Neutral Citation Number: [2020] EWFC 13

Case No: BV18D02377

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2020

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between :

YM	**Applicant**
- and -	
NM	**Respondent**

- -
- -

Mr Justin Warshaw QC (instructed by **Farrer & Co**) for the **Applicant**
Mr Patrick Chamberlayne QC and **Mr Andrew Holden** (instructed by **Family Law in Partnership**) for the **Respondent**

Hearing date: 22 January 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. I have before me two interlocutory applications which concern the marriage between YM (hereafter 'the wife') and NM (hereafter 'the husband'). The wife is represented by Mr Justin Warshaw QC, instructed by Farrer & Co, and the husband by Mr Patrick Chamberlayne QC and Mr Andrew Holden instructed by Family Law in Partnership.

2. The first interlocutory application is an application by the wife for maintenance pending suit, issued on 11 December 2019. The second application is an application, also by the wife for an order injuncting the husband from selling the former matrimonial home unless he agrees to the wife's proposed terms for an escrow agreement with respect to the sale of the former matrimonial home. The parties remain agreed that the former matrimonial home should be sold.

3. It is important to note at the outset that this matter is listed for a substantive hearing before Mr Justice Holman for three weeks in June 2020 on the wife's application to set aside a financial remedies consent order made by Deputy District Judge Pearce on 23 August 2018 and for rescission of a decree *nisi* pronounced on 4 July 2018. Save in respect of child maintenance, the consent order makes no provision for periodical payments and effects a clean break by dismissing the parties' respective claims for periodical payments orders.

BACKGROUND

4. For the purposes of the applications before the court, the background to this matter can be stated relatively shortly.

5. The wife is 46 years of age and is a Russian citizen, born in Moscow. The husband is 54 and is a German Citizen, born in Leipzig in what was at that time East Germany. The husband moved to Russia in 1982. The parties began a relationship in 2000 and began to cohabit in 2004. They married in April 2006. The parties have two children, a son, who is 11 years old, and daughter, who is 8 years old. The husband has three other children from previous relationships.

6. During the course of the marriage the husband was involved in industry in Russia, from which it is said he accumulated substantial wealth. The wife case is that she gave up work in 2008 following the birth of the parties' first child. In 2014 the parties relocated with the children to England. The marriage broke down in 2017 over the Christmas and New Year period.

7. Dealing in detail first with the background to the application by the wife for maintenance pending suit, as I have noted, a key feature in this application is the existence of a concluded financial remedies consent order. In 2009, the parties entered into a post nuptial agreement in Russia. In 2014, the parties entered into a second post nuptial agreement in England. At the time the parties entered into the second agreement, the husband was advised by Withers and leading counsel and the wife was advised by Charles Russell and leading counsel. The second post nuptial agreement provided that, upon divorce, the wife would receive total assets of some £40M from the husband.

8. Following the breakdown of the marriage, on 10 January 2018 the parties signed an agreement which was expressed to be in full and final settlement of all claims that each may make against the other in connection with their marriage or on death. The agreement provided the wife with assets of some £32M (the husband contending that the agreement differed from the 2014 post-nuptial agreement by reason of changes in his financial position between 2014 and 2018). The wife now contends that she was pressured into signing this agreement by the husband (who she alleges implied there would be serious adverse personal consequences for the husband and financial consequences for the family if she did not sign) at a time when she was shocked and distressed at the very recent breakdown of the marriage.

9. After signing the agreement on 10 January 2018 the wife, unbeknownst to the husband, attended a meeting at the offices of Farrer & Co with a friend of hers, LK, on 16 January 2018. The wife contends that she remained in a state of shock at the breakdown of the marriage and has a poor recall of this meeting. The wife originally contended that the file from Farrer & Co should not be disclosed by reason of legal professional privilege. However, she eventually conceded to its disclosure. It is accepted by all parties that Farrer & Co did not see the agreement of 10 January 2018, or the subsequent draft consent order the wife ultimately signed on 22 January 2018. However, disclosure of the file from Farrer & Co shows that over the course of the one and a half hour consultation with Caroline Holley:

   i) LK stated that the way the husband spoke to the wife on separation "sounded like he would try hard to remain friends, and would take care of you, and that your lifestyle and the children's lifestyle would not change."

   ii) In articulating the settlement she sought to achieve, the wife is recorded as stating "You said £15M including a new home, a stable income and for him to provide you with a stable business. You would go for the house in Sardinia for sure" and received clear advice that "this is a fraction" of what she could expect to receive in financial remedy proceedings based on her assessment of the husband's worth (which the wife estimated at £500M), that he would wish to do such a deal as he would be "getting off lightly" but that this would be the wife's decision.

   iii) The wife received clear legal advice not to sign any documents and to ensure that any document she was provided with was provided to her lawyers for review. She was further advised to have no serious discussions with the husband until she had filed a divorce petition.

   iv) Whilst LK is recorded as stating in passing at one point that the husband "knows you are stressed and is threatening you", at no point does it appear from the attendance note that the wife asserted she has been placed under duress by the husband regarding financial matters.

