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Case No: BV16J00127

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/06/2020

Before :

MRS JUSTICE LIEVEN

Between :

D

Applicant

and

E

First Respondent

and

F

Second Respondent

Submissions by **Mills & Reeve LLP** for the **Applicant**
Submissions by **Nicholsons Solicitors LLP** for the **First Respondent**
No Submissions made for the **Second Respondent**

AFTER WRITTEN SUBMISSIONS

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE LIEVEN

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.

Mrs Justice Lieven DBE :

1. This is a short judgment to deal with an ancillary dispute that has arisen in this case. The parties reached an agreement at mediation on 20 January 2020 and signed heads of terms. Following a hearing before me on 2 March 2020 and after hearing submissions on various points I approved a final order. One of the matters that remained outstanding before me was the question of what security should be provided by the Husband for the terms of the agreement being fulfilled. I ordered that the parties should seek to agree that matter but in default of agreement should make written submissions to me which I would seek to determine without a hearing.
2. The parties have failed to agree the terms of the security. This is disappointing in circumstances where a very large proportion of the overall assets must already have been taken up in lawyers' and valuers' fees and the purpose of the mediated agreement was to bring to an end this difficult family dispute. I have a considerable suspicion that this litigation is now being driven more by the children to the marriage than by the divorcing parents. The parents are both in their 80s and the children's interests seem to have become overly intertwined with the dispute between Wife and Husband. It is very hard to see how this continuing litigation is in the interests of either of the main parties.
3. Under the terms of the agreement the Husband is to pay the Wife three lump sums; £1,000,000 by 20 July 2020; £850,000 by 20 January 2022; and £150,000 by 20 January 2025 (or on the Husband's death or realisation of the sale of Property G). The second and third lump sums will not be paid if Husband and Wife remain married and continue to live together. This was inserted because the Husband and Wife continue to live together in the matrimonial home and it is the Husband's case that they have both said on various occasions that they intend to continue to live together when these proceedings end. The Wife disputes this. It is not difficult to see that behind this dispute must be a very sad personal situation.
4. From the written submissions there appear to be the following areas of dispute;
 - (a) Whether the security should be discharged when the lump sum against which it is charged is paid;
 - (b) The precise terms of the charges;
 - (c) The particular properties to be charged.
5. The heads of terms provided for security to be given and the dispute was which properties and on what terms. The Wife originally asserted that all assets should remain charged until all the lump sums had been paid. She now accepts that properties can be discharged from the security but only when a property is sold or refinanced to pay the contractual obligations. The Husband says that this is unfair and unnecessary and if he can raise the money to pay the lump sum by some other means then the charge on the property relating to that lump sum should be discharged. The Husband's lawyers have submitted a draft which achieves this result.
6. The terms of the charge proposed by the Wife is in the form of a commercial bankers' charge. The Husband argues that this is predicated upon two independent and commercial partners whose interests are aligned and where both parties sole interest is

in commercial success. The Husband argues that this form of charge is not appropriate in a matrimonial case, particularly one where there has been such a serious family falling out as here between the children, and where the daughters might have their own interest in enforcing charges to remove the asset from the Husband and therefore the Interested Party (the son).

