Neutral Citation Number: [2022] EWFC 199

Case No: ZC17J00073

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/06/2022

Before :

MR JUSTICE PEEL

- -

Between :

SOFIIA BOGOLYUBOVA	**Applicant**
- and -	
GENNADIY BOGOLYUBOV	**Respondent**
and	
JOINT STOCK COMPANY COMMERCIAL BANK "PRIVATBANK"	**Proposed Intervener**

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James Turner QC (instructed by **Mishcon de Reya**) for the Applicant
Charles Howard QC (instructed by **Hughes Fowler Carruthers**) for the Respondent
Lewis Marks QC and Marina Faggionato (instructed by **Hogan Lovells**) for the Bank

Hearing date: 9 June 2022

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Approved Judgment

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MR JUSTICE PEEL

Mr Justice Peel :

1. H and W bring before the court an application for approval of a financial remedies consent order which reflects the terms of a separation agreement dated 20 February 2017. Notice of intention to apply for a consent order was given by solicitors for both parties in a joint letter dated 7 December 2021, accompanied by a Form A lodged by W.

2. PrivatBank applied on 7 March 2022 (i) to intervene in the proceedings, (ii) for a stay of the application for financial relief pending the outcome of a commercial dispute between PrivatBank, H and others in the Chancery Division, and (iii) for specific disclosure of certain documents.

3. H, W and PrivatBank are represented. H is currently in Ukraine. His solicitors have had difficulty taking instructions, but H's leading counsel, Mr Howard QC, made plain to me that he unequivocally supports the making of the consent order. In practice, H and W make common cause.

4. I heard leading counsel for PrivatBank, Mr Marks QC, at a directions hearing on 30 March 2022. At this hearing, I again heard Mr Marks QC for PrivatBank, who opened the case. Leading counsel for W, Mr Turner QC, and then Charles Howard QC, leading counsel for H, responded. Although PrivatBank had not been joined to the proceedings, nobody took exception to me hearing from Mr Marks QC. There was a hint of a suggestion from Mr Howard QC, that as the bank is not a party, they should have no right to make submissions on the application for the consent order to be made. But having received written and oral submissions from all leading counsel, I propose to have regard to all the matters in the round.

The background

5. H and W began their relationship in 2007, entered into a religious marriage in 2008, moved to the United Kingdom in 2009, and married formally on 26 May 2011. Both are Ukrainian nationals. W is 40 years old; H is 60. They have 4 children aged between 9 and 14.

6. On 10 March 2011 they entered into a pre-marital agreement under the terms of which W would receive upon separation:

   i) £1m.
   ii) £2m for each year of marriage.
   iii) £500k pa for life.
   iv) £20m in trust as a housing fund.

   H's wealth was recorded in the pre-marital agreement at £3bn.

7. In March 2016, the parties separated.

8. Also in 2016, Tatneft, a Russian oil company, brought claims against H for about $300m and obtained a Worldwide Freezing Order ("WFO") against him. In 2021,

some 5 years later, Tatneft's claims against H were dismissed, and the WFO was discharged, along with similar orders in the Isle of Man and Jersey.

9. In May 2016, negotiations started between H and W. On 20 February 2017, those negotiations culminated in a separation agreement under which, putting it in broad terms:

   i) The pre-marital agreement was terminated with immediate effect.
   ii) H's wealth was recorded at about £1bn.
   iii) It was recorded that the bulk of H's wealth was non-marital in nature.
   iv) W was to receive certain assets via trust distributions within 6 weeks of any discharge of the Tatneft WFO, but until then it was acknowledged that H could not implement the required steps. The WFO was annexed to the separation agreement.

10. Pursuant to the separation agreement W was entitled to receive from H a minimum of £95m.

11. At the time of the separation agreement, PrivatBank had not made any claims against H.

12. On 22 March 2017, W petitioned for judicial separation.

13. In December 2017, PrivatBank issued proceedings against H and seven other defendants seeking $1.91bn plus interest (said by PrivatBank's solicitors to amount to a total sum, including interest, of about $4.2bn as at 17 March 2022). H had been a shareholder and officer of the bank until December 2016 when it was declared insolvent by the National Bank of Ukraine, and subsequently nationalised. PrivatBank alleges that H and others perpetrated a massive fraud and misappropriated billions of dollars during 2013 and 2014.

