IN THE BLACKBURN FAMILY COURT

Neutral citation: [2023] EWFC 269 (B)

Case No. 1657028076243455

Courtroom No. 2

64 Victoria Street
Blackburn
BB1 6DJ

Wednesday, 7th June 2023

Before:
HIS HONOUR JUDGE BOOTH

B E T W E E N:

S

and

S

MS S HARRISON KC appeared on behalf of the Applicant
MS E MCGRATH KC & MR M GEORGE appeared on behalf of the Respondent

APPROVED JUDGMENT

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.

HHJ BOOTH:

1. This is my judgment in the final hearing of financial remedy proceedings between Mrs S and Mr S.
2. Mrs S has been represented by Ms Harrison KC. Mr S has been represented by Ms McGrath KC and Mr George. I have had from both teams of advocates very helpful documents, both at the start of the case and in support of their closing submissions and I am very grateful to them for the time and effort that has been put into those documents.

Introduction

3. I have a bundle of documents that exceeds the permitted size. I do not say that critically, I make that as an observation. I gave permission at an earlier stage for the bundle to exceed 350 pages. The bulk of that bundle relates to four statements and exhibits directed to the question of when Mr and S separated. The point being made was that their date of separation might prove critical to how their assets, accumulated in what, otherwise, would be categorised as a long marriage, should fall to be divided between them.
4. The argument of Mr S was that some of the assets accrued after separation should be treated as "post-marital acquest", to use the current jargon; in other words, treated as non-matrimonial as opposed to everything acquired during their marriage that would be treated as matrimonial. In the ordinary course of cases of this nature, the starting point, and indeed the finishing point, would be that after a long marriage everything would be divided between them broadly equally. Such is the scale of the assets that they have, no adjustment would be required because of 'need'.
5. The date of separation, however, is not the final determinant of how their assets should be divided. At the end of the day, as Ms McGrath readily conceded, I must take an overview and, ultimately, decide what is a fair distribution between these parties considering all the circumstances of the case having applied the factors set out in section 25 of the Matrimonial Causes Act 1973.
6. Mr S insisted when he gave his evidence, that this case was about the date of separation. In that, he was fundamentally mistaken. The clue should be in the name of the court hearing his case. This is the Financial Remedies Court, a subdivision of the Family Court, staffed by judges with particular expertise in this field of the law. These are financial remedy proceedings. The law that I must apply is that set out in the Matrimonial Causes Act. I must apply the checklist in section 25(2). The children of this marriage are no longer relevant. Although that checklist is something I am obliged to consider, taking it into account paragraph by paragraph in this case adds little.

Background

7. This case concerns a long marriage between a couple in their mid-sixties. They married in 1983. They have two adult children aged 33 and 30. I have been asked to take an approach looking at their marriage through the eyes of somebody who was applying a reasonableness test. That is not what I have to do at all. What I must do is look at this particular marriage between this particular couple. Experience of divorce cases throughout my career tells me two things: firstly, no two marriages are the same; and, secondly, no divorcing couple ever tells anybody everything that has gone on in their relationship.
8. This couple's particular way of operating during their lengthy marriage was that, for many years, from about 2003, Mr S spent his working week away from home. For most of the past 20 years he has been based in Germany working for German companies in very lucrative employment. He tells me and I accept that to earn his salary and his bonuses he has had to work very hard.

9. When he first went abroad, the children were still at home and dependent on their parents' support, the younger child then being 17 years of age. Mrs S had employment, initially, in local government and then as a teaching assistant which she eventually gave up with the agreement of Mr S, and, for the final period of time with which I am concerned was fully dependent on Mr S. In any event, the salary she earned went only a very modest way in supporting the family. The reality is she has been financially dependent on Mr S throughout the marriage.
10. Such has been Mr S' financial success that they have been able to acquire, in joint names, four different houses including a holiday home and an apartment in London. The total assets, when adding their savings and the bonuses comes to the order of about £11,000,000.
11. In addition, they have pension provision: very modest pension provision in Mrs S' case from her days in local government and much more substantial pension provision acquired by Mr S. They have, effectively, agreed on a division of their pension assets with a pension sharing order for Mrs S to receive 70.4% of Mr S' pension provision.
12. They have agreed the distribution of the houses between them and are retaining assets in their respective names. The issue I must decide is the size of the lump sum to be paid by Mr S to Mrs S.
13. Both in their different ways have made a full contribution to the marriage partnership.
14. This is not a needs case. I have not been invited to investigate, at all, their future financial needs and obligations. They will be comfortably met however I divide the assets between them.

