Judgments

FAMILY DIVISION

Neutral Citation Number: [2014] EWHC 2864 (Fam)

Case No. RG11D00397

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Date: Wednesday, 11th June 2014

Before:

MRS. JUSTICE ROBERTS

B E T W E E N :

US	**Applicant**
- and -	
SR	**Respondent**

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Official Court Reporters and Audio Transcribers

One Quality Court, Chancery Lane, London WC2A 1HR

Tel: 020 7831 5627 Fax: 020 7831 7737

info@beverleynunnery.com

MR. R. SEAR (instructed by Pinsent Masons LLP) appeared on behalf of the Applicant.

MR. J. EWINS (instructed by Levison Meltzer Pigott) appeared on behalf of the Respondent.

J U D G M E N TMRS. JUSTICE ROBERTS:

1 I am going to give a brief *extempore* judgment in relation to this application which is launched by Mr. Ewins, who is counsel for the wife, in the context of her extant claims for financial remedy orders arising from divorce proceedings. The issue before me today is how this litigation is to be funded to its conclusion, which includes a five day hearing listed in July this year. I am not going to say a great deal about the background or the chronology to these proceedings because, as is common knowledge to everybody in this court, I have had extensive involvement in this case in terms of a ten day fact-finding exercise. That resulted in a lengthy judgment which was produced in January of this year, in which I made a significant number of findings in relation to the litigation and the conduct of each of these parties in the context of disclosure and other aspects which were the subject of lengthy allegations and cross –allegations.

2 Counsel who appear today, Mr. James Ewins instructed by Levison Meltzer Pigott on behalf of the wife, and Mr. Richard Sear instructed by Pinsent Masons on behalf of the husband, have represented each of the parties throughout this litigation as it has unfolded before me. We are all very familiar with the history of this matter and for that reason I am not going to go into the background in the context of this short judgment which is being delivered late in the day.

3 At the conclusion of my judgment in relation to the computation exercise, I made certain findings as to the assets which were available to each of these parties. By and large, with one or two forensic comments, they are as reflected in the schedule which has been produced for me today by Mr. Ewins. That schedule, depressingly, shows that once the burden of costs already incurred are factored into this case, the assets available for division are less than £4 million, including about £1.7 million of pension funds.

4 I have already described these proceedings as 'a financial disaster' for this family. I go so far as to suggest that the longer they go on they are in fact better described as a financial catastrophe for the family (not least the children involved who will need ongoing support and housing for a considerable number of years).

5 I have done my very best to encourage the parties to settle this case. We have a five day hearing listed in July **2014**. In terms of the distribution aspects of the case, I am told that there is a combined six figure costs liability which is going to have to be met before we get to the conclusion of that process.

6 I was encouraged to see from the correspondence which is in the bundle before me that settlement negotiations, including open offers, were ongoing between these parties. Unfortunately they came to nought. It is clear to me that, although at one stage there was a tentative agreement in principle as to bridging the significant shortfall which the wife has in relation to her outstanding legal costs, that agreement was quite clearly abandoned (as I see from the correspondence) against the backdrop of what one might call emergency funding to enable a settlement meeting to take place.

7 As Mr. Ewins tells me, and as I accept, when that agreement was not perfected and matters moved on, those instructed by the wife had to turn their minds to the difficult issue of how they were to continue to represent her. First,

there was the significant liability they were carrying in respect of their professional costs; secondly there was the quandary of how they were to meet a further liability in relation to counsel's fees of the upcoming hearing. I take the view that that was a perfectly proper position for them to take, just as I accept entirely that those who represent the husband are entitled to look to him for proper funding of his legal costs in this application.

8 The husband has already taken what I suspect was a difficult decision to dispense with the services of his leader, Ms. Deborah Bangay QC. Although I have no doubt about the ability of Mr. Sear, his junior counsel, to conduct proceedings on his behalf, I accept that in that respect he has had to make sacrifices in terms of his own representation.

