IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2018] EWHC 3626 (Fam)

No. ZC15D03864

Royal Courts of Justice

Wednesday, 28th November 2018

Before:

MR JUSTICE COHEN

(**In Private**)

B E T W E E N :

AR — Applicant

- and -

JR — Respondent

MR N. DYER QC and MS K. COOK (instructed by Penningtons Manches LLP) appeared on behalf of the Applicant.

MR P. MARSHALL QC and MS K. KELSEY (instructed by Bishop & Sewell) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE COHEN:

1 This is an application pursuant to rule 4.4(1)(b) of the Family Proceeding Rules 2010 that the wife's application for financial remedies in this divorce suit be struck out on the basis that it is (a), vexatious, and/or duplicative and/or (b), on the basis there has been prior compromise. I hope the parties will forgive me if I refer to them as "the wife" and "the husband." Apart from the fact that it is still an accurate description, it is a convenient shorthand.

Basic facts:

2 The parties married in 1967 and have two children who are both now in middle age. The parties themselves are in their late 70s. It appears that when they married they had minimal assets and everything that there now is, and it is a substantial fortune, has been built up during the marriage. The parties' married life was spent largely in West Africa, particularly in Nigeria, where the husband established a very successful business supplying support vessels to the offshore oil industry. By the end of 2015, the net equity in his principal business appears in the accounts at only just under 1 billion US dollars, the husband being either the sole owner or holding the vast majority of the shares.

3 The marriage grew unhappy. In 2001, the wife filed a petition for divorce but that was withdrawn soon afterwards, and I need say no more about it. She says the parties reconciled.

4 In 2010, the wife issued judicial separation proceedings and served a Form A. On 10 August 2010, a decree of judicial separation was pronounced. On 14 October 2011, a consent financial order was made by District Judge Bowman, who dealt with the matter on paper. The effect of that order is at the core of the application before me.

5 On 7 August 2015, the husband filed a petition for divorce on the grounds of five years' separation, and it is in the context of the financial remedy proceedings which followed the issue of that petition and subsequent pronouncement of decree nisi that the husband's strike out application was issued.

6 I have read a large file of papers which included statements from each of the husband and the wife. Both gave evidence before me. It was hard to connect the evidence that each gave with their written presentations. In statements, each was so firm and certain about the events of 2010 to 2011, yet in the witness box each struggled to have any real recollection at all. It was conceded by counsel, at the end, that I would have to rely on the documents from the time in question rather than anything said orally in evidence or in writing in recent times, when those documents were really no more than an attempt to rationalise from the contemporaneous documents what is now very largely forgotten by the parties.

7 I have also had the advantage of full written and oral submissions by leading counsel, assisted by junior counsel and their solicitors, and the cases could not have been better put to me than they were.

8 I now turn to the events of 2010-2011, and I take up the story in 2010 when the parties had separated, even on the wife's date of the separation which is somewhat later than that of the husband. By that time, the wife knew that the husband had formed a relationship with another woman. She issued her petition for judicial separation and applied for a financial

award. Both the husband and the wife had the same solicitors in the proceedings in 2010-2011 as they now have.

9 On 10 June 2010, the husband's solicitors wrote as follows to the wife's solicitors:

> "We write further to the above matter. As we have indicated in previous correspondence, our client wishes to reach an agreement with your client to provide your client's financial security. In the circumstances, could you please provide us with details as to the financial provision that your client may be seeking. We will then take instructions from our client."

10 On 28 June, in a letter written several days after the service by the wife's solicitors of her Form A and notice of first appointment, the wife's solicitors say this:

> "Our client seeks a fair share of your client's assets and income under English law. Her fair share will need to include a lump sum for her to invest to provide her with a similar level of income to that which she is currently receiving for the rest of her life. It would also need to include sufficient additional lump sums to enable her to purchase an apartment in central London and a property in Australia, in close proximity to our client's son's home.
>
> Clearly our client cannot begin to quantify what would be fair for her to receive until your client has provided at least basic details of his net worth, including the value of all assets in which he has an interest anywhere in the world, and the total amount of income from all sources. Our client asks you to provide those details."

