Case No: ZZ21D77072

IN THE FAMILY COURT SITTING AT
THE ROYAL COURTS OF JUSTICE

Neutral Citation Number: [2024] EWHC 3479 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 December 2024

Before :

Mr Geoffrey Kingscote KC
(sitting as a Deputy High Court Judge)

- -

AF **Applicant**

- and –

GF **Respondent**

- -

- -

Deborah Bangay KC and Georgina Howitt (instructed by RWK Goodman) for the applicant

Richard Sear KC (instructed by Burges Salmon) for the respondent

Hearing date: 25 November 2024

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Addendum Judgment

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 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.

A Background

1. This is an addendum to the judgment that I handed down immediately prior to the hearing on 25 November 2024 following the final hearing in May and June 2024. I first distributed a draft of that judgment on 25 July 2024.

2. The addendum judgment is necessary because of a number of events that have taken place since the close of evidence on 3 June 2024.

3. In June 2024 W disclosed to H's partner's daughter, GM, confidential information concerning the proceedings. That led to an application in July 2024 for H to adduce further evidence. In that application H indicated that he did not wish to give an undertaking that he had offered at the trial (which I had endorsed) not to actively seek to terminate W's employment at Leumadair. W has now left her position at Leumadair with a settlement agreement dated 14 November 2023, equivalent to 13 months of income.

4. It is the implication of these changes of circumstances that I have to consider in the addendum judgment.

5. The case was listed for a 1 day hearing on 25 November where I heard brief oral evidence about the change of circumstances and considered two live applications:

    a. H's application dated 18 July 2024 for adduce further evidence.
    b. W's application dated 8 November 2024 for:
        i. The court to reconsider the question of ongoing spousal periodical payments in the light of the material changes following the final hearing and prior to finalisation of the final order. She seeks a nominal periodical payments order for a period of 3 years.

ii. Disclosure in relation to Board Minutes and all written communications (including but not limited to emails, texts and Whatsapp messages between H and Mr Q regarding the termination of his employment).

6. I had dismissed H's application dated 12 November 2024 for a strike out of W's application by way of a short, written indication dated 21 November 2024.

B Chronology

7. I set out a brief chronology of the procedural events below to give some background.

8. The evidence closed on 3 June 2024.

9. I prepared a judgment following the close of evidence with a final draft being nearly completed by mid July 2024.

10. On 18 July 2024 I received a request from H requesting that permission be granted to adduce further evidence in relation to disclosures made by W which had a material impact on the undertaking that H had offered at trial in relation to W's employment. He was no longer prepared to give that undertaking.

11. Through the court I requested a response to the application from W. I received no response.

12. I provided the draft judgment on 26 July 2024 without reference to H's application. It is 38 pages long. I requested that the parties send me corrections, a draft order and any further submissions by 13 August 2024. I acceded to a request to extend that time to 6 September 2024.

13. That judgment recorded, and accepted, an agreement by H that he would give an undertaking not to actively seek to terminate W's employment at Leumadair. I considered in my judgment that H bore no ill will towards W.

14. I received corrections on 4 September 2024 but did not receive a draft order. I acceded to requests to produce the draft judgment to the parties and for further time for a draft order until 17 September 2024.

15. On 13 September 2024 conscious that H's application was outstanding I emailed the parties requesting their thoughts on how best to resolve the matter: written submissions or a hearing.

16. I received an email response from Mr Sear KC on 15 September 2024 suggesting that W file her evidence in response to H's application, with submissions 48 hours in

advance of any hearing date. I was told that W's team needed longer to take instructions but that it was likely that a hearing would be required.

17. On 11 October 2024 I received a response from W's team requesting a 1 day hearing with a proposal from Ms Howitt that the parties would attempt to agree a date for the submission of evidence absent which they would ask me to determine the matter. Ms Howitt requested the parties' clerks to obtain a date.

18. I received no date by 29 October 2024 from the parties, so I found and gave them options. The parties confirmed the date of 25 November 2024, after a further chasing email from me on 6 November 2024.

