IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2020] EWHC 2301 (Fam)

Case No. BV16D30527

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 23 July 2020

Before:

MR JUSTICE MOSTYN

(**In Private**)

B E T W E E N :

JB — Applicant

- and -

DB — Respondent

MS S. PHIPPS (instructed by Charles Russell Speechlys LLP) appeared on behalf of the Applicant.
THE RESPONDENT appeared in Person.

J U D G M E N T S

(via Zoom Conference)

MR JUSTICE MOSTYN:

1 On 15 June 2018 I made a consent order. That consent order covered two valuable properties, namely the property in London and the property in New York. The New York property comprises, in fact, two units which have been joined into one.

2 The consent order which I made was erected on the premise that those two properties constituted matrimonial property and their value would be aggregated, along with another property which has since been sold, and the overall value divided equally between the parties. The order provided for the property in London to be sold, and the order gave the wife the option to retain the New York property provided that its value was fully brought into account and divided under the terms of the order. It was an implied premise of the order of 15 June 2018 that the trusts which owned the London property and one of the units that comprised the New York property would be collapsed or dissolved to enable the proceeds or their value to be divided equally between the parties. Although the expression "collapsing the trust" was not used in the order of 15 June 2018, it is referred to explicitly in an order which seeks to implement that consent order which was made on 2 October 2019.

3 Although the parties have been wrangling ever since in a most unseemly way, the fundamental basis of the order has never been questioned until recently. The matter comes back before me because on 17 March 2020 the wife made an application essentially to seek to implement the terms of the order.

4 The husband made a cross-application on 25 March 2020 to like effect to implement the order in the way that he said that it should be implemented. In support of his application, the husband adduced the expert evidence of Mr Richard Langer, a member of the firm of McNamee Lochner in New York. Mr Langer wrote a report on 29 April 2020, which he supplemented on 12 May 2020 and 6 July 2020. He also gave oral evidence before me via Zoom. He explained that the trusts in question, which own respectively the London property and one of the units within the New York property, are *bona fide* trusts which continue to exist and which would not, at least in relation to the trust which owns the New York property, be capable of being collapsed or dissolved. Specifically, he explained that one of the units within the New York property, is subject to a trust made in December 2001 in respect of which the settlor was the wife. Now this trust was established for the plain purpose of mitigating the effect of American gift tax, as has been explained by Mr Langer, and indeed also in an earlier report written to the court by Mr Weinstock of the firm of Kostelanetz & Fink.

5 The trust agreement in question, the 2001 trust agreement, created what is known as a QPRT, or a Qualifying Property Residence Trust. Provided that certain stipulations are complied with, this trust has the effect of mitigating the effect of American gift tax. The terms of the trust are these: that the wife may reside in the relevant unit, which is unit B, rent free, and she must receive any net income of the trust as well as any excess cash. That latter entitlement is not really relevant because the trust does not have any independent income, but exists only to own unit B.

6 The trust provides that it lasts until the first to occur of the wife's death, the expiration of 30 years from the creation of the trust, or the trust ceasing to hold a personal residence of the wife. It provides that if the term ends because of the wife's death then all its assets are to be

distributed to the wife's estate. However, and this is highly relevant, if the term ends because of the expiration of a 30 year period, which I note will expire in just over ten years time, then all of the assets of the trust are to be distributed outright to the wife's then living descendants *per stirpes* - that means, of course, equally for each branch - but with provisions that a share passing to a descendant aged under 40 is held in a separate trust for such a descendant until that age.

7 It goes on to provide in very detailed and, it has to be said, well drafted terms that if the term ends because the trust ceases to hold a personal residence of the wife, then the trust is converted into an annuity trust for her benefit. That event has come to pass, and the trust in question has ceased to hold a personal residence of the wife, with the result that it has been converted, as Mr Langer has so eloquently explained, into what he would call a "grantor retained annuity trust", or GRAT.

8 Mr Langer has explained that in order to collapse or dissolve that trust, which is the foundation of the agreement reached between the parties incorporated in the order of 15 June 2018, there would need to be consent of all relevant parties, and this would include any adult children of the parties of whom, as I speak, there is one, J, who is nearly 20, having been born on 1 October 2000, who will shortly be joined in majority by his sister, R, who was born on 8 August 2002, and who will turn 18 in a few weeks time. He has explained with crystal clarity that the consent of those adult children will be needed, and the consent of the New York court would be needed to be granted in respect of the two younger children, A, who is rising 17, having been born on 27 October 2003, and S, who is rising ten, having been born on 20 November 2010.

