

[2005–06 Gib LR 274]**HOLGADO v. HOLGADO**

SUPREME COURT (Dudley, A.J.), October 23rd, 2006

Family Law—domestic violence—ouster order—interim order pending divorce—only made in cases of real necessity not as matter of course—applicant to show that cohabitation intolerable for reasons connected with respondent’s behaviour or habits—proof of truth of allegations not needed, merely that they may be true—accommodation for children of family primary consideration but wife’s grandchildren less significant if not adversely affected by home atmosphere—husband may be temporarily excluded while alternative arrangements made for grandchildren

The petitioner wife sought, without notice, a non-molestation order against her husband, an order restraining him from approaching the matrimonial home and an order ousting him from the home.

The parties’ relationship had lasted 20 years and they had been married for nearly 10. The wife gave evidence (denied by the husband) that he had previously been violent towards her and she left him for two months, returning in January 2006. An attempted reconciliation did not succeed and she left again to visit her daughter in the United Kingdom; she sold one of their family cars and their computer but maintained that their separation was not intended to be permanent, though the husband claimed that this was not how it appeared to him.

When she returned in June 2006, there were disagreements about the use of the telephone, access to different parts of the home, the sharing of the bedroom, excessive noise by the husband, provocation by the wife, maintenance and the provision of food—about which they gave conflicting evidence. An allegation of the husband’s drunkenness on one occasion, followed by an argument, after which he called the police, resulted in a written police report that he bore no signs of violence, which he himself signed as accurate (perhaps indicating that he was not very drunk).

The wife’s grandchildren were living in the home with them and needed care. Their father had left the country and their mother had appointed the wife as their guardian, since was possibly facing a custodial sentence for drug offences.

The wife then obtained, without notice, orders for non-molestation by the husband, restraining him from approaching the matrimonial home by a specified distance and ousting him from the home. The court reconsidered the orders on the *inter partes* hearing.

Held, refusing the injunctions sought and making consequential orders:

(1) This was not a case for a non-cohabitation order or an ouster order, which should be granted only in cases of real necessity and not as routine steps on the way to divorce. It was true that there was considerable tension and the atmosphere in the home was bordering on the intolerable but the parties' behaviour had not yet reached the point at which the court was prepared to say that it was just and reasonable to order the husband to leave, since both of them still had the right to live in the house. It was not essential that one party's account of their married life should be believed rather than the other's, as the allegations would need to be tried out in full when the matter came to divorce proceedings (paras. 11–12).

(2) Ordinarily, had the children been "children of the family," their interests would have been the primary consideration and the wife, who had care of them, would have been able to live with them in the matrimonial home. As grandchildren, however, on whom the family tension had apparently no adverse impact, their interests need only be considered in the short term and the court was only prepared to exclude the husband for a brief period to allow alternative arrangements to be made for them (paras. 15–16).

(3) The *ex parte* injunctions would therefore be discharged and new injunctions would be refused. The husband would be excluded from the home for approximately a month and would be ordered to pay the wife interim maintenance of £40 per week (para. 17).

Cases cited:

- (1) *Aguilera v. Aguilera*, 1991–92 Gib LR N [19], observations of Kneller, C.J. applied.
- (2) *Burke v. Burke*, [1987] 2 FLR 71; (1987), 17 Fam. Law 201, *dicta* of Lloyd, L.J. applied.
- (3) *Debono v. Debono*, 1993–94 Gib LR N–14, referred to.
- (4) *Richards v. Richards*, [1984] A.C. 174; [1983] 2 All E.R. 807; [1983] Fam. Law 256; (1983), 12 HLR 68, referred to.
- (5) *Summers v. Summers*, English C.A., *The Times*, May 19th, 1987, applied.

Legislation construed:

Domestic Violence and Matrimonial Proceedings Ordinance 1998, s.3:

"(1) On an application to the court by a party to a marriage, the court shall have jurisdiction to grant an injunction containing one or more of the following provisions—

- (a) a provision restraining the other party to the marriage from molesting the applicant . . .
- (c) a provision excluding the other party to the marriage from the matrimonial home or a part of the matrimonial home or from a specified area in which the matrimonial home is included . . .

whether or not any other relief is sought in the proceedings."

Matrimonial Homes Act 1967 (c.75), s.1(3): The relevant terms of this sub-section are set out at para. 10.

Ms. S. Sacramento for the petitioner;
C. Simpson for the respondent.

1 **DUDLEY, A.J.:** On September 28th, 2006, Mrs. Holgado, without notice to the respondent, sought and obtained injunctive relief under the Domestic Violence and Matrimonial Proceedings Ordinance *inter alia* preventing her husband from molesting and assaulting her, approaching within 30 metres and excluding him from the matrimonial home. Attached to the order was a power of arrest.

