle at £180,000.

14. In the context of his willingness to write a judgment in the absence of a settlement between the parties, the learned judge stated: 'That does not mean, I think, that I am bound to award £180,000. It could be less, it could be much more . . .'

. . .

20. The court's attention is drawn to the remarks addressed by the husband's counsel to the learned judge, at line 39 of page 41, and the learned judge's own accusation at line 28 of page 42, of being 'slightly manipulated' and of 'a further delaying tactic' by the husband and/or his counsel."

43 The complaint, though described as the Chief Justice showing apparent bias, is more accurately a submission that, by his words, he gave the appearance of having a closed mind, so that it seemed that thereafter there was a real danger that the parties would not receive a fair trial.

44 The Gibraltar Constitution, quite apart from the European Convention of Human Rights, guarantees to all parties in litigation before it, a fair trial or a non-biased tribunal.

45 In *Porter* v. *Magill* (4), Lord Hope of Craighead formulated the test to be applied when deciding whether a decision-maker has shown apparent bias. Lord Hope first quoted a passage from the judgment of the Court of Appeal, delivered by Lord Phillips of Worth Matravers, M.R. in *Re Medicaments and Related Classes of Goods (No. 2)* (2) ([2002] 2 A.C. 357, at paras. 102–103):

"'85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R.* v. *Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge

> was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.'
>
> 103. I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R.* v. *Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to 'a real danger'. Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

All the other members of the House of Lords agreed.

46 What would the fair-minded and informed observer have concluded here? "Informed" means that the observer would know, as the Chief Justice did, the previous history of the proceedings. As I said, the Chief Justice's attempts to save the incurring of further costs by giving an indication of his thinking after reading the papers about the proper figure for settlement, was, in itself, entirely proper. It did however mean that he ran the risk that the complaint which is made here would be made. Some of these comments were firmly expressed, though the observation that the wife should not have a penny less than £180,000 was in the context of the offer, not to pay her that amount in cash, but to transfer to her securities which were said to have had that value in 2002, probably depreciated in value or possibly depreciated in value since that time.

47 After anxious consideration, I decide that the fair-minded observer would conclude that the Chief Justice had formed a provisional view, but that it was perfectly possible that he could and would if necessary be persuaded by argument to change it and that he did not demonstrate that he had a closed mind. I would therefore reject this ground of appeal.

48 I turn therefore to the more detailed matters with which Mr. Budhrani has dealt in his submissions. First, the submissions he made about the value of the family assets, the total assets.

Value of the family assets

49 This relates mostly to the Chief Justice's adoption of the sum of £1,020,000 as the total value of the family assets (including the

matrimonial home), as the best basis for his calculations. He correctly appreciated that this was agreed as being the value as at July 31st, 2002, of the various elements of investments disclosed.

50 There was evidence that by December 2002, as a result of the general decline in the market for equities, the value of one policy, the Norwich Union Plan had declined by about £12,500, that is to say by about 10%.

51 The ground of appeal that deals with this reads as follows:

> "The learned judge erred in adopting £1,019,170.16 (based on Mr. Hugh Drummond's valuation of the family assets as at July 31st, 2002) as the value of the family assets at the date of the hearing. In particular [the judge]—
>
> (a) . . . disregarded the fact that the value of the Norwich Union Investment had fallen by £12,666 in the intervening period;
>
> (b) . . . disregarded Mr. Drummond's view that, in so far as the value of the Traded Endowment Policies, which comprise the family assets, is concerned, 'in current market conditions a certain amount of prudence would be best employed';
>
> (c) . . . failed to have due regard to his own finding that Mr. Drummond's 'valuation is, in all probability, a high valuation of the assets as they stand today';
>
> (d) . . . disregarded the fact that the husband's potential interest in a family discretionary trust (the value of which was notionally agreed by the parties as £66,666) is not an asset realisable at the instance of the husband."

I propose to deal with those in reverse order. In other words, I propose to discuss first the family discretionary trust.