10. Following the meeting with Farrer & Co the wife sought to negotiate the payment of additional assets to her as part of the agreement between the parties, namely the transfer to her of the parties' villa in Sardinia, worth £11M. The husband agreed to that proposal during three hours of discussions on 21 and 22 January 2018. On 22 January 2018 the husband and wife signed a draft consent order. At the time the final draft consent order was signed the husband deposed to assets held in trust (of which

he was a beneficiary) of between £200M and £250M. The consent order signed on 22 January 2018 made financial provision for the wife that the *husband* contends amounts to assets of £43M:

i) A group of franchises in Russia, worth some £12M;

ii) Property in Russia, worth some £15M;

iii) The villa in Sardinia, worth some £11M; and

iv) Cash in the sum of £6M.

11. Once again, the wife now alleges that she signed the draft consent order under duress from the husband, who she alleges was yelling and making threats about the financial consequences of her not signing. On 22 January 2018 the wife also signed a statement of information for a consent order (Form D81) and signed the revised version on 28 January 2018 but now contends she does not remember doing so. The wife contends that as a result of threats made by the husband she also withdrew her instructions from Farrer & Co on 26 January 2018. The file from Farrer & Co contains an attendance note of that date in which it is recorded that the wife was withdrawing her divorce petition against advice, that the wife stated she "trusted" the husband and that she understood that if she had reached an agreement with the husband she should take legal advice on its terms.

12. Within this context, I also note that disclosure of the file from Farrer & Co reveals that following the wife signing the draft consent order on 22 January 2018, LK wrote to Farrer & Co on a number of occasions. In her email to Caroline Holley on 23 January 2018, LK made no mention of any concerns that the wife had been placed under duress when recounting the events of 22 January 2018. Indeed, on 24 January 2018 LK wrote to Ms Holley and stated that the wife "feels OK with what she has and does not want anything else". Whilst Mr Warshaw sought to characterise aspects of that latter email as showing the wife was scared of the husband, the terms of the email make clear that what she feared was her petition being overtaken by that of the husband.

13. The husband contends that on 20 February 2018 the wife was sent documents in the divorce proceedings and that on 23 February 2018 she signed the acknowledgement of service and Form A. Both those documents bear that date and the signature of the wife. The file from Farrer & Co which details the meeting on 16 January 2018 reports the wife (via LK) as telling Farrer & Co that the husband had told her he was going to issue divorce proceedings. By contrast, the wife now contends that on 8 June 2018 she received a certificate of entitlement to decree and was again shocked as she contends she had not received a divorce petition and had not knowingly signed an acknowledgement of service.

14. On 4 July 2018 the court wrote to the husband's then solicitors, Withers, stating that the Deputy District Judge considering the draft consent order had requested confirmation that the wife had taken legal advice or had the opportunity to take legal advice, a breakdown of the net effect of the order, a copy of the 2014 post nuptial agreement and a copy of the document signed by the parties on 10 January 2018. The letter was not sent to the wife and Withers did not supply the wife with a copy.

15. The husband contends that significant steps were thereafter taken to implement the terms of the consent order. Specifically, the husbands points to the fact that the wife has now taken over the fifteen franchises in Russia pursuant to the terms of the consent order, signing the relevant documents on 30 June 2018, after which the wife actively managed the business and retained the profits therefrom. He further asserts that the wife found an alternative property in Ascot, which the husband purchased for her in the sum of £2.25M as part of the financial agreement between them. On 6 July 2018 the wife signed a document confirming that the purchase price of her new property would be offset against her entitlement under the consent order. The husband has sought from the wife disclosure of messages she sent to him on a messaging app called Theema, contending that these further evidence the wife's enthusiastic participation in the implementation of the terms of the consent order. The wife now contends that messages from the app are no longer available as she sat on the telephone, which had the effect of permanently deleting the app, preventing her from accessing the messages.

16. By contrast, the wife contends that the husband's case on implementation of the consent order is a mischaracterisation and that all that in fact happened was that the Russian companies remained in her name, that the husband took steps to ensure that the wife transferred assets to him and that he announced that the wife would be taking over the businesses in Russia. With respect to the latter, the wife asserts that the husband "stripped" assets out of that business in the form of a $686,000 dividend and a withdrawal of $385,000 prior to the business being transferred to her. The wife contends that the husband refuses to allow her access to €1,479,886 to which she is entitled under the terms of the consent order, placing her under financial pressure.