The parties' respective cases

15. Mrs S contends for a starting point of a broadly equal division of their assets between them. She concedes that there should be some adjustment for money paid to Mr S at the cessation of his employment that represents, on the date of the termination, his future salary, a payment for future bonus and a payment for holidays. It is also conceded that I should make some adjustment in respect of a long-term incentive plan (LTIP 2), the second of two five-year plans which have been paid to him at the conclusion of the five years and because of some negotiations he had with his employers over that payment. All of that is set out in an open offer dated 2 May 2023. It is all premised on a clean break.
16. Mr S' proposal for settlement of this case involved a very considerable adjustment away from 50/50 on the basis that the parties separated in 2010 and that he has a valid argument that what was earned post 2010 should be treated as non-matrimonial.
17. Having heard both parties give their evidence on the date of separation, I indicated, at the close of play yesterday, that Mr S' position was not credible. That resulted in a change of position and, as of this morning, he made a different proposal, much closer to Mrs S' position but with adjustments in respect of some capital gains tax which I will deal with in due course, an adjustment in respect of the LTIP 2 and an adjustment to reflect the settlement terms he negotiated so that he was, in broad terms, about £800,000 short of Mrs S' offer. That was a realistic proposal for him to put forward. It is a tragedy for these parties and their children that it was not put forward earlier. The position as it stands now is that they have spent, in round figures, £550,000 between them on their legal costs.

My conclusions as to the date of separation

18. Accordingly, what did I make of the evidence about the date of separation? I indicated, yesterday, that I would not pull my punches on this. I have formed a very clear view. An opportunity to reflect overnight and to consider the submissions made to me this morning and earlier this afternoon have done nothing but reinforce my views.
19. This marriage broke down in September 2021. When the solicitors Mrs S instructed in September 2021 wrote to Mr S, they recorded that the marriage had broken down in

September 2019. Mrs S says that was a mistake. Mr S says that was the very latest I could possibly find this marriage broke down.

20. I have had the benefit of hearing Mr and Mrs S on this point, and I have read what seemed like hundreds of pages of documents. I am left with no doubt, whatsoever, that my date is the accurate one. Why do I say that? Firstly, insofar as there is any dispute between Mr and Mrs S, I prefer Mrs S' version of events to that of Mr S. Mr S has suggested that Mrs S has been motivated in her attitude to this litigation by monetary matters. In other words, she is greedy. That is not her attitude he is describing but his own.
21. Why did he contend that this marriage broke down in 2010? What happened in 2010 was that Mr S began a relationship with another woman in Germany. It appears he lived with her for approximately two years in the accommodation he had in Germany until that relationship broke down and she moved out. During that time, he rarely visited Mrs S or the children in this country.
22. The evidence I have from Mrs S, which I accept, is that at the start of that relationship, Mr S spoke to Mrs S suggesting that they should have a trial separation. I have no reason to doubt her when she tells me that that is what she believed was going on although she knew what was happening in Germany. When Mr S' relationship in Germany broke down, he resumed his previous *modus operandi* of living in Germany and visiting the family home and seeing Mrs S and the children most weekends. Mr and Mrs S went on holiday together. Their lives largely resumed as they had been before. A great deal of cross-examination was spent by Ms McGrath questioning Mrs S about her sex life. That has been described by Ms Harrison as "distasteful" and "humiliating".
23. Mr S' case was the fact that they did not resume their previously active sexual relationship meant their marriage was at an end. If every marriage where there was no sexual relationship between married partners resulted in the marriage ending, I suspect there would be relatively few surviving marriages between mature couples. My phraseology but not Mrs S' is that she "took him back". She told me she forgave him. Life continued until 2017 when Mr S commenced a second relationship, this time with a married woman with children who lived in the south of England. They conducted their relationship, it appears, at the parties' apartment in London. It is clear to me that Mrs S knew of that relationship but treated it as somewhat different because Mr S was not living with this woman. However, otherwise, their relationship continued as it had done since 2012.
24. I heard evidence from Mr S about him being left alone in his house during Covid lockdown in 2020. His case fell apart on the documents he had filed in support of his contention that photographs of him with his arm around his wife were of no significance because that is how he behaved as a tactile man in the company of women and he exhibited several score photographs of him with other women, on holiday, at a time when, on his case, he was languishing on his own at the house. I am satisfied those photographs were primarily included in the bundle to humiliate Mrs S.
25. However, in 2021 Mr S began a relationship with a woman who lived in Southport. On this occasion, he chose to exercise no discretion, introducing this woman to his children. As far as Mrs S was concerned, that was the final straw. Again, my words, not hers, "Three strikes and out". She consulted solicitors in September 2021 and that is when the marriage ended. As it happened, in September 2021, the lady from Southport broke off her relationship with Mr S and he was, apparently, distraught.
26. Mrs S described how, on the evening of 12 September 2021, Mr S rang her telling her that this person had ended their relationship and that he was contemplating suicide. He said he did not know if their marriage could work again, or not, leaving Mrs S with the clear impression he wanted to revive their marriage again. She did not tell him she had already