52 This trust, which was never put before the Chief Justice or the text of which was never put before him, has not been put before us, and I have to describe it as it has been described to us. It has seven beneficiaries, of whom the husband is one, and the trust has a major but not total share in the ownership of a property in Gibraltar. The sum of £66,666 was put forward by Mr. Budhrani in correspondence as "the hypothetical value" of the husband's share, arguing of course, that by the nature of the discretionary trust the share should not be included in the assets.

53 Mr. O'Toole, for the wife, refers us to a decision of the Court of Appeal in England in the case of *Thomas* v. *Thomas* (5). That was a decision of a court constituted by Waite, L.J. and myself.

54 The facts, quite shortly, were these. The wife, as here, had no capital assets of her own. The husband was one of three shareholders in, and was

joint managing director of, a thriving business. The other shareholders were his brother and his mother. The policy of the board of the company was to pay only relatively modest salaries and dividends to the directors and shareholders respectively and to retain most of its profits in the company.

55 On the break-up of the marriage, the wife sought both a capital payment and maintenance or periodical payments from the husband. The judge at first instance ordered that the husband should pay her both a capital sum and periodical payments, the amount of which he could not pay out of his then current assets or income, and the issue which is relevant to this appeal, was whether under those circumstances, since the case was considering not merely the wife but also the children, there being two children of the family, it was right to take into account the fact that, if the policy of the company changed, the husband might well obtain from the company a much more substantial income. In the course of his judgment, Waite, L.J. said ([1995] 2 F.L.R. at 670):

> "The discretionary powers conferred on the court by the amended ss. 23–25A of the Matrimonial Causes Act 1973 to redistribute the assets of spouses are almost limitless."

And then (*ibid.*, at 670–671):

> "But certain principles emerge from the authorities. One is that the court is not obliged to limit its orders exclusively to resources of capital or income which are shown actually to exist. The availability of unidentified resources may, for example, be inferred from a spouse's expenditure or style of living, or from his inability or unwillingness to allow the complexity of his affairs to be penetrated with the precision necessary to ascertain his actual wealth or the degree of liquidity of his assets. Another is that where a spouse enjoys access to wealth but no absolute entitlement to it (as in the case, for example, of a beneficiary under a discretionary trust or someone who is dependent on the generosity of a relative), the court will not act in direct invasion of the rights of, or usurp the discretion exercisable by, a third party. Nor will it put upon a third party undue pressure to act in a way which will enhance the means of the maintaining spouse. This does not, however, mean that the court acts in total disregard of the potential availability of wealth from sources owned or administered by others. There will be occasions when it becomes permissible for a judge deliberately to frame his orders in a form which affords judicious encouragement to third parties to provide the maintaining spouse with the means to comply with the court's view of the justice of the case. There are bound to be instances where the boundary between improper pressure and judicious encouragement proves to be a fine one, and it will require

attention to the particular circumstances of each case to see whether it has been crossed."

56 After considering the facts of the case and the arguments on appeal, Waite, L.J. said (*ibid.*, at 677):

"The judge's order certainly involved a powerful inducement to the extended family to come to the husband's assistance, but the provision of that incentive fell, in my judgment, within the bounds of judicious encouragement and lay well short of the kind of order that is condemned in the authorities as placing improper or undue pressure on third parties."

57 In my judgment, I set out principles that I derived from the authorities as follows (*ibid.*, at 678):

"(a) Where a husband can only raise further capital, or additional income, as the result of a decision made at the discretion of trustees, the court should not put improper pressure on the trustees to exercise that discretion for the benefit of the wife.

(b) The court should not, however, be 'misled by appearances'; it should 'look at the reality of the situation.'

(c) If on the balance of probability the evidence shows that, if trustees exercised their discretion to release more capital or income to a husband, the interests of the trust or of other beneficiaries would not be appreciably damaged, the court can assume that a genuine request for the exercise of such discretion would probably be met by a favourable response."

We dismissed the appeal in that case.

