IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2019] EWHC 2152 (Fam)

No. FD11D03744

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 12 June 2019

Before:

MR JUSTICE COHEN

(**In Private)**

B E T W E E N :

NICHOLA ANN JOY — Applicant

- and -

CLIVE DOUGLAS CHRISTOPHER JOY — Respondent

MR D. SOKOL appeared on behalf of the Applicant.

MR N. WILKINSON (instructed by DWFM Beckman Solicitors) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE COHEN:

1 This hearing comes about as a result of the unfortunate demise of Sir Peter Singer before giving judgment in a case which he heard in December 2017. In consequence, the matter has had to be re-argued before me. The issue is whether or not I should determine, almost certainly by its dismissal, the wife's application for capital orders against the husband or whether I should further adjourn her capital claims.

2 The background is as follows: the husband is aged 60, the wife is 52. They cohabited in 2003 and had three children now aged 13, 12 and 8 respectively. They married in 2006 and separated in 2011. Divorce proceedings were protracted as a result of the husband denying the jurisdiction of the courts of England and Wales, until eventually accepting it. The financial remedy proceedings came before Sir Peter Singer for trial in 2015.

3 The background of the parties' worth is set out in the judgment dated 28 August 2015 at paras. 21 and 22:

> "21. The substance of the wealth in this family's background derives from H's business activities commenced since these parties first met and continued (if not indeed, as W would have it, commenced) during the period of cohabitation and marriage. The bulk of it originally came from operations conducted through an offshore company LCAL Inc (LCAL), the shares in which (TB noted) TB told Sofia Moussaoui (SDM, the partner at Beckmans who acts for H) at a meeting (their second, in Hong Kong in April 2014) had always been registered with RFG as trustees for NHT, and never in H's name.
>
> 22. LCAL was incorporated in June 2004 as the vehicle through which H conducted (as the driving force, albeit initially with outside investors) an innovative and in due course very lucrative commercial airline leasing business. H's case is that it was not until about 2007 that the company began to make significant amounts of money. In May 2013 H estimated the value of the NHT assets to be £70m, subject to over £21m of contingent liabilities in respect of borrowing facilities with EFG Private Bank (EFG) which since about 2007 and still at that point were available to H."

4 In those proceedings the wife sought a lump sum of £27 million in the hope that she could prove that assets which the husband had placed, or caused to be placed, in a trust called NHT were an available resource to him. The husband claimed to have no assets available to him, notwithstanding his lifestyle. The judge said this:

> "83. On the face of it, H has been wiped out. Unless he manages to sell the Piper aircraft and to keep the proceeds immune from attack by the trustees he is left with no free assets of any substance but only a variety of more or less pressing liabilities. His income situation is as dire. That at least could be ameliorated were he willing and able to take up employment, but a number of obstacles stand in his way which he says prevent that from happening in the immediate future. Meanwhile he hopes to be able to continue living at Château T with the children, it would seem indefinitely, and spoke in terms of retaining it as the family home long-term, even though for fiscal reasons he might be spending more than half the year based in Switzerland or in Monaco or wherever, while the children in three years' time also might be boarding full-time at schools in England. Quite how this scenario might be

achievable without being underwritten, one way or another, from trust resources it is difficult to contemplate."

It was the husband's case that he has been, since November 2013, permanently excluded from the trust.

5 The judge formed a dim view of the husband's evidence. At para.149 he said:

> "The consequence is that I must approach every relevant and significant assertion made by H with extreme caution. He showed in the context of the jurisdiction proceedings the extent to which he would duck and dive, weave and contrive."

