[2018]EWHC 3841 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Case No: 2018/0089

Courtroom No. 50

The Royal Courts of Justice
Strand
London
WC2A 2LL

Monday, 17th December 2018

Before:

THE HONOURABLE MR JUSTICE MOSTYN

RE:

APPEAL OF MF

MRS BAILEY-HARRIS appeared on behalf of the Applicant

JUDGMENT
(Approved)

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MR JUSTICE MOSTYN:

1. This is my judgment on the appeal by MF against the judgment of His Honour Judge Hess given on 23 April 2018 as supplemented on 24 June 2018. Permission to appeal was granted by Baker J on 23 July 2018. He directed: "unless otherwise ordered by the judge during the appeal, the appeal listed pursuant to this order should be held in open court but subject to reporting restrictions orders".
2. At the time that that direction was made the relevant rule as to the hearing of appeals was the general rule FPR27.10, which provides that "proceedings to which these rules apply will be held in private unless where these rules provide otherwise or, subject to any enactment, where the court directs otherwise". Therefore, the default position, as I have pointed out in previous appeal judgments, is that the appeal will be heard in private in contrast to the appeals in the Court of Appeal where the default position is that they will be heard in public.
3. It is my opinion that if the court is to make a decision disapplying the starting position then it has to justify that on the facts of the case, and I see nothing in the order of Baker J explaining why he considered that this particular appeal should be heard in public. My view that there must be an individual fact-specific reason for disapplying the general rule applies equally were the matter to be considered under the new rule 35.12A which came into force a week ago on 10 December.
4. Of course, by that new rule, a practice direction might be issued which provides for circumstances which may be of general application, or applicable only to specified appeal courts or proceedings, in which the appeal court will ordinarily make an order for the appeal to be heard in public. However, as yet, no such practice direction has been issued and until such practice direction is issued, it is my strong view that there must be a fact-specific reason to disapply the general rule. It is for this reason that I decided last Friday that this appeal would not be heard in public.
5. In his principal judgment of 23 April 2018, Judge Hess set out the background to this case. The husband is now aged 49 and the wife is now aged 45. They cohabited in Germany from 1999 and married on 22 August 2003. They lived all their married life in Germany in a house in Lohheide. That property was valued at €195,000 in 2002.
6. It was throughout the marriage in the wife's sole name having originated from the wife's parents. In paragraph 9 (iii) of his judgment, Judge Hess says this:

> "The wife's ownership of the family home is complicated by the fact that her parents (from whom the property originally came) have retained a charge over the property by which they are entitled to occupy part of the property and which prevents the wife selling the property during their lifetime (they are apparently both aged approximately 70-years-old). It does not (apparently) prevent the wife borrowing money against the property, although I imagine this might be complicated if her parents objected".

7. The property, having been transferred to the wife before the marriage, was subject at that time to a mortgage of €57,000. During the course of the marriage the husband contributed from his earning to meeting mortgage repayments and also for home improvements. He estimated that throughout the marriage, which was relatively lengthy, he contributed a total of €70,000. Although there is no specific finding, it is to be taken, given that the wife was making a full domestic contribution that she must have contributed equivalently in money's worth to the cost of the mortgage and other household outgoings during the term of the marriage.
8. By the time that the matter was determined by Judge Hess on 8 March 2018, the value of the

property was said to be €185,000. The Judge questioned the accuracy of this valuation given the valuation back in 2002 of €195,000, but, on any view, it is plain that there was no measurable capital appreciation of that property during the marriage. Therefore, the Judge was faced with the situation where the principal, indeed, the sole asset, as opposed to liability, was non-matrimonial in origin. It was for this reason that the parties agreed that no capital claims would be made by either of them in the German court which pronounced their divorce.

9. There were two children born to the wife during the marriage, A, who was born on 19 June 2003 and who is now therefore 15, and H who was born on 3 April 2005 and who is now aged 13. They continue to live with the wife and their grandparents in the property to which I have referred.

10. The marriage broke down in 2011. The husband left the family home in March of that year. In May 2012, he returned to live permanently in England. On 21 November 2012 the parties were divorced in Germany. At that point the German courts dealt with child maintenance issues, although I have not been informed of the terms of that disposition.

11. In relation to the division of the capital, a position statement filed in these proceedings by the husband on 14 September 2017 revealed that on 26 November 2015 the husband's German rechtsanwalt, which I assume is his lawyer, applied for financial disclosure. On 10 August 2016, the German lawyer wrote a letter to the Family Court in Selle confirming that the disclosure request, the German word for which was '*ausaunfssgufe'* had finished and that the husband's capital application - the German words are *'zugewinn ausgleichsantrag'* - might follow.

12. However, 15 days later on 25 August 2016, the husband's German lawyer wrote to the Family Court confirming that no capital application would be made by him. On 16 September 2016, the wife's German lawyer confirmed to the German Family Court that she agreed with the husband's approach and that no capital decision was necessary.

13. It has been explained to me that the reason that the parties made this agreement that the husband would not make any claim for capital provision in the German Courts, was that none would be awarded to him because of the reasons that I have explained. There was no marital aquest generated during the marriage in circumstances where all the capital had been provided by the wife of the family prior to the marriage and it had not increased in value.

14. Therefore, having made this agreement that there would be no capital claim formulated or pursued in Germany, the husband elected in August 2017 to apply under Part III of the Matrimonial and Family Proceedings Act 1984 for financial relief following a foreign divorce in circumstances where the powers of this court would be wider than directing a division of the marital aquest and could extend to awarding a lump sum to the husband to meet his needs. Permission to make the claim was granted under section 12 of the 1984 Act on 18 September 2017.