11 Then, on 30 July, the wife's solicitors write again, saying this:

> "We are in the process of preparing our client's Form E financial statement so that we are in a position to exchange Forms E with you by 25 August 2010, the date set by the court. We are having some difficulties preparing the full assessment of our client's income needs as she pays for many items with her credit cards but does not have any statements. Please can you ask your client to provide them."

12 On 1 September her solicitors wrote to say the date for exchanging Forms E had passed and asking "please may we have it by 9 September" when the wife was due to attend a consultation with leading counsel. The response to that letter, from the husband's solicitors, says this:

> "We are presently not in a position to provide you with confirmation regarding exchange of Forms E, which you are seeking. We will contact you as soon as we have further instructions from our client."

13 The first appointment was postponed at least twice. No Form E ever came from the husband.

14 At some stage, the parties entered into negotiations. The parties have not shown me any of the correspondence, no doubt all of it without prejudice, that surrounded those negotiations. The wife says that she had no idea what the husband was worth, as he had made no disclosure, but that she knew he was significantly rich. The husband does not suggest that he ever did give disclosure but agreement was reached and each party filed a Form D81, that is a statement of financial information. In her statement, the wife gave her capital as being £6.8m, inclusive of the first tranche of nearly £5m of an agreed lump sum which she had

already received. The husband's statement is as devoid of detail as it could be, save to say that he said he was worth "plus or minus £9m." He gave no breakdown, and nor is it clear whether that figure of £9m was before or after the payment of £5m which I have just referred. That was his sole disclosure.

15 The minutes of the Consent Order appear at A2, and I shall quote from them in some detail, adding my own underlining. The judge had read correspondence from the parties' solicitors, including the draft minutes of order, and the order says this:

> "And upon the basis that:
> (i) In her claim for ancillary relief in these judicial separation proceedings the petitioner issued a Form A and filed her Form E.
> (ii) The respondent has not served a Form E.
> (iii) The respondent has not provided full disclosure of his financial resources.
> (iv) Notwithstanding the absence of full disclosure from the respondent, the parties have agreed terms in settlement to the petitioner's claim for ancillary relief in these proceedings.
> (v) The petitioner had received independent legal advice before agreeing to the order in the terms set out below.
> (vi) In this context, the petitioner agrees that the financial provision ordered below is in full and final settlement of any claims that she may bring against the respondent in any jurisdiction.

16 I shall jump through certain other recitals, but the order itself is important. It was an order by consent by both parties, which provided;
1. The respondent shall pay a lump sum to the petitioner of $16,129,122, payable by two instalments, the first half having already been paid by the date of the order;
2. That until lump sum instalments are paid in full, there would be periodical payments at the rate of £21,600 per month;
3. Upon compliance in full with the paragraphs 1A and 1B above (the lump sum provision), paragraph 2 above shall be discharged and the petitioner's claims in these proceedings for periodical payments, secured periodical payments, lump sum and property adjustment order shall stand dismissed, and the petitioner shall not be entitled to make any claim against the respondent's estate under the Inheritance (Provision for Family and Dependants) Act 1975.

Paragraph 4 contains a dismissal clause which starts: "The respondent's claims in these proceedings ..."

17 The wife, unsurprisingly, puts stress on the repeated use of the words "in these proceedings." It is self-evident that these proceedings must mean these judicial separation proceedings. The husband relies on the words in recital (vi), and in particular the reference to the financial provision ordered being in full and final settlement "of any claims." And, he says this shows that it was meant to cover future proceedings.

18 I should explain that the relatively unusual dismissal of Inheritance Act claims in a judicial separation financial order is explicable by the fact that the husband himself was not domiciled in England and Wales and thus the wife would have no claim against his estate, although he might against her estate, at least in theory.

19 Judicial separation proceedings are now relatively uncommon. In the last set of statistics that I have seen, in 2014 there were just 140 decrees. Those of us practising for many years will have seen judicial separation proceedings more often and drafted financial orders, sometimes intended and expressed to cover both judicial separation and subsequent divorce

proceedings. But, of course, often the award is only to cover judicial separation proceedings.

