

Neutral Citation Number: [2013] EWHC 4380 (Fam)

Case No. FD09D05739

IN THE HIGH COURT OF JUSTICE
(FAMILY DIVISION)

Royal Courts of Justice,
Strand, London WC2A 2LL.

Date: Thursday, 21st November 2013.

Before:

MR JUSTICE MOYLAN

AM Applicant

- v -

SS Respondent

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MR S. CALHAEM (instructed by Vardags, 8 Bell Yard, The Strand, London, WC2A 2JR)
appeared on behalf of the Applicant.

MR S. WEBSTER (instructed by Levison Meltzer Pigott, 45 Ludgate Hill, London EC4M7JU)
appeared on behalf of the Respondent.

JUDGMENT (As Approved)

MR JUSTICE MOYLAN:

1. This is an application by a wife for a Legal Services Order in the course of heavily contested financial remedy proceedings. At this hearing the wife is represented by Mr Calhaem, and the husband by Mr Webster. I do not propose, given the hour – it is now almost 4.25 – to give a lengthy judgment. I propose to give something of a summary judgment.
2. The background history is as follows. The husband is aged 45 and the wife is aged 28. They married in October 2007 and have one child who is aged nearly five. The marriage came to an end in 2009. The parties have been involved in litigation in England since that time, first in respect of the divorce suit, and following the dismissal of the husband's application for a stay or a dismissal of the wife's petition in 2010, financial remedy proceedings. The litigation has been costly. The husband has spent something in the region of £200,000 and it appears that the wife has spent something in the region of £250,000, a combined total of £450,000. On the husband's case, the costs substantially exceed the resources available to the parties. On the wife's case, they total but a small percentage of the husband's wealth.
3. So far as these proceedings are concerned, on 11th April 2011, when the husband was neither present nor represented, an order for maintenance pending suit was made at the rate of £8,000 per month. On 5th August 2011 this was varied to £5,500 per month with effect from 1st June 2011 and the arrears were fixed at £10,200. In December 2012 the wife made an application for an order for maintenance pending suit in respect of her costs. As at the date of her statement, which was either the end of December or the beginning of January 2013, she owed her current solicitors £39,000 and her costs to the conclusion of a preliminary two day hearing which was then listed for March 2013, were estimated at £120,000.
4. On 27th February 2013 Deputy District Judge Stanton awarded a sum of £60,000. The District Judge gave a full judgment which sets out the background to this case, which has not materially changed. The net sum, therefore, that the wife received in respect of her costs, after payment of the amount then owed to her solicitors of £39,000, was £21,000.
5. The two day preliminary hearing was then adjourned. The proceedings have continued through a Financial Dispute Resolution hearing on 12th June 2013 and a number of Directions hearings and is currently listed for a five day final hearing in March 2014. The wife currently owes her solicitors £104,000. The amount that she seeks in respect of her costs to the conclusion of the hearing in March is £122,000. The total sum that she seeks by way of a Legal Services Order is very broadly £226,000.
6. The wife's case is that the husband has very significant financial resources and that during the marriage the parties enjoyed a lavish lifestyle. As to her own financial resources she states that her only asset is a 10% interest in her parents' property in Morocco. She asserts that this is completely illiquid and that her parents are not able to help her infunding her legal costs or, inferentially, by assisting her in realising her 10% interest in the property to which she has ascribed a value of £100,000. In respect of the husband, the wife asserts that he can afford to pay the legal costs order that she seeks either from his own resources and/or from funds regularly provided to him or for him by his father.
7. The case features a number of properties and the wife's position in respect of these properties is as follows. There is a property in London in St John's Wood ("the St John's

Wood Property”) and another in Cairo, Egypt (“the Cairo Property”). The wife has been ordered to set out her case in respect of these properties which she has done in a Statement of Case which is dated 21st November 2012. In that document she asserts:

‘Both the property in Egypt and the property in London were gifted to the Respondent and me on our engagement. As part of Arabic culture, when parties are to be married it is explained to the couple what is being gifted to them. I was told that the Respondent and I had been gifted these two properties and one would be my London home and one would be my Egyptian home. In reality the properties have already been gifted to the Respondent as future family homes for when he was married. They became such when we were officially engaged and the wedding was planned.’