instructed solicitors. On 19 September 2021, a week later, she raised the question of divorce with him. He told me in evidence that he was angry and accepted that he had lashed out verbally at Mrs S and said that he would "fight her tooth and nail" and leave her "with nothing or everything". She thought that reference to leaving her with everything was that he was contemplating killing himself.

27. Having found himself abandoned by his girlfriend from Southport, he invited Mrs S to accompany him on a trip to Majorca which he had planned to take with that lady. Mrs S declined. He invited her to go to Portmeirion. She agreed to do that as one last attempt to see whether reconciliation was possible despite having consulted solicitors and despite, as per my finding, them being, effectively, separated. Mr S told Mrs S that he had enjoyed the trip and thought they could make a go of their marriage again. However, for Mrs S, it was too late.

The legal consequences of my finding

28. Ms McGrath invites me to consider several cases led by *Rossi v Rossi* [2006] EWHC 1482 (Fam), a decision of Mostyn J, *Jones v Jones* [2011] FCR 242, Wilson LJ, and the more recent case of *Hart v Hart* [2017] EWCA Civ 1306, Moylan LJ. There are a number of other cases on the point, all of which I have cited to me with regularity. They deal with how the court should approach the different ways to look at assets that are either matrimonial or non-matrimonial. They amount to this: there are two potential approaches: one is a scientific approach, a formulaic approach where Mostyn J frequently promotes the idea that the Family Court is not exercising a palm-tree style of justice and that there must be some closely argued rationale behind every financial decision that the Court makes. The alternative is a Moylan LJ approach whereby the scientific and formulaic approach can only take the Court so far and that the Court must exercise a broader discretion or judicial evaluation, applying the test of fairness.

29. If I lean in any direction, it is in the Moylan LJ approach. The whole point of the legislation and the total absence of any formulae or guidance allows the Court to craft a bespoke solution in every case. The counterargument is it means there is a lack of certainty, condemning litigating parties to vast expenditure on legal fees while they gradually work their way towards a solution, often driven by them spending far more than they should on legal fees and recognising the process is getting them nowhere. In other words, they are ground down towards a settlement.

What is the correct approach in this case?

30. I am happy to start with the proposal put forward by Mr S this morning. However, it requires some adjustment. Therefore, for clarity's sake, so that the parties can understand what I am doing, I am dividing their assets in broadly equal shares but making an adjustment to reflect the fact that part of what was negotiated as part of his termination package by Mr S when he left his employment represents funds that were referrable to the future and referrable to the fact that his employment was terminated earlier then it might otherwise have been by his employers deciding to dispense with his services. Accordingly, insofar as he calculates 30% of the LTIP 2, I adopt his figures. As far as the settlement monies are concerned, I adopt his figures. Accordingly, that is my starting point.

31. Let me deal with some of the factors that move away from that. Firstly, the incidence of capital gains tax. Capital gains tax will be payable on the transfer of assets between Mr and Mrs S. They are outside the statutory time limit. There is legislation going through Parliament in the Finance Bill 2023 that will come into effect at some stage, possibly, this summer, which will alter the capital gains tax rules for married couples. Mr S has proposed a rather convoluted method of trying to achieve equality of liability for capital gains tax on the transfer of the various assets between them. I am with Ms Harrison on that point. That

is a recipe for this couple to spend tens of thousands of pounds more in resolving an issue in a way that is likely to be disproportionate to the amount of money they have to pay. Capital gains tax will lie where it falls.