20 I am satisfied that no mention of divorce was made in 2010/2011. It is, of course, completely absent from the correspondence and documents I have seen, and there is no reference to it at all in the order. If the award was intended to cover divorce proceedings, I am in no doubt that these very experienced specialist solicitors would have ensured that it said so. All the ostensible signs and drafting show clearly, to me, that divorce was not on the menu in 2010 /2011. Even the husband accepts that; in his statement at C84, at para.17, he says this:

> "(The wife) was adamant during both sets of proceedings in 2001 and 2009, that she did not want us to get divorced. It is my belief that she didn't think we ever would get divorced and that instead we would continue to be married but living and operating our respective finances separately. Although I had asked her to agree to a divorce previously, in the face of her continued refusal, I was resigned to the fact that we were likely to remain married to one another and that our only option was to resolve our finances through judicial separation rather than divorce proceedings."

21 Now, he is plainly wrong in what he says about 2001, but it is clear from what he says, in addition to the matters which I have already referred, that divorce was not on the cards. And, it is clear to me that the parties negotiated an agreement that was meant to cover judicial separation and nothing more. I am fortified in arriving at that conclusion by additional matters:

1. This was a very long marriage and the creation of great wealth during it would inevitably lead to an award that was not a needs-based award. Whilst needs generously construed could be met without there being financial disclosure, it would have been impossible to assess an entitlement-based award in a total absence of information.

2. Thus, the wife's argument that the entitlement element or sharing element of an award could be dealt with when the marriage was dissolved is a logical argument, even though not fully explicit in the documents I have seen.

3. It is clear that various aspects of their finances remained intertwined. As late as 2015, the husband was seeking that the wife should transfer to him a property in Holland, in exchange for him making her a payment, and seeking the transfer of various shareholdings that she had in some of his companies. This is not consistent with a final severance of financial ties.

22 Although the wife relies on it, I place much less weight, if any, on the fact that the husband continued to pay periodical payments on a voluntary basis after he had paid the lump sum award in full, and also that he provided for the wife, amongst other family members, in a trust that he set up in 2014. He says that that was just a sign of him being generous and the parties being on good terms then, and I am prepared to accept that. But the fact is their finances had remained enmeshed and that the sorting out that one would expect to see in a final settlement had not been carried out.

23 The husband says that even if it was not spelt out that the 2011 award was a final award encompassing future divorce proceedings

1. That is the way that he, the husband, took it, and

> 2. In any event, she should have made her claim within the judicial separation proceedings and what she is seeking to do now is an abuse of the court process.

24 I will park for a moment the issue of whether she should have made the claim and focus next on his assertion that he took the 2011 award as being a final award to encompass divorce proceedings as well. The best way of judging that is by looking at his reaction to these proceedings. On 8 October 2015 the wife issued her Form A.

25 The next relevant document was that at D7, a letter from the husband's solicitors, sent on 7 March 2016 to the Central Family Court, where the proceedings were taking place. The solicitors write this:

> "We agree with the applicant's solicitors (that is the wife's solicitors) that the application for financial remedy in the first appointment should be adjourned to the first open date after 31 July 2016." The explanation being given that the parties were abroad. The letter continues:
>
> "A letter, setting out proposals for settlement was forwarded to the wife's solicitors. However, due to their client's absence in this country, they have not been able to take instructions".

26 The wife filed her Form E and at box 1.15 she says this in reply to the need to state the details of any other court cases:

> Type of proceedings: judicial separation proceedings were issued in the principal registry ... attached at tab 1.15 is a copy of the consent order agreed between us at the time, which reflects the financial agreement we reached in the context of judicial separation proceedings only. That agreement was reached in the absence of disclosure.
> And later in the form, she highlights clearly that she is seeking to have a sharing award, stating that whilst the husband provided her with what may be considered a very generous financial settlement, she anticipates 'this does not even begin to represent a fair division of our assets. Our marriage was over forty years in duration and I supported him unequivocally in establishing and developing his business empire.'"

And there is more in the same tone.