2 Although a return date for an *inter partes* hearing was fixed for October 16th, 2006, the respondent applied under the liberty to apply provision in the order seeking its discharge, which matter came before me on October 12th, 2006. On the hearing of that application, I took the view that the proper course was to hear the petitioner's application afresh on an *inter partes* basis, taking account of the further affidavit evidence filed and served by the petitioner and respondent.

3 Although they were married on March 24th, 1997, the relationship between the parties goes back 20 years. It is not in issue that it has come to an end. In May 2006, the respondent's solicitor wrote to Mrs. Holgado to ascertain whether she would be instructing solicitors upon whom service of a divorce petition could be effected.

4 It appears that the relationship had deteriorated by the end of 2005. Mrs. Holgado went away from the matrimonial home for some two months, returning in January 2006. Mr. Holgado says that at the time she never said that this departure was a temporary measure. An attempted reconciliation did not prosper and Mrs. Holgado once again left for the United Kingdom in May 2006, she says, to be with her daughter who was undergoing IVF treatment. Before this second absence, Mrs. Holgado sold one of the family cars, because she says all her savings had been exhausted. However, she says that "never did I state or imply that I would not return to my home." Mr. Holgado in effect says that he formed the view that she had left for good, given the sale of their car, their computer and her having taken everything save for some old clothes. It is fair to say that the tenor of the letters from Mrs. Holgado to Mr. Holgado during her May stay in the United Kingdom tends to support his understanding of the situation.

5 In June 2006, Mrs. Holgado returned to the matrimonial home. According to Mrs. Holgado, the respondent disconnected the phone, took the key to a back patio thereby denying her access to it, failed to keep food in the house for her or provide her with maintenance. She further

says that she slept in the spare room to avoid him and that at weekends Mr. Holgado would be drunk, abusive and aggressive. She also alleges that he plays music very loud and slams doors so as to make her life a misery. Mr. Holgado refutes these allegations. He says, and it is not denied by Mrs. Holgado, that she has had the telephone reconnected, and that only she can use it because it needs a pin number before a call can be made and that whilst upon her return from the United Kingdom she slept in a spare bedroom, she subsequently moved into the matrimonial bedroom where they have been sleeping together for the last month. Moreover, he says that it is in fact the petitioner who seeks to provoke him by, for example, scratching his glasses against the floor tiles.

6 Matters, it seems, came to a head on Sunday, September 24th. According to Mrs. Holgado the respondent returned home at about 5.30 p.m. very drunk. An argument ensued and the respondent telephoned the police, accusing Mrs. Holgado of having assaulted him. Mr. Holgado for his part says that the petitioner slapped him three times and pushed him, all this in the presence of their five-year-old grandchild. The only independent evidence, a letter from the Royal Gibraltar Police to the petitioner's solicitors, confirms their attendance at the parties' residence. It states that Mr. Holgado bore no signs of violence. It is, however, silent as to whether Mr. Holgado was drunk, I think that I can infer that absent such reference and his compliance with the officer's request to sign his notebook, it is unlikely that he was considerably drunk.

7 More generally, Mrs. Holgado says that Mr. Holgado has not assaulted her since her return from the United Kingdom after Christmas. She does, however, say that she has been assaulted by him in the past. This is corroborated by the petitioner's former daughter-in-law, Ajessa Edwards, who in her affidavit recounts some rather disturbing incidents of violence by the respondent towards the petitioner and her son, Ms. Edwards's former partner. These assertions by Ms. Edwards would seem somewhat surprising given her apparent willingness to have the respondent look after her five-year-old son whilst the petitioner was away in the United Kingdom last Christmas. Moreover, Mrs. Holgado's letters to her husband, described by Ms Sacramento as "love letters," do not corroborate what in effect is her assertion that this is an abusive relationship. For his part, Mr. Holgado denies ever having assaulted the petitioner.

8 The other issue arising in this case is that of the petitioner's grandchildren, Kyla and James Edwards, aged nine and five respectively. The petitioner's son (the respondent's step-son) left Gibraltar years ago and has no contact with the children. The children's mother, Ms. Edwards, is said to be unable to care for the children as at present she is facing a possible custodial sentence in respect of drug charges. On July

21st, 2006, Ms. Edwards appointed the petitioner guardian of the children.

9 Section 3 of the Domestic Violence and Matrimonial Proceedings Ordinance, pursuant to which the petitioner seeks relief, gives the court jurisdiction to grant injunctive relief including ouster orders. It is, however, silent as to the criteria to be followed by the court when making such orders.

10 I have been referred to *Richards v. Richards* (4), which turns on the interpretation of s.1 of the Matrimonial Homes Act 1967 and particularly sub-s. (3) which provides:

“On an application for an order under this section the court may make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case . . .”

