Neutral Citation: [2023] EWFC 162

Case No: 1675160626387017

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 September 2023

Before :

MR JUSTICE PEEL

- -

Between :

HAT **Applicant**

- and -

LAT **Respondent**

- -
- -

Nicholas Cusworth KC and Joshua Viney (instructed by **Farrer and Co LLP**) for the **Applicant**
Richard Todd KC and Christian Kenny (instructed by **Charles Fussell and Co LLP**) for the **Respondent**

Hearing date: 27 July 2023

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Approved Judgment

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MR JUSTICE PEEL

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 parties must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Peel :

1. For convenience, I shall refer to the parties as Wife and Husband ("W" and "H") although they were divorced nearly 25 years ago.

2. Before me is W's application dated 30 May 2023 for:

   i) interim pps at £9,344 pm inclusive of health insurance, backdated to the date of the application; and

   ii) a LSPO for £227,321 to the FDR.

The background

3. The background facts are unusual. Particular features include; (i) a deed of separation entered into and implemented in 1994, but apparently not converted into a court order; (ii) a delay of nearly 30 years since the deed of separation before W applied for financial remedies; and (iii) ongoing generous financial support made by H to W from at least 2002 onwards (thus, over 20 years).

4. W is 64 years old, H 72. They married in 1984 and separated in 1993 so that this was a marriage of some 9 years. Decree Absolute was pronounced on 3 November 1998. They had a high standard of living. There were no children of the marriage. H has had a successful career, including founding XYZ company, in the 1990s, which was listed and subsequently sold; H's share thereof was £314m.

5. W says that after the separation, they had an on/off relationship until 1996, then reconciled and lived together from autumn 1996 to summer 1998, just under two years; H roundly disputes this although he agrees they remained on good terms. I am not convinced that this dispute should materially affect the outcome, but it generates a great deal of heat.

6. On 16 February 1994, the parties entered into a deed of separation. W says she has no recollection of it, and in correspondence and Form E made no mention of it, but it bears her signature and it is clear that she engaged Manches and Co, together with Mr Barry Singleton QC and Mr James Turner. Just before signing, W's solicitors sent a letter saying they were no longer instructed because "she is not following our advice"; that was a matter between her and her lawyers. H had advice from Emsley Solicitors. On a preliminary view, there is nothing to suggest that there is any vitiating factor of the sort identified in **Radmacher v Granatino [2010] UKSC 42** which renders the deed of separation invalid. The essential terms of the deed were:

   i) H to pay W £702,000;

   ii) Clean break.

   It appears to be agreed that H complied with the agreement, paying the £702,000 and implementing other, more minor provisions.

7. It is not entirely clear whether the separation agreement was converted into a draft consent order, which was then submitted to the court for approval and sealing. H says he "has a memory of a consent order but he is not a lawyer". W says "my financial

claims were not dealt with at the time of our separation". It seems likely to me that had an order been made by the court; (i) there would be a record of it, but despite extensive searches at court, none has been located, (ii) H or his former solicitors would have evidence of an order and/or (iii) W or her former solicitors would have evidence of an order. But there is in fact not a single document evidencing the making of a final order. There is nothing in any of the lawyers' files to show that a draft was prepared in correspondence, and then lodged at court. H lives in hope that a consent order will be found, but I suspect it is a forlorn cause.

8. It seems to me that, for the moment, I should proceed on the basis that no order was made, unless and until proof thereof is provided. If a consent order comes to light, then W's financial remedies application automatically falls away. If not, she is entitled in principle to proceed with her Form A dated 7 February 2023.

9. Despite the express terms of the Deed of Separation which purported to conclude all financial matters, H in 2009 provided financial assistance to W to enable her to buy a property in Central London, subject to a declaration of trust dated 25 November 2009, as later amended in 2019. The terms of the settlement (as later amended) were:

    i) It was recorded that H paid £2,145,000 towards the purchase price of £3,500,000, repayable by W without interest to H's children in equal shares;

    ii) W is entitled to occupy the property until death;

    iii) If H predeceases W, the £2.145m shall be treated as a gift to her.

10. W continues to live at the property which has a value of £4,950,000 less mortgage of £400,000. That would suggest W's legal interest, after repayment of the loan to H, is about £2.2m.