58 Here we are considering a situation in which much of the husband's needs for additional income is not immediate but will probably arise in about 10 to 15 years' time. Applying the decision of the Court of Appeal in *Thomas*, the Chief Justice was in my view entitled to conclude that, if then or thereafter the husband needed to seek assistance from the family trust, a request would probably meet with a favourable response. It follows, in my view, that the Chief Justice was entitled to include the husband's hypothetical share within the total assets.

59 I turn to the value of the traded endowment policies. There is no evidence about the value of these assets at February 2003, though the husband could have obtained their surrender value at that date. Mr. Budhrani's argument was that, as the Norwich Union Plan had fallen by about 10% between July 2002 and the end of December 2002, the Chief Justice should assume that the traded endowment policies had done so. In my view, there was no justification to such an assumption and the Chief Justice was entitled to reject it.

60 Thirdly, the one clear piece of evidence the Chief Justice had, was about the drop in value of the Norwich Union Plan. Overall, that and the global figure of £1,020,000 as the assessed value of the total family assets at July 31st, 2002 were the only figures available to him. If the husband had wanted more up-to-date values of all the assets, at say, January 2003, he could have sought them. It is not for this court to disagree with the Chief Justice, who has the task of forming an overall view on the evidence before him, unless he can be shown to be wrong in principle or have clearly made an error which has a substantial effect on the overall sum. Neither is the case here. On this issue, I reject Mr. Budhrani's argument.

61 Medical costs I deal with quite briefly. Mr. Budhrani submits that the Chief Justice should not have concluded there was no evidence that the husband is going to have to bear the cost of medicine as such, and in my view the Chief Justice was entitled to take that view. If there was no clear evidence before him, there wasn't going to be any cost of medicine.

62 The most important matter amongst these financial matters was the Chief Justice's treatment of the husband's inheritance of £172,000. Mr. O'Toole argues, and I agree, that this sum comes within the phrase "other financial resources" to which, by virtue of s.32(1)(a) of the Matrimonial Causes Ordinance, he was required to have regard. But the Ordinance does not require the Chief Justice to treat such resources in any particular way.

63 Guidance as to how such resources, and indeed the other matters referred to in s.32, are to be treated is to be obtained from the speech of Lord Nicholls of Birkenhead in *White* v. *White* (6) ([2001] 1 A.C. at 610):

> "I must also mention briefly another problem which has arisen in the present case. It concerns property acquired during the marriage by one spouse by gift or succession or as a beneficiary under a trust. For convenience I will refer to such property as inherited property. Typically, in countries where a detailed statutory code is in place, the legislation distinguishes between two classes of property: inherited property, and property owned before the marriage, on the one hand, and 'matrimonial property' on the other hand. A distinction along these lines exists, for example, in the Family Law (Scotland) Act 1985 and the (New Zealand) Matrimonial Property Act 1976.
>
> This distinction is a recognition of the view, widely but not universally held, that property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage

> these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.
>
> Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property."

"Claimant," of course, will normally mean a claimant wife.

64 The Chief Justice has treated the money inherited by the husband, and incidentally quite recently inherited, as necessary to meet the husband's, not the wife claimant's, needs in this case which, speaking for myself, I regard as a sensible and practical approach.

65 Mr. Budhrani argues that the Chief Justice was only entitled to do this after he had assessed the wife's financial needs, following what was said by Lord Nicholls of Birkenhead, and could only take the husband's inheritance into account as part of the family assets if he had decided that the wife's needs could not be met without taking the husband's inheritance into account. In this case, he submits, the Chief Justice made no such assessment, so he could not do what he did. Mr. O'Toole argues, and I agree, that in his judgment (2003–04 Gib LR 15, at para. 26), which I have already read, where the Chief Justice discussed the wife's need for further income, he was in effect, though not in terms I accept, setting out what he considered to be the wife's needs. What is clear, however, is that here we have a case in which the Chief Justice's award to the wife was £146,000, which was the balance after he had decided what the husband should have for his capital and accommodation needs, £650,000. If the £172,000 inheritance were not treated as part of the family assets and the Chief Justice sought to award the husband £650,000 there would have been nothing left for the wife at all, and so it is self-evident that there would not have been sufficient, without that sum, to meet the wife's needs, even if he had not assessed them. Clearly, in my view, the passage in Lord Nicholls's speech is satisfied.