6 The judge took the view that the husband's exclusion from the trust was a deliberate device to try and defeat the wife's claim, and he said this:

> "166. Against that background TB clearly conceived and took steps to put into operation the plan to exclude H permanently from all benefit under NHT in reaction to the threat posed by W's claims, and the risk that they might result in orders affecting trust assets. His and H's case is that he embarked on that without consultation with and without informing his long-term client and the settlor of NHT, the person who had made such valuable contributions to the development not only of the trust's first US$100m but also to the profits made through the Car Portfolio. It is clear on the evidence that this plan was hatched before and was independent of the EFG account closure (for instance having regard to the fact that the application for sanction of the proposed deed reached Bannister J in mid-October 2013). In the judgment he gave in November he recorded that the application "is designed to ensure that the assets of the Trust are not available to the Court in the English proceedings."

7 The judge's conclusions are set out in paras.170 to 177:

> "170. The evidence is now complete and so is my conviction that W's suspicions and her case against H and TB/RFG and the Trust are made out. Their position is an elaborate charade, the stage management of which has been conducted ruthlessly and without regard to cost. I do not need to speculate how TB plans to re-establish the access H enjoyed to capital and income which previously was his albeit via elaborate financial arrangements designed no doubt initially for fiscal purposes to distance him from their source. I do not need to consider whether the exclusion deed could or could not be upset, nor whether the undisclosed opinions taken from leading Chancery counsel on the topic by H are soundly based if, consistent with H's case, he could not even have made the trust deed available for their consideration. I am confident that when the time is ripe and there is the will to get H out of this impasse where seemingly he is stuck in what on any realistic view would be inextricable penury, TB will find a way.
>
> 172. There may be other routes, but it does not follow that I must follow them. My conclusion is clear, that H will far more likely than not via car-related employment with an NHT entity once again within the foreseeable future be in a position to support a very affluent lifestyle.
>
> 174. The determination with which NHT assets have been protected and the vigour with which TB has made clear that none will be either coerced or encouraged to go in W's direction are undeniable. Were I in a position to make orders directly against

> NHT or its assets (which on the findings I have made I do not believe, as a matter of law, I could) it is clear W would face an uphill and most likely doomed and interminably Sisyphean struggle to collect. Were I to make a lump sum order against H I can be sure that would not encourage TB and RFG to make the necessary funds available to him with which to meet that obligation.
>
> 175. So (as I canvassed I might during the course of the evidence and with Mr Pointer as he made his closing submissions) I shall adjourn W's claims for a lump sum and for any adjustment of property order (save that I will dismiss her claims to vary NHT on the basis it is a nuptial trust, and for the transfer to her of cars from the Car Portfolio which I have found are not his).
>
> 176. I am mindful of cases where it has been said that capital claims should not be left indeterminately unresolved, but there are hard cases (a category within which this case certainly falls) where fairness and justice must prevail over the normal desirability of finality in litigation. I refer as examples to *Hardy v Hardy* [1981] 2 FLR 321 and *MT v MT (Financial Provision: Lump Sum)* [1992] 1 FLR 362. In my judgment it is certainly foreseeable that an accommodation will be made to give H access to part of the millions held within NHT."

8 The judge accordingly adjourned the capital claims of the wife and made a periodical payments order in the sum of £120,000 per annum backdated to November 2014. That order remains in place to today and there is no application by the husband to vary it before me.

9 Mr Wilkinson, who appears on behalf of the husband, relies on para 174 to make the point, somewhat unattractive though it is, that as the judge found that the trust would not co-operate in producing money for the wife, or for the husband to give to the wife, it must follow that the adjournment which Sir Peter Singer granted, let alone any further adjournment, should not have been permitted.

10 The judge concluded his judgment by asking the question at para 207 as follows:

> "At [5] of this judgment I set out what I perceived as that primary issue of fact--whether H's plight [his asserted permanent and irrevocable exclusion from benefits from the trust] is genuine or a contrived façade."

