IN THE FAMILY COURT
[2022] EWFC 15

No. ZZ21D44117

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday 4 February 2022

Before:

MR JUSTICE MOSTYN

(**In Private)**

B E T W E E N :

SUSAN NANCY BAKER — Applicant

- and -

ANDREW HARTILL BAKER — Respondent

MR T. BISHOP QC and MR T. HARVEY (instructed by Stewarts Law LLP) appeared on behalf of the Applicant.

MR A. BOJARSKI (instructed by Farrer & Co, Solicitors) appeared on behalf of the Respondent.

J U D G M E N T

(**via Microsoft Teams**)

MR JUSTICE MOSTYN:

1 This is my decision on the wife's application for maintenance pending suit.

2 The recent decision of the Court of Appeal in *Rattan v Kuwad* [2021] EWCA Civ 1 endorses the guidance I gave 16 years ago in *TL v ML and Others (Ancillary Relief: Claim against Assets of Extended Family)* [2006] 1 FLR 1263. The Court of Appeal decision confirms that the sole dispositive criterion on an application for maintenance pending suit remains 'reasonableness'. It confirms that the purpose of maintenance pending suit is to meet immediate or current needs, and that in assessing those needs an important factor is the marital standard of living. It makes clear that the analysis does not have to be undertaken with close numerical exactitude; a broad approach to the assessment of immediate needs is not only acceptable, but is likely to be commonplace.

3 The Court of Appeal did not disturb what I said in my fourth principle, namely:

> "Where the affidavit or Form E disclosure by the payer is obviously deficient the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources (*G v G, M v M*). In such a situation the court should err in favour of the payee."

4 Mr Bishop argues that this principle occupies centre stage in this case, and I have to say that I do agree that the disclosure made by the husband in his Form E, and through his later solicitor's correspondence, has been lamentable. The husband has some serious questions to answer. It is bizarre that so many irreconcilable statements and other pieces of contradictory evidence have been given in such a short period of time, with incorrect representations being followed hard on the heels by false statements. It is for this reason that I will order that the husband's reply to questionnaire is to be exhibited to an affidavit and sworn to be true. In this way the husband will know that if it is subsequently shown that he has deliberately given false answers, then he will potentially face a charge of perjury for which the maximum sanction is seven years' imprisonment, in contrast to the maximum sanction for making a false declaration of truth on an answer to a questionnaire, which is a mere two years' imprisonment for contempt of court.

5 This does not look like a very promising case for settlement, and for this reason I have indicated that I would permit the case to be set down for a final trial notwithstanding that an FDR has not yet taken place. The case will be fixed for trial in the Michaelmas Term 2022, with a time estimate of seven days, before me if available, but before another judge if I am not available. We are therefore looking at a period to be covered by maintenance pending suit of about 10 months.

6 The wife's claim is for maintenance pending suit of $23,000 a month. This corresponds to £17,000 a month, and so we are talking about a total amount of maintenance pending suit, pending trial, of about £170,000. Although the husband, in his maintenance pending suit witness statement, rather pallidly argued that his financial circumstances were so strained that he could not afford to pay maintenance pending suit, I completely reject that submission. He could pay £170,000 in instalments without any difficulty. I need only remind myself that the latest disclosure, made in a letter delivered today or yesterday, added nearly $6 million to his fortune. The question is whether the wife should be awarded maintenance pending suit in this amount.

7 I reject two of Mr Bishop's arguments. First, I reject the argument that the existence of the 2015 separation agreement, with which the husband has not complied almost from the very start, fortifies or bolsters the wife's claim for maintenance pending suit. Mr Bishop relies on my decision in *BN v MA* [2013] EWHC 4250 (Fam), when I held that a young wife who had made a prenuptial agreement should be expected to adhere to it on the breakdown of the marriage. In that case there was, as I say, a comprehensive prenuptial agreement which provided for a certain amount of support in the event of the breakdown of the marriage within a specified period. The marriage duly broke down, but the wife, nonetheless, applied for very substantial maintenance pending suit arguing that the terms of the agreement were completely irrelevant. I held that the terms of the agreement were not irrelevant, and that the court should, if possible, seek to hold the wife to the terms of her agreement on an interim basis.