19. On 8 November 2024 I sent an email stating that I wished to resolve all matters on 25 November 2024 if possible. I requested the parties to set out by 4pm on 15.11.24 their submissions as to the appropriate ambit of the hearing to make it as efficient as possible.

20. On the same day W made her application.

21. I did not accede to a request from W's team for further time for submissions.

22. I agreed Mr Sear KC's suggestions that:
    a. W's application be served by 4pm on 8.11.24 and the evidence on which she intended to rely by noon on 11.11.24.
    b. Parties file their submissions by 15.11.24 to allow me to determine the ambit.
    c. Submissions for the hearing by 22.11.24.

23. On 15 November 2024 I received the submissions. Unfortunately, I missed the submissions from Ms Howitt. That delayed the production of my initial indication regarding ambit until 22 November 2024.

24. At 18.04 on Monday 11 November, I received the statement supporting W's application. It was thus 6 hours later than my request.

25. On 12 November 2024 H applied to strike out W's application.

26. Mr Sear KC's submissions referred to H filing a statement by Wednesday 20.11.24 in response to W's application which he did. That was in the bundle received on 21.11.24

27. On Thursday 21 November 2024 there was further communication regarding my preparation of a decision as to ambit and I delayed, at Mr Sear KC's suggestion, the filing of submissions for Monday 25.11.24. I produced the initial determination as to ambit on 22 November 2024.

28. In that initial determination I dismissed H's application to strike out and indicated that I would hear brief oral evidence on 25 November 2024 if necessary.

29. That is the procedural background. I now set out the facts.

C The developments since June 2024.

30. The evidence closed on 3 June 2024.

31. On 30 June 2024, following the hearing, W says that GM, the daughter of H's partner Ms M "reached out" to her (W). It was, in fact, not clear to me if it was GM or her father who approached W.

32. GM was worried about H's relationship with her mother. GM is very critical indeed of H. In the context of the conversation W disclosed confidential information concerning the proceedings to GM .

33. GM wrote an email to her sister, PM, in which she set out very strong criticisms of H and set out facts from the trial – which would have come from W - some of which were incorrect. The email is very negative indeed about H. H said it caused him an unbelievable amount of hurt. That is understandable.

34. H's solicitors wrote to W's solicitors on 11 July 2024 confirming that they were aware of what W had said to GM .

35. On 16 July 2024 H solicitors wrote to say that they would be asking that judgment be held back until W's solicitors had replied.

36. W then instructed her solicitors to write to say that her discussion with GM did not relate to the proceedings. That letter was untrue, as W accepts.

37. That day H's solicitors then provided the email from GM to PM which made it clear that W had shared confidential information

38. On 18 July 2024 H made an application for permission to file fresh evidence. In the application he said that he was unwilling to give the undertaking that I said he should give in my judgment.

39. On 19 July 2024 W apologised for what she had said to GM . She said that she had "now reflected on matters and wishes to apologise, unreservedly, to your client for the upset she has evidently caused which was unintentional".

40. The result of the conversation between W and GM has, H says, been devastating. Ms M and her daughter are no longer in contact.

41. W says that H discussed the proceedings with her friend, the operations director. H admitted that he had discussed the email with the operations director. He did not discuss the financial remedy proceedings.

42. On 10 October 2024 W was informed during her weekly meeting with Mr Q, the Chair of Leumadair Investment Management Ltd (Leumadair Investment)that the board members had serious concerns as to whether it had sufficient trust and confidence in her to continue in her role as Managing Director of Leumadair Contract Management Ltd (trading as Blue Leumadair). He said there had been concerns for a while and said that the underlying funds had diminished in value by c 23%. The letter dated 10 October 2024 following the meeting invited W to a further meeting on 25 October 2024; explained that no decision had been made about W's employment and said that a union representative could be present at that meeting.

43. There was no allegation of gross misconduct.

44. In her evidence to me W said that her performance had not hitherto been questioned by Mr Q. She says she was in complete shock. But she accepted in cross- examination that weekly meetings had started in January 2024 because of the performance of the funds. She said that the meetings were a waste of time and were largely chit chat and pointed out that the performance was worse last year.