14. On 19 Dec 2017, PrivatBank obtained a WFO from Nugee J against H. On 9 March 2018, H applied to set aside the freezing order on the grounds that this country did not have jurisdiction to entertain PrivatBank's claims. On 4 December 2018, Fancourt J acceded to H's application. PrivatBank appealed. On 15 October 2019, the Court of Appeal allowed the appeal, concluding that there was a good arguable case of fraud on an epic scale.

15. As I have already indicated, on 11 March 2021 Tatneft's claims were dismissed and all WFOs in respect thereof were subsequently discharged

16. On 12 May 2021, H's solicitors in the Chancery proceedings wrote to PrivatBank's solicitors asking for the bank's consent to his disposal of assets so as to comply with the terms the separation agreement which required implementation within 6 weeks of discharge of the Tatneft WFO. Agreement was not forthcoming.

17. On 18 October 2021, a decree of judicial separation was made on W's petition.

18. On 7 December 2021, W issued her Form A. The covering letter was signed by both parties stating an intention to incorporate the terms of the separation agreement in a consent order "subject to the variation or discharge of the second WFO".

19. On 16 February 2022, H's solicitors wrote to PrivatBank's solicitors that the parties had applied for approval of a consent order to be made reflecting the separation agreement.

20. On 17 March 2022 PrivatBank issued its application.

21. The trial of PrivatBank's claim was originally listed for 13 weeks starting in June 2022 before Trower J. On 15 March 2022, H and certain other defendants applied to adjourn the trial based on the difficulties imposed on them by being resident in Ukraine. That application was granted on 28 March 2022, and the refixed trial is due to commence in June 2023.

22. On 30 March 2022, a directions hearing took place before me.

23. Shortly before the present hearing, H and W provided to me a draft consent order, substantially in the terms of the separation agreement. It is that order for which approval is sought by H and W, and which PrivatBank opposes. I was also provided with a Form D81 which suggests that the parties' assets (including assets in respect of which they are discretionary beneficiaries), very substantially in H's name, are about £3.8bn, a very significant increase on the figure in the separation agreement. There has been no (or no recent) financial disclosure that I am aware of, and I am in no position to judge the accuracy of the figures as broken down in the D81. In the notes to H's assets, it is acknowledged that a large proportion of the assets is held in Ukraine, and it is not possible realistically to value them with any degree of accuracy.

Analysis

24. W and H submit the consent order can and should be made. They say that (i) there is no good reason not to make an order reflecting an agreement freely and at arm's length agreed between H and W, and (ii) thereafter all matters of enforcement and implementation should be dealt with in the Chancery Division in conjunction with the commercial litigation. The draft consent order is, they say, expressly subject to the WFO, and therefore cannot be implemented unless and until the freezing order is discharged or varied. In other words, they seek a conditional order although it seems to me that to say this is a "condition" of the consent order is something of a misnomer as implementation of the proposed consent order, if made by me, would in any event be subject to the WFO by operation of law. It is clear that their intention, if the order is made, would be to apply to Trower J for variation of the WFO so as to permit implementation of the consent order. They submit that it is for Trower J to determine whether or not to vary the WFO, and thereby permit or prevent implementation, and not for me to refuse to make the consent order and thereby prevent implementation. So, they submit, as a matter of principle the application by PrivatBank to stay the making of the consent order must fail.

25. PrivatBank submits essentially that I should not make the proposed consent order until the outcome of the commercial litigation is clear. Only then can the court decide

whether, exercising its s25 discretion, it is appropriate to approve the agreement and convert it into an order of the court.

26. Having read the bundles (two bundles were prepared, one containing the material not provided to PrivatBank) and written submissions, and having listened carefully to the oral submissions, in my judgment PrivatBank's case is to be preferred.

27. My starting point is s25 of the Matrimonial Causes Act 1973 (as amended) which obliges the court to have regard to, inter alia, "income, earning capacity, property, and other financial resources…" and "…needs, obligations and responsibilities...".

28. As a matter of practice, the court will usually embark on a two-stage exercise, (i) computation and (ii) distribution; **Charman v Charman** [**2007] EWCA Civ 503.** The court generally needs the foundation of an understanding of the assets, to the degree of specificity required in each case, to enable it to judge what is a fair outcome.