11. According to W (although I did not read this in her evidence), in 1998 H paid her a further £320,000.

12. Further, since 1999 (per W) or 2002 (per H), H has provided W with generous ongoing financial support. On any view, H was under no legal obligation to do so, but the fact of the matter is that he did, for over two decades. In broad terms, he met W's utility bills and paid her a monthly allowance which has increased over time to the sum of £8,500pm from April 2016 onwards, in addition to which he paid for her BUPA cover. Additionally, he bought a car for her, and paid for educational courses. According to W, but disputed by H, he promised he would support her indefinitely. There are letters written by H's business adviser to W's bank in 2016/2017 suggesting monies would be paid for the rest of her life, although that strikes me as not necessarily to be seen as anything more than assistance for W to obtain lending and/or banking facilities. H says that he always operated on the basis that he had no obligation to pay anything to W and he would not have made such payments if he thought there would be future litigation.

13. In March 2022, H told W he would cease all payments, and that the house should be sold. The former was within his legal rights, the latter not so. Quite what prompted this abrupt change is not clear. In July 2022, he reduced the payments from £8,500pm to £5,000pm, and from December 2022 he stopped paying anything. As a result of

pressing from W's solicitors, in April 2023 H offered £3,000pm on an interim basis, which he increased to £4,000pm in May 2023. Neither offer was acceptable to W and those figures put forward by H have in fact not been paid voluntarily by him.

Resources

14. W has her interest in the London property. She has modest bank balances of about £15,000, an anticipated inheritance of £35,000 from her late father, and £600,000 of chattels and art.

15. H is, I am satisfied, very wealthy. Upon some prompting from me, he has accepted through counsel that he has the means and liquidity to meet the maximum claim which W might pursue; that, in turn, upon prompting from me, was put by W through counsel at about £5m, being a relinquishing of H's loan under the property declaration of trust so that W would own the property free of encumbrance to him/his children, and a further sum by way of capitalised maintenance. It follows that H is well able to afford the interim orders sought by W. Broadly his resources comprise :

    i) Personal, non-trust wealth is put at about £8.5m, but that is, arguably, an illusory figure in that it nets off loans due from H to a family trust. Thus, a country estate is ascribed a gross value of £40m, but a net value of £400,000 after deduction of costs of sale and a loan of £38m from the trust.

    ii) He is a beneficiary, together with his current wife and their three children, of an offshore discretionary trust holding £420m. I assume that the origin of those monies is the proceeds of sale of H's business. I also assume that the figure includes the value of the loan advanced to H in respect of the country estate. In their position statement, H's counsel state that the trust meets his income and capital needs. The trust is plainly a resource and, again, with encouragement from me, H accepted that proposition.

16. The consequence of H's concessions about his wealth, which are akin to the so called millionaire's defence, is that the need for financial disclosure disappears and the case can be managed more swiftly and efficiently than might otherwise have been the case.

17. It is too soon for me, as the allocated judge, to say too much about the ultimate disposition of this case. W in her Form E seeks a clean break which seems inevitable. In her counsels' position statement, she confines herself to seeking a needs based award, which, as mentioned above, is pitched at about £5m. H, by contrast, submits that W should be held to the Deed of Separation and receive no further financial provision.

The application

18. I turn to the application for MPS and LSPO.

19. The law on MPS can be readily stated. The statute enables the court to make such order for MPS as the court thinks reasonable, and the same applies to interim pps after pronouncement of decree absolute. In **TL v ML 2006 1 FLR 1263**, Deputy High Court Judge Nicholas Mostyn QC (as he then was) stated that the sole criterion is reasonableness which is synonymous with fairness. That formulation was approved

by the Court of Appeal in **Rattan v Kuwad [2021] EWCA Civ 1**. I reject the submission made on behalf of H that W should be confined to emergency, immediate relief; that is not consistent with the overarching approach of reasonableness which the authorities endorse.