17. Pursuant to the letter from the court dated 4 July 2018, in July 2018 the husband wrote to the wife in Sardinia, where she was on holiday with the children, requesting that she sign a letter confirming that she had had the opportunity to take legal advice and a letter confirming that the husband was purchasing a property for the wife as part of the discharge of his obligations under the draft consent order. The wife signed these letters on 6 and 11 July 2018 respectively. The wife now contends this was again as a result of threats made by the husband that he would leave her with nothing if she took legal advice, and would not proceed with the purchase of the new property.

18. On 16 July 2018 Withers wrote to the court asserting a "dramatic negative change in the value of the assets" set out in the 2014 post nuptial agreement, that the wife was entitled to assets worth £43M under that agreement and that the assets received by the wife under the consent order amounted to £43M. The wife contends that this analysis was not fully explained. The letter to the court was not copied to her. The court made the consent order on 23 August 2018, decree *nisi* having been pronounced on 4 July 2018.

19. The wife's application to set aside the consent order appears to have its genesis in September 2018, some eight months after signing the draft consent order on 22 January 2018. In September 2018 the wife returned to England with the children from holiday in Sardinia to find, on her case, a bare minimum of her and the children's personal items from the matrimonial home and that the husband (or someone else in the household) had opened some boxes and left them in disarray. In her statement, she states as follows:

> "Until this point, even in the face of all [NM]'s wrongdoing, I had still somehow hoped he could be trusted and that we would be taken care of...this relatively small but cruel mistreatment suddenly brought it home to me that I could not trust anything he said and that I must get over my fear of his threats and take steps to protect myself and the children. It was at this point that I reinstructed solicitors."

20. Within this context, the wife re-instructed Farrer & Co who wrote to Withers on 11 September 2018 asking for copy documents and requesting that the husband take no further action in the divorce suit or the financial remedy proceedings. The wife alleges that the husband telephoned her and threatened to "destroy" her if she failed to instruct Farrer & Co to withdraw the letters sent to Withers. On 24 September 2018 the wife applied to rescind the decree *nisi*. On 28 September 2018 the wife made an application to set aside the consent order. As I have noted, the application to set aside the consent order is currently listed before Holman J for three weeks in June of this year.

21. With respect to the question of the former matrimonial home, it was purchased in 2014 for £35M and is the only significant asset in this jurisdiction. There is borrowing secured against the property of £17,325,000. There is no agreed valuation before the court but the husband contends the property is now worth between £20M and £22M. In September 2018 the wife registered a Home Rights Notice against the former matrimonial home. On 11 February 2019 the husband applied to the Land Registry to cancel that notice. The wife has now secured a stay of that application based on the interlocutory application before this court for injunctive relief. The husband contends that a sale of the former matrimonial home has fallen through due to the existence of the Home Rights Notice. On 18 April 2019 the parties reached agreed terms with respect to an escrow agreement to deal with the sale of the former matrimonial home. However, as matters stand, that agreement has broken down.

22. Within this context, the parties have between them managed to produce a dispute regarding the sale of the former matrimonial home that is positively labyrinthine in its history. At one point Mr Holden seemed determined to present that history to the court stage by agonisingly detailed stage. However, the genesis of the current dispute is a depressingly familiar one. Namely, an irreconcilable breakdown in trust. The wife does not trust the husband to deal honestly with the proceeds of any sale of the former matrimonial home and contends that the same will only be sufficiently safeguarded by their being an escrow agreement in terms agreed by the parties (to which proposal the husband agreed, although agreement as to the terms has foundered). By contrast, the husband contends that he can be trusted and that, to the extent that the wife's requires reassurance, an undertaking by his solicitors to hold the proceeds of the sale of the former matrimonial home is sufficient to protect the wife's interests, which undertaking he has offered.

23. In this way, the parties have each contrived to bring themselves to an expensive and pointless stalemate with respect to the sale of the former matrimonial home. Within this context, the wife now applies to the court for an order injuncting the husband from selling the former matrimonial home if he refuses to sign her version of the escrow agreement.

SUBMISSIONS

The Wife

24. Within the context of the foregoing background, on behalf of the wife Mr Warshaw submits that for the court to entertain her application for maintenance pending suit in the context of the substantive application to set aside the consent order, the wife must demonstrate to this court that there is "a real prospect" that she will succeed in setting aside the consent order before Holman J in June of this year.