29. Further, a long line of cases makes plain that the court has an independent duty to survey the terms of a financial remedies consent order. To select but one, in **Xydhias v Xydhias 1998 EWCA Civ 1966** Thorpe LJ said this:

"My cardinal conclusion is that ordinary contractual principles do not determine the issues in this appeal. This is because of the fundamental distinction that an agreement for the compromise of an ancillary relief application does not give rise to a contract enforceable in law. The parties seeking to uphold a concluded agreement for the compromise of such an application cannot sue for specific performance. The only way of rendering the bargain enforceable, whether to ensure that the applicant obtains the agreed transfers and payments or whether to protect the respondent from future claims, is to convert the concluded agreement into an order of the court. The decision of the Privy Council in ***de Lasala v de Lasala*** [1980] AC 546 demonstrated that thereafter the rights and obligations of the parties are determined by the order and not by any agreement which preceded it. The order is absolute unless there is a statutory power to vary or unless vitiated by a fact that would vitiate an order in any other division. Additionally, as was demonstrated in ***Robinson v Robinson*** [1983] FLR 102 an order in ancillary relief proceedings may be set aside if the product of a material breach of the duty of full and frank disclosure. An even more singular feature of the transition from compromise to order in ancillary relief proceedings is that the court does not either automatically or invariably grant the application to give the bargain in the force of an order. The court conducts an independent assessment to enable it to discharge its statutory function to make such orders as reflect the criteria listed in section 25 of the Matrimonial Causes Act as amended. The decision of this court in ***Kelley v Corston*** has a decisive impact on this appeal, as was pointed out by my lord, Lord Justice Mummery. Although the judgments in ***Kelley v Corston*** have since been criticised by this court in the case of ***Arthur JS Hall & Co (a firm) v Simmons*** (The Times: 18th December 1998), the ***Peacock v Peacock*** point, with which we are concerned, was again affirmed by the judgment of the court. Lord Justice Pill in his judgment approved the first instance decision of ***Peacock v Peacock*** and continued at 268G:

> "Section 33A deals expressly with consent orders for financial relief. It was enacted to enable courts to deal with consent applications upon a

> consideration of the papers. However it does not in my judgment remove the duty of the court to consider the merits of the settlement. The parties have a duty of full and frank disclosure. They must disclose the information prescribed by rules of court. The court then has a duty, in the context of the statute, to consider whether there are other circumstances into which it ought to enquire. It follows from the existence of that duty, which will no doubt lead to the making of further enquiries in some cases, that, if a consent order is made, it is made with the approval by the court of its contents."

The reference to procedure under section 33A has no bearing on this appeal where the information as to the parties respective financial circumstances was contained in extensive preparation for full trial in compliance with directions of the court. But the remainder of the citation is directly in point.

In similar vein Lady Justice Butler-Sloss, having approved the same passage from the judgment in ***Peacock v Peacock,*** continued at 273:

> "The court retains the duty laid upon it under section 25 in respect of consent orders as well as contested proceedings. It has to scrutinise the draft order and to check, within the limited information made available, whether there are other matters which require the court to make enquiries. The court has the power to refuse to make the order although the parties have agreed it. The fact of the agreement will, of course, be likely to be an important consideration but would not necessarily be determinative. The court is not a rubber stamp."

At the foot of the same page she described this balance in ancillary relief litigation as, 'a situation entirely different from the jurisdiction in the other Divisions of the High Court or civil litigation in the county court.'

In consequence, it is clear that the award to an applicant for ancillary relief is always fixed by the court. The payer's liability cannot be ultimately fixed by compromise as can be done in the settlement of claims in other divisions."

30. The fundamental question in this. Should I, in the exercise of my independent duty, approve the proposed consent order? The answer, I am satisfied, is no. If the bank succeeds against H, he will have a liability in damages of up to $4.2bn which, on the basis of the evidence before me, could wipe out the entirety of his assets. I appreciate that the Form D81 suggests there might be a surplus but in the absence of corroborative documentation, I do not consider I can so find, especially as H himself acknowledges the limitations of valuations in the current economic, political, and military climate in Ukraine. That would, or could, place H in a position of inability to meet his obligations to W, both in terms of quantum and structure. It might, however theoretically, extinguish all but the £100m due to be paid to W leaving him with nil assets. It would be illogical and, in my judgment, wrong to approve an order which might subsequently be shown to be incapable of compliance, and potentially unfair to either or both parties. It would be illogical and, in my judgment, wrong to approve the consent order until the extent of H's potentially massive liability is established.