45. I heard evidence from Mr Q at trial and he was an impressive and honest witness whose evidence I accepted entirely. I took the view that he would be fair to W and would not "do her down". Neither W nor Mr Q referred to the weekly meetings in their evidence before me at trial.

46. In her statement W says that she was upset and asked if there was anything she could do to which Mr Q said no and handed her a letter marked "without prejudice save as to contract". That letter stated as follows

    a. "Given the performance of the business over the last two years and the recent write down in the value of the funds the company has serious concerns as to whether it has sufficient trust and confidence in you to continue in your role as Managing Director. Accordingly, the company is considering whether a change in leadership is required. The company is willing to go through a formal process with you to address those concerns before a final decision is made. However, as an alternative to the formal process the company wishes to explore the possibility of entering into a settlement agreement under which your employment with the company would terminate in return for an enhanced severance payment.

b. By offering the settlement agreement we are not indicating that we have to decided to terminate your employment and if you do not accept the settlement offer it will not prejudice the formal process in any way".

47. The settlement agreement was for £135,000.

48. W resigned herself to the fact that her position was untenable and, with representation, negotiated an enhanced package that was finalised on 14 November 2024 for £90,000 as payment in lieu of notice and £83,000 by way of compensation for loss of employment of which £30k is tax free. That sum effectively pays W until December 2025.

49. H produced a statement on 20 November 2024. In his statement H denied that he had any involvement with W's employment position. He had recused himself from board meetings when W's employment was discussed.

50. He said that the relationship between Ms M and GM has been damaged.

51. H said that he would struggle to give the undertaking that he had offered in court but that he had taken no steps in respect of the termination of her employment. She answered to Mr Q. He is bound by the rules of the Financial Conduct Authority (FCA) as is Mr Q.

52. H said also that the NAVs of the funds had dropped by c 22 to 23%. H said that he understands that that drop prompted the decision in relation to W. The result of the reduction in the NAVs is that his shareholding in the funds, and his interest in Leumadair, has diminished but he is not taking any steps to try to vary the order.

D The law

53. I have handed down the judgment following the trial. Both parties agree that I have jurisdiction to change my mind following the handing down if I consider it fair to do so, and if there has been a material change to the circumstances of the case. The authorities make it clear that changing your mind is to be discouraged. The case is akin, though not identical to, the case of *H v T (Judicial Change of Mind)* [2018] EWHC 3692 (Fam) where MacDonald J had made an arithmetical error in his draft judgment. I have not made an error but am dealing with a change of circumstances. Ultimately, it is a matter for my discretion. But as Mr Sear KC said it is a narrow path of discretion.

54. The key point in issue is consideration of the clean break provision and its replacement with a 3 year extendable term to allow W to find alternative work. W accepts that she is effectively paid until December 2025 so it is only if she fails to find employment before

then that an application would be made in relation to the nominal order. That is a 2 year window. H would then be nearly 64 years old and W would be 54.

E The hearing

55. I heard evidence from both parties. Ms Bangay KC made an application for disclosure of the Board Minutes that concerned the decisions in relation to W's employment. I did not make an order for disclosure prior to oral evidence but said that I would consider the need for minutes when hearing evidence. In fact, H had already obtained the relevant Board Minutes, as he explained in cross examination, and these were produced to the court. There can be no doubt that I had sufficient information to dispose of this case.

56. W repeated her apology to H for her disclosures to GM though she said she did this with good intentions. W said that she was a people person and was trying to help GM who was concerned about her mother. That does not explain why she told GM inaccuracies about the trial. She also apologised for not being truthful in correspondence. I did not get the impression that she genuinely understood the impact of these discussions with GM on H or how he might feel about giving an undertaking. Ms Bangay KC said that the disclosures were completely unconnected with her employment, but they speak to her judgment and her honesty.

57. W was in clear breach of the implied duty of confidentiality in relation to the financial remedy proceedings. She also instructed her solicitors, initially, to write an inaccurate letter denying that she has spoken to GM about the proceedings.