20. The law on LSPO is similarly clear. In **Rubin v Rubin [2014] EWHC 611** Mostyn J said this:

> 13. I have recently had to deal with a flurry of such applications and there is no reason to suppose that courts up and down the country are not doing likewise. Therefore it may be helpful and convenient if I were to set out my attempt to summarise the applicable principles both substantive and procedural.
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> i) When considering the overall merits of the application for a LSPO the court is required to have regard to all the matters mentioned in s22ZB(1) – (3).
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> ii) Without derogating from that requirement, the ability of the respondent to pay should be judged by reference to the principles summarised in *TL v ML* [2005] EWHC 2860 (Fam) [2006] 1 FCR 465 [2006] 1 FLR 1263 at para 124 (iv) and (v), where it was stated
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> "iv) 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. In such a situation the court should err in favour of the payee.
> v) Where the paying party has historically been supported through the bounty of an outsider, and where the payer is asserting that the bounty had been curtailed but where the position of the outsider is ambiguous or unclear, then the court is justified in assuming that the third party will continue to supply the bounty, at least until final trial."
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> iii) Where the claim for substantive relief appears doubtful, whether by virtue of a challenge to the jurisdiction, or otherwise having regard to its subject matter, the court should judge the application with caution. The more doubtful it is, the more cautious it should be.
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> iv) The court cannot make an order unless it is satisfied that without the payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings. Therefore, the exercise essentially looks to the future. It is important that the jurisdiction is not used to outflank or supplant the powers and principles governing an award of costs in CPR Part 44. It is not a surrogate *inter partes* costs jurisdiction. Thus a LSPO should only be awarded to cover historic unpaid costs where the court is satisfied that without such a payment the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings.
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> v) In determining whether the applicant can reasonably obtain funding from another source the court would be unlikely to expect her to sell or charge her home or to deplete a modest fund of savings. This aspect is however highly fact-specific. If the home is of such a value that it appears likely that it will be sold at the conclusion of the proceedings then it may well be reasonable to expect the applicant to charge her interest in it.
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> vi) Evidence of refusals by two commercial lenders of repute will normally dispose of any issue under s22ZA(4)(a) whether a litigation loan is or is not available.
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> vii) In determining under s22ZA(4)(b) whether a Sears Tooth arrangement can be entered into a statement of refusal by the applicant's solicitors should normally answer the question.

viii) If a litigation loan is offered at a very high rate of interest it would be unlikely to be reasonable to expect the applicant to take it unless the respondent offered an undertaking to meet that interest, if the court later considered it just so to order.

ix) The order should normally contain an undertaking by the applicant that she will repay to the respondent such part of the amount ordered if, and to the extent that, the court is of the opinion, when considering costs at the conclusion of the proceedings, that she ought to do so. If such an undertaking is refused the court will want to think twice before making the order.

x) The court should make clear in its ruling or judgment which of the legal services mentioned in s22ZA(10) the payment is for; it is not however necessary to spell this out in the order. A LSPO may be made for the purposes, in particular, of advice and assistance in the form of representation and any form of dispute resolution, including mediation. Thus the power may be exercised before any financial remedy proceedings have been commenced in order to finance any form of alternative dispute resolution, which plainly would include arbitration proceedings.

xi) Generally speaking, the court should not fund the applicant beyond the FDR, but the court should readily grant a hearing date for further funding to be fixed shortly after the FDR. This is a better course than ordering a sum for the whole proceedings of which part is deferred under s22ZA(7). The court will be better placed to assess accurately the true costs of taking the matter to trial after a failed FDR when the final hearing is relatively imminent, and the issues to be tried are more clearly defined.

xii) When ordering costs funding for a specified period, monthly instalments are to be preferred to a single lump sum payment. It is true that a single payment avoids anxiety on the part of the applicant as to whether the monthly sums will actually be paid as well as the annoyance inflicted on the respondent in having to make monthly payments. However, monthly payments more accurately reflects what would happen if the applicant were paying her lawyers from her own resources, and very likely will mirror the position of the respondent. If both sets of lawyers are having their fees met monthly this puts them on an equal footing both in the conduct of the case and in any dialogue about settlement. Further, monthly payments are more readily susceptible to variation under s22ZA(8) should circumstances change.

xiii) If the application for a LSPO seeks an award including the costs of that very application the court should bear in mind s22ZA(9) whereby a party's bill of costs in assessment proceedings is treated as reduced by the amount of any LSPO made in his or her favour. Thus, if an LSPO is made in an amount which includes the anticipated costs of that very application for the LSPO, then an order for the costs of that application will not bite save to the extent that the actual costs of the application may exceed such part of the LSPO as is referable thereto.

xiv) A LSPO is designated as an interim order and is to be made under the Part 18 procedure (see FPR rule 9.7(1)(da) and (2)). 14 days' notice must be given (see FPR rule 18.8(b)(i) and PD9A para 12.1). The application must be supported by written evidence (see FPR rule 18.8(2) and PD9A para 12.2). That evidence must not only address the matters in s22ZB(1)-(3) but must include a detailed estimate of the costs both incurred and to be incurred. If the application seeks a hearing sooner than 14 days from the date of issue of the application pursuant to FPR rule 18.8(4) then the written evidence in support must explain why it is fair and just that the time should be abridged.