7. The Husband argues that all the court should do is take reasonable and proportionate steps to ensure that the Wife has good security. He points to the provision which gives the Wife an absolute veto in respect of certain matters, the provision for costs and an apparently unfettered right to inspect the property.
8. The third area of dispute is the properties which are to be charged. The Husband has offered up properties with the valuation given to them by the Single Joint Expert instructed. The Wife argues that the SJE report was only produced 3 days before the mediation and the Wife would have raised questions of the expert if the matter had proceeded. Further, she says that the valuation was not prepared for security where it would be common for the reduced price on enforcement of security to be taken into account. She says that reasonable points have been raised concerning the value of the various properties and that proper replies have not been given. Both parties then set out various detailed points about the values given and why they are or are not reliable. Just one example of these points is that the Wife says that Property H has an access dispute and this might discount the value that could be achieved.
9. The Wife suggests that certain other properties would be suitable security. She then suggests that various amendments should be made to the charge to deal with specific issues on each property.
10. It seems to me that the issues around security have spiralled entirely out of control in this case. The parties agreed to the overall terms precisely to save the expense of trial, as against a valuable but not immense estate. There now appears to be a danger that the benefits of that settlement are being lost, both through increasing further legal fees and further acrimony. In my view it is time to bring this to a stop and to impose an element of broad sense to the dispute. This is not a commercial dispute and it appears that the principal parties intend to continue to live together, which must tell its own story. It is not in my view appropriate to approach the issue of security for the agreement in the same way that one would a commercial transaction. It is also appropriate to take into account the fact that this is not a case where the assets can be spirited out of the jurisdiction, or the Husband himself is at all likely to remove himself from the jurisdiction, or to make enforcement of the agreement exceptionally difficult.
11. It is obviously important for the Wife to have security, but the approach must be a proportionate one to the nature of the dispute and the facts of the case. It must be remembered that the Husband is under a contractual obligation to pay the lump sums to the Wife and if he does not do so she can take action to enforce, with or without the security. The security is important but it is by no means the only way to ensure the Husband meets those contractual obligations.
12. The Wife argues that she is worried the second and third lump sums will not be paid. She refers to the fact that she is 81 years old and in poor health. However, it must be remembered that the first lump sum is due to be paid in just 3 months time, and that will give her £1,000,000. This is a considerable sum which will both protect her lifestyle

and any care needs she has for some time but also allow her to enforce the other sums if that becomes an issue.

13. In my view it is appropriate to proceed on the basis of the valuations of the SJE. I cannot possibly begin to assess the impacts on value of the various points raised by the Wife and the degree to which they do or do not affect the valuation report figures without evidence from the SJE, which I think would be totally disproportionate. I therefore do not accept the points raised by the Wife on the valuations given and proceed on the basis that those valuations are the appropriate ones for the purposes of the security.
14. I do not consider it necessary or appropriate that the security should be held against all the lump sums rather than each one specifically. I do not understand this to have been what was agreed in the heads of terms. But in any event, it is a fetter on the way the Husband conducts his business. The agreement is that various lump sums are paid at various dates. Once the lump sum in question is paid the security in respect of that lump sum should be discharged.
15. In relation to the terms of the security, I find the Wife's submissions somewhat ironic. She says that she is neither a solicitor nor a surveyor and will be unable to assess the impact on the security of any request for consent under the charge without professional advice. However, she has had no difficulty in seeking professional advice through this process, and I am told that one daughter is a solicitor and one a surveyor. I can see no difficulty in inserting the word "reasonable" into clause 8.1.4, even it is to some degree repetitive, if it reinforces to the parties that actions under the agreement must be reasonable. Given the nature of the security in question it is inevitable that the Wife or those advising her is going to have to have some role in any decisions over the properties to be secured, and the terms of the Husband's proposed clauses appear to be appropriate.
16. I do not think that it is right that clause 5.1 should make provision for indemnity costs, including costs incurred in relation to environmental costs. Environmental costs can be very considerable. I can see no possible reason why the Husband should go out of his way to unreasonably incur costs in this regard as it would hardly be to his benefit to do so. This appears to me to be an example of an unreasonable approach by the Wife, or at least those advising her.
17. The Husband asks that I make a costs order against the Wife in respect of these submissions. The normal order in this type of litigation is that each side bear their own costs. The Wife's solicitors argue that the Husband failed to respond promptly to the proposals that they were making, and also allege that the Wife is frightened of the Interested Party, and there have been further altercations since the last hearing before me. In these circumstances I think the most sensible course is to make no order for costs, it not being possible to tell on the material before me as to where any unreasonable conduct lies.
18. For the reasons set out above I approve the Charge drawn in the form drafted and submitted by Husband with:
 - (a) The Husband's amendments in red to be used and the Wife's amendments in blue not to be used; and

(b) The properties to form the security shall be as set out in the consent order.