9 However the reality is we are where we are. As I myself stressed to these parties during open email correspondence between the Bar and the Bench after I had handed my judgment down in January of this year, what was essential was that some agreement was reached in relation to funding both parties' costs, so that we did not face the spectre of the July hearing on the basis that either was unrepresented. It is a highly complex case even if it is run from the foot of the base of my findings. It would be an almost impossible case for the wife as a litigant in person (because she is somewhat handicapped in terms of her understanding of legal principles and her use of English) and I have no doubt an equally difficult exercise for the husband.

10 Thus, settlement negotiations, as I accept, broke down in relation to the interim situation, and what I am now dealing with is a situation where each side comes to court today to seek provision for their ongoing costs. The target of that provision is a significant fund of money which is currently held in a Jersey account. It is US Dollar account maintained offshore in the Channel Islands. I am told the current balance in that account is just over $710,000 which translates into a sterling equivalent of just over £420,000. That fund represents the proceeds of the husband's activities in employment which were not disclosed until a very late stage of the proceedings, a matter of less than a month before the October 2013 fact finding hearing. That fund is currently frozen as a result of undertakings which he gave in September of last year pending the final outcome of these proceedings.

11 Where we are at the moment in terms of each side's liabilities is that the wife currently owes her solicitors, in broad terms, a sum of £75,000 in respect of costs already incurred and unpaid. An estimate has been produced on her behalf of a need for £52,000 going forward. I am told by Mr. Ewins that that costs estimate is not in issue. Mr. Sear very sensibly did not take any issue with that figure and it is difficult to see how he could, given that on any view it represents a significant discount on what the wife's solicitors would otherwise be entitled to charge. They have reached an agreement with her whereby they will represent her on a fixed cost basis. To that extent it is, as I accept, an arrangement which indirectly benefits the husband because it means at the end of the day there is going to be more available for distribution between the parties. Thus, I accept what Mr. Ewins says to me that there is an inbuilt discount in that figure.

12 The wife today seeks a sum of £127,577; that is what Mr. Ewins says she needs. She asks for those funds to be released to her solicitors from the Jersey account less any sums which are produced by the sale of a BMW vehicle which I am told is currently under offer from a local garage franchise.

13 The husband's position is that he has been able to clear his legacy of historic cost debt by transferring to his solicitors a sum of approximately £100,000 which came back to him from an earlier arrangement that was put in place as a result of a Novitas loan. His position, as he comes to court today, is that he needs a further sum of just under £105,000 to put him in a position where he can fund his own costs to the conclusion of the July hearing.

14 The offer he has made to cover the wife's costs is that £50,000 from the HSBC fund will be released together with an assumed sum of £25,000 from the sale of the BMW vehicle. However there is an important caveat to his offer which is that he should receive a release of £60,000 in order to deal with a significant element of his own costs going forward. To that extent the parties are some £52,600 apart as matters stand.

15 Without in any sense doing injustice to the very detailed written submissions which I have received from both counsel, what it comes down to in terms is this. Mr. Ewins on behalf of the wife submits to me that there should be no release at all to the husband in relation to his ongoing costs, and in support of this submission he points to the fact that the husband has access to potentially liquid funds of approximately £275,000, being the sum of about £160,000 cash in a bank account and a portfolio of shares in this jurisdiction worth approximately £115,000. Thus, Mr. Ewins says the husband has the means to enable him to meet the £104,000 which he claims he will need to spend between now and the end of the trial.

16 He also points to the significant difference in the costs burden which the husband is likely to incur and that which the wife will have to meet. He also points to the fact that even if he is obliged to look to his own resources to meet that liability, he will still have £174,000 onshore and liquid. That is the response which Mr. Ewins advances to the submission made to me by Mr. Sear on behalf of his client that if I do not permit release to the husband then he will be faced with significant hardship as a result of having to fund his own costs.

17 I say again now what I said at various points during counsels' submissions today. This is by no means a 'run of the mill' (if I may put it in those terms) application for financial provision for legal costs. This is, in effect, an application made in the context of hard fought, bitterly contested and part heard proceedings where there are allegations on both sides as to the extent to which each of these parties has complied with his and her obligations to make full and frank disclosure. I see with some disquiet that those allegations rumble on in the context of the latest round of updating disclosure which has been made by the parties.