21. In respect of both the MPS and LSPO applications, I proceed on the assumption that there is no court order embodying the deed of separation and therefore no formal bar

to the application. If such an order emerges, any interim finance provided for by me will have to be repaid without quibble.

22. Even if no such order comes to light, it will be open to me at the final hearing to decide on the merits that any interim finances provided for by me shall be repaid. If, for example, I conclude that W shall receive no further sums, it will be open to me to discharge the interim orders on a backdated basis such that W has to reimburse H. W must give an undertaking to that effect for the avoidance of doubt. Whether I would consider it appropriate to do so would depend on a merits based analysis at the time.

23. What then of the delay of some 30 years since the deed of separation, or 25 years since decree absolute, before W initiated her financial remedies claim?

24. Mostyn J surveyed the jurisprudence in **Rossi v Rossi [2007] 1 FLR 790.** He correctly, in my respectful opinion, referred to the potential for injustice occasioned by a lengthy delay. The payer is entitled to take the view that no claims will be initiated against him or her, and there is no risk to his financial arrangements. Further, the longer the time that passes the more likely it is that documents will not be located and memories will cloud. He concluded at para [31] that:

> "Of course there can be no question of implying an actual limitation period into the law of ancillary relief (Twiname v Twiname [1992] 1 FLR 29). It is simply a question of how the delay should be treated in the exercise of the statutory discretion."

25. The facts here are very different from the older cases in the canon of authority referred to by Mostyn J in **Rossi**. At the risk of repetition, the factor which marks out that difference is the ongoing support by H to W for an uninterrupted period of over 20 years, and which has now ceased. Further, this is an interim hearing, not a final hearing where these arguments can be more fully ventilated.

26. In **Wyatt v Vince [2015] UKSC 14**, 28 years had elapsed since separation. W reappeared to make a financial claim after H had amassed great wealth. The Supreme Court decided that there was no procedural or statutory time limited bar to the wife's application for financial remedies, overturned the strike out order made by the Court of Appeal pursuant to rule 4.4 of the FPR 2010, and reinstated the first instance costs allowance order of £125,000. It concluded that even if the court considers a financial remedies claim has no real prospect of success, that is not by itself a prohibition against an applicant's right to apply for relief, although Lord Wilson offered some preliminary views about the merits of the application, and the impact of delay on the exercise of the s25 criteria.

27. In **BN v MA 2013 EWHC 4250** Mostyn J stated that on an application for interim provision, the court should apply the terms of a pre-marital agreement closely unless the applicant can demonstrate to a convincing standard that there is a likely prospect of satisfying the court it should not be upheld. In that case, there was a pre-marital agreement entered into some 15 months before the wife's application for financial remedies and interim provision. The facts of this case are readily distinguishable. True, there was a marital agreement (albeit post separation rather than pre marriage), but thereafter H provided ongoing financial support, in the form of housing and

general subvention, from 1999 or 2002 onwards. H relies on the delay in prosecuting the financial remedies claim, but in my judgment, W's claim for financial remedies is strengthened by that ongoing support, and the significance of the delay is reduced. Time will tell whether W's claim for further financial provision succeeds, but prima facie she has an arguable case and it would be unfair on this interim application to hold her too closely to the deed of separation.

28. Accordingly, in my judgment;

    i) delay in bringing a claim for financial remedies is not by itself a jurisdictional or procedural bar to making a claim;

    ii) delay does not automatically, on the merits, disentitle the applicant to financial relief, but it will be a factor (potentially a highly material one) when weighing up the s25 criteria;

    iii) delay does not prevent the court from making interim orders, albeit I accept I should tread carefully and consider, in the exercise of my discretion, whether the claim has prospects of success, or is so spurious that there is no justification on the merits for the making of an interim order.

29. On a broad overview of the case, I do not at this stage regard W's claims as doubtful or speculative, as characterised by H, although they are likely to be significantly curtailed by reason of the deed of separation and the passage of time before W initiated her claim. But W can point to the financial support for at least two decades which, arguably, generated dependency and, on her case, was explicitly on the basis that such support would continue for her lifetime.