25. Mr Warshaw submits that, on the evidence before the court, the wife is able to demonstrate this and, thus, this court should move to determine her application for maintenance pending suit at this hearing. Within this context, Mr Warshaw relies on a pleading document setting out the grounds on which the wife seeks to set aside the consent order. In summary, that pleading provides as follows:

    i) The wife was pressured and threatened by the husband into signing documents in circumstances where she was accustomed to doing as instructed and not questioning the husband, namely the agreement on 10 January 2018 and the draft consent order and Form D81 on 22 January 2018, the Form A and Acknowledgement of Service on 23 February 2018, confirmation of her ownership of several companies on 20 June 2018 and documents in relation to the purchase of her new property on 6 July 2018. In this regard, the wife relies on detailed statements of evidence in which she sets out an account of pressure and threats.

    ii) The wife was not given a meaningful opportunity to consider the documents and to take legal advice prior to signing the documents in question, and was prevented from taking such advice by the husband.

    iii) The wife was not given full or proper disclosure prior to signing the agreement on 10 January 2018 and the draft consent order on 22 January 2018 and not permitted to read the Form D81, the wife now contending that there are significant errors and omissions in the Form D81, the Deputy District Judge not being given a proper account of the net effect of the order or proper disclosure of the assets.

    iv) The husband failed to disclose to the wife correspondence, in particular the letter to the court dated 4 July 2018 lodging the consent order, the letter to the court dated 16 July 2018 (which letter the wife now contends contained false and misleading statements about which she had no opportunity to make representations to the court).

    v) The consent order submitted to the court contained errors and omissions.

    vi) The husband engaged in "dishonest behaviour" by interfering with mail in an attempt to obtain a more advantageous financial order. In this regard, the wife relies on the statement of TC, a former member of the family's staff, who deposes that he was instructed by the husband to intercept mail and to make sure that the wife did not see a lawyer.

26. If the court is persuaded that the wife can demonstrate to the requisite standard that she will succeed in setting aside the consent order, as to the merits of the application for maintenance pending suit, Mr Warshaw submits that in this case in which the court should order maintenance pending suit ahead of the hearing before Holman J in June. Mr Warshaw sets out his arguments as to the merits of that application in his comprehensive note and supplemented those arguments with oral submissions during the course of the hearing.

27. With respect to the application for injunctive relief, Mr Warshaw submits that the court has jurisdiction to make an order injuncting the husband from selling the former matrimonial home should he not agree to sign the wife's version of the escrow agreement as (a) the former matrimonial home is the only asset of significance in the jurisdiction, (b) the future sale price is not known, (c) his draft does not mirror the agreement he has already entered into and (d) there is "plainly" a risk of dissipation of the asset.

The Husband

28. In reply to the application for maintenance pending suit, Mr Chamberlayne submits that the wife's application for maintenance pending suit is misconceived and should be dismissed in circumstances where there is already a consent order in place that has been stayed only pending a hearing of the wife's application to set that order aside.

29. In this context, Mr Chamberlayne relies on the decision of Mostyn J in *BN v MA* [2013] EWHC 4250 (Fam) as authority for the principle that, where a party seeks maintenance pending suit in a situation where the court's jurisdiction to make such an order relies on overturning a previous agreement, before the court can order maintenance pending suit that party must demonstrate to a convincing standard that he or she will satisfy the court in due course that the agreement should not be upheld. Mr Chamberlayne further submits that, in the circumstances of this case, the wife's prospects must be evaluated in the context of the court having already pronounced decree *nisi* and made a consent order dismissing the wife's claims for maintenance (the case of *BN v MA* concerning only a pre-nuptial agreement). Accordingly, Mr Chamberlayne submits on behalf of the husband that the test for permitting the wife's application for maintenance pending suit to proceed is more stringent than the 'real prospect of success' test contended for by Mr Warshaw and that the wife must show she is *likely* to satisfy the court in due course that the agreement should not be upheld.

30. Within this context, Mr Chamberlayne submits that, in circumstances where the burden is on the wife to demonstrate she is likely to succeed in overturning the consent order, the wife is very far from being able to satisfy this test. In support of this submission he relies on the following matters:

    i) That the wife signed the agreement dated 10 January 2018.

    ii) That the wife took specialist legal advice from Farrer & Co on 16 January 2018.

    iii) That the attendance note from Farrer & Co pertaining to their meeting with the wife makes no mention of the wife raising concerns regarding duress.

iv) That subsequent to taking legal advice from Farrer & Co on 16 January 2018 the wife successfully renegotiated the terms of the agreement of 10 January 2018 to include the addition of the villa in Sardinia, worth £11M.

v) That the wife signed the draft consent order on 22 January 2018 subsequent to having taken legal advice from Farrer & Co on 16 January 2018.

vi) That the communication from LK to Farrer & Co on 24 January 2018, two days after the consent order was signed, states that the wife "feels OK with what she has and does not want anything else".

vii) That at no point prior to the consent order being made by the court on 23 August 2018 had the wife indicated that she did not wish to proceed with the agreement.

