



Neutral Citation Number: [2021] EWHC 116 (Fam)

Case No: BV17D16308

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/01/2021

Before :

THE HON. MR JUSTICE COHEN

Between :

FRB
- and -
DCA
(No. 4)

Applicant

Respondent

Mr R Todd QC, Mr N Yates QC (instructed by Vardags) for the Applicant
Mr S Leech QC, Mr D Bentham (instructed by Payne Hicks Beach) for the Respondent

Hearing dates: 7 December 2020

Approved Judgment

I direct that pursuant no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HON. MR JUSTICE COHEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cohen :

1. This is a judgment written to supplement that of 21 December 2020 (the December judgment No. 3) where I left open certain issues pending receipt of further argument.

Variation of periodical payments

2. At paragraph 42 of the December judgment I called for written submissions on the inter-relationship between the enhanced order for periodical payments that I was making and those parts of the order of 27 March 2020 (the March order) which contained provision for the payment of periodical payments and household expenses. Perhaps inevitably, that has led to some reopening by the parties of the arguments advanced at the December hearing.
3. On behalf of W it is said that there should be no adjustment of the March order. The increase of £1.2m pa does nothing other than reflect the increase in the lump sum that W will receive as a result of H's late payment. All that the new order does is to provide that she receives some of her award earlier than would otherwise be the case and provide an incentive for H to pay that which he should have already paid. Thus, she should receive periodical payments of £1.92m pa plus the continued payment of household expenses.
4. H says that I have no jurisdiction to make an order for payment of a sum reflecting the interest due on the lump sum as it does not become payable until there is decree absolute. Thus, there should be no change to the March order.
5. It was necessary for me to consider whether I have the jurisdiction to increase periodical payments in the circumstances where there has been no payment of any part of the lump sum by the due date.
6. I of course accept that the lump sum cannot be enforced until there is decree absolute. That does not mean that it cannot be paid before decree absolute and I remind myself that the date for payment of the first tranche was the very date that H chose, namely 30 September 2020. Similarly, interest can run from the date of the order. But, says H, as the lump sum cannot be enforced until decree absolute, neither can the interest attached to it because of late payment.
7. There is no statutory bar on varying the order for periodical payments. In deciding whether to vary it I have to take into account all the circumstances. H accepts that if W had applied for decree absolute the whole of the lump sum of £49m would be forthwith payable, together with interest for late payment, absent any order to the contrary.
8. W has next to no weapons in her armoury. The only asset of substance in this country is the heavily charged matrimonial home, which H should have, but has not, transferred to W free of charge by 30 September. The rest of his fortune is invested in businesses and property elsewhere in the world.
9. H wants to remarry. The only arrow in W's quiver is her opposition to granting the decree. It is understandable why she wishes to retain her arrow and opposes the making of the decree.

10. I do not accept that it is a misuse of the court's powers to vary the maintenance order, in circumstances where I have found that H has the means to make payments towards the lump sum and where he has paid not one penny nor offers any proposal for payment. As I said before, he needs an incentive to pay.
11. It is important to stress that subject to the amendment of paragraph 11 of the March order, there is no double recovery. What my order does is to provide for W to receive what she would receive in any event at an earlier stage than would be the case in the circumstances which arise from H's failure to pay the lump sum. It is fair that W should be compensated now for being kept out of her money.
12. I have to guard against double counting. This takes two forms. First, paragraph 11 of my March order provides for interest to run at the rate of 4% on the outstanding lump sum. By reason of H's default in paying £30m, the whole of the sum of £49m is payable and interest is accruing on that, it being rightly conceded by H that interest can be ordered to be paid from the date of the order until the date when payment is due, irrespective of whether the payment is enforceable (see s.23(6) MCA 1973).
13. In my December judgment I explained why I limited the increase in periodical payments to a sum reflecting only the interest on £30m rather than £49m. It must follow that if W is to receive a sum in lieu of the interest that would otherwise accrue, the payment of interest on that element of the lump sum must cease to be payable, as otherwise W would be receiving the sum both now, following the making of this order, and again pursuant to paragraph 11.
14. More difficult is the question of what the effect of this increase in periodical payments should be upon the March order for periodical payments to W of £720k pa and certain household expenses, put by W at £25k pm and by H at £15k pm exclusive of mortgage and child related payments.
15. There is much to be said on both sides. I have come to the conclusion that it would not be right for an increase of this size to have no impact upon the original order. To do so would be to run into the double counting complaint. If H had paid the £30m, the periodical payments would have been reduced by 61.2% (30/49) and thus go down from £720k pa to (in round figures) £280k pa. The amount of this element of the periodical payments award will thus be varied from £720k pa to £280k, making for an amended payment of £1.480m (£123.3k pm) rather than the figure of £1.92m.
16. This approach is consistent with the approach of Baron J in *H v H* [2006] 1 FLR 327. I accept that the result is that W does not receive the full sum that she would receive if the periodical payments were not to be varied, but in fact the loss is significantly mitigated by the fact that she will not have to pay tax upon the interest which would be accruing and further she has the benefit of receiving the payment earlier than might be the case.
17. I do not accept H's characterisation of the order as double counting provided that proper care is taken to ensure that the provision in paragraph 11 for the accrual of interest pending payment is put into abeyance in respect of this tranche of the lump sum and that the appropriate adjustment is made by reducing the periodical payments pro rata with the payment of the lump sum as and when it is paid.