And he answered it at as follows:

> "209. It would be tedious were I to give even half an explanation why those three suggested virtues are not, in my view, even half-truths rather than the whole truth and nothing but. Who would think that my underlying conclusion was that there was throughout this case corrosive collusion between H and TB to distort the reality of the relationship between H and the millions in the Car Portfolio elsewhere within NHT, and that that conclusion could be dissipated by such bland assertions. One would think that H had throughout been meticulously compliant with the fundamental obligation to give full, frank and clear exposition of his financial situation: whereas the reality as I have found it to be is that from the very outset he has deliberately set about obscuring the true situation as to past, present and future.
>
> 210. H's blatant dishonesty in relation to these proceedings cannot so easily be finessed away. The brazen declaration in 2015 (for the first time) that not only had the witness AC been confused and mistaken in April 2013 as to when they had last

met before that moment, but that he too had been so confused and mistaken as to admit that AC's evidence was correct and thus that he had lied, was breath-taking."

11 Remarkably, just three months after the order was finalised, the husband applied to vary downwards the periodical payments order. The proceedings took until July 2017 to come on. The husband claimed, in those proceedings, that he was living hand-to-mouth, reliant on loans from his supporters. The judge was not impressed, and in his judgment dated 11 August 2017, some six or seven weeks after the hearing, the judge said this:

> "49. I am however not persuaded any more than I was in 2015 that H faces the current and seemingly continuing dilemma he depicts. I have read nothing in H's written evidence nor heard anything in the submissions made on his behalf to dissuade me from the unchallenged and now unchallengeable conclusions regarding his bad faith at which I arrived in August 2015. I refer again to [170], [172], [177] and [178] of the August 2015 judgment, all already replicated herein. In particular I am not persuaded by any of this evidence or those submissions that some epiphany has overtaken H so that he should now be trusted as a man whose evidence and overall presentation can be accepted as gospel.
>
> 50. I have already referred to the total lack of his transparency in relation to the genesis of the SCo arrangements. Quite how or when H might hope to repay all or any of the €433,000 in personal loans he has received between July 2013 and February 2017 is not just problematic but inconceivable on his case unless his fortunes change dramatically for the better. That will predictably remain the dilemma unless at some stage funds flow in his direction from his connection with Anthology or some other NHT-related enterprise.
>
> 51. I therefore see no reason to dissent from the prognosis at which I arrived in [170] and [172] of the August 2015 judgment. I remain of the view that H's apparent difficulties will be resolved at some point (including resolution of the $7 million debt TB claims he owes NHT and as to which I made some trenchant findings at [45], [48], [49], [73 to 83] and [143 to 148]).
>
> 69. At the risk of repetition, this ignores the thrust of my unchallenged findings implicating H and TB in a dishonest attempt to contrive a situation in which they hoped to defeat W's claims. Nor does the existence of this contract detract from my conclusion that there will be a second day of reckoning sometime, somewhere, somehow whereby H's allegedly disastrously deflated fortunes will be repaired and he will, in particular, be relieved of what I found to be the artificially contrived obligation to pay $7 million or thereabouts to NHT.
>
> 70. At some stage, and one hopes it may be sooner rather than later, it must make commercial and pragmatic sense for W to offer to accept a much more modest sum than she tilted at in the main hearing, and for H and for TB to find a means to make that available and thereafter to be free to dismantle the cumbersome and no doubt the distracting protective façade which has been erected."

The variation application was dismissed.

12 By his 2015 order, Sir Peter Singer had adjourned the wife's lump sum claim and ordered the husband to provide the very limited information set out at para. 13 of the order. I am told that the judge refused the wife's application to enlarge the requirement of the provision of information. The judge had ordered that the wife's capital claims be restored for hearing

in 2017, and they came before him in December 2017, rather than the summer as had been anticipated. That delay was caused by the need to deal with the variation application which the husband had issued.

13 Before leaving the 2015 order, it is right that I should also mention that by para.19 of the order the judge ordered the husband to pay £334,263 towards the wife's costs, all of which remains unpaid.

14 Following the death of Sir Peter, the matter was allocated to me and on 29 January 2019, I gave directions which included an order that each party file an updating statement, including the provision of documentary evidence in support of their alleged debts.