8. During the course of his submissions Mr Webster took me to another document completed by the wife, namely, an annex to her Form E, which is dated 15th March 2011 and in which she says in respect of the property in Egypt:

‘During the first year of the marriage the Respondent’s father gifted to us a property to set us up at [the Cairo Property] in Egypt.’

9. There is another property, in Acton, London (“the Acton Property”), which is held in the husband’s sole name. It is the wife’s case that this property is owned beneficially by him. It has not yet been valued but it was purchased in 2005 for approximately £600,000.
10. The final property is a flat in, Maida Vale (“the Maida Vale Property”). This property is legally and beneficially owned by the husband. In the note prepared by Mr Calhaem for this hearing he states that the wife believes the property to be worth between £750,000 and £1m. A direction was given by Mrs Justice King at the conclusion of the FDR for valuations to be obtained but no valuation or formal valuation has yet been obtained.
11. The wife’s case more generally is that the husband is financially supported by his father and receives significant sums from him. She refers in her statement to the manner in which such financial support was given during their marriage.
12. The husband’s case in respect of his financial position is simple. He asserts that his only significant asset is the Maida Vale Property. In his Form E he estimated its value at £445,000 but in a document supplied with his Answers to Questionnaire dated 22nd October 2013 he effectively estimated its value at £630,000. There is a mortgage secured against the property in favour of RBS in the sum of approximately £416,000. If the husband’s estimate of the value of the property is correct, it has equity of very broadly £200,000, ignoring for these purposes any Capital Gains Tax which might be due. If the wife’s belief as to its value were to be correct then obviously the equity would be substantially greater.
13. The husband’s case in respect of the St John’s Wood Property is that it is part of a larger plot of land. The plot is vested in the name of company which I shall refer to as T Limited a British Virgin Island company. That company is in turn owned by a Leichtenstein Anstalt which I shall refer to as S S of which the husband’s father is said to be the sole beneficiary. At a Directions hearing on 21st June 2013 I ordered the husband to provide sworn evidence from the Administrators of S as to (1) all information provided to them addressing the beneficial ownership of S and (2) all documents in their custody, possession or control in relation to the beneficial ownership of S.
14. In purported compliance with this Direction a document has been produced by the

husband signed by two individuals who have some status in an entity which I shall refer to as Z Trust. That document is dated 22nd July 2013. I raised during the course of the hearing whether it amounts to sworn evidence because it does not appear or the contents do not appear to have been sworn to be correct. However, in it it is stated that Z Trust is the corporate director of S and there are produced with the statement a very small number of documents being principally the Articles of S and a document, probably an extract from a Register, dated 27th September 1993 when S was initially founded. In that statement the Directors of Z Trust confirm or state that there has always been only one beneficiary of the establishment since 9th April 1997 and that is the husband's father. The husband's case is that he has neither directly nor indirectly any interest in the St John's Wood Property.

15. In respect of the Cairo Property, the husband's case is that this property is owned by his father.
16. The husband accepts that he is able to make use of both the St John's Wood Property and the Cairo Property when he is in London and in Cairo but, as I have said, his case is that neither directly nor indirectly does he have any interest in those properties.
17. In respect of the Acton Property, it is the husband's case, as set out in a statement produced during the course of these proceedings by his father dated 1st March 2013, that the property was registered in his name:

'partly because of my poor relationship with my daughter at the time and partly also because I wanted to keep this property out of the hands of her husband whom I did not trust. It was always intended and has always been the case however that the full beneficial interest in this property in Acton belonged to my daughter and not to [the husband].'

It is the husband's case that he has neither directly nor indirectly any interest in the Acton Property.