9 He has gone on to explain in his evidence his categorical view that the New York court simply would not grant the necessary consent to enable the trust to be collapsed. He was asked how the New York court would react to an order made by me which purported to have the effect of collapsing the trust, and he explained that although there would no doubt be expressions of comity the New York court would be most unlikely to reciprocally enforce that order. So, therefore, in relation to unit B, one part of the New York apartment, the whole basis of the order is shown to be false, in that it is not capable of being liquidated and its value transferred to the parties, as the order contemplated. So, therefore, in this crucial respect, and this property is worth a considerable sum, the order was made on a fundamentally false and mistaken basis.

10 The situation is comparable, although perhaps not quite so serious, in relation to the property in London. That is owned by a similar trust created in 2011, the DB 2011 Residence Trust Agreement. That is in similar terms inasmuch as the grantor of it, or settlor of it, is the husband, and it creates a 26 year term, as opposed to a 30 year term in relation to the New York property trust. It provides that during this term the husband may reside in the London property, and that the terms lasts, as I have said, for 26 years or his earlier death, or the trust ceasing to hold a personal residence for the husband. That event has occurred. Similarly to the New York property trust, this trust has been converted, by its very terms, into a GRAT or a grantor retained annuity trust.

11 It goes on to say that if the term ends because of the husband's death, all the assets go to his estate. However, and critically, if the term ends because of the expiration of 26 years - and that would be in 17 years time - then all the assets are to be held in a continuing trust for the descendants of the wife and the husband until the death of the survivor of the parents, after

which the remaining assets are to be distributed outright to the children *per stirpes*, but with any share passing to a descendant under the age of 30 held in a separate trust.

12 It can be seen that in this instance the falling in of the remainder of the children is rather further away in time than in relation to the New York property trust. Nonetheless, the children in relation to this trust also have a meaningful interest which the order of 15 June 2018 seemingly ignored. This trust, bearing in mind that its subject matter, namely the property situated in London, is subject to the jurisdiction of the High Court, which has the power, of course, under s.24 of the Matrimonial Causes Act 1973 to vary the trust, it constituting plainly a post-nuptial settlement. The court will readily exercise its powers to vary a post-nuptial settlement when the subject matters of the settlement are within these shores. Mr Langer has explained that if the court were to exercise its power to vary the settlement to bring about the end of the trust, for example, that would likely be recognised in New York on the basis that it would accept that the English court had subject matter jurisdiction over the trust in question.

13 Even if the New York court declines to exercise its power to reciprocate that would be rather, one might have thought, a futile gesture, given that the English court could make an effective dissolution of the trust and orders for sale and distribution of the proceeds of the property and would not need to await any consent from New York. I referred to this priority of power in my decision of *BJ v MJ (Financial Remedy: Overseas Trusts)* [2011] EWHC 2708 (Fam), when I cited a decision of the Deputy Bailiff of Jersey (*Mubarak v Mubarik* [2009] 1 FLR 664) where he said that where the subject matter of the Jersey Trust was situated within the jurisdiction of the English court, the Jersey Trust would be inevitably be realistic, and so I believe would the New York court. So I do not believe the fact that the trust in question is governed by New York would present any obstacle to a variation being made in relation to that particular trust. However, the court is not going to do so in a casual way disregarding the valuable interests of the children; nor is it going to do so disregarding the provisions of the Family Procedure Rules, Rule 9.11 which provides that:

> "(1) Where an application for a financial remedy includes an application for an order for a variation of settlement, the court must, unless it is satisfied that the proposed variation does not adversely affect the rights or interests of any child concerned, direct that the child be separately represented on the application.
> …
>
> (3) Where a direction is made under paragraph (1) or (2), the court may if the person to be appointed so consents, appoint –
>
> (a) a person other than the Official Solicitor ... to be a children's guardian ..."

So if the application to vary the 2011 trust is going to be pursued, and I gather that it is, the adult children need to be joined to the proceedings, and the younger children also need to be joined to the proceedings, and they need to have a guardian.

14 I have decided that no order setting aside my order of 15 June 2018 will take effect before 8 August 2020 so that by that time R will also be an adult, leaving A and S needing to be represented by a guardian. It has been agreed between the parties that the wife's sister, who lives in the United States, will, subject to her consent, act as guardian. The order that I will make will provide for her costs as guardian to be met equally by the parties. I cannot, of course, dictate to her which solicitors she should instruct, but I would expect that the parties

themselves will make recommendations to her. Once she has instructed solicitors J and R should be informed which solicitors she has instructed, and I would hope very much that they will likewise instruct those same solicitors so that there is common representation of all four children by the same solicitors.