58. W said, and I accept entirely, that she is in shock following the loss of her employment. She has seen head-hunters who have told her that there are very few jobs at her level. She has been told that it is a bad time to look for employment and that she needed to see people in person to "share war stories". The recent Budget had not helped her sector. She has not made any job applications as yet. She said in her statement that based on conversations with head-hunters she did not believe she would command a salary of £180,000. There is no evidence in writing. It is clear to me that she is devastated by the loss of her employment. She says that she expected to work at Leumadair until her retirement.

59. In cross-examination W accepted that she had put her earning capacity at £300,000 in trial, that she considered herself to be underpaid at £180,000 and that she thought she should have been paid £275,000. She said she had been overly-optimistic in oral evidence. It is clear to me that W is, as I said in court, a real "grafter". She is industrious, conscientious and deeply committed to her work. She would be a great asset to any company in this field. At trial I recorded that she had said that her earning capacity was £300,000 and I remain of the view that she has a substantial earning

capacity. Given the very short period of time since the settlement, W's evidence to me in the final hearing, and the absence of written evidence, I do not find that her earning capacity is now below £180,000 as she suggests. I do think that it will take some months for her to find suitable employment.

60. In cross examination H accepted that Mr Q had said that W's employment would only be under threat if there was a breach of covenant.

61. I reminded myself that H had told me in the final hearing that there was no guarantee that W would remain in post indefinitely as there were concerns about management of Leumadair particularly in relation to costs.

62. H was adamant that he had not been involved in the decisions in relation to W's employment. He said that he was regulated by the FCA. He did not know of the emails that Mr Q had sent in January 2024 regarding the decision to impose weekly meetings until very recently. He accepted that he had not wished to give the undertaking: he said he had lost personal trust in W.

63. H accepted that he had not disclosed the minutes of the board meetings voluntarily absent a court order. He explained that the question of W's employment had been discussed in a number of board meetings but that he had recused himself when W's employment was discussed.

64. H explained that there were a number of ad hoc meetings in September and October 2024 because of the "redemption situation" – investors removing their funds. There had been lots of conversations with Santander who had raised financing issues again.

65. The minutes were produced. They disclosed that H had indeed recused himself from discussions regarding W's employment and he did that in all the meetings, including the first in October 2023. The minutes of the October 2023 meeting recorded that Mr Q reported to the Board on the staffing challenges that the Fund's portfolio management companies are facing, particularly from the lender, to turn around the performance of the business. Mr Q briefed the Board on concerns with the existing management team. It was recorded that should there not be any signs of improvement then steps would need to be undertaken shortly to make changes to the management team. The reference to the lender is consistent with Mr Q's oral evidence to me at trial of the importance of the lender to the business.

66. The meetings between W and Mr Q started in January 2024.

67. I have also been provided with minutes from 24 September 2024, 25 September 2024 and 16 October 2024.

68. The 24 September minutes gave slightly mixed messages about the Funds. At 3.1 it was recorded that the Board should consider revising park projections downwards and, factoring in that downturn the DCF models would create a 20 to 25% reduction to the NAV. But Mr Q went on to say that the parks were operating profitably and ultimately the decision was taken to maintain current projections.

69. The 25 September minutes record that H was asked to leave the meeting due to the court undertaking. H indicated in court that he would give an undertaking (as Mr Q knew, I believe, from giving evidence in the trial) but did not actually give that undertaking. H said that he was determined not to be involved with decisions regarding W's employment. I accept that evidence, and the evidence he gave that he had not discussed W's employment with Mr Q.

70. The minutes record that Mr Q briefed the Board on management changes. He said it was H's and Mr Q's position to set out the management strategy and it was time to call the management team into account. This conversation was in the absence of H. The Board discussed various scenarios. There are 5 members of the Board including H. The Board (absent H) discussed various scenarios and concerns regarding changes to the management which Mr Q would consider further.