viii) That to the contrary, that the wife signed a number of documents between 22 January 2018 and 11 July 2018 consistent with, and that sought to implement the agreement and subsequent consent order.

ix) That the wife was actively involved in implementing the terms of the consent order by the purchase of her new property and the transfer and operation of the Russian businesses, which businesses she thereafter proceeded to run.

x) That the wife made no complaint of duress or material non-disclosure until some eight months after the signing of the consent order, including at the points over that period at which she signed further documents and at which she was involved in implementing the terms of the consent order.

xi) The credibility of the wife on the application to set aside must be seriously in doubt in circumstances where (a) she did not complain about the terms of the consent order until after the court had made the order, (b) her reasons for deciding to challenge the consent order lack cogency based as they are on a minor irritation of little or no consequence regarding boxes of chattels and (c) she initially alleged that her signatures on the relevant documents supporting the agreement may have been forged only to retract that grave allegation.

31. Within this context, on behalf of the husband Mr Chamberlayne contends that the wife cannot demonstrate that it is likely she will succeed in setting aside the consent order and that, in circumstances where the consent order provides the wife with assets worth tens of millions of pounds, it cannot be said that this is a case where the wife is in any event in a predicament of real need.

32. In reply to the application by the wife for an order injuncting the husband from selling the former matrimonial home if he does not sign the escrow agreement in the terms proposed by the wife, Mr Holden submits that the order sought, which the wife's application describes as a "freezing order", is in highly unusual terms and is, in effect, a species of an unless order. In these circumstances, Mr Holden submits that the court has no jurisdiction to make such an order against the husband, the husband being under no obligation to the court to enter into an escrow agreement the terms of which he does not agree and the purpose of an unless order being to secure compliance by a party with his or her obligations to the court.

33. Mr Holden further submits that what, in reality, the wife seeks is a freezing injunction to prevent the disposal of a specified asset, in this case the former matrimonial home, pending the determination of her claim. Within this context, Mr Holden contends that the application cannot satisfy the requirements that must be met before a freezing order can be granted. In particular, Mr Holden submits that:

    i) The wife has provided no evidence, let alone the solid objective evidence required for an application for a freezing injunction pursuant to either s 37 of the Matrimonial Causes Act 1973 or s 37 of the Senior Courts Act 1981 of a real risk of dissipation sufficient to justify the granting of a freezing injunction.

    ii) In fact, the husband has offered repeated assurances that he will not dissipate the value of the property.

    iii) In any event, there is no immediate prospect of the property being sold until (a) the husband's appeal against the Lands Tribunal stay order is heard, (b) the Lands Tribunal hears and determines the husband's application to remove the Home Rights Notice and (c) thereafter a buyer is identified.

    iv) It is not sensible to grant a freezing injunction to restrain the sale of the former matrimonial home in circumstances where the mortgage on the property is incurring payments of £28,000 per month.

    v) In making the application for a freezing injunction the wife is guilty of material non-disclosure and has failed to offer cross-undertakings.

34. Within this context Mr Holden submits that the wife's application for injunctive relief should be dismissed as wholly misconceived.

LAW

35. In this case the application for maintenance pending suit is made in the context of a consent order dismissing all the wife's claims for maintenance. Whilst the wife has applied to set aside that order on the grounds set out above, it follows from the existence of the approved consent order that until such time as the outcome of the wife's application to set aside that order has been determined, the court will be cautious before it grants relief to the wife to which she would not be entitled were the consent order to be upheld by the court.

36. As I have alluded to above, the principle that the court will be cautious in granting interim relief where the ultimate entitlement to such relief remains in dispute was demonstrated in the context of financial remedy cases and with respect to pre-nuptial agreements in the case of *BN v MA*, in which Mostyn J noted as follows at [33]:

    > "[33] In my judgment, when adjudicating a question of interim maintenance, where there has been a prenuptial agreement, the court should seek to apply the terms of the prenuptial agreement as closely and as practically as it can, unless the evidence of the wife in support of her application demonstrates, to a convincing standard, that she has a likely prospect of satisfying the court that this agreement should not be upheld. In the absence of any evidence of that nature from the wife, it is my judgment

> that it is appropriate for me to seek to apply the agreement to this case as closely as I can, provided that the wife is not left in any real predicament of need."

37. In addition to the principle that the court should be slow to grant relief to which a party has not yet definitively shown that they are entitled, a further principle also operates in cases of the type with which Mostyn J was concerned in *BN v MA*. Namely, that where the parties have reached a prior agreement on the relief now claimed, the court will be reluctant to disturb that agreement absent cogent evidence of unfairness.

