IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2019] EWHC 3676 (Fam)

No. ZC17D00215

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 19 December 2019

Before:

MR JUSTICE COHEN

(**In Private)**

B E T W E E N :

MB — Applicant

- and -

EB (No.2) — Respondent

MR P. MITCHELL (instructed by Vardags Solicitors) appeared on behalf of the Applicant Husband.

MR N. CUSWORTH QC (instructed by Payne Hicks Beach) appeared on behalf of the Respondent Wife.

J U D G M E N T

MR JUSTICE COHEN:

1 On 25 June 2019, I gave judgment on a summons where I was asked to determine three issues between the parties. Those were, first, when the marriage, in the sense of the marital partnership, came to an end. Secondly, whether there were any grounds for vitiating an agreement made between the parties in 2011 and, thirdly, whether there was a marital acquest.

2 I determined all three issues in favour of the wife, although the husband can legitimately say that, on the first issue, he suffered only a partial defeat, in the sense that I found that a relationship of sorts continued between the parties until 2016. However, I could not conclude matters between the parties, as my remit as prescribed by Roberts J, who set up that hearing, did not include an assessment of whether the husband had an outstanding needs claim which the wife should meet, and thus I did not have the information available to me to carry out that exercise. It is that issue which is now back before me.

3 I need say very little about the wife, because she accepted at the June hearing before me that she had resources available to her of not less than £50 million and could meet with ease any order that I might reasonably make for the meeting of the husband's needs and I therefore now turn my attention to him.

4 He is 59 years old. He describes himself as a struggling artist. He filed a statement, inexplicably later than ordered, just a few days ago in which he says that, since the start of 2016, he has sold just two paintings at a total value of a sterling equivalent of about £5,000. That is two sales over four years. I accept that he has no realistic prospect of meaningful employment.

5 He lives in the converted garage in Brighton, now a studio with an upstairs sleeping platform, which I described in my earlier judgment. He lives there so that he can rent out the flat, which the wife provided for him, which produces, net of tax and expenses, an income of about £16,500 a year. The studio is not suitable accommodation for the long-term. The husband has spent significant amounts of time abroad and/or staying with the lady who was his partner, but whom he says is now just a friend. He puts his income needs at £30,000 pa.

6 Mr Cusworth QC, who appears on behalf of the wife, says that, whatever his income is that is available to him, he will live within it, as he has always done. But Mr Cusworth does not challenge the figure of £30,000 as being unreasonable, save that it includes £5,000 for exhibiting his artwork for sale. I disallow that figure in assessing an ongoing budget. If the husband's artwork does not wash its face, that is nothing that the wife should be obliged to fund. Thus, it is that he claims to have an income need of £25,000 per annum, as I find it to be.

7 I found that the marital partnership ended in 2004. Thereafter, the parties continued to spend some time together. It was a minor part of the year, but, when the parties were together, the wife funded it. When they were apart, the husband received no financial support from the wife.

8 In 2011 an agreement was reached between the parties and enshrined in a document that they both signed, having had the benefit of legal advice. Its effect was to give the husband exactly what he asked for, namely a flat in Brighton where he could rent out rooms to have an income and a studio in which he could work as an artist.

9 There was no further income provision and, as I commented during the last hearing and in my previous judgment, it was an agreement that is hard to fathom, because it left the husband having to live in the studio if he was to receive the income from renting out his flat, and thus it was, as it seemed to me and still seems, plainly inadequate to meet his reasonable needs in the round.

10 True it is, as Mr Cusworth points out, that this was a short marriage, arguably even a very short marriage, of only some four years, and that plainly limits what the husband could ever hope to get out of it on separation and divorce; true that it gave him exactly what he wanted; true that he knew it was to be in full and final settlement, and true it is, as Mr Cusworth repeatedly said to me, that the parties have autonomy to enter into agreement and it is not for the court to curtail that freedom. That the husband thought that it was at least adequate provision until 2017 can be seen from the fact that he did not seek support earlier, and true it is that this was not a prenuptial agreement. It was a separation agreement, in which the husband was looking to the future in setting out his demands. Mr Cusworth is right to say that nothing has changed as I look at the situation now, eight years since that agreement was entered into. So, says the wife, this claim should be dismissed without any further payment.

11 Notwithstanding the wife's primary case, she has made two open offers. First, in June 2018, she offered the sum of £300,000, which was broadly the equivalent of meeting the husband's then outstanding costs of £155,000 plus interest in a sum that has not been quantified before me, providing about £125,000 on top by way of free capital. There was no response from the husband to that open offer. In September 2019, the wife increased her offer to £336,000, which, in fact, would have left the husband slightly worse off. It provided £236,000 towards his costs and £100,000 on top.

12 It is necessary to explain where this figure of £236,000 came from, and it is to be seen in the order of Roberts J of 2 November 2018. The learned judge there ordered that the wife should pay that sum, £236,000, by way of a legal services payment order and provided that the husband was to grant her a charge over his interest in the flat, which was in his name, to secure the money that the wife was putting forward to meet the costs. The order goes on to recite that the charge will be prepared and executed at the expense of the wife and its terms would include that it is not to be enforced without permission of the court and not, in any event, prior to the conclusion of the final hearing. The judge made it very clear to the husband that he was running the risk that this provision of funds by the wife by way of charge might result in him having to sell his property. The wife was underwriting that element of his costs and, in giving a charge, he was going into this arrangement with his eyes wide open as to its potential consequence.