66 I would therefore reject this argument also and thus dismiss the appeal against the award of £146,000.

Costs appeal

67 I preface this part of my judgment by reminding myself that the Chief Justice had been concerned with, and was familiar with, this litigation from the outset. He reminded himself at an earlier stage of his judgment, of the various summonses which the wife had taken out and in some cases had had to take out in order to secure future progress of the matter. I have already referred to that.

68 And then, in reaching his decision on costs, the Chief Justice directed himself in accordance with the judgments in *Gojkovic* v. *Gojkovic (No. 2)* (1). He quoted passages from the first judgment and I will return to give shorter quotations.

69 There has been a much more recent decision of the Court of Appeal in England delivered on July 28th, 2003, dealing with costs in matrimonial cases in the case of *Norris* v. *Norris* (3). This was of course given well after the Chief Justice's judgment. However, counsel before us are agreed that the question at issue in *Norris* v. *Norris* does not arise in the present case and that the *dicta* in *Gojkovic* are therefore still to be applied.

70 The leading judgment in that case was given by Butler-Sloss, L.J. She said ([1992] 1 All E.R. at 271):

> "However, in the Family Division there still remains the necessity for some starting point. That starting point, in my judgment, is that costs prima facie follow the event (see Cumming-Bruce L.J. in *Singer (formerly Sharegin)* v. *Sharegin* [1984] F.L.R. 114 at 119) but may be displaced much more easily than, and in circumstances which would not apply, in other divisions of the High Court . . . If the application is contested and the applicant succeeds, in practice in the divorce registries around the country where most ancillary relief applications are tried, if there is money available and no special factors, the applicant spouse is prima facie entitled to, and likely to obtain, an order for costs against the respondent. The behaviour of one party, such as in material non-disclosure of documents, will be a material factor in the exercise of the court's discretion in making a decision as to who pays the costs."

And later she said (*ibid.*, at 273):

> "There are many reasons which may affect the court in considering costs, such as culpability in the conduct of the litigation, for instance (as I have already indicated earlier) material non-disclosure of

documents. Delay or excessive zeal in seeking disclosure are other examples. The absence of an offer or of a counter-offer may well be reflected in costs, or an offer made too late to be effective. The need to use all the available money to house the spouse and children of the family may also affect the exercise of the court's discretion. It would, however, be inappropriate, and indeed unhelpful, to seek to enumerate and possibly be thought to constrain in any way that wide exercise of discretion. But the starting point in a case where there has been an offer is that, prima facie, if the applicant receives no more or less than the offer made, she/he is at risk not only of not being awarded costs, but also of paying the costs of the other party after communication of the offer and a reasonable time to consider it . . . I cannot, for my part, see why there is any difference in principle between the position of a party who fails to obtain an order equal to the offer made and pays the costs, and a party who fails by the offer to meet the award made by the court. In the latter case prima facie costs should follow the event, as they would do in a payment into court, with the proviso that other factors in the Family Division may alter that prima facie position."

71 The learned judge in this case expressed his decision on costs as follows (2003–04 Gib LR 15, at paras. 31–33):

"31 In this case the wife had to initiate proceedings because the husband failed to pay her proper maintenance and he took control of the family's finances. When those proceedings were instituted the husband offered a low amount of maintenance and declared that the purpose of his agreeing to pay this amount 'was to encourage the commencement of negotiations for suitable and appropriate financial settlement' but went on to ask the court to reject the wife's claim for maintenance and make an order for payment of a lump sum. That was stated in his affidavit dated August 17th, 2000, at which stage full disclosure had not been effected. The wife went on record as requiring by way of settlement half the value of the matrimonial home and 35% of the remaining capital. During the course of proceedings her position hardened to a request for 50% of all family assets. Of course the eventual award has not come up to these demands but in correspondence the wife solicited an offer of settlement from the husband. At no stage during the course of a case which has stretched over many months, unless perhaps informally and very shortly before the hearing of this matter, did the husband make any offer of settlement. It is as if he has been unable to bring himself to do so.