38. Within the foregoing context, with respect to the test the court is to adopt when deciding whether to grant interim relief pending determination of a dispute as to a party's ultimate entitlement to such relief, in the context of a pre-nuptial agreements in *BN v MA* Mostyn J articulated the test as requiring the party seeking to avoid the pre-nuptial agreement to demonstrate convincingly a likely prospect of success in that regard.

39. The facts of this case are different to those in *BN v MA*. In this case, rather than a pre-nuptial agreement there is a consent order in place between the parties that has been approved by the court following the grant of decree *nisi* but prior to the grant of decree absolute. Leading counsel were not aware of any authority that considers by what test the principle that the court should be slow to grant relief to which a party has not yet definitively shown they are entitled should be mediated in the context of the parties having agreed, and the court having approved a consent order following the grant of decree *nisi* but prior to the grant of decree absolute.

40. As I have noted, Mr Warshaw submits that the appropriate test in these circumstances is that applied on appeal, namely that the wife must demonstrate a real prospect of success. In this context, I note that in *Tanfern Limited v Cameron MacDonald* [2000] 1 WLR 1311, relying on the decision of Lord Woolf MR in *Swain v Hillman*, The Times 4 November 1999, the Court of Appeal concluded that the word 'real' in the context of an application for permission to appeal means that the prospect of success must be realistic rather than fanciful.

41. As I have also noted, by contrast Mr Chamberlayne contends for a more stringent test. Mr Chamberlayne submits that this court is not concerned here with the question of whether a party should be permitted to argue that the court below made an error, as is the position in an application for permission to appeal, but rather with the question of whether a party should be granted relief in the face of an agreed order excluding such relief where the starting point is that the order was properly made. Further, Mr Chamberlayne submits that the court must have regard to the significance of the fact that decree *nisi* has been pronounced, relying on the characterisation of Lord Wright in *Fender v St John Mildmay* [1938] AC 1 at p.36 of "a marriage which by the decree of the Court is practically doomed to extinction in a brief period of months", the decree *nisi* determining "the status of the parties though its final operation is suspended and it is subject to a contingency".

42. In these circumstances, and by analogy with the decision of Mostyn J in *BN v MA*, Mr Chamberlayne submits that the wife must satisfy a more stringent test before her application for maintenance pending suit can proceed in the face of an as yet

undetermined application to set aside the consent order. Namely, she must demonstrate that it is *likely* she will satisfy the court that the consent order agreed between the parties and made by the court should now be set aside, rather than simply demonstrating a realistic and not fanciful prospect of doing so. Mr Chamberlayne further submits that, whereas in *BN v MA* the court was dealing with a prenuptial agreement, in circumstances where this court is dealing with a consent order approved by the court, the wife's application requires an even closer scrutiny of the likelihood of the wife succeeding in having the order agreed between the parties set aside.

43. The evaluation of the chances of success, to whatever is the appropriate standard, must have regard to the criteria that will be applied to the substantive application. Within this context, it is important also to note the principles that are applied on an application to set aside a consent order. In this regard, Mr Chamberlayne reminds the court that, as I have already noted, PD9A paragraph 13.8 states that in an application to set aside a financial remedy consent order pursuant to FPR r 9.9A(a)(ii) the starting point is that the order which one party is seeking to have set aside is properly made. Paragraph 13.5 of PD 9A further makes clear that the grounds on which a financial remedy order may be set aside are and will remain a matter for decision by judges but include fraud, material non-disclosure, certain limited types of mistake or a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis on which the order was made.

44. I will deal with the legal principles governing the wife's application for injunctive relief when examining the merits of that application below.

DISCUSSION

Application for Maintenance Pending Suit

45. As I have noted, the court will be necessarily cautious before it moves to grant relief to the wife to which she would not be entitled were the consent order to be upheld by the court in June. As Mr Chamberlayne submitted, the court is not here concerned with the question of whether a party should be permitted to argue that the court below made an error, but rather with the question of whether a party should be granted relief in the face of an agreed order precluding such relief where the starting point is that the order was properly made and before the application to set aside the order has been determined. To make an order for maintenance pending suit in these circumstances would be to fundamentally disturb the concluded agreement reached between the parties and approved by the court prior to the decision of the court as to whether that agreement should be upheld. In the circumstances, before the court takes such a step it must be satisfied to an appropriately rigorous standard that such relief should be considered. The applicable test for taking such a step must reflect this and in my judgment the test for permission to appeal does not adequately do so.

46. Rather, within the foregoing context, I am satisfied, having regard to the reasoning of Mostyn J in *BN v MA*, that in order to pursue her application for maintenance pending suit at this stage the wife must demonstrate to this court that she is likely to succeed in setting aside the financial remedy consent order before Holman J in June of this year. Such a test is, I am satisfied, commensurate with both the principle that the court should be slow to grant relief to which a party has not yet shown definitively they are entitled and the principle that where the parties have reached a prior agreement on the

relief now claimed the court will be reluctant to disturb that agreement absent a cogent justification for doing so.