18 In terms of the law as I must apply it, this is an application for a legal services payment order which now falls under ss.22ZA and 22ZB of the Matrimonial Causes Act 1973. There is no issue in terms between counsel on the law as I must apply it, and Mr. Sear has pointed me to the recent decision of Mostyn J in the case of *Rubin v Rubin* [**2014**] **EWHC** 611 (Fam). That judgment which set out very helpful guidance on the manner in which these applications should be dealt with and the principles to be applied, is much more relevant, I suggest, to what one might refer to as a standard free-standing application. To that extent there are significant difficulties in an application of those principles to this case. Nevertheless, the guidance is helpful. At para.12 the learned judge quoted from one of his own decisions in the case of *BN v MA* [2013] **EWHC** 4250 (Fam) in which he said this at para.36:

"The statutory provision [in other words s.22ZA], in my judgment, does not more than to codify the principles to be collected in this regard in the authorities, most recently in *Currey v Currey* [2007] 1 FLR 946. Under s.22ZA(3) the court cannot make a costs allowance unless it is satisfied that without the amount of the allowance, the applicant would not reasonably be able to obtain appropriate legal services for the purposes of the proceedings or any part of the proceedings, and for the purposes of this provision the court must be satisfied in particular that the applicant is not reasonably able to secure a loan to pay for the services (See s.22ZA(4)(b))."

19 In para.13 of his judgment in *Rubin*, Mostyn J continued in this vein:

"(i) When considering the overall merits of the application for a LSPO [legal services provision order] the court is required to have regard to all the matters mentioned in s.22ZB(1)-(3).

(ii) Without derogating from that requirement, the ability of the respondent to pay should be judged by reference to the principles summarised in *TL v ML* [2005] **EWHC** 2860 (Fam), … where it was stated

'Where the affidavit or Form E disclosure by the payer is obviously deficient the court should not hesitate to make robust assumptions about his ability to pay…'"

20 As I have indicated, whilst there seem to be ongoing issues in relation to disclosure, I cannot at this stage go down that path. I am proceeding on the basis of the assets that I can see reflected in the schedule prepared by Mr Ewins. More importantly for our purposes, at (iv) His Lordship said this:

"(iv) The court cannot make an order unless it is satisfied that without the payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings. Therefore, the exercise essentially looks to the future. It is important that the jurisdiction is not used to outflank or supplant the powers and principles governing an award of costs in CPR Part 44. It is not a surrogate *inter partes* costs jurisdiction. Thus a LSPO should only be awarded to cover historic unpaid costs where the court is satisfied that without such a payment the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings.

(v) In determining whether the applicant can reasonably obtain funding from another source, the court would be unlikely to expect her to sell or charge her home or deplete a modest fund of savings. This aspect is however highly fact-specific. If the home is of such a value that it appears likely that it will be sold at the conclusion of the proceedings then it may well be reasonable to expect the applicant to charge her interest in it."

21 All of that guidance is relevant to the current application but I want to preface what follows with the indication I have already given to both counsel. When I concluded my fact-finding judgment, I made it very plain that I envisaged making a substantial costs order against the husband in respect of some significantly misleading disclosure he had made to the court. This included fabricating bank statements to show false information designed to hide the true position from the court. I will not repeat what I said in my judgment but he knows, subject to any adjustment I make in relation to the litigation conduct I found to have been perpetrated by the wife, that he is in a position of significant financial exposure on that front.

22 To that extent and to the extent that the wife already has £75,000 of historic costs outstanding, I take the view that I can quite properly in this part heard litigation take that into account. But for the absence of time at the conclusion of the fact-finding hearing in October 2013, it is highly likely that the husband would already have had to meet a significant costs order which would have operated to deplete his existing assets and to reduce the exposure of the wife's solicitors. In my mind, the fact that that exercise has had to be postponed is a very relevant feature of this case.

23 I do not propose to say anything about the correspondence which dealt with the purported agreement back in April and May of this year. That is because I take the view that that agreement fell away when it was clear that what was going to have to be addressed in the context of today's hearing was a full application, and one designed to make provision for costs ongoing to the end of the July hearing.