18. The husband accepts, as I have indicated, that he is assisted by his father by being able to use the properties in London and Egypt. He also accepts that he has received financial assistance from his father, partly by way of salary, when he has been working for his father or one of his father's companies, and that he has received other assistance with the payment of legal fees in these proceedings and the payment of school fees. He says that he owes his father and his sister significant sums of money, I believe the former is or was of the order of £106,000 and the latter is or was of the order of £82,000. He does not accept, and indeed specifically asserts, that his father would not make funds available to him to enable him to meet any Legal Services order which might be made by the court. In his evidence he makes clear that his father would not enable him to meet any obligation which might be imposed by any such order.
19. Sections 22ZA and 22ZB of the Matrimonial Causes Act 1973 address the court's power to make an order for payment in respect of legal services. Section 22ZA sets out the structure of the approach which the court must adopt. In particular by 22ZA(iii):

'The court must not make an order under this Section unless it is satisfied that without the amount the Applicant would not reasonably be able to obtain appropriate Legal Services for the purposes of the proceedings or any part of the proceedings.'

Subsection (iv):

'For the purposes of subsection (iii) the court must be satisfied in particular that (a) the Applicant is not reasonably able to secure a loan to pay for the services and (b) the Applicant is unlikely to be able to obtain the services by granting a charge over any assets recovered in the proceedings.'

20. Section 22ZB sets out matters to which the court must have regard when deciding whether or not to exercise its power under Section 22ZA. They are (a) the income, earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable future; (b) their financial needs, obligations and responsibilities; (c) the subject matter of the proceedings, including the matters in issue in them; (d) whether the paying party is legally represented in the proceedings; (e) any steps taken by the Applicant to avoid all or part of the proceedings; (f) the Applicant's conduct in relation to the proceedings; (g) any amount owed by the Applicant to the paying party; and (h) the effect of the order or variation on the paying party.
21. When determining whether to make an order under Section 22ZA, in my view I should also have regard to the overriding objective, which is set out in Rule 1.1 of Family Procedure Rules 2010. It states that the Rules are a new procedural code with the overriding objective of enabling the court to deal with the cases justly. It provides that dealing with a case justly includes, so far as is practicable, (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues, (c) ensuring that the parties are on an equal footing, and (d) saving expense.
22. I have been referred to a number of authorities but I only propose to refer, briefly, to *Currey v Currey No 2* [2007] 1 FLR 946. Although this decision addresses the law prior to the amendment of the Matrimonial Causes Act 1973 in my view, as submitted by Mr Webster, it still assists the court when determining whether to exercise its power under Section 22ZA. I quote from para. 1 of the judgment of Lord Justice Wilson (as he then was):

'Although in making a costs allowance the court has a discretion, I cannot imagine that it would be reasonable to exercise it unless the Applicant had thus duly demonstrated that she could not reasonably procure legal advice and representation by any other means. That I venture to suggest is, in effect and as a matter of common sense, a necessary condition of making an allowance. But I certainly do not consider that it will always be a sufficient condition. No doubt the Applicant's due demonstration will incline, often very strongly, towards the making of an allowance but at this stage other factors may well come into play which will no doubt on occasions lead the court to decline to make it notwithstanding the demonstration. The subject matter of the proceedings will surely always be relevant and in so far as it can safely be assessed at so early a juncture the reasonableness of the Applicant's stance in the proceedings will also be relevant. So also will a variety of other features.'

23. The other authority to which I propose to refer, also briefly, is a decision of Mr Justice Mostyn, then sitting as a deputy, namely *TL v ML* [2006] 1 FLR 1263. He referred, when determining an application for maintenance pending suit, to the principles which he considered should be applied, and I quote from the headnote:

'(5) ... 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. 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 the final trial.'