30. I now come to my decision.

31. Dealing with general maintenance first, I conclude that, although the deed of separation provides for no further payment to W, and some 30 years have passed since then, the fact is that H has since 1999, or 2002, provided W with substantial sums. He chose to do so, and should not be criticised for his generosity. On the other hand, W became accustomed to the sums which were regular and steady. If she is correct (and I accept she may not be), H assured her that he would continue to support her indefinitely. My task is to decide what is reasonable between now and a final hearing which might be six to nine months away. I do not think it would be fair to W for an established income stream from H of over £100,000pa to cease, or be significantly curtailed, in circumstances where she has minimal liquid resources of her own to meet her needs. Something approaching the status quo ante should be restored pending fuller consideration.

32. Given H's wealth, I do not consider it to be fair to expect W to in some way access the equity in her property, or sell chattels, certainly at this interim stage, to meet her needs for a relatively short period of time. In my view, the pressing need is to hold the ring until the parties reach settlement or the court makes a final decision. The fact that H offered some monies on an interim basis is at least a partial recognition of that. I propose to order H to pay £8,500pm. It is less than W's interim expenditure list of £11,436pm, but some items can be pared down and W has a job earning about £14,000pa gross which puts her in a position to make a contribution of her own. The

sums shall be backdated to the date of application, and any arrears shall be paid by 4pm on 3 August 2023. The application was prompted by H's unilateral decision to cease the payments which had been made for many years, and I see no reason why W should bear the loss since the date of application.

33. As for the LSPO, I am satisfied on the evidence that W's solicitors will not enter into a Sears Tooth arrangement, and she is unable to secure monies from litigation funders; the suggestion that she should offer a sale of her home, or a charge over it, to secure funding seems to me to be unreasonable and conflicts with Mostyn J's dicta in **Rubin.** It would be particularly unfair as there is no guarantee she will receive anything from H (he offers nothing) and would thereby be putting her home at significant risk. Her modest bank balances should not be depleted. Nor, in my view, would it be reasonable to expect her to sell chattels and art which are an intrinsic part of her home.

34. In my judgment, a LSPO should be made in order to level a playing field which would otherwise lean heavily in H's favour. W seeks £227,321. That includes the costs of the hearing on 15 June, today's hearing and the FDR, as well as the preparatory work for the hearings. H engages leading and junior counsel, and it is not unreasonable for W to do so.

35. I considered applying a notional reduction to reflect what would occur on a standard basis assessment, a technique which has on occasions been used by judges of the Division (see, for example, Cobb J in **BC v DE [2016] EWHC 1806 (Fam)** who, at para 26, applied a 15% deduction). But on balance my view is that to do so would be the wrong approach in this case. This is not an inter partes costs order where such a deduction is routinely applied. It is a solicitor/client sum sought by W to enable her to litigate in circumstances where she cannot reasonably be expected to access her own limited resources.

36. The approach to quantum, in my view, is simply whether the costs sought are reasonable, in the context of the nature of the litigation, the issues, the resources, and how each party is approaching the proceedings. Scrutinising the figure claimed, it seems to me to be little overstated given that, in my view, this is not an over complex case. I doubt that as much solicitor time as is claimed will be required. I note that W's costs to date exceed H's by £50,000, and consider that this sort of discrepancy in W's favour going forward, and paid for by H, would not be justified.

37. Insofar as W's claimed figure includes incurred costs, they are payable to her current solicitors and are in respect of these proceedings. That is akin to the circumstances in **BC v DE,** and distinct from the facts of **Rubin** where the historic costs were in respect of other, concluded litigation. W is, in reality, dependent upon her solicitors and beholden to them. If she does not pay the outstanding costs, that may affect their ability or willingness to represent her. It is not reasonable to expect them to offer interest free credit, when H has abundant wealth to meet those costs, and in circumstances where I have already indicated that, if I so determine at final hearing, some or all of the costs allowance may be repayable.

38. In my judgment, the sum sought of £227,321 is too high, and a reasonable sum would be £200,000. It shall be paid in equal monthly instalments between now and the FDR, the first payment to be made by 4pm on 3 August 2023.

39. Counsel are requested to draft an order to reflect this judgment.