15 It is unthinkable that I should move to be making any kind of orders of an interim nature in relation to either property before the children have had the opportunity of making representations as to the impact on their interests of such an order. I say this because the husband has submitted that I should now make an order for the sale of the New York property in circumstances where it is subject to a mortgage of which he is a mortgagee, and he wishes to be released from those mortgage covenants for obvious reasons. However, in my judgment, it would be beyond inapt for me to make such an order without having heard any representations from the children as to the rightness or wrongness of making such an order. So I decline to make an order for the sale of that property at this stage.

16 Rule 9.9A provides the procedure for setting aside a financial remedy order. The procedure is straightforward and it is to be made under the Part 18 procedure. I waive that requirement. Under practice direction 9A, para.13.5 it is stated that:

> "An application to set aside a financial remedy order should only be made where no error of the court is alleged ... The grounds on which a financial remedy order may be set aside are and will remain a matter for decisions by judges. The grounds include ... certain limited types of mistake ..."

17 In my own decision of *J v B* [2016] 1 WLR 3319, I summarised the principles in play where it is sought to set an order on the ground of mistake. In para.57 I stated:

> (i) The court may set aside an order on the ground that the true facts on which it based its disposition were not known by either the parties or the court at the time the order was made.
>
> (ii) The claimant must show that the true facts would have led the court to have made a materially different order from the one it in fact made.
>
> (iii) The absence of the true facts must not have been the fault of the claimant.
>
> (iv) The claimant must show, on the balance of probabilities, that he could not with due diligence have established the true facts at the time the order was made.
>
> (v) The application to set aside should be made reasonably promptly in the circumstances of the case.
>
> (vi) The claimant must show that he cannot obtain alternative mainstream relief which has the effect of broadly remedying the injustice caused by the absence of the true facts.
>
> (vii) The application if granted should not prejudice third parties who have, in good faith and for valuable consideration, acquired interests in property which is the subject matter of the relevant order."

18 In my judgment, the true facts on which I made the consent order on 15 June 2018 were not known by either the parties or the court at the time the order was made, and had the true facts been known I would have made a materially different order from the one which was made. I cannot say that the absence of the true facts was the fault of either party alone. It was possibly the fault of all the parties and the court taken together. Although there was abundant evidence before the court, including the letter from Mr Weinstock, all of which assumed that the order for collapse of the trusts, specifically the trust in New York, could be made, I do not believe, given that that evidence existed, that it would have been reasonable for the parties to have investigated the correctness of that assumption. So I am satisfied that the parties would not have been able, with due diligence at that time to have established the true facts at the time the order was made. That requirement should not, where there has been a manifest mistake, be applied too rigorously to prevent the court to make again a disposition on the true facts.

19 I am completely satisfied that the order cannot stand because it is made on a fundamentally false and mistaken basis. I, therefore, direct that the order will be set aside.

20 Ms Phipps has produced a draft order on which I have the following comments. In para.6 I would wish the order to recite that the court heard the oral evidence of Mr Langer as well as accepted his expert opinion. That is implicit in what she has written, but I want it explicitly to state that the court heard the oral evidence of Mr Langer.

21 Paragraph 9 will provide that the order will be set aside with effect from 8 August 2020. Paragraph 12 will provide that the younger two children, A and S, will be represented by a guardian, and that, subject to her consent, will be the wife's sister.

22 Paragraph 18 deals with the question of tax returns where an absurd - I hesitate to use the words "almost infantile" - dispute has arisen. The husband was directed by a previous order of 2 October 2019 to provide completed tax returns and the supporting documents. The wife agrees that she has received the tax returns - these are joint American tax returns - but she says that she has not seen or had access to the supporting documents. She says that they are held in some online site which requires a password to access them and the password that she has been given does not work. The husband says this is the first he has heard of it. It is unseemly that such a trivial dispute should be troubling the court. So para.18 will provide that the respondent will comply in full with para.36 of the order of 2 October 2019. The respondent maintains that he has, but nonetheless he will supply the necessary functioning password to enable the wife to access the supporting documents. It is imperative that those tax returns are filed as soon as possible for the reasons explained by Mr Langer.

23 This leaves three final points, all of almost unsurpassable triviality. The first of them, namely the question of the reimbursement of the deposit paid for R's university education costs in New York has been resolved, and I need say no more about it.