That provision was interpreted to mean that none of the specified matters are required to be treated as paramount over any of the others but the weight to be given to any particular matter depended on the facts of each case.

11 In Gibraltar the statutory provision provides no guidance as to the test to be applied. In *Aguilera v. Aguilera* (1), a case pre-dating the Domestic Violence and Matrimonial Proceedings Ordinance 1998, Kneller, C.J. considered the matters which should be taken into account when determining whether to grant an ouster order under the court’s inherent jurisdiction. The note in the *Gibraltar Law Reports* reads (1991–92 Gib LR N [19]):

“When making an interim order excluding one party to a marriage from the matrimonial home pending the hearing of a divorce petition, the court need be satisfied only that the applicant’s allegations might be true, as there will be a full hearing of the evidence at the divorce hearing . . . To exclude the respondent from the home, the court must be satisfied that the circumstances of the parties’ cohabitation make it intolerable for the applicant (and any children who live with them) to remain in the home with the respondent due to his wilful conduct, some personal defect for which he is not entirely responsible, or even circumstances unrelated to his conduct . . . It will examine whether it is fair, just and reasonable to exclude him . . . The issue of blame is irrelevant, and it is not an essential pre-requisite that there should have been or was likely to be physical violence . . . If there are children the provision of a home for them is the primary consideration. If the applicant has to have charge of them and it is inevitable that she

must do so in the matrimonial home, the respondent will be excluded if the parties cannot reasonably share the home . . .”

12 I see no good reason to depart from the *dicta* of Kneller, C.J., which indeed were applied by Alcantara, A.J. in *Debono v. Debono* (3). However, to my mind that criteria must be applied in line with the English Court of Appeal decision in *Summers v. Summers* (5), applying *dicta* of Lloyd, L.J. in *Burke v. Burke* (2), who said ([1987] 2 FLR at 83):

“It must never be forgotten that an ouster order is a very serious order to make. It is described . . . as a ‘drastic order’ and an order which should only be made in cases of real necessity. It must not be allowed to become a routine stepping-stone on the road to divorce on the ground that the marriage has already broken down and that the atmosphere in the matrimonial home is one of tension.”

13 Mrs. Holgado through her counsel accepts that there has been no physical violence since before Christmas. The recent incidents relied upon by Mrs. Holgado are in effect: (a) the changing of the locks to the home and his having disposed of her clothes prior to her return from the United Kingdom (save that the tenor of her letters could well have been construed in terms that she was not returning); (b) Mr. Holgado’s having disconnected the telephone (save that Mrs. Holgado then had it reconnected with a pin number); (c) Mr. Holgado’s refusal to allow her to use the family car (but it is not, I think, disputed that she had earlier sold another family car without his consent); (d) his failure to provide her with food or maintenance (though Mr. Holgado exhibits supermarket receipts of August 26th, September 3rd, September 9th and September 17th with an average expenditure of about £84); (e) his not allowing her to have friends or family in the house; (f) his being verbally abusive and playing music loudly and slamming doors; and (g) the incident of September 24th when the police were called.

14 I remind myself that I only need be satisfied that the allegations might be true. That, however, does not mean that the factual matrix is not to be considered with circumspection. Particularly, as the respondent also makes cross allegations such as: (a) the petitioner’s return to the matrimonial bedroom; (b) her chaining and padlocking the bedroom windows, thereby barring the only means of escape; (c) her padlocking the gate to a tunnel where the respondent keeps his tools; (d) a ring going missing; (e) the scratching of glasses; and (f) the alleged assault on September 24th when he called the police.

15 Undoubtedly, there is great tension in this household and the atmosphere must be bordering on the intolerable for both parties. However, both of them have a right to live in the home. In the circumstances of the case, and on the evidence before me, absent the impact

which the prevalent atmosphere in the home may be having on the grandchildren, it would not in my view be just or reasonable to exclude the respondent.

16 The children are not, however, “children of the family” and therefore they can only be factored in as a short-term issue, and their needs cannot properly prevent Mr. Holgado from returning to the matrimonial home. I am therefore minded to exclude the respondent for a short period simply so as to allow alternative arrangements to be put in place in respect of the grandchildren.

17 In the circumstances I make the following orders:

1. The application for injunctive relief is refused and the *ex parte* injunction is discharged.
2. The respondent is excluded from the matrimonial home until Monday, November 27th, 2006 at noon.
3. The respondent is to pay interim maintenance to the petitioner in the sum of £40 per week.
4. Costs are reserved.

18 Of course, in the event that either party acts unreasonably, it is open to either of them to come back to court to seek injunctive relief. In any event, this is a case in which it is important that the hearing of the substantive petition be expedited and I trust counsel for both parties will actively pursue such a course.

Orders accordingly.
