



Neutral Citation Number: [2020] EWFC 70

Case No: ZC20P04055

IN THE FAMILY COURT
At the Royal Courts of Justice
(In Private)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 November 2020

Before :

SIR JAMES MUNBY

Between :

FS
- and -
(1) RS
(2) JS

Applicant

Respondents

The applicant in person

Matter dealt with on paper

**Judgment Approved by the court
for handing down**

**Covid-19 Protocol: This judgment will be handed down by the judge
remotely by circulation to the parties' representatives by email and by
placing it on BAILII**

Sir James Munby :

1. This is a footnote to a judgment I handed down on 30 September 2020: *FS v RS and JS* [2020] EWFC 63.
2. One of many matters I dealt with related to a potential TOLATA claim flagged up by the applicant in relation to which he had lodged a Restriction on 20 June 2020 (see paras 10, 141, 164-171, 176). Paragraph 7 of my order provided that the applicant was by 4pm on 11 November 2020 (time to be of the essence) to notify both the court and the respondents' solicitors whether or not he intended to pursue the claim and that in the event that he failed within that time to comply with that direction then (unless the court had on application made by the applicant before the expiry of the relevant time extended time) (i) the applicant should be debarred from pursuing any such claim and (ii) the Restriction should be removed.
3. It is to be noted that on this as on all other points I refused the applicant permission to appeal (para 173) and refused to extend his time for renewing the application (para 174). It is also to be noted that, although I was asked (and refused) to grant a stay of execution pending appeal in relation to my costs order (para 175), there was no application for a stay of execution in relation to the TOLATA order, merely an application (which I refused) to alter the form of order I had indicated I was going to make, and in the event did make (para 176).
4. It will be appreciated that the date specified in paragraph 7 of the order was such that there was more than adequate time to enable the applicant, if so advised, to apply to the Court of Appeal for a stay.
5. On the afternoon of 10 November 2020, the applicant, who by then was acting in person, applied to me informally as follows (I make no complaint in the circumstances about the informality and confirmed to the applicant that I did *not* require him to make a formal application on Form N244):

“I write with respect to paragraph 7 of your Order to let you know that I do not presently intend to bring a ToLATA claim since I am financially unable to do so. That situation might change if my Appeal to the Court of Appeal is successful and I am able to bring the ToLATA claim alongside my other financial relief claims.

Can I please therefore ask that your Order be varied to read that I should have to signal my intentions about the ToLATA claim some 3 weeks after the Appeal is decided and pursue the claim at that point if need be? That is the only thing that makes any sense right now and it is obviously right to tie the ToLATA claim up as a package with my other financial relief claims, particularly if the Court of Appeal agree with my interpretation of whether jurisdiction should be allowed for the claims.”

6. I asked the applicant to send me his appellant's notice and grounds of appeal and to tell me whether the Court of Appeal had yet considered his application for permission to appeal. He promptly supplied me with the two documents and told me that his section 10 applications were presently being dealt with by the supervising Lord

Justice and that the question of permission would only be dealt with subsequent to those applications being first dealt with.

7. Notwithstanding what I had told him, the applicant informed me that he intended to proceed by way of a formal application with a witness statement in support.
8. Shortly after 2pm on 11 November 2020, I was sent by the respondents' solicitor a copy of an order King LJ had just made which, so far as material for present purposes, ordered that "Paragraph 7 of the order of 30 September 2020 (the TOLATA paragraph) is stayed pending the determination of the PTA or further order of this court."
9. I thereupon emailed the parties, including the applicant, that "This order of the CA renders the application to me redundant."
10. Nonetheless the applicant subsequently sent me his formal Form N244 application and witness statement in support, together with a draft of the order he was inviting me to make. He followed this up shortly after with an email that "my application still has relevance notwithstanding the Order of Lady Justice King since I am obviously seeking more than a mere stay in this matter."
11. The applicant's application (like his draft order and witness statement) makes clear that what he is seeking is "a variation of paragraph 7 of the present Order to allow me time (i.e. at least 3 weeks) to pursue the ToLATA application after the outcome of my Appeal is known." The basis of this application is set out in his Form N244 as follows:

"I am seeking a variation of paragraph 7 of the present Order to allow me additional time to pursue a ToLATA application in circumstances where (1) I do not presently have anywhere near sufficient funds to engage solicitors and Counsel to pursue this specialist application on my behalf and (2) I have a pending Appeal ... in the Court of Appeal which may result in the present Order being overturned and jurisdiction being accepted for my various claims for financial relief under Schedule 1 of the Children's Act 1989, Section 27 of the Matrimonial Causes Act 1973 and the High Court's Inherent Jurisdiction. Needless to say, it would make logical sense to pursue the ToLATA claim at a later stage as part of a package with my other financial relief claims if and when the Court accepts jurisdiction and makes funding orders so that I can afford to instruct my prospective Counsel and Solicitors to act in this matter. Having taken advice and without waiving privilege, I am of the view that the Appeal has good prospects of success."

I note that in his witness statement this last assertion has become "I am firmly of the view that the Appeal will succeed." In his witness statement the applicant refers to the fact that his previous solicitors and counsel have withdrawn because of lack of funding.

12. I am not prepared to "vary" my order in the way sought by the applicant. He has given no good reason why I should revisit it (even if it were in my power to do so), not least given what I had said on the point in my previous judgment (para 176). The time for that has passed. For good or ill, paragraph 7, like the rest of the order, must stand in

the form set out at the end of my previous judgment (para 177). If it is to be varied, that is now a matter for the Court of Appeal.

13. The applicant says “This is just a simple application for variation of an Order whilst an Appeal is dealt with. I believe that most Judges would grant such a simple request as a matter of formality whilst an Appeal was pending.” I cannot agree. There is as yet no “appeal” pending, for the applicant has not yet been given permission to appeal; and, with all respect to him, the suggestion that the “variation” by the first instance judge of his perfected order whilst an appeal is dealt with is a “matter of formality” is very wide of the mark. The Court of Appeal is now seised of the matter and it would be wholly inappropriate for me to be varying my order, let alone in the way he suggests and as circumstances now are.
14. What I had been minded to do, though I had come to no final conclusion on the point when it was overtaken by events, was to grant the applicant a stay of paragraph 7 for three weeks to enable the Court of Appeal to consider the matter. That, however, has been overtaken by the order made today by King LJ, so I say no more about it.
15. Accordingly, the application is dismissed.