32 Mr. Budhrani has manfully tried to persuade me that the wife has conducted these proceedings in a hostile manner and that she

has failed to accept the husband's declaration of his assets, thus prolonging and complicating the proceedings. This is an easy accusation to make by a party who has taken control of the assets and has refused to make an offer of settlement. At every turn the wife has needed the court to step in and the correspondence file is littered with letters unanswered by the husband's solicitors. It even required the drafting of a summons to force the husband to pay his share of the fee for valuation of the matrimonial home, many months after the report was agreed upon and the wife had paid her share of the fee.

33 The husband has at all times had sole access to the information necessary to quantify the family assets. It was his duty to make that quantification, by means of professional help if necessary, to provide that proof to the wife and also to make an offer of settlement. The evidence shows that he dragged his feet on the quantification and neglected to make any offer of settlement. If he had made an offer the high costs which the parties will have to meet in this case could have been avoided. It is insufficient for him to say he made a true declaration of assets. It was his duty to follow such declaration with an offer of settlement. In my judgment the husband will have to meet those costs."

72 Mr. Budhrani submits first, that the Chief Justice was wrong to say that the first affidavit did not contain full disclosure. The only omission was the reference to the family trust matter, and that was understandable because the husband believed on advice that that was not an asset to be taken into account.

73 Secondly, and perhaps more substantially, he submits that the Chief Justice was wrong to treat the husband's failure to make any offer as conclusive. In my view the husband's failure to make any offer was clearly a most important factor in the Chief Justice's view in coming to his order as to costs, but I do not accept that he treated it as conclusive. But nevertheless it was indeed a most important factor. If over $2\frac{1}{2}$ years a husband makes no offer to settle his wife's claim and no attempt to negotiate, it is very difficult to see how he can complain if when she receives an order in her favour, that weighs heavily in the scales against him as regards costs.

74 And thirdly, Mr. Budhrani argues that the Chief Justice failed to take account of the wife's conduct of the proceedings. The ground of appeal on this aspect of the matter reads:

"The . . . judge erred in disregarding the wife's own conduct of the matter, in that she—

(a) grossly exaggerated the value of the family assets;

(b) persisted in her allegations that the husband was concealing assets from her and was perjuring himself in his affidavits of disclosure; and

(c) refused over a period of one year and eight months to accept the medical evidence as to the husband's condition, thus rendering it difficult if not impossible for the husband to make a meaningful offer of settlement at an early stage in the proceedings."

75 Part of the difficulty in dealing with matrimonial property in cases of divorce is that the emotions which have been aroused during the break-up of the marriage sometimes affect the conduct of the litigation thereafter, and to an extent this appears to have been the case here.

76 Undoubtedly the wife did at one time put too great a value on the family assets, and appeared over-sceptical about her husband's, or former husband's, medical condition, but these were matters which could have been and indeed, in time, were dealt with by evidence, and need not have resulted in great delay nor extra cost. I do not myself understand why they should render it impossible for the husband to make a meaningful offer of settlement at an early stage. He, on advice, could have assessed what he considered to be a proper offer of settlement and put it forward, and negotiations could then have started. At the very least it would have meant that the area of dispute between the parties was illuminated whereas this was not the case in the present case at all.