24. Both Mr Calhaem and Mr Webster have made extensive written and oral submissions. I propose to summarise them, without intending any disrespect to their length and eloquence, very briefly. Mr Webster asserts that there are no resources against which a Legal Services Order can or should be made. He further asserts that, even if there are such resources available, no payment should be made because – putting it very broadly – of the lack of merit in the wife’s claims and the expensive manner in which those claims have been litigated. He focuses in particular on the wife’s claims in respect of the St John’s Wood Property and the Cairo Property.
25. The wife’s case is that without any payment for legal services she would be forced to conduct the litigation in person. Mr Calhaem contends that this would be contrary to the overriding objective because the parties would not be on an equal footing. They would, he submits, be on a very unequal footing. He also submits that, having regard to the matters set out under Section 22ZB including the issues arising in the proceedings, it would be appropriate to make an order which would enable the wife to meet her outstanding costs and her future estimated costs, namely a total sum in the region of £226,000. He submits that the husband is able to pay such an order either by accessing his own resources, namely, the properties to which I have referred, and/or because of the provision that has historically been provided for him by his father. Mr Calhaem additionally argues that, because the husband has met every order which has been made against him requiring a financial payment, there is reason to suppose that he would meet any additional obligation which I might impose.
26. Dealing first with Section 22ZB(1)(a), namely, financial resources: on the evidence currently available, in my judgment the only asset which is clearly available to the husband is the equity in the Maida Vale Property. As referred to above, this would appear to have available equity of at least £200,000. Apart from that asset, on the evidence, in my view, the wife’s case in respect of the St John’s Wood Property and the Cairo Property does not appear strong and is not such as enables me to conclude, at this interim hearing, that these assets are the husband’s given that her case is based purely on oral evidence. Her case in respect of the Acton Property might appear to be on stronger ground as the property is in the husband’s name. But the husband and his father provide an explanation as to why that occurred and state that it was always intended to be for the benefit of the husband’s sister.
27. As to the wife’s assertion that the husband receives – has received and might be expected to continue to receive – significant funds from his father, it is correct that the husband has received significant payments from, in particular, a company to which I refer to as K Holdings. In his written submissions (on p. 10) Mr Calhaem has set out a schedule of the amounts asserted to have been received by the husband from K Holdings. However, most – or a significant part of those payments – appear to be at least notionally in respect of salary and a significant part of the other monies set out by the husband in his evidence are in respect of the legal fees of these proceedings and school fees. It is, however, clear on the evidence that the husband’s legal costs will continue to be supported or funded by his father.
28. Accordingly, the husband has some resources available to him which, if I consider it appropriate, can be utilised for the purposes of meeting a Legal Services Order.

29. The husband's income position is less clear in that he is, he says again, working for his father. However, it does not appear to me on the current evidence that there are likely to be significant funds available through that source to enable him to contribute to the wife's legal costs having regard to the existing maintenance order of £5,500 per month.
30. Turning to the next section, financial needs, obligations and responsibilities, those are in my view self-evident in these proceedings, in particular in respect of legal costs.
31. The next issue I propose to address is the subject matter of the proceedings including the matters in issue in them. This is complex litigation. It is clearly litigation in which, in order to procure what I would call broadly 'access to justice', it would be appropriate, if possible, for both parties to be legally represented. I take fully into account Mr Webster's points as to the strength of the wife's claims, which factor in my view is implicitly included in sub-para. (c) or, if not, it is certainly a matter to which the court should have regard as set out in Lord Justice Wilson's judgment. I have set out my view currently of the strength of the wife's claims, particularly in respect of the St John's Wood Property and the Cairo Property.
32. Addressing paragraph (d), the husband is legally represented and will continue to be legally represented because he is in the fortunate position that his father remains willing to fund his legal costs.
33. If, pursuant to paragraph (h), I have regard to the effect of the order on the paying party, if I were to make an order in respect of legal services it might – subject to how I phrased such an order – have an effect on the husband. In my view I can address that, if I decided it is appropriate to make an order, by the form in which I do so.
34. Turning now to the critical element set out in Section 22ZA, namely, am I satisfied that without a Legal Services Order, so "without the amount" as set out in that Section, the wife would not reasonably be able to obtain appropriate legal services for the purposes of the proceedings? I am satisfied that the wife is not in a position to secure a loan to pay for such services. I am also satisfied that she is unlikely to be able to obtain such services by granting a charge over any assets recovered because it is not clear at present that she will recover any assets. That does not in my view impact on the current position of the Maida Vale Property. I am also satisfied that the wife is not able through her family, as submitted by Mr Webster, to obtain funding to support or cover the cost of legal services. I am, accordingly, satisfied that absent any order made by me the wife would not reasonably be able to obtain appropriate or indeed any legal services.
35. Looking at the matter more broadly, there is in my view a significant potential that this case is being litigated in a manner which is disproportionate to the resources within Section 25(1)(a). That is a relevant consideration because the overriding objective requires me, among other things, to seek to ensure that a case is dealt with in a way which is proportionate to the nature, importance and complexity of the issues. However, the factor to which I give the strongest weight, when deciding whether or not to exercise my discretion in this case and the form in which I might exercise it, is the obligation so far as practicable to ensure or seek to ensure that the parties are on an equal footing. Having regard to the complexity and nature of these proceedings, and having regard to the fact that I am not in a position other than tentatively to draw any conclusions as to the reasonableness of the Wife's stance (to adopt the words used by Lord Justice Wilson), in my view if it is practicable to do so I should use the power given to me by Section 22ZA to make a Legal Services Order. It may be that in doing so the parties will be exhausting