47. Turning to the application in this case of the test I have articulated, I bear in mind that at this stage I am not determining the substantive application to set aside the consent order but rather am charged with considering its prospects of success by reference to the test I have enumerated. In the circumstances, the court's evaluation must necessarily be a broad one rather than a detailed forensic analysis of the evidence, which is the role of the substantive hearing. Within this context, applying the test as I have articulated it, I am not satisfied that the wife has demonstrated that she is likely to succeed in having the financial remedy consent order set aside by Holman J.

48. I accept that there is some evidence before this court in support of the wife's contention that she was placed under a degree of pressure by the husband with respect to a financial settlement and not provided with certain items of documentation. However, it must be observed that much of that evidence is in the form of assertions made by the wife in detailed statements filed and served many months after the fact; assertions that are self-serving in nature. Within this context, that evidence must be set against the following factors that I am satisfied militate against a conclusion that the wife is likely to succeed in her application to set aside the order such that it would be appropriate to entertain her application for maintenance pending suit at this stage:

i) The wife signed the agreement dated 10 January 2018.

ii) The wife took specialist legal advice from Farrer & Co on 16 January 2018. Whilst it is the case that Farrer & Co were not shown the agreement of 10 January 2018, it is clear from the attendance note that the wife received legal advice regarding the settlement she sought to achieve and what she could expect to receive in financial remedy proceedings based on her assessment of the husband's worth, clear legal advice not to sign any documents and to ensure that any document she was provided with was provided to her lawyers for review and to have no serious discussions with the husband until she had filed a divorce petition. It was a matter for the wife whether or not she chose to follow that advice.

iii) Whilst the wife now asserts duress on the part of the husband, the attendance note from Farrer & Co pertaining to their meeting with the wife immediately after the agreement of 10 January 2018 was signed and immediately before the draft consent order was signed on 22 January 2018 makes no mention of the wife raising specific concerns she had been placed under duress by the husband regarding financial matters (I accept it records that "[LK] said he knows you are stressed and is threatening you"). Indeed, passages of the attendance note suggest to the contrary, in particular "[LK] said the way he spoke, he sounded like he would try hard to remain friends, and would take care of you, and that your lifestyle and the children's lifestyle would not change" and later "You said he is trying to be a good friend and said he would stay in a hotel etc" and finally "thus far he seems reasonable".

iv) Subsequent to taking legal advice from Farrer & Co on 16 January 2018 the wife successfully renegotiated the terms of the agreement of 10 January 2018 to include the villa in Sardinia worth £11M, consistent with her stated

intention to secure this asset during the consultation with Farrer & Co, the attendance note recording that "You said £15M including a new home, a stable income and for him to provide you with a stable business. You would go for the house in Sardinia for sure".

v) That the wife signed the draft consent order on 22 January 2018.

vi) In her email to Caroline Holley on 23 January 2018 LK made no mention of any concerns that the wife had been placed under duress when recounting the events of 22 January 2018. The communication from LK to Farrer & Co on 24 January 2018, two days after the consent order was signed, indicated that the wife "feels OK with what she has and does not want anything else".

vii) At no point prior to the consent order being made by the court on 23 August 2018 is there evidence that the wife indicated that she did not wish to proceed with the agreement.

viii) Rather, the wife signed a number of documents between 22 January 2018 and 11 July 2018 consistent with, and which sought to implement the agreement and subsequent consent order. Namely, the agreement on 10 January 2018, the draft consent order and Form D81 on 22 January 2018, the Form A and Acknowledgement of Service on 23 February 2018, confirmation of her ownership of several companies on 20 June 2018 and documents in relation to the purchase of her new property on 6 July 2018.

ix) The wife was also involved in implementing the terms of the consent order. Specifically, the wife took over the fifteen franchises in Russia pursuant to the terms of the consent order, signing the relevant documents on 30 June 2018, after which the evidence indicates that the wife actively managed the business and retained the profits therefrom. The husband purchased for the wife a new property in the sum of £2.25M as part of the financial agreement between them. On 6 July 2018 the wife signed a document confirming that the purchase price of her new property would be offset against her entitlement under the consent order.

x) The wife made no complaint of duress or material non-disclosure until many months after the signing of the consent order, including making no complaint at the points over that period at which she signed further documents and/or at the points during that period at which she was involved in implementing the terms of the consent order.