18. I do not consider that the order for payment of household expenses needs adjustment. That part of the March order (paragraph 19) was expressly agreed by the parties to continue until the redemption of the borrowing on the matrimonial home, an event which should have but has not yet taken place.
19. I have not accepted that this level of payment is one beyond H's means for the reasons given in my March judgment and at paragraphs 28, 43 and 44 of my December judgment. I regard it as fair and reasonable.
20. The backdated element of this award leaves a shortfall of 4 months at £63.3k pm. H has suggested that he pay off the shortfall at the rate of £48k pm in addition to making periodical payments of 100k pm, a lower sum than I have ordered. W says the arrears should be paid by the end of January 2021. I order that they shall be paid by 4 equal monthly instalments, with the first payment due on 31 January 2021, and I am satisfied that is within H's means.

LSPO

21. I called also for further submissions as to the time for payment of the LSPOs. However, logic compels me to reconsider the sum that H should pay towards W's legal services in circumstances where I have now fixed her periodical payments at a sum considerably greater than was the case in December.
22. H's initial argument was that W should pay her costs liabilities from her own resources and from the income being paid to her under the March order. I pointed out at paragraph 52 of my December judgment that her own capital resources did little more than permit her to pay off other liabilities. Nor would her periodical payments award as set in March 2020 get near to allowing her to save sufficient for the outstanding future litigation.
23. I am satisfied that if I had not increased W's periodical payments, she would not have been able reasonably to pay towards her outstanding costs or for the forthcoming litigation. In my December judgment I expressed the view that H should provide W with the funds for payment of those costs. Those comments were made in the absence of a determination of the level of ongoing maintenance provision and it is right that I should revisit them having fixed that level. This is appropriate, notwithstanding that I dismissed the grounds of opposition to the making of an order that H had previously put forward (paragraph 47 of my December judgment),
24. H's revised proposal was that he should pay £150k pm towards W's total claim of £810,842, being the total of her outstanding and forthcoming costs (but excluding the costs of these proceedings) as set out at paragraphs 45(a), (d) and (e) of my December judgment.
25. In making this suggestion, I did not take H to be withdrawing from his primary submission that W should be paying her costs from her own resources.
26. The costs that W still owes her solicitors from previous proceedings (£253,389 rather than the slightly higher figure which appears at para 54(i) of the December judgment and which has been revised) would have been paid out of the lump sum due by 30 September 2020, as I repeat, the date that H selected. I remain of the view that H

should pay W the necessary sum to cover those costs and receive credit for that payment against the first tranche of the lump sum that he pays. This is justified as there is a huge disparity of means between the parties and W should not be expected to denude herself of capital in the circumstances which arise in this case.

27. It is true that the backdating of the increased maintenance award will create a fund when the arrears are paid, but that will not be sufficient to cover both W's past and future costs and it is fair that she should be entitled to preserve a capital fund which is modest when compared with what I have found H's resources to be, and will do no more than broadly put her back in the same position as in December, but having repaid her cousin and loan from a commercial lender.
28. The amount of the costs that W seeks for forthcoming hearings in respect of Children Act matters and a dispute about the ownership of the family artwork which involves a third party are respectively put at £188,899 and £368,554. H has not challenged these figures.
29. I consider that provided W receives the increased periodical payments order she will be in a position to make a contribution towards her own costs. The increase that I have provided is in the sum of about £63.3k pm. In reaching my decision I bear in mind that if H had paid the lump sum there would be no question of him also contributing towards W's costs and the general principle that a LSPO is to be available only for those who could not otherwise reasonably pay their own costs. But it would equally be wrong for me to overlook why this situation has come about and I have to strike an appropriate balance.
30. Notwithstanding that the increase comes about as a result of H's default, I consider it reasonable that one half of the increase should be put by W towards her forthcoming costs and the other half should be available to her to use at her discretion.
31. Thus, instead of making an order for payment of £557,453 in respect of those future costs, I reduce the figure by £158k, being 5 payments of £31.6k. I have selected 5 payments on the basis that W's costs will be incurred in the period between January-May, by when the litigation should be concluded.
32. That requires H to pay a total of £253,389 plus £399,453 which I round to £650,000. I accept H's proposal that the sum be paid by 5 equal instalments of £130,000 starting on 31 January 2021.

Costs of these proceedings

33. The costs are at large. W has succeeded on every issue, to a greater or lesser extent. I accept H's point that W pitched her case significantly higher than I have allowed, seeking interim payments of £2.5m pa but this has added little to the costs of the applications.
34. W says that I should make an order in the sum that she has expended, namely £159,223, or alternatively make an order for costs to be assessed, with a payment to be made on account of £120,000. H says that I should take into account that W has, in effect, abandoned an application for security and has had only a partial success in her applications. Once again, he does not challenge the quantum of the claim.

35. I do the parties no favours putting the matter off for assessment. In my judgment a proper award which reflects the outcome is one that obliges H to pay 80% of W's costs, which I summarily assess at £128,000. This payment should be made by 31 January 2021.
36. Insofar as this leaves a gap between what W has expended on this application and the sum that I have awarded, she must bear that herself. She will have the resources to do so.