24 The husband says that he has not recovered all of his personal possessions from the matrimonial home, which he left in, I think, January 2017. He asks that on a date in August he can attend to make a final inspection and identify his own personal property and, provided that it is agreed to be his own personal property, to remove it. That is not unreasonable in my view, and so I direct that on a date to be agreed in August he should be entitled to attend to identify his remaining personal possessions and, provided that those are agreed to be his personal possessions, to remove them from the property. That will be the

last time that he will be allowed to do this, and the last time that he will be able to make any further claim in relation to personal possessions.

25 Finally, the question of who should have the membership of a beach club in the United States: it is here that I have to exercise the judgment of Solomon because it is not a divisible asset. On divorce it has to go one or other of the parties. I rule that it should go to the wife.

26 That concludes this judgment, subject to the question of costs.

***L A T E R*:**

27 On 25 March 2020, the husband made, as I have stated in my previous ruling, his cross-application. That cross-application incorporated the contents of an email from Mr Langer dated 24 March, which stated his view that the collapse of the trust in New York in relation to the New York property would be well-nigh impossible. He said:

> "Without commencing court proceedings, the court proceeding in the US, which is very unlikely to be successful, we do not know of any way to revoke the trust.

So the issue about the collapsibility of the trust was right at the centre of the arena at the time that I made my directions on 16 April 2020.

28 I referred to the issue about the collapsibility of the trust in paras.1, 2 and 4 of my directions ruling. At para.11 I directed this:

> "The parties are directed in the meantime to use their best endeavours to resolve the issues, if necessary through mediation or another form of non-court dispute resolution. The court will require at the hearing a full explanation of what efforts have been made to resolve the issues and will want to know why, without breaching privilege, the case has not been capable of settlement."

29 Now, Mr B argues that, until there had been a definitive understanding of the impediment standing in the way of collapsing or dissolving the trust in New York, it was essentially impossible to resolve the issue by discussion and mediation. I do not agree with that. I would not have made the direction at para.11 if I had thought that there had to be a definitive ruling by me as to the collapsibility or dissolvability of the trust. On the contrary, the issue being squarely in the centre of the arena, it would have been possible for the parties in discussions to have a worked out a way to solve the problem, of which an obvious one was to have agreed a figure which properly represented the interests of the children in remainder, to have carved that out and to have provided for it, leading to consensus as to the extent of the residue of the trust, so that that residue could be dealt with in the terms of the order of 15 June 2018.

30 A meeting was agreed between counsel, namely, Ms Phipps representing the wife, and Mr Lazarides representing the husband, to take place on 22 May 2020. That meeting was a completely proper step and was in conformity with the terms of my order of 16 April 2020, para.11. However, the afternoon before the meeting was due to take place the husband's solicitors wrote to cancel it stating that there was a funding issue. This was a surprising statement to be made, given that the husband has, for the purposes of this hearing, apparently spent over £92,000 in costs, and was well able to find the funds to pay for the fees of Mr Langer. Although the date of the meeting came and went, one might have hoped

that a new meeting would have been set up, but by 10 June 2020 the husband's new solicitor was writing to say that she did not consider that a counsel only conference at this stage would achieve anything at all, which seems to me to represent a rather cavalier approach to the obligation incorporated in para.11 of my order 16 April 2020.

31 The fact is that now, on 23 July 2020, the first meeting that has taken place between the husband and the wife's representatives has been this morning, by which time the parties have between them spent over £140,000 in costs.

32 Ms Phipps says that as a result of the husband's failure to comply with the general obligation imposed on litigants to seek to resolve their issues consensually, and the specific obligation in this case which I had set forth in para.11 of my order of 16 April, should be marked by an order being meted out that he should pay all of her costs, which are £52,039. That is, in my view, a manifestly unreasonable aspiration. There should be some sanction to reflect the court's disapproval that the husband has paid such cavalier regard to his obligations as incorporated in my order, but the idea that all of the costs would have been saved down to the last penny had that meeting taken place is completely fanciful. Indeed, having regard to my views of the personalities of the parties, which has been formed over the number of years that I have been involved with this case, I am tolerably clear in my own mind that the meeting would probably not have reached a successful conclusion and that we would be here anyway. I may be wrong about that, but certainly the obligation to engage properly in negotiations to see if there was a way round what had now emerged as a very significant impediment should have been taken very seriously indeed, and that in the circumstances where the husband has wilfully refused to do so he must face a sanction in costs which I assess in the sum of £15,000.