31. Had this hearing been a First Appointment in contested proceedings, the court would surely have stayed the proceedings until conclusion of the Chancery dispute, or perhaps adjourned the final hearing until after such conclusion, because of the vast sums at stake which would have a material impact upon the financial remedies outcome. I accept that in many, perhaps most cases, the risk of a liability or debt

flowing from third party litigation does not lead to a stay of the proceedings, particularly when a proposed order is made by consent. That is because the sums are generally of not such significance as to justify delay and can be dealt with by contingent sums, or reverse contingent sums. Parties sometimes take a view; one might be willing to shoulder a greater risk of responsibility for uncertain and uncrystallised liabilities, but will usually seek something in return from the party which is freed from any such responsibility. The difference in this case is the sheer scale of the potential liability which, in my view, renders uncertain and unsafe any assessment of the parties' net assets and any evaluation of whether the outcome in the proposed consent order is fair.

32. Nor, in my view, can I simply ignore the interests of PrivatBank, or their submissions on the making of a consent order. I appreciate the bank does not assert a proprietary claim to any of the parties' assets (which would usually justify an intervention in the proceedings), but it plainly has an interest, and I am entitled, in my view, to weigh in the balance PrivatBank's claims against those of H and W when considering whether to make the proposed order or not.

33. W and H rely on the conditionality clause in the proposed consent order which reads as follows:

> "48. No substantive provision of this order or of the agreements and undertakings recited in it shall be implemented or enforceable until the earliest of (a) such date, if any, as the PrivatBank Worldwide Freezing Order is conclusively discharged, or varied by a competent court to the extent necessary to permit such implementation or enforcement; or (b) further order of this court permitting any such implementation or enforcement.
>
> 49. The approval by the court of this Order is entirely without prejudice to the exercise by a competent court of the power to vary the PrivatBank Worldwide Freezing Order, and this Order does not purport to operate so as to fetter or otherwise limit the exercise of any such power.
>
> 50. Nothing in this Order shall operate so as to estop the applicant and the respondent, jointly or severally, from applying to a competent court to dismiss, discharge or vary the PrivatBank Worldwide Freezing Order."

34. I have already remarked that this condition is in fact no more than a statement of applicable law in that, self evidently, the proposed consent order cannot be implemented unless and until the WWO is varied or discharged. It does not prevent W and/or H from applying for variation or discharge. A more restrictive condition might be, for example, an undertaking by the parties not to apply for variation or discharge until determination of the claims of PrivatBank, but that is not offered.

35. H and W submit that if I make the conditional order, either or both of them might then apply to lift the freezing order so as to give effect to my order (W would be so entitled as a person affected by the WFO). To do so, they would need to persuade Trower J

that it is right and proper to do so. That, it seems to me, would throw on to Trower J a need to consider the financial remedy proceedings, the nature of the order, the available resources, and the circumstances in which the order was made. Inevitably, H and W would rely upon the fact of the consent order (if approved) to seek to persuade Trower J that the WFO should be varied, particularly as it is opposed at this hearing by PrivatBank. At the very least, it would be submitted to Trower J that (i) approval of the consent order (despite PrivatBank's opposition) indicates that the financial remedies judge considers it fair and (ii) it is an enforceable order. I do not consider this to be by itself a proper reason for making the consent order. In any event, H and W can apply for variation of the WFO even without a consent order, so as to give effect to the settlement agreement; I make no comment on the likelihood of that succeeding before Trower J. It seems to me, as PrivatBank submits, that H and W are seeking to put the cart before the horse, deploying a consent order to assist in any WFO litigation, whereas my task is to decide whether it is right to make the consent order in the first place. Nor do I accept that refusing to make a consent order would in some way prioritise the claims of PrivatBank. If PrivatBank is ultimately successful, the courts in Chancery and Family will no doubt need to consider the interrelationship between enforcement of a financial remedies order and a damages award. That is a familiar exercise, but it is unhelpful to speculate now as to how that process would play out.

36. I note that the parties did not attempt to obtain a consent order during the Tatneft litigation in similar circumstances where WFOs were in place until it came to an end. The terms of the separation agreement prevented implementation of the agreement until 6 weeks after conclusion of the Tatneft litigation and discharge of the WFOs, but they did not prevent the making of a consent order prior to implementation. I do not see any material difference between the position under the Tatneft litigation and the position here.