77 The one aspect of the wife's conduct which does concern me, relates to her concern about the evidence about her husband's medical condition. Mr. Budhrani's firm originally obtained a report about his condition from Dr. Maskill, who is a consultant physician in Gibraltar and is a friend of the husband. The wife was unwilling to accept its validity, so in due course a report was obtained from Dr. Abbott, who is a consultant neurologist and who from time to time visits Gibraltar from England. The Chief Justice based his decision on Dr. Abbott's report as I have already said. However, in her fifth affidavit, sworn on November 23rd, 2001, the wife deposed:

"I have subsequently discovered that both the respondent and Dr. Abbott are old colleagues and therefore Dr. Abbott was neither honest nor an independent expert, of which Dr. Abbott should have notified my solicitor. I have reason to believe that Dr. Abbott's report is simply a gross exaggeration of the respondent's true state of health and, because of the fact that they were old colleagues, he has been quite happy to elaborate in his report."

78 Dr. Abbott was not an old colleague of the husband. It is true that he had met the husband previously because he had previously consulted Dr. Abbott about his condition, though quite some time before, as I

understand it. The imputation that Dr. Abbott was biased, dishonest and not independent was in my view wholly unjustified. Ms. Evans, solicitor for the wife, should not have allowed her client to include these allegations in the affidavit. They were, I imagine, motivated by the emotion to which I have referred but they should simply not have been allowed to be made.

79 Nevertheless, they had no effect at all on the result, since the Chief Justice did accept in total the validity of Dr. Abbott's report and his opinion.

80 The award of costs is particularly a question for the discretion of a trial judge who has had the conduct of the proceedings. This court will only interfere with this order if persuaded that the trial judge was clearly wrong. We are certainly not in that situation here. There was material on which the Chief Justice could properly make the order for costs which he did make. I would therefore dismiss this part of the appeal also.

81 **STAUGHTON, J.A.:** I agree with the judgment of the President and have only a few words to say on the topic of bias. This is always of importance. It is fundamentally important that there should be no bias in the proceedings of the law. On the other hand, it is, as Mr. O'Toole submitted, particularly important in family disputes that judges should be allowed whenever possible to give some indication of what would be an appropriate figure for a settlement, provided that they are still prepared to try the case and to do so fairly. What do we mean by bias? No doubt, people have different meanings. I would say that bias is a tendency to base a decision on a factor or factors which are irrelevant to the decision and detrimental to the case of one of the parties. I cannot see any sign of bias in that sense in this case. It seems to me that what was really meant by Mr. Caruana's counsel, when he asked the Chief Justice to recuse himself, was that it was inappropriate for a judge to express views before he has heard the whole case. That is not the law. Being a judge is a much more sophisticated task than that. It is sometimes very desirable for the judge to express a view in the course of a case, and helpful too. If it were not so I would have been guilty of misconduct in half the civil cases I have tried at first instance or heard on appeal, in the last 22 years. In addition, the Chief Justice sought the parties' approval to the course that he took and received it. There was no impropriety on his part in this case and I too would dismiss the appeal.

82 **CLOUGH, J.A.** concurred with both judgments.

Appeal dismissed.

[2003–04 Gib LR 174]

ROCCA v. ROCCA

SUPREME COURT (Pizzarello, A.J.): October 7th, 2003

Family Law—domestic violence—injunction—breach—committal to prison by Supreme Court for specified period under common law powers not subject to remission

The respondent was committed to prison for a breach of an injunction made by the Supreme Court, granted under the Domestic Violence and Matrimonial Proceedings Ordinance.

The Attorney-General applied to the court for directions in relation to the imprisonment of the respondent, and whether reg. 6(1) of the Prison Regulations applied to this situation, *i.e.* whether or not the Superintendent of Prison had the power, and was under a duty, to consider remission for the respondent, as regards his imprisonment.

The Attorney-General submitted that (a) remission was granted at the discretion of the Superintendent of Prison; (b) it applied to a person who was serving a sentence of imprisonment; and (c) the respondent was in prison and therefore the Prison Regulations applied, whether he had been imprisoned under the common law or under s.5 of the Domestic Violence and Matrimonial Proceedings Ordinance.

The respondent submitted that (a) the Superintendent was under a duty to consider remission; and (b) there was an express power in the Prison Regulations for him to do so.