13 The offer from the wife, once again, provoked no reply from the husband until last week. The principle elements of his offer was as follows: (i) the wife should transfer to the husband the flat that she owned directly above his which had an assumed value of around £400,000; (ii) payment of a lump sum of £527,000; (iii) the foregoing by the wife of the charge of £236,000. The combined effect of all this was that the husband was seeking, in one form or another, a provision of about £1.3 million. That was about as far wide of the mark as can be imagined.

14 This case should have been a very easy case to settle. A sum of £25,000 for life for a man of 59 years of age, according to the Duxbury tables, would require a lump sum of £325,000. The only sum that the husband required on top was about £10,000 to replace his car. His small tax bill and the works that he wanted to carry out to his property could be done from his own resources. It seems to me that if the husband had come back with any form of

constructive offer, it is highly likely that this case would have settled, because the sum required is a pinprick to the wife's resources.

15 The reason that this case has not settled is because of the way that the husband has chosen to run his case. He has sought to argue as follows: (1) that this marriage lasted for 17 years, that is from 1999/2000 to 2016/17, during which time the parties remained living together; (2) that he made a full contribution to the marriage as a homemaker, a claim that I described in my earlier judgment as risible; (3) that he had a sharing claim; (4) that there was a marital acquest; (5) that the agreement entered into in 2011 was of no relevance and was entered into under undue influence or duress. Every one of those proposals was misplaced and wrong.

16 The outcome of it all is the husband has spent or will have spent by the end of the case the staggering sum of about £650,000 in costs. The wife has funded £236,000 of that sum. The husband has paid £36,000, and the sum outstanding inclusive of interest to his solicitors is around £380,000. This is wholly disproportionate to what has been in issue.

17 It is necessary now that I should refer to the husband's health. I mentioned in my earlier judgment that he has a longstanding history of depression going back to adolescence. It is clear that its intensity is variable. His problems were aggravated substantially when, on honeymoon, he fell, hit his head on the ground and suffered a cerebral haemorrhage, and it is clear that that event has had an effect on his functioning.

18 Just a couple of days ago, he produced unilaterally two medical reports, which should have been produced much earlier and it is fair for Mr Cusworth to say that if they were produced when they could and should have been, consideration could have been given to the instruction of a joint expert. But, nevertheless, I have admitted the reports and they have been helpful.

19 Dr A is a clinical psychologist, and she reported at paragraph 82 under the heading "H's ability to understand questions put to him in high stress environments" as follows:

> "H's scores fell within average in cognitive testing in the absence of stressors. When stressful elements are introduced, his performance tends to deteriorate. In particular, his ability to process complex information becomes rapidly impaired."

20 At 85, the question is "The extent to which his injuries impact in his ability to secure and retain employment." Answer:

> "Upon conclusion of the divorce proceedings, H will need to engage in long-term talking therapy and psychiatric support for him to regain a sufficient level of functioning to seek meaningful occupation. In the short-term, his ability to secure and maintain employment of any form is most likely compromised. Upon completion of the divorce proceedings and assuming a good engagement to a mental health provider, H will need at least six months to one year of talking therapy and psychiatric support to secure and maintain employment. This will have to be within a stress free environment, considering his disadvantages due to his cognitive profile.

21 At 89, question, "The impact that ceasing his work as an artist and sculptor would have upon his brain injury and mental stability." Answer:

> "His mental health and consequently his cognitive abilities will most likely deteriorate should he have to cease his work as an artist. This will have a detrimental effect on his ability to seek alternative employment and live independently."

22 Finally, at 90, "Any risks posed to his mental stability and brain injury associated in certain situations." Answer:

> "H's ability to cope with the above stresses has been greatly reduced following the brain injury. There would be serious risk of self-harming and suicide if having to cope with [and there are the various risk factors], namely the thought of losing his home, the thought of losing his ability to raise an income from his currently tenanted property, the thought of not being able to pay his debts, the risk of bankruptcy and the thought of having his ex-wife living in the flat above him."

23 Dr M, a consultant clinical neuropsychologist, expressed the same view as Dr A as to the husband's functioning.

24 My clear impression is that the inadequacy, as I find it to be, of the arrangements made in 2011 for a man who, before the arrangements were made had neither a secure home nor earning ability, came about because he overestimated his ability as an artist and/or underestimated the effect of his health difficulties.

25 The wife's argument that the autonomy of the parties in circumstances when a marriage is over and the parties are looking to the future is one to which I have been attracted. But, on a fine balance, I do not accede to it for the following case-specific reasons: (1) The agreement did not, in my judgment, ever provide satisfactorily for the meeting of the husband's income needs and capital needs. It could meet one, but not both. (2) The wife knew at all material times that the husband could not provide for himself in income terms and that he had nowhere settled to live without provision being made by her. (3) In particular, she knew of his health difficulties. (4) Notwithstanding what he asked for, it is not a satisfactory way of life that the husband should live in a small converted garage, now the studio, so that he could let out his house to provide an income. (5) Although I found the marriage ended in 2004 as a partnership, the extent of the parties' co-dependence thereafter cannot be completely disregarded. (6) The award to meet the husband's needs in the circumstances would only be a small pinprick to her wealth. (7) This is not providing an 'after the event' insurance. It is meeting a need that was always there.