8 I am quite satisfied that that decision was completely correct, but this case is a world away from that one. Here, the wife is relying on the agreement, which she has not hitherto sought to enforce in the USA, in order to bolster a conventional claim for maintenance pending suit in circumstances where the husband wishes to challenge the agreement in the main proceedings, on various grounds including that he was borderline incapacitated by addiction to an infamous opioid called OxyContin. In my judgment, it would be quite wrong of me to afford any kind of recognition, explicit or implicit, to the separation agreement which the wife has not chosen to enforce for six years, in advance of the final hearing. It would be wrong for any kind of pre-judgment or pre-recognition of that agreement to be afforded in these interim proceedings. In my judgment, the maintenance pending suit application should be dealt with entirely conventionally.

9 The second argument of Mr Bishop, which I reject, is that the wife should be treated as being entitled to roll up part of her investment income back into the principal, rather than to apply it to meet her immediate or current needs. I should explain that, in addition to her home in New York, the wife owns 16 apartments in Brooklyn worth about £2.7 million. These are rented out. Further, the wife has investment funds worth about £2.6 million. In addition to the income generated by these capital assets, the wife has the sole use of the husband's American State pension which provides nearly $36,000 a year. The reason that Mr Bishop argues, on behalf of the wife, that she should be entitled to accumulate most of her investment income generated by her portfolio is that she is very concerned that she will not be able in these proceedings to secure the husband redeeming the mortgage on her home, and that she will have to discharge it from her own funds if she is to be able to carry on living there for the remainder of her life. She argues that if she has to spend part of that investment income, then that ambition may be jeopardised. I reject this argument. In effect, it asks me to speculate that were I to award a lump sum in the wife's favour to redeem the mortgage I would be unable to enforce it. I am not prepared to engage in such speculations as to the effectiveness of my enforcement powers. In my judgment, the wife's income is what it is, and it is to be treated as being available fully to meet her current needs.

10 For the purposes of my decision, I accept the reasonableness of the wife's interim budget in the annual sum of $409,836. My calculation of her income I take from the table produced by Mr Harvey, and on which Mr Bojarski made submissions. For the purposes of my calculation I take the following income figures for the current calendar year 2022. They are as follows: Tax exempt interest $7,979; taxable interest $2,241; qualified dividends $45,000; ordinary dividends $50,000; Social Security benefits $18,500; capital gain $2,336; and rent on 53, 55, 57, 59 Duffield Street in Brooklyn $369,106 – that is the actual 2021 receipt of rent and I am satisfied that it would be reasonable to take the same figure for 2022, notwithstanding that the rental market in New York, just like London, is probably in this calendar year going to experience a post-Covid bounce. Then, there are the deductions:

insurance $3,500; management fees $32,000; mortgage interest $87,000; repairs $35,000; taxes $19,450; utilities $19,789; and depreciation and other expenses, including staff tips $2,139. Adding up the income figures and subtracting the expenses figures gives a total net income of $296,284. Against that I set the wife's budget of $409,836, giving an annual shortfall of $113,552. I credit against that sum the husband's State pension, which he accepts will continue to be used by the wife solely, of $35,554, giving an annual shortfall of $78,008 or $6,500 per month. That is the figure I award as maintenance pending suit. I make the award in Dollars as that is the currency in which the wife spends her money.

11 I am not prepared to award any backdating. The first payment will fall due on 1 March 2022. Although it is not a term of the order, I am expecting 10 payments to be made with the final instalment falling due on 1 December 2022.

12 That is my judgment.

L A T E R:

13 Even though the wife's award has fallen quite a considerable distance short of what she was pitching for, in my judgment she has not been imperilled by a *Calderbank* offer, and normal orthodox principles of costs following the event should thus apply. So, she should get her costs to be assessed on a reasonable basis.

14 The schedule of costs makes for slightly alarming reading, in my judgment, claiming for work done on documents by solicitors and by counsel the sum of £14,000, together with a further £4,500 for attendances, and £7,500 for counsel's brief fees.

15 I accept Mr Bishop's point that these documents – witness statements for maintenance pending suit – had to be prepared very carefully, but by the same token I do accept Mr Bojarski's point that for the purposes for a standard assessment, applying the rates set out in the CPR, £14,000 is just an untenable amount for work on documents for a case of this nature.

16 And so I allow, in relation to work done on documents, £5,000. For attendances, I can see that there were letters going backwards and forwards between the solicitors, I allow £3,000. I consider that counsel's brief fees of £7,500 are reasonable. So, the amount that is ordered is £15,500.

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CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

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