32. Next, Mr S has spent very significantly more on his legal costs than Mrs S. Why is that? Ms McGrath says his affairs are complex. He has had to gather information from his employers in Germany. That information has had to be considered by his legal team so that it could be understood and so that it could be factored into the case. I note that he is represented by both a Silk and a junior who have, quite properly, taken parts of the case under their respective wings. Ms Harrison, on Mrs S' behalf, says, conventionally, it is the applicant who runs up more costs because it is the applicant making the running, it is the applicant who had to do work such as preparing the bundle for the Court, making applications and so on. I am struggling to understand why Mr S' costs are so much higher than Mrs S' and I view that as something that requires some modest adjustment.
33. Next, Mrs S invites me to make an adjustment that Mr S pay the interest charges that have accrued on a loan she has taken both to fund her litigation and to pay her living expenses. This arises out of another episode where Mr S was forced to accept that he had lashed out. Three things: Mrs S found her second card on the parties' joint bank account, serviced by Mr S, rejected. Mr S' solicitors' explanation for why it was rejected was that Mr S cancelled it. Mr S, in evidence, said he had not, and he could not understand why it was refused and perhaps it was just one of those occasions when the card did not go through. I do not accept Mr S' explanation. Secondly, without telling Mrs S, Mr S began to cancel the standing orders in respect of the family home paid from the joint account. Thirdly, when Mrs S raised the question of her immediate need for financial support, Mr S' proposal was that she should sell her car. Mr S has a collection of 15 cars, ranging in type from a Ferrari California, all the way down to an elderly Mini Metro, with a particular penchant for products of Messrs Porsche. Mrs S declined. What did Mr S do? He refused to tax the car. He made a declaration that the car was not being used and he then sold it in part exchange for a Porsche for himself.
34. That is the background. Mrs S had an investment fund now worth £260,000. She took advice. The question was what was the best way of financing herself, both her litigation costs and her day-to-day expenses now not being met by Mr S. The effective options available to her were either to invade the investment or to take a loan. The advice she received was that she would lose more money if she had to invade the investment. At the time, Mr S was still working. Mr S could have carried on paying but he decided not to. I have no doubt if Mrs S had invaded the investment and lost the money, there would have been a claim for what had been lost. Now there is a claim for the interest on the litigation and household expenses loan. She is bound to succeed on that.
35. I am under a statutory duty to impose on Mr and Mrs S a clean break as soon as it is just and reasonable for me to do so. Now is the time when there should be a clean break.
36. Finally, and on the basis that Mr S has:
    - comprehensively lost on the question of the date of separation and was always bound to lose on the point; and
    - failed to make a realistic offer until the third day of the final hearing;

    I should make an order for Mr S to pay at least a proportion of Mrs S' costs.
37. Mr and Mrs S are entitled, when it comes to the question of costs, to a separate determination. I do not have the material before me, today, to assess what the costs order should be if I am persuaded to make it. That inevitably means I would have to make an order for costs in default of agreement and set out the parameters of that costs order. Of course, when making my determination as to costs, I apply Part 28 of the Family Procedure

Rules, in particular, Practice Direct 28A and the Civil Procedure Rules Part 44 and the relevant parts thereof. I will come back to that.

38. Conclusion

39. Therefore, extracting the adjustments for capital gains tax inserted by Mr S in his proposals of this morning and looking at the other matters that I can properly consider in assessing the lump sum, I have concluded that the appropriate lump sum for him to pay to Mrs S is £2.6 million. She is entitled, in addition, to the interest that she is required to pay on the loans that she has taken in the circumstances I have described.

40. When I stand back from that division between them, it means Mr S will be left with more than 50% of their joint assets, Mrs S less. A calculation was done to show that if I take out those amounts that Mr S has characterised as post-marital acquest (non-matrimonial property), so, his settlement monies and part of the LTIP 2, there was, very broadly, on his proposals a 50/50 division. As a starting point, I do not regard that as unreasonable, but it is not the end of the matter.

41. I must stand back from the detail and assess whether what I propose to award is fair looking at the case overall. In my judgment it is.

Costs

42. How do I apportion costs? Two elements are in play: firstly, a failure to make a realistic and timely open proposal. If the proposal made this morning had been made in response to Mrs S' open proposal made on 2 May, so, say, made by 20 May, the hearing costs might have been avoided. I have no doubt there would have been significant efforts to bridge the gap and I would have expected those efforts to succeed. Secondly, Mr S has run a dishonest and hopeless factual case. It occupied two days of court time. If I condemn him for that, I run the risk of condemning him twice over because I have already condemned him in the costs for not making an offer. However, there is, of course, the preparation ahead of today to deal with that issue. The bulk of the documents in the bundle are directed to that but I have no idea how much of that preparation time was given over to preparing for that issue although it must have been a significant part but, plainly, a long way from being all of it. That will have to be the subject of a costs assessment. I do not see how it can be otherwise.

43. What Mr S is going to have to pay to Mrs S is the costs attributable to the issue of the date of separation and, in addition, the costs incurred from the period, from 20 May onwards. That will have to be assessed if not agreed and Mr S needs to understand the costs of that assessment are likely to fall at his door should it not be agreed and in the absence of realistic proposals to settle.

End of Judgment.

Transcript of a recording by Ubiqus
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This transcript has been approved by the judge.