The wife's statement:

15 She states that her sole income is what the husband provides. Under the order for periodical payments he should, by now, have paid £550,000 since November 2014 less a credit for any payments that he had made towards the wife's rent of her home in France or towards the children's periodical payments in accordance with the order made in France. I am told that he is now up-to-date with the relatively modest child support required to be paid in France, albeit that the payments have not been made in any regular way. There is a dispute as to what amounts he has paid towards her rent. Also, he has made one payment of €80,000. But overall, he is substantially in arrears.

16 The wife's total debts are enormous. The biggest sum by far being what she owes her lawyers which, of course, would have been substantially defrayed if he had paid the costs ordered in 2015. Her financial position is dire to the extent that for much of last winter the wife's home, in which the two children spend half their time, was without water or heating.

The husband's statement.

17 This sets out that in November 2017 he lost his employment, which he, rightly or wrongly, blames upon the wife. Secondly, that since December 2017 the eldest child has been living in his care. The younger two children continue to alternate week-in and week-out with each parent in France. Thirdly, that the eldest child is now at an English public boarding school with the school fees paid by a man whose initials are RS, and that the husband divides his time between spending weeks at his very comfortable chateau in France for the week when the younger two children are with him, and in his sister's flat in Belgravia for the week that he is in England.

18 Fourthly, he has massive loans according to the schedule that he has produced of monies received from supporters. Excluding what RS has paid to the husband's solicitors, the detail of which I am not told, the total of those gifts and loans since July 2013 is €845,000; and €342,000 have been received in the period between January 2018 and April 2019 alone.

19 The wife's description of the husband's lifestyle as lavish with exotic holidays and fast cars may well be exaggerated, but it is plain that he is living in two very comfortable homes in England and France, with a housekeeper in France, and he is not subject to anything close to the level of deprivation which the wife is suffering.

20 The documents that he has exhibited evidencing the loans show them to be repayable without interest at various dates over the next few years, the last being in June 2022. The husband made it clear in his 2017 statement that he does not lightly take out loans and that repayment of them at the due date is an obligation he takes seriously. In his words, "I do not

like to commit to things I cannot pay." Thus, says the wife, the husband must expect to receive funds over the course of the next three years, as how else would he be able to make the repayments. In particular, one of his two most generous supporters, if not the most generous, is RS, his close friend who happens also to be the protector of the trust (NHT).

21 RS, says the wife, would only advance funds if he could be confident of repayment. Thus, says the wife, she would wish her capital claims to be further adjourned until July 2022.

22 The husband says:

1. There is no evidence whatsoever that the trust will provide him with any monies. Indeed, he says all the evidence is to the opposite effect.
2. A continued adjournment offends the clean break principle and the overriding objective.
3. An adjournment is against the body of authority on the adjournment of claims.
4. It is contrary to the European Convention on Human Rights.

23 This case must be seen against its factual background:

1. The judge found that the husband settled a trust with a very large sum of money.
2. He and his children were the sole beneficiaries of the trust until he was irrevocably excluded in November 2013 after the marriage had broken down, and although the children are not currently beneficiaries they could be restored as beneficiaries as they are not excluded. There are no other beneficiaries at the moment.
3. The judge found the husband's evidence to be blatantly dishonest and designed to obscure the past, present and future.
4. The judge was confident that in some manner, and at some time which he could only surmise, the husband would benefit again from the trust.
5. The wife has nothing and is destitute, or near to it.
6. The husband on the other hand, through the assistance of his friends, continues to enjoy a comfortable life.

24 It is not appropriate for me to speculate how Sir Peter Singer might have determined the matter if his judgment had been produced following the hearing in December 2017, and I refuse the invitation held out to me by Mr Sokol, on behalf of the wife, to draw conclusions from an email that Sir Peter sent to the parties. But in the light of his conclusion in the 2017 judgment in the maintenance proceedings, it might be thought unlikely that he would not have granted a further adjournment. However, I am looking at it now in 2019, approaching four years after the judgment of 2015 which adjourned the wife's capital claims.

