IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2019] EWHC 3866 (Fam)

No. FD19F00030

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 6 December 2019

Before:

MR JUSTICE COHEN

(**In Private**)

B E T W E E N :

MWH — Applicant

- and -

GSH — Respondent

MR M. TURNELL (instructed by Viberts) appeared on behalf of the Applicant.

MRS U. RICE (Family First Solicitors) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE COHEN:

1 Mr and Mrs H had a long marriage spent in England. The marriage ran into difficulties and in April 2017, the husband ("H") left the former matrimonial home in Berkshire, and set up home with his new partner in Jersey. I am told that within about six weeks of arrival, he commenced divorce proceedings in Jersey. It is the belief of the wife ("W") that he did so because Jersey does not have provision within its family law for the making of a pension sharing order.

2 W instructed solicitors in Jersey to act for her and they negotiated a financial settlement with H's solicitors. The agreement, which was signed by both parties and both solicitors, was embodied in a consent order made by the Royal Court on 28 March 2019. It essentially provided for a clean break between the parties with the former matrimonial home being ordered to be sold and the proceeds divided, 55 percent to W and 45 percent to H. W made it plain to her Jersey solicitors that she was not happy with the deal but, nevertheless, she entered into it. Correspondence suggests that she had already, by that time, decided or had been advised, I know not which, to make an application under Part III of the Matrimonial Family Proceedings Act 1984 in England and Wales. The divorce was made final in Jersey in April 2019.

3 Very promptly, on 12 April 2019, she applied under Part III of the Act. The application came before Cobb J on 21 May 2019 who gave W permission to apply for a pension sharing order. W appeared in person although I apprehend that she had been advised in the background by Mrs Rice, a solicitor who has acted for W before me today and has been, I understand, involved throughout these proceedings.

4 The hearing was not attended by H. It was without notice in accordance with the rules although I am told that W had sent him copies of the documents in advance but there is a suggestion that he did not receive them. In his judgment, which has been transcribed, Cobb J concentrated on the section 16 factors which are headed:

> "Duty of the court to consider whether England and Wales is appropriate venue for application."

No reference at the hearing, so far as I can tell from the judgment, was made to section 12 of the Act. W had a duty of full and frank disclosure and should have drawn the jurisdictional issue to the attention of the judge.

5 Section 12 is headed, "Applications for financial relief after overseas divorce etc."

> "(1) Where—
>
> (a) a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, by means of judicial or other proceedings in an overseas country, and
>
> (b) the divorce, annulment or legal separation is entitled to be recognised as valid in England and Wales,
>
> either party to the marriage may apply to the court in the manner prescribed by rules of court for an order for financial relief under this Part of this Act."

6 It is necessary to travel from section 12(1)(a) to section 27 of the Act. Section 27 is in the interpretation section and reads as follows:

> "In this Part of this Act—
>
> ...
>
> 'overseas country' means a country or territory outside the British Islands..."

7 The term "British Islands" is a term which has, since 1889, referred collectively to:

(1) United Kingdom of Great Britain and Northern Ireland;

(2) The bailiwick of Guernsey including Alderney, Guernsey, and Sark;

(3) The bailiwick of Jersey; and

(4) The Isle of Man.

8 Schedule 1 of the Interpretation Act 1978 defines the British Islands as the United Kingdom, the Channel Islands, and the Isle of Man. It therefore follows, and Mrs Rice accepts, that Jersey is not an overseas country within the meaning of section 12(1)(a) of the Matrimonial Family Proceedings Act 1984.

9 This would appear to be an insuperable objection to W's application but in an ingenious argument, which does great credit to Mrs Rice's industry and scholarship, she argues as follows. First, she says, I must look at the Law Com. No. 117 Family Law: Financial Relief After Foreign Divorce report. It was this report that was the precursor to this part of the 1984 Act. At paragraph 65, the material passages read as follows:

> "65. We have considered whether the proposed jurisdiction to award financial relief should extend to cases where a decree of divorce or nullity was obtained in Scotland, Northern Ireland, the Channel Islands or the Isle of Man. These countries all have their own legal systems and the grounds for matrimonial relief, and the financial provision orders available, differ from country to country... and the courts in Guernsey and Jersey have powers which are in most important respects similar to those in England and Wales. In Scotland, however, the courts have no power to order the transfer of property on divorce.
>
> 66. It would nevertheless in our view be inappropriate to allow those divorced elsewhere in the British Isles to apply to the courts in England and Wales for financial orders; there will be few if any cases in which a person divorced in another part of the British Isles will have suffered the 'serious injustice' which we believe it should be necessary to establish as a condition precedent to the exercise of the powers we propose."