The petitioner submitted in reply that (a) the Superintendent must not defy a direct order of the court; (b) the court had fixed a date for the respondent's release, which must be adhered to by the Superintendent, or he would be guilty of contempt; and (c) s.5 of the Domestic Violence and Matrimonial Proceedings Ordinance did not apply to this situation, as that section was confined to the magistrates' court, and the common law powers of committal possessed by the Supreme Court were unaffected.

Held, making the following ruling:

An order of the Supreme Court committing a contemnor to imprisonment for a specific period had to be served in its totality and reg. 6(1) of the Prison Regulations concerning remission did not apply (para. 8).

Legislation construed:

Domestic Violence and Matrimonial Proceedings Ordinance 1998, s.5:

The relevant terms of this section are set out at para. 2.

Prison Regulations 1987, reg. 6(1): The relevant terms of this sub-section are set out at para. 2.

L. Yeats for the Attorney-General;
D. Hughes for the petitioner;
J. Daswani for the respondent.

1 **PIZZARELLO, A.J.:** This is an application by the Attorney-General for directions in relation to the term of imprisonment to be served by the respondent, following a breach of an injunction made in the Supreme Court on August 14th, 2003. On September 12th, 2003, the respondent was committed to prison to October 24th, 2003, in respect of the said breach. The injunction was granted under the Domestic Violence and Matrimonial Proceedings Ordinance.

2 Mr. Yeats drew the court's attention to reg. 6(1) of the Prison Regulations 1987. That reads:

> "A prisoner serving a sentence of imprisonment for an actual term of more than five days may, on the ground of his industry and good conduct, be granted remission in accordance with the provisions of this regulation."

Remission, he submitted, is granted at the discretion of the Superintendent of Prison, and applies to a person who is serving a sentence of imprisonment. He referred to s.5 of the Domestic Violence and Matrimonial Proceedings Ordinance:

> "A person who is in breach of an injunction or other order of the court to which this Ordinance applies, shall be liable to imprisonment for a period not exceeding 6 months or to a fine not exceeding level 3 on the standard scale, or to both."

The respondent's situation is covered by the terms of the Regulations, irrespective of whether the contemnor has been imprisoned under common law powers or under proceedings brought under the Domestic Violence and Matrimonial Proceedings Ordinance. In the United Kingdom, the normal rules of remission apply to contemnors, and of course this is understandable as it helps the prison authorities to keep discipline.

3 Mr. Daswani, for the respondent, associated himself with Mr. Yeats' submission. The Superintendent, he said, has a duty to consider remission and there is the express power in the Regulations to do so.

4 Mr. Hughes submitted that the Superintendent must not defy a direct order of the court. The court fixed a date for his release and that has to be observed by the Superintendent on pain of being guilty of contempt himself. This order does not relate to a s.5 situation. That section is

confined to the magistrates' court. The powers there are given by statute and do not impinge on the common law powers of committal which the Supreme Court possesses and does not lose as a result of the Domestic Violence and Matrimonial Proceedings Ordinance. A contemnor can be released early, but he must purge his contempt and make an application. Mr. Hughes observes the situation in England is a little different, insofar as the Superintendent's discretion is concerned. There, the discretion is given directly by an Act, namely s.45(3) of the Criminal Justice Act 1991. The provision which gives the discretion to the Superintendent in Gibraltar are regulations and must need give way to the judge's direct order.

5 In reply, Mr. Yeats submitted that if the contemnor is in prison he is imprisoned. Therefore he is a prisoner and the Regulations apply.

6 Having heard the arguments, I rule that an order of the Supreme Court committing a contemnor to imprisonment for a specific period has to be served in its totality and the Prison Regulations concerning remission do not apply.

Ruling accordingly.

[*November 25th, 2003: The learned judge refused to grant an application to release the respondent from custody on the ground that he had not purged his contempt, and also made an order for joint custody of the children, but with care and control to the petitioner and supervised access to the respondent. In addition, the learned judge made a judicial separation order and an order that the respondent should not approach within 50 metres of the home or within 30 metres of the petitioner.*]