27 The husband's Form E was duly provided in reply. And at box 4.3, the narrative part, he refers to the fact that he had made a settlement of over $16m in accordance with the order made in the judicial separation proceedings and paid additional sums as well. Under box 4.5, he has to answer this enquiry:

> "Give details of any other circumstances that you consider could significantly affect the extent to the financial provision to be made ... include ... any agreement made between you and your spouse/civil partner, before or after your marriage/civil partnership, stating whether or not you rely upon the agreement, giving your reasons," The box is left blank by him.

So, there is no assertion or suggestion made by him anywhere that the wife's claims have already been dealt with.

28 This case has been before the court on at least four occasions before today. The matter came before District Judge Aitken on 3 June 2016, where she made orders for the service of documents, and adjourned the first directions appointment. An order for costs was made against the husband; both parties were represented by specialist matrimonial counsel.

29 The matter returned to District Judge Aitken on 20 October. Prior to the hearing, the husband's solicitors had filed a statement of issues in readiness for the adjourned first appointment. The issues were set out as follows:

> 1. What, if any, further capital provision should be made for the wife by the husband, following the substantial financial settlement made at the time of judicial separation in 2010 ...
> 2. What, if any, further maintenance provision should be made by the husband for the wife, given that the previous order had expired and that he had made generous financial payments to her.
> 3. Whether a clean break order should be made without further financial provision being made by the husband for the wife.
> It is self-evident that no point was being taken that the wife's claims had been disposed of.

30 District Judge Aitken ordered the valuation of eight properties and transferred the matter to the High Court, it being asserted the total value of the assets exceeded £500m.

31 The matter came before Roberts J on 22 March 2017. That was proceeded in the usual way by a position statement, drafted by counsel on behalf of the husband. In it, counsel asked for "need for realism and proportionality," and objected to the likely very substantial costs of a single joint expert valuation of the husband's business interests, bearing in mind that they were, as it was asserted, in an illiquid company and in trusts largely offshore and in Nigeria. Roberts J made a detailed order for the instruction of a single joint expert of the husband's business interests.

32 Thus, so far, the parties had attended three appointments in which husband's specialist family lawyers who had previously been instructed in 2010-2011 had not sought to argue that the wife's claim had been dealt with.

33 The matter next went before Mostyn J on 1 December 2017. In the position statement prepared on the husband's behalf, he by that stage being represented by leading as well as junior counsel, there was no assertion that the wife had no surviving claim. I am told that it was at Mostyn J's instigation that the order emerged that the husband should issue his application in the terms which I have already mentioned at the start of this judgment. It is, of course, for the husband alone to decide what application, if any, he wishes to issue.

34 As I have already stated, it is clear to me that the order of 2011, made in judicial separation proceedings, was not intended to cover a subsequent divorce, for the reasons that I have already explained. My acceptance of that is, of course, fortified by the fact that at no stage until 2018 is there any suggestion made that the 2011 order was intended to cover a divorce settlement. And as I said earlier, that evidence of the husband is dependent not on any independent recollection that he may have, but is a reconstruction from the documents which I find to be an erroneous reconstruction. The husband has failed to produce any satisfactory evidence that the 2011 comprise was intended to cover claims in divorce. The burden is upon him to do so, but I find as a fact that the 2011 agreement was not intended to cover a divorce, and that neither party thought that it did cover a divorce.

35 That is not the end of the matter because I have to consider what has loosely been called "the Henderson argument," namely that the wife should in the judicial separation proceedings have made her full financial claim covering her entitlement in all respects arising from the marriage.

36 I start by referring to the Family Procedure Rules 4.4(1)(a) and (b). Rule 4.4 of the Family Procedure Rules reads as follows:

> "(i) Except in proceedings to which parts 12 to 14 apply, the court may strike out a statement of case if it appears to the court;
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the application;
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings."

It is (b) that the husband relies on in this case.

37 In the practice direction, explanation is given by way of examples within the rule. 2.2 reads as follows:

> "An application may fall within Rule 4.4(1)(b) where it cannot be justified, for example, because it is frivolous, scurrilous, or obviously ill founded."