37. I acknowledge that there is and will be continuing delay as a result of the Chancery proceedings, but that is, regrettably, unavoidable as a result of the unusual facts of this case; in practice, little or nothing can be progressed until conclusion of the commercial litigation.

38. I do not accept W's submission that with a consent order in place, once the PrivatBank litigation ends, and assuming the claim is dismissed, she would need to be in a position to enforce immediately. For a start, the financial dispute between W and H has proceeded consensually and there is no reason to think that there will be an enforcement issue. Further, upon conclusion of the PrivatBank litigation W can swiftly apply to me (as the allocated financial remedies judge) for the order to be made.

39. W submits that the consent order should be made because she cannot otherwise claim against H's estate in the event of his death. He is not domiciled in this jurisdiction, there is no indication that he intends to become domiciled here, and a claim therefore cannot be brought under the Inheritance (Provision for Family and Dependants) Act 1975. It may also be the case that W's financial remedies claim would abate in the event of H's death in the light of authorities such as **Harb v Bin Abdul Aziz (No 2) [2006] 1 WLR 578**, although that specific point is due to be considered by the Supreme Court on a leapfrog appeal from the decision of Mostyn J in **Hasan v Ul-**

Hasan (Deceased) and Anor [2021] EWHC 1791 (Fam). I reject this submission. This case, as between H and W, is proceeding consensually. It is open to H to execute a will so as to make provision for W. That may require expertise in both Ukraine and this jurisdiction to assist H, but I have seen nothing to suggest it cannot be done. The separation agreement itself at clause 10.1 records a covenant by H to make provision for W and the children by will within 6 weeks of the date of the agreement in terms no less generous than those set out in the agreement; it is not even clear (and certainly not expressly stated on behalf of H) that there is no such will in existence, nor, if it has not been done, is there any explanation why not. I am not satisfied that (if it be the case that there is no appropriate testamentary provision in place) H's failure to comply with a term of the separation agreement should in itself be a reason for the making of the consent order which in turn reflects the separation agreement. It may also be that, as W and the children are within the class of beneficiaries of various discretionary trusts, the absence of testamentary provision may not be fatal. In any event, I do not consider that this argument outweighs factors pointing against making the order.

40. There was some suggestion that the WFO may not fully cover trusts of which W is in the class of beneficiaries, and that the consent order is needed to encourage the trustees to make distributions to W. But this appeared for the first time in oral submissions and, in my view, there is no evidential foundation for me to take it into account. In any event, I am not satisfied that, even if correct, this should dissuade me from refusing to make the consent order for I consider that it is only when the litigation result becomes clear that the court can see the case holistically and decide whether to approve the consent order.

41. I accept that W and H are prima facie entitled to an order which reflects the agreement reached, in accordance with the **Radmacher** principles. But that does not impede the court from considering the order in the light of all the s25 factors, taking into account the third party interests of PrivatBank. Ordinarily the court will compute the assets and then move on to distribution. To undertake that exercise here and now is all but impossible. In my judgment, it would not be fair or appropriate to accede to the application for a consent order to be made. I will not, however, stay the financial remedy proceedings as there may be matters which need to be progressed from time to time pending the outcome of the PrivatBank litigation. Nor will I make an order that no consent order can be made until the conclusion of the PrivatBank proceedings; I will simply refuse the application to make the consent order. It may be that some justification emerges in due course for a consent order to be made, although I cannot immediately anticipate what that might be. H and W shall have liberty to renew the application for a consent order to me, and must notify PrivatBank of any such application.

42. Rule 9.26(B) (1)(a) of the FPR 2010 provides:

"(1) The court may direct that a person or body be added as a party to proceedings for a financial remedy if –
(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so

that the court can resolve that issue."

In my judgment, and for reasons already given, there is clearly an issue between PrivatBank which, because of the scale of the claim, is connected to the matters in dispute in the financial remedy proceedings. However, on the basis of my refusal to approve the consent order, PrivatBank would be content not to remain joined to the proceedings. I propose therefore to join them for the purposes of this order, but henceforth they shall be discharged from the proceedings.

43. PrivatBank shall not be entitled to disclosure of any documents within the financial remedy proceedings unless agreed by the parties or ordered by the court. I refuse the specific disclosure sought by PrivatBank which in my view is not necessary, particularly in the light of my primary decision.