15. Although she was served with the proceedings and was directed to give disclosure in Form E, the wife did not engage with the proceedings beyond sending an email to the court on 20 December 2017 and again, on 14 March 2018 in which she said:

> "I defend myself against the law suit... the competent Judge Mr Zwilling has judicially determined that the case has been settled. This decision is final. The divorced couple are therefore legally bound to it. A new decision is no longer possible. This is a necessarily[sic] result from the German law... an English court is not competent. This follows from the regulation. The divorced couple married in Germany. They were married under German law. This means that German law also applies to disputes over finances... I have not made a financial fortune out of marriage, so I cannot pay

> my divorced husband any money... I have no money to hire a lawyer in the UK. Please let me know what options I have to find a lawyer. If a judgment has already been adjudged against me, I hereby give notice of appeal".

That was the sum total of the wife's engagement with the English proceedings.

16. The learned judge in his judgment first considered the duty under section 16 of the 1984 Act to consider whether England and Wales is the appropriate venue for application. Pursuant to section 16(1) it is provided that before making an order for financial relief, the court shall consider whether in all the circumstances of the case it would be appropriate for such an order to be made by a court in England and Wales, and if the court is not satisfied that it would be appropriate, the court shall dismiss the application.
17. Under section 16(2) certain specific matters have to be considered including: (a) the connection that the parties have with England and Wales; (b) the connection the parties have with the country in which the marriage was dissolved; (d) any financial benefit which the applicant or a child has received, or is likely to receive, in consequence of the divorce, by virtue of any agreement or the operation of the law of a country outside England and Wales...; and (f) any right which the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any country outside England and Wales and if the applicant has omitted to exercise that right the reason for that omission.
18. The grounds on which the husband sought an award from the Family Court here in England were exclusively on the basis of that he had needs; specifically, that he had since the breakdown of the marriage incurred indebtedness. He had incurred indebtedness inasmuch as he had raised a mortgage to buy a property in Upavon with his cohabitee. That mortgage was £123,000 and, according to his Form E, he had incurred certain debts totalling £35,672 mostly with short-term lenders such as Sainsbury's and Barclaycard.
19. That figure of £35,672 included £5,439 of legal fees, when in fact his outstanding costs at the time of the hearing were nearer £15,000. Excluding legal costs and the mortgage, which was reflected in the value of the property he had purchased, it would appear that he had incurred roughly £30,000 of short-term debt.
20. Coincidentally, this is almost exactly the amount of debt that the wife had incurred since the separation because additional mortgages had been raised on the former matrimonial home in a further €34,565 (or about £31,000) since the breakdown of the marriage. This is referred to in Judge Hess's judgment at paragraph 9(ii). Therefore, it would appear that the penalty of separation had fallen almost equally on the parties.
21. It was suggested in submissions to me that in circumstances where the wife had not engaged in proceedings, the court might draw the inference that the debt that the wife had incurred on the former matrimonial home of €34,565 had not in fact been spent but, rather, had been squirrelled away and was available to her. However, that was not a finding that Judge Hess made and there is no express appeal against the finding that the wife had no further assets available to her.
22. In his judgment, Judge Hess determined that the husband had a reasonable need to have some of his debts met and he awarded a lump sum of £20,000 to be set against those debts. However, in circumstances where the only source of payment of that debt would be yet further borrowing on the matrimonial home, the judge decided that it was reasonable and fair for enforcement of that that lump sum to be deferred until completion of full-time tertiary education by the youngest surviving child of the family.
23. In order to compensate the husband being kept out of his money, he awarded interest on the outstanding sum at 2% per annum being an estimation of what likely future inflation would

be. In making his award, the judge plainly took the view that it was fair and morally right for this wife to fund debts that the husband had incurred subsequent to the marriage to the tune of £20,000.

24. Authorities since the new epoch of financial distribution, which began in 2000 with the decision in *White v White* [2000] UKHL 54, have emphasised that when applying the principle of need the court should look carefully for a causal connection of the claimed need with the marriage. It would appear that each of the parties has, as a result of the collapse of their relationship and a separation of their economies, incurred debt. The debt for each of them has been approximately the same.

25. It is quite difficult to see why, as a matter of fairness, the fact that the husband has incurred debt means that the wife has to fund his debt to the tune that he was suggesting or indeed at all; but the decision that the judge made that there should be a contribution by the wife to the husband's debts is one which was, in my judgment, plainly within the spectrum of decisions that he could have reached, even if I would not have made it myself.

26. Therefore, I cannot find that the judge's primary decision to award this sum towards the husband's debt is outside the spectrum of reasonable decisions that might have been made and so the primary ground of appeal is dismissed.

27. The consequential rulings, namely deferral and to provide the husband with compensation at the rate of 2%, were, in my judgement, squarely within the spectrum of reasonable decisions available to the judge. It is true, as Mrs Bailey-Harris rightly says that the steer given by section 25A of the Matrimonial Causes Act is to bring economic relationships between the parties to an end as soon as possible. However, that has to be balanced against the requirement to have regard to the interests of the children in section 25(1) of the Matrimonial Causes Act and, in my judgment, the judge, having made the decision that £20,000 should be paid towards the debts, was not wrong, but was plainly right, to defer implementation of the decision until the children were out of education. He was also plainly right to insulate the award against the impact of inflation. The fact that the husband was paying a higher rate of interest on his debt to my mind is *nihil ad rem*.

28. Finally, the judge refused to grant the husband's *ex parte* application for security to be granted in relation to the award. He justified that in his supplemental judgment in terms which, in my judgment, are unimpeachable. For these reasons, therefore, the appeal is dismissed.

End of Judgment

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This transcript has been approved by the judge.