38 2.5 points out the examples are intended only as illustrations. I accept that if I were to find that the application for financial remedies was vexatious, duplicative or had been the subject of prior compromise, that would be likely to fall within 4.4(1)(b).

39 The use of FPR 4.4(1)(b) was considered by the Supreme Court in *Wyatt v Vince* [2015] UKSC14. I refer to the judgment of the court, given by Lord Wilson, and in particular paragraph 27 where he says:

> "Although the power to strike out under Rule 4.4 (1) extends beyond applications for financial remedies, for example, to petitions for divorce, no doubt it is to such applications that the rule is most relevant. The objection to a grant of summary judgment upon an application by an ex-spouse for a financial order in favour of herself is not just that its determination is discretionary, but that, by virtue of s.25 (1) of the 1973 Act, it is the duty of the court in determining it, to have regard to all the circumstances and, in particular, to the eight matters set out at subsection 2. The determination of an application by a court which has failed to have regard to them is unlawful. The meticulous duty cast upon Family Courts by s. 25 (2) is inconsistent of any summary power to determine either that an ex-wife has no real prospect of successfully prosecuting her claim, or that an ex-husband has no real prospect of successfully defending it. Indeed, were the latter conclusion to be appropriate, how should the court proceed to quantify the ex-wife's claim?"

40 A series of subsequent cases were cited to me but to which I need not refer in this judgment. They make it clear that it is a jurisdiction to be used very sparingly. But, I accept that the jurisdiction survives and the application of the principle in Henderson, may, in an appropriate case, provide an example of a case that might perhaps be struck out under Rule 4.4(1).

41 The principle in Henderson was first formulated by Vice-Chancellor Wigram in *Henderson v Henderson* [1843] 3 Hare 100, namely that a party is precluded from raising in subsequent

proceedings matters which were not but could and should have been raised in the earlier ones. The Vice-Chancellor explained it thus:

> "I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction. The court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in context, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

42 Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1 explained the principle in this way:

> "*Henderson v Henderson* abuse of process, is now understood, although separate and distinct from cause of action, estoppel and issue estoppel, has much common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of a party and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in earlier proceedings if it was to be raised at all."

43 I conclude this canter through the law by reference only to the reminder given by Lord Wilberforce in *Brisbane City Council v A G for Queensland* [1979] AC411. When giving the advice of the Judicial Committee of the Privy Council, he explained that the true basis of the rule in *Henderson v Henderson* is abuse of process and observed that it "ought only to be applied when the facts are such as to amount to an abuse: otherwise, there is a danger of a party being shut out from bringing forward a genuine subject of litigation."

44 In my judgment, the argument that the wife should have made her full claim in judicial separation proceedings is unsustainable:

1. There was no obligation to do so. Indeed, as the husband accepts in the passage in his own statement which I have already read, the anticipation of the parties, was that they were to remain married.
2. Divorce and judicial separation are not the same cause of action. Divorce terminates a marriage; judicial separation does not.
3. On the facts of this case, the wife did not have the material upon which she could assess the value of her sharing claim in 2011. The husband knew that as much as the wife. He had not provided the information. True it is that she might have been able to obtain disclosure via court orders, but she was under no obligation to do so. She was entitled to say:

> "We are still married and I want to remain married to you for many years, perhaps the rest of my life, and for as long as that remains the case, I am content to have my claims dealt with on a needs only basis."

4. Both parties were or must have been fully aware on the advice from their own lawyers that the wife's entitlement claim had not been dealt with.

5. They must both have been aware, as the correspondence in 2015 shows, that there were matters that still had not been dealt with.
6. There is not a shred of evidence that the wife misled the husband in any way at all.
7. Nor do I find there is any acceptable evidence that he was in fact misled in any way.

45 In all the circumstances, therefore, the application fails for all the reasons that I have given. I end with just one plea to the parties. They are now in their late 70s. It does not appear to me that either is in the best of health. This litigation has been going on for three years. They should not be spending time locked in litigation when there is plainly more than ample funds available in this case for it to be settled. I do urge them to consider mediation to try and bring matters to a closure.

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