26 I want the parties to know that I have taken into account and re-read *Edgar, Radmacher, North* and *Wyatt v Vince*. But I do not think it is necessary for me to set out in this judgment the principles that they enunciate. Inevitably, every case is fact-specific.

27 In the circumstances and leaving aside costs, which I shall deal with separately, it would be proper to provide an award of £325,000 to meet the husband's needs for an income and a further £10,000 for the car replacement. I have taken into account and considered the husband's desire to obtain the ownership of the top flat, which the wife owns. I am told that she wishes to sell the flat and I am relieved to hear that, and I will accept an undertaking offered by her to do so and to limit the extent to which she should ever visit by giving advance notice, so that the husband knows when she might be around so that he can avoid unwanted contact. But it would be wrong for me to increase my award simply to enable the husband to have the use of the top flat because it would be convenient to him.

28 This brings me next to the issue of costs. Mr Mitchell, appearing on behalf of the husband, described his submissions on this aspect as bold, and that was certainly a fair description. He says that I should make an award that would cover the <u>whole</u> of the husband's costs, because he says that the costs have arisen as a result of the wife seeking to run a case that the marriage

effectively came to an end in 2002 or 2004 and that the relationship between the parties ended there and then, when I, in fact, accepted and found that there were elements of co-dependency right up to 2016. Mr Mitchell goes on to say, in a needs-based case, it is inevitably the payer who ends up having to pay the costs, because otherwise the needs cannot be met.

29 I reject that description of what the case was about. I have set out the issues which I have determined and the way that I have determined them.

30 On any proper presentation of the case, this would have been a straightforward needs case and, even with the expense of top firms of solicitors, should not have cost each side more than £100,000. I accept that there might have been an additional issue which would have needed to be resolved about quite what the relationship between the parties was between 2011 and 2016. But I cannot see how this would have increased the costs by more than about another £50,000 a side.

31 In considering what I do about costs, I refer to Family Procedure Rule 28.3 and, in particular, sub-rule (7):

> "In deciding what order (if any) to make under paragraph (6) [which is the rule where the court can consider, if appropriate, the conduct of a party in relation to the proceedings], the court must have regard to –
>
> (a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;
>
> (b) any open offer to settle made by a party;
>
> (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (d) the manner in which a party has pursued or responded to the application or a particular allegation or issue."

(e) I think is not relevant, and (f) "The financial effect on the parties of any costs order."

32 This has been amplified by the amendment to Practice Direction 28A, and it is worth quoting from the Family Procedure Rule Committee Costs Working Group, and para.5 of their paper says this:

> "The FPRC is concerned that insufficient emphasis is given to encouraging parties to engage reasonably and responsibly in negotiations. In particular, there is concern that little positive guidance was given in PD.28A to assist the parties to understand the likely costs consequences of failing to litigate sensibly and failing to engage in sensible negotiations and/or of making an open proposal which is significantly higher or lower than the award ultimately made by the court."

33 In consequence, para.4.4 of PD.28A was amended to include, with effect from 27 May 2019, new text as follows:

> "The court will take a broad view of conduct for the purposes of this rule, and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs.

> This includes in a 'needs' case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court. Where an order for costs is made at an interim stage the court will not usually allow any resulting liability to be reckoned as a debt in the computation of the assets."

34 It is self-evident that the payment of something in the region of £1.25m worth of costs between the parties is grossly disproportionate to what was in issue. I find that the wife's offer was light, but I am in no doubt that, if there had been a sensible (or any) response, there would have been a quick resolution of this case. This case has been conducted by the husband in a manner that I find to be irresponsible and unreasonable. The wife does not seek her costs from the husband. However, I see no reason why he should expect the wife to pay his costs unreasonably incurred.

35 I, therefore, cap her liability to his costs at £150,000 for the reasons that I have set out. In fact, that figure is almost identical to what his costs were when the wife made her open offer in June 2018. Whilst I have found that the offer was not enough, I have no doubt it would have got the negotiations to open and to come to a successful conclusion. But, of course, it was only 18 months later, just last week, that the husband made his first offer, and it was, in my judgment, massively overcooked.

36 Whatever the husband's difficulties are, and I accept that he does have difficulties, they are not to be funded by the wife. The wife has paid £236,000 towards the husband's costs. Inclusive of costs of £150,000, the award that the husband receives in total will be £485,000. I would want to hear submissions as to how that is appropriated between the charge which the husband entered into and payment of capital. It will, of course, leave the husband in debt to his solicitors with a substantial sum owing to them. That is a matter between him and them. But, in my judgment, it is not for the wife to bankroll this litigation which I find to have been unreasonably conducted by the husband.

37 That is my judgment.

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