24 In terms of the law as I must apply it and on behalf of his client, Mr. Sear makes, as ably as he makes all his points written and oral, the following headline submissions. He says to me the starting point is that the wife must be expected to pay her own costs if she has the funds to do so. I take the view, as I have already made clear, that from the evidence before me at the moment the wife has discharged the burden of establishing that she is without the means to make a material contribution to her own costs. Mr. Sear on behalf of the husband complains about the fact that in terms of what one might call the *Currey* criteria, in other words her ability to raise funding from external commercial sources, she has not properly discharged that burden. He points to the fact that all I have in the papers before me are letters from Bank and Bank, to whom she made applications in or about November of last year, stating neither was prepared to extend further credit.

25 Mr. Sear complains that she has not provided the underlying documents which supported those requests. Mr. Ewins tells me she simply does not have them. I have some little working knowledge now of the way in which these banks operate, and I can see no reason why I should not proceed on the basis of that *prima facie* evidence from the banks. They are the only two banking organisations in Russia with which she has a commercial relationship.

26 Apart from the rental income she receives from the Russian property portfolio, she is a woman without any earned income and without any further resources. My reattribution of funds to her at the conclusion of the fact-finding hearing was clearly made on the basis that I accepted that she did not have access to those funds because they no longer existed. All she has is whatever her potential claims may be worth in these proceedings. There are two properties in Moscow, and there is the property here which has an equity of about £500,000 in round terms when the various loans are taken into account. Other than that, according to Mr. Ewins's schedule her liquid assets amount to just over £15,000 and she has a significant raft of liabilities.

27 Mr. Sear then invites me to consider his client's criticism that she has not done enough in terms of exploring other commercial avenues. I have seen a response from her existing litigation funder, Novitas, to whom she already owes a sum of about £200,000 which, with interest at a fairly punitive rate of 18%, is now standing at somewhere between £220-240,000. The reply which I have in the bundle at C1 dated 21st March **2014** makes it clear there is no further recourse to borrowing from that source. I accept in those circumstances that the wife meets the requirements in s.22ZB(1)-(3) in terms of her inability to fund this litigation from other sources.

28 I have already made it plain that the essential task is to ensure that both parties are represented to the conclusion of the July **2014** hearing. I take the view that it is reasonable to assume that she should be entitled to the continuation of the representation she had at the last hearing. It is, in my view, essential to the proper and reasonable overriding objective of proportional case management in this hearing. Therefore I start from the position that the need on her side is properly put in the sum of £127,577. I am going to make an order in terms that, with any necessary set off in relation to monies received from the sale of the BMW motor car, that is the provision which should be released to her solicitors (not to the wife) from the frozen funds in the Jersey account.

29 That then leaves the issue of the husband's position in relation to costs. In terms of the primary submission made on his behalf by Mr Sear, I do not accept that a refusal at this stage to release a further £104,000 from those funds would place him in a situation of undue hardship now or in the foreseeable future. I have already addressed the point that he has recourse to assets outside those funds of about £275,000. Further, I have already taken on board his concerns that further erosion of those funds may well deprive him of the means to make proper provision for his current wife and his young daughter, never mind for the needs of his other children.

30 I take the view that it would be wrong in principle and indeed unfair to the wife, to proceed in this application on the basis that this is a straightforward and free-standing application. The history of these proceedings and indeed the legacy of the husband's conduct in these proceedings inevitably has an impact on how his application for the release of funds is to be dealt with. I am in no doubt that the costs order which I have already advertised in my earlier judgment albeit (as yet) unquantified, and the resulting inchoate liability, if it had been transposed into a hard and crystalised liability, would by now have been satisfied and the figures at which we were looking would be very different.

31 For those reasons I accede to the application which is made by Mr. Ewins. I reject the application made by Mr. Sear for the release of £60,000 from the Jersey account to his client. I am satisfied that my order is not only in accordance with the legal requirements of s.22ZB(1)-(3) of the 1973 Act but in particular, and given my extensive knowledge of this case, meets the requirement imposed on this court to achieve a position of fairness as between these parties.

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