71. The final documentation was an extract from the minutes of the meeting of Second Leumadair Investment Limited (Second Leumadair Investment) on 16 October 2024. Ms M was present as an Associate of First Leumadair Investment Limited (First Leumadair Investment). That is her role. She was also present at the meeting in October 2023.

72. H and Ms M left the meeting before Mr Q told the Board of his meeting with W. He said that he had told her the Board had requested a review of the management team and that her position may be at risk and then explained the without prejudice discussion.

73. None of the minutes disclose that H was involved in discussions about W. They show that he actively elected to be absent.

F My analysis

74. Ms Bangay KC stated that her application was in two parts, or limbs. Limb "A" was that the judgment be revisited on the basis that H had encouraged, effected or been responsible for W losing her employment. Limb B is the fact that W has lost her employment position with Leumadair with the concomitant financial implications.

75. Ms Bangay KC said it was to be expected that there would not be an evidential trail linking H and the decision not to employ W. Impliedly, she accepted that there was limited support in the minutes, save for the reference to management strategy and

calling the "management team into account". I do not regard the reference to management team as being supportive of her argument. H was in charge of strategy with Mr Q but it was Mr Q who was in charge of her employment.

76. There is no evidential link between W's loss of employment and actions taken by H. All the minutes demonstrate that H deliberately absented himself when these matters were discussed. It was the Board (absent H) who took the decisions and Mr Q implemented the decision. W did not ask Mr Q to give evidence. As I have stated in this judgment Mr Q was a witness I trusted. Mr Q explained to W that there had been a reduction in the NAVs of the funds and Mr Q explained that it was the Board who had concerns about W's work.

77. Although I can see why W is suspicious of the timing, the evidence in the round, including the minutes of October 2023, September 2024 and October 2024, the weekly meetings and the reduction in NAV are sufficient to demonstrate that W's departure was not orchestrated by H. W therefore fails on Limb A.

78. Ms Bangay KC's second argument is the fact that there has been a material change to the financial circumstances of the case such that it undermines the basis of the judgment, and I should therefore reconsider the clean break.

79. I consider the financial position of the parties.

80. My award resulted in both parties having almost identical amounts of non-pension capital assets. On my arithmetic, W retained assets of £5.08m plus a pension worth £518k, after payment of the lump sum of £150k reflecting chattels. H retained £5.13m and £1.04m in pensions. Of that £5.13m, £3.7m is reflected in the value of Leumadair assets.

81. W's capital base is far more liquid than that of H. H's liquidity comes in the form of income. I found his income to be £1m, a figure proposed by Mr Sear KC though H says that it is currently £385k. W was earning £180k gross but her own evidence was that her role was worth £300,000.

82. W has already received the proceeds of sale of the ski chalet at £515k, the family home at £1.172m so nearly £1.7m in total. She will receive another lump sum within 28 days, £1.06m in July 2025 and another lump sum of c £1m in 2026.

83. In total, as stated above, W will have liquid assets of c £5m albeit that £320k is represented by her mother's home.

84. W is securely housed in a mortgage-free property worth £970k. At trial W had included a property particular for a £3m house. If she chose to purchase that property, she would

still have c£2m to invest plus her pension. The reality is that W will wait to see what employment positions she is offered before purchasing a new home.

85. The settlement agreement provides for 13 months of net income until W is 54. The £2m investment figure calculated above would generate from the age of 54 about £100k net pa, plus private pension income, absent any earned income at all. That is higher than W's take-home pay set out in her MPS statement.

86. My judgment was based upon W remaining employed at Leumadair. But employment positions are never guaranteed. W told me that she had an earning capacity of £300,000. She has a substantial earning capacity. I accept she will strive to find employment. She is, as I say a "grafter".

87. So, in those circumstances, are the changes sufficiently material to justify revisiting the order?

88. W essentially seeks a nominal order for a 3 year period, until H is 65, the first year of which is covered by her settlement agreement, to ensure that she can find employment.

89. There is a strong statutory steer towards a clean break. Mostyn J deprecated the use of the nominal order as an insurance policy in the case of A v M [2021] EWFC 89.