49. In addition to these matters, and whilst again reminding myself that at this stage I am not determining the substantive application to set aside the consent order but rather am charged with considering its prospects of success by reference to the test I have enumerated, on the face of the evidence before the court there are a number of matters that touch negatively on the credibility of the wife's assertions. In particular, the wife initially asserted that her signature on the documents that I have summarised above may have been forged, but thereafter retracted that allegation. This must inevitably impact on the court's assessment of the credibility of the wife's other assertions regarding the circumstances surrounding the agreement of the consent order and the subsequent implementation of that agreement. Likewise, as I have noted, the court

must be circumspect with respect to the wife's reasons for deciding to seek to set aside the consent order, based as they are not on the serious allegations of duress and material non-disclosure that the wife now levels at the husband but rather on a minor irritation caused by the disruption of certain boxes of chattels.

50. In the foregoing circumstances, whilst as I have had regard to the fact that the wife does place before the court detailed evidence in statement to support her application, including the statement from TC, on a survey of the evidence for the purposes of this interlocutory application as summarised above, I am not satisfied that the wife has demonstrated to this court that she is likely to succeed in having the consent order made on 23 August 2018 set aside by Holman J.

51. In the circumstances, and where the wife is not in a predicament of real need, I am satisfied that it would *not* be appropriate to grant an order for maintenance pending suit *before* the determination by Holman J of the wife's substantive application to set aside the consent order approved by the court in August 2018. In the circumstances, the wife's application for maintenance pending suit is dismissed.

Application for Injunctive Relief

52. With respect to the application for injunctive relief, I am not satisfied that it is appropriate to grant the order sought by the wife injuncting the husband from selling the former matrimonial home unless he agrees to sign an escrow agreement in the terms proposed by the wife.

53. The court has jurisdiction to restrain the disposal of an asset, in this case the former matrimonial home, during the course of financial remedy proceedings under either s 37 of the Matrimonial Causes Act 1973 or s 37 of the Senior Courts Act 1981. As was made clear in *L v K (Freezing Orders: Principles and Safeguards)* [2014] Fam 35 at [18] and [19], for an application for an injunction to restrain the disposal of assets to succeed the applicant must put forward an appropriately strong case, supported by evidence of objective facts (rather than mere expressions of suspicion or anxiety) that the respondent to the application owns or has an interest in specified assets and that there is a real risk of their dissipation. Proof of that real risk of dissipation requires proof of an intention to dissipate, dissipation in this context meaning a deliberate or reckless dealing with the assets in question rather than some random event unconnected to the motives of the respondent.

54. Within this context, the first difficulty with the wife's application is that in my judgment she has not put forward an appropriately strong case. The wife has not provided objective evidence that there is a real risk of the husband dissipating the proceeds of the sale of the former matrimonial home. The only evidence cited by the wife to support her contention that there is a real risk that the husband will dissipate the asset comprising the former matrimonial home is the husband's application to remove the Homes Rights Notice, the failure by the husband to agree the wife's proposed terms for the escrow agreement and an assertion that the husband took profits from the Russian business prior to its transfer to the wife (which the husband contends were legitimate transactions, there being no term in the agreement that prevented profits being taken prior to the transfer of the businesses).

55. Even were these matters to constitute evidence of a real risk of dissipation (which I question), I note that the husband has provided three assurances to the wife via his solicitors regarding the treatment of the funds raised from the sale of the former matrimonial home. More fundamentally however, I am satisfied that there is no imminent prospect of the former matrimonial home being sold. There is currently no potential buyer for the property and it is unlikely that a sale will be possible until the litigation regarding the Home Rights Notice in the Lands Tribunal is concluded, which it is anticipated will take up to six months. Within this context, I am satisfied that the evidence currently before the court comes nowhere near that required to demonstrate a real risk of dissipation.

56. Further, as was also made clear in *L v K* at [25], absent objective evidence of a real risk of dissipation, there is no jurisdiction to grant a freezing order simply in order to provide security for a party's claim. Within this context, the order sought by the wife is, in circumstances where it seeks to force the husband to agree to the wife's terms concerning the escrow agreement and in the absence of an appropriately strong case, supported by cogent evidence that there is a real risk of dissipation, an order that seeks simply to provide security *per se* for the wife's claim. In effect, the injunction says that, independent of any real risk of dissipation, the husband is not allowed to sell the property unless he provides the specific security for the wife's claim that she has chosen, namely an escrow agreement in the terms stipulated by her. That is not an appropriate use of a freezing injunction.

57. Within the foregoing context, I am satisfied that the wife's application for injunctive relief in the terms she seeks is misconceived and must also be dismissed.

CONCLUSION

58. For the reasons I have given, I dismiss the wife's application for maintenance pending suit and I dismiss the wife's application for injunctive relief in terms set out in her application for the same.

59. That is my judgment.