all the resources available to them in litigating this case, but in my view at this stage I am not in a position to say that that is what is happening.

36. During the course of the hearing it seemed to me that, if I decided that it was right to make an order, I might come to the conclusion that the only asset which I can safely conclude is or might be available is the equity in the Maida Vale Property. I have, as demonstrated by this judgment, come to that conclusion. That led me to raise with both parties whether the wife's legal representation could be secured by a charge being provided by the husband to her over that property. As I understand it, Mr Webster did not contend that I could not make such an order but submitted, as I have made clear during the course of the judgment, that I should not for the reasons he advanced. Mr Calhaem indicated that the wife's solicitors were not keen on the idea of any such charge, but that if I was to adopt that route then they would seek to persuade me that I should make some allowance by way of a lump sum – and if I have written it correctly the sum was £50,000– and that a number of additional provisions should be included among which were that the current mortgage should not be increased; that the judgment debt rate should apply to the amount owing; and that the charge should be realisable after the conclusion of the proceedings.
37. The wife and the wife's solicitors are in a somewhat vulnerable position because they are already owed £104,000. In other words costs have been incurred of £83,000 without any protection at all. I reach that figure by deducting the sum of £21,000, namely the amount which I concluded was left from the previous award made by Deputy District Judge Stanton.
38. The total amount sought, in addition to £104,000, is the estimated future costs of £122,000. As set out above, I am satisfied that without any award the wife would not be able to obtain legal representation. I have come to my conclusion principally, as I have indicated, because of the complexity of the litigation and the need to ensure equality of footing. That does not mean, however, that I must exercise the power given to me by Section 22ZA by simply making an order for the payment of legal services in the amount sought.
39. Turning now to the amount, Mr Webster challenged the sum sought of £122,000 and also questioned the costs incurred of £104,000. I do not propose to award all that sum having regard to what has already been spent, because it seems to me it would be disproportionate for me to do so. Nor do I propose to award a sum which covers all the costs which have been incurred and are owing to date. Having regard in particular to the current position, namely that the wife's solicitors are already, and without any protection at all, owed £104,000, I propose to order the husband to provide the wife a charge over the Maida Vale Property in a fixed amount to cover the payment of her legal services. I propose to limit the amount of the charge to £150,000, of which £100,000 is to be used in respect of the wife's costs not currently incurred to the conclusion of the hearing and it is to be used only for that purpose, and £50,000 is to be used in respect of the costs incurred to date. I will also make an order that the husband is not to increase the amount currently due to RBS and is not otherwise to dispose of or deal with his interest in the Maida Vale Property.
40. I do not propose to make any order to provide a cash sum because in the circumstances of this case I do not think that would be a fair or just exercise of the power given to me by Section 22ZA. I also do not propose to include any provision in respect of interest because in my view this is a power to be used to provide for legal costs; it is not a power to be used to provide an indemnity in respect of all sums that the wife might in due course be liable to pay her solicitors.