10 That was the position in 1982. Subsequently, as Mrs Rice points out, reforms have been made to the Matrimonial Causes Act 1973 which permit pension sharing orders to be available as part of the range of powers under the 1973 Act. This change to the law of England and Wales has, I am told, not been replicated in Jersey.

11 From that starting point, Mrs Rice says that there is a serious injustice and, in particular, she points to the fact that H's pension income is apparently some 2.5 times that of the income of the wife. Accepting that at face value, it does not, of course, necessarily follow that substantial injustice has occurred or would occur because the absence of powers to pension share can be dealt with in other ways by, for example, offsetting. I do not know whether offsetting was part of what led to the unequal division of the proceeds of sale of the matrimonial home because I do not have the information before me to form a view.

12 On behalf of W, Mrs Rice says that I should apply the three principles of interpretation which she says are 'the literal rule', 'the golden rule', and 'the mischief rule'. The mischief rule has taken me to the authority of *Heydon's Case* [1584] EWHC Exch J36, a judgment of Sir Roger Manwood CB and I think also the other Barons of the Exchequer. Mrs Rice directs me to this particular passage which reads as follows:

> "2. ...And it was resolved by them [i.e. the Barons of the Exchequer], that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:
>
> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> 3. And, 4th. the true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*..."

Mrs Rice says this is a good example of mischief arising and as a result of it, I should construe the statute to provide a remedy.

13. There is however, in my judgment, a fundamental problem with what she asks me to do, namely that I am not being asked simply to construe the statute; I am being asked to ride roughshod over it. Mrs Rice says in response to that that, in those circumstances, if there is an absurd result being produced by the statute, I should apply the golden rule which, so it is said, prevents inconsistency and absurdity in the application of the literal rule.

13 I do not accept that there is inconsistency or absurdity in applying the statute and I am taken to the *Sussex Peerage case* (1844) 11 Cl & Fin 85 where Tindal CJ said this:

> "My Lords, the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the

> statute and to have recourse to the preamble which, according to Chief Justice Dyer, is 'a key to open the minds of the makers of the act and the mischiefs which they attended to redress."

14 In this case, there is, as I say, no ambiguity whatsoever. Parliament has made the statutory law to be found in the 1984 Act and it is for Parliament and Parliament alone to change it if thought appropriate.

15 Very much as her fallback position but which in a point that I must address, Mrs Rice says this application is too late and she takes me to Family Procedure Rules 2010, 18.10 and 18.11. 18.10 is headed:

> "Service of application notice following court order where application made without notice."

At subparagraph (3), it reads:

> "The order must contain a statement of the right to make an application to set aside or vary the order under rule 18.11."

I think it is accepted by Mrs Rice that the order of the court is deficient in that respect and it did not draw to the attention of the recipient his right.

18.11 is headed:

> "Application to set aside or vary order made without notice."

At (2):

> "An application under this rule must be made within 7 days beginning with the date on which the order was served on the person making the application."

16 It, of course, follows from the fact that the order did not contain the statement of the right to make an application that the respondent can properly say that he was unaware of (a) the right to make the application and (b) that he had to do so within seven days.

17 I have a general power under rule 4.1 to:

> "...extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired) ..."

18 It seems to me plainly right in this case that I should extend H's time for applying to set aside the order of Cobb J. To do anything else does no favour to either party. It would simply mean that the parties are pitched into a financial remedy application which will end up foundering on exactly the same jurisdictional basis as today's application must founder because the court, at a final hearing, will find it has no jurisdiction to make the order that W seeks.

19 In the circumstances, it seems to me clear that there is no jurisdiction for W's application. I accordingly, having extended the time for making the application, grant H's application to set aside the permission granted by Cobb J and I strike out W's application.

L A T E R

20 It is clear to me that costs must follow the event. W has known from the outset of the proceedings, or at least since well before the first hearing at Reading when the costs started to escalate, that her case was on weak ground and she knew exactly what was going to be said on behalf of H. There is no reason why H should be penalised as a result of W's determination to run this point. I work on the basis that on a standard basis of assessment, a costs order would be made in the region of about 70 percent of the solicitor's bill. There is a small element of duplication in counsel's fees for this hearing as it was very much the same argument as would have been run in Reading at the earlier hearing.

21 Taking these matters into account, I assess costs in the sum of £11,000 and I direct that they shall be payable out of W's share of the proceeds of sale of the former matrimonial home.

CERTIFICATE

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**** This transcript is approved by the Judge ****