90. In my judgment I found that these parties would both benefit from a clean break. There is substantial animus and distrust between them as the events of June and July 2024 demonstrated.

91. An ongoing order for periodical payments must be justified on the basis of needs and fairness.

92. In my view neither needs nor fairness require that I exercise my discretion to revisit my judgment. The reasons are as follows:

    a. Although I based my judgment on award on the fact that W would work at Leumadair, employment positions, and the success of businesses are never guaranteed, as H said in evidence. Losing employment is always a possibility.

    b. W has a substantial earning capacity and a strong desire to work. She is conscientious and has been very successful. I am satisfied that she will do her best to find alternative work and that she will find a suitable alternative position. Her earning capacity is substantial – her figures were £300,000 to me at trial and I think that, with time, she will be able to at least match the figure from her previous employment at Leumadair.

c. W's liquid capital base and her pension provision are such that, even if she were to purchase a property for £3m (3 times the value of her current home) then she would still have a fund of £2m that would generate c £100,000 pa net without any earned income at all. The likelihood is that W will find alternative employment and will be able to supplement that investment income. W does not, therefore, need a nominal order.

d. The ages of the parties. W is 53 and H is 62. W is seeking a 3 year term until H is 65. W would only activate the nominal order if she failed to find employment after three years. That would mean that W would be seeking substantive maintenance from H, then over 65, notwithstanding the fact that she would have c. £5m of capital assets, and be aged 56 with rather more working years ahead of her than H.

e. The date of separation of the parties is more than 3 years ago.

f. I have found that H did not orchestrate the removal of W from her employment.

g. W has received a settlement figure equivalent to 13 months of net income which will allow her sufficient time to find an appropriate alternative position.

h. There is a great benefit to both parties in finality in this litigation.

93. I do not consider that fairness or W's needs require me to reconsider the clean break order. It will remain.

G Other issues

The previous personal service company debt.

94. The previous personal service company debt has been on its books for 10 years. H says that the debt should be paid now, to regularise the debt positions, and offset against the first tranche of lump sum. W says that it should be deducted from the final tranche of the lump sum.

95. H says that he has limited liquidity and his asset base has diminished. But W points to her loss of employment. I take the view that W's loss of employment does, on balance, persuade me that the debt be paid from the final tranche.

Confidentiality agreement.

96. This has now been agreed.

Interest payment for lump sum

97. W seeks that payment of interest payments, at 4% pa, be made on a monthly basis, so she can invest the monies herself. H says it should be rolled up to the date of payment of the lump sum to which it relates and refers to his lack of liquidity.

98. I consider that the interest be paid on an annual basis for the following reasons

a. W has received a lump sum equivalent to 13 months salary (up to December 2025).
b. She has received c£1.7m of liquidity since the trial.
c. She will pay the previous personal service company debt from the final tranche of the lump sum.
d. The first substantial lump sum payment is due in July 2025 before the period covered by the settlement agreement expires.
e. W therefore has substantial liquidity.
f. An annual payment is more straightforward and minimises the ongoing interactions between the parties.

Security

99. H gives three quite trenchant reasons why there should not be security.

a. Practical difficulties: it would require either a charge against H's shares in the fund that will likely need to be sold, or against shares in his current personal service company whose assets are almost entirely comprised of a loan to a Delaware company that owns a property outside of this jurisdiction.
b. There is no jurisdiction under s23 Matrimonial Causes Act 1973.
c. H is FCA regulated and, of course, there is a court order.

100. W's concerns largely focus on the fact that H is outside the jurisdiction. Ms Bangay KC and Ms Howitt assert that the court does have jurisdiction under the inherent jurisdiction or under s 37 MCA 1973. I agree with Mr Sear KC that there is no evidence of a risk of dissipation required as is required for the s37 application.

101. There is a court order. Interest is payable on the lump sum. There is no history of non-compliance with orders. I have found that H was not instrumental in W losing her employment position. He is regulated by the FCA; his livelihood depends on it. I do not find that there should be security.

Costs

102. The parties have agreed to produce short written submissions.

Geoffrey Kingscote KC