25 I, of course, acknowledge the statutory requirement to seek to achieve a clean break, as the husband repeatedly urges upon me. But, as he does not seek to challenge the order that he continue to pay periodical payments at the rate of £120,000 per annum, that goal is unachievable.

26 The husband says that the wife's claim to capital can be maintained by her ability to apply to capitalise the maintenance award as and when she chooses, and when the husband has means. But that runs the risk of constraining her claims in accordance with *Pearce v Pearce* [2003] 2 FLR 1144. Her lump sum should be at large and not limited to a capitalisation of what may by then be a modest periodical payments order. I have already set out what Sir Peter Singer said in 2015 at para.178 of his judgment.

27 Those words are as true now as they were in 2015. And when Mr Wilkinson refers to the husband's human rights it should be remembered that the wife has rights too, including having her claims properly determined.

28 Mr Wilkinson referred me to eleven authorities on adjournment, excluding this case and the recently decided court case of *Quan v Bray and Ors* [2019] 1 FLR 1114. I am not going to go through them all but suffice it to say that every one of them is a case either: (i) where there was an expectation of inheritance; or (ii) an expectation of a bonus or gratuity. None of those other cases, with the possible exception of *MT v MT* and *Quan* to which I will return in moment, involved serious misconduct by the payer. Indeed, some of them are probably not properly described as adjournment cases as in both *Milne* [1981] FLR 286 and *Priest* [1980] FLR 189 the wife received either a fixed sum or percentage of a sum, albeit with the payment deferred for what may have been many years until the event occurred.

29 In *MT*, a decision of Bracewell J reported at [1992] 1 FLR 362, the judge at page 368 said this:

> "I have considered all these authorities with care, and I am satisfied that I do have a discretionary power to grant an adjournment of the wife's application for a lump sum, and I further find that it is appropriate for me to exercise that power in favour of the wife. I am satisfied that justice between the parties demands such an adjournment in the unusual circumstances of this case. My reasons for exercising discretion in favour of the wife are as follows:
>
> 5) The attitude of the husband towards providing for his wife gives me serious concern as to her financial future if she is not permitted to apply for a lump sum at a later date. The husband's even gone so far as to invite the Swiss bank to call in the loan, which would have had the effect of rendering the wife and son homeless. He has written of forcing the wife, by financial pressure, to return to Germany against her wishes. Reliance on periodical payments places her in a precarious position. They can only be capitalised on the application of the payer, which the husband, on my judgment, would never do, since he objects to the wife having any capital in any circumstances. To restrict her to periodical payments only would put her at the mercy of the husband, who I would find would seek actively to minimise his responsibilities."

And so, her capital claims were adjourned until the death of the 83-year-old father of the husband, whenever that occurred.

30 In *Quan v Bray*, Mostyn, J after referring to this case, said at para.52:

> "I have reached the same conclusion in this case. It is equally exceptional, and it is foreseeable that at some stage in the future the husband will have accumulated sufficient sums to make a proper clean-break capital settlement on the wife."

Mostyn J's adjournment in that case was without any limitation of time.

31 The husband says, well, it is all self-defeating to keep the wife's claims open. He has received nothing, nearly four years on, from the trust, why should that change? Mr Sokol, in reply, rightly refers me to para.70 of the 2017 judgment, already quoted, where Sir Peter

Singer set out the obvious good sense of the husband finding the means of settling the wife's claims to their mutual benefit.

32 It is also apposite to refer to the following paragraph which reads:

> "71. The trustees have asserted that the welfare of the children (currently, so far as one knows, the only potential beneficiaries of this multi-million pound trust) is their prime concern, and so it would be entirely normal and natural for the trustees to permit the children's parents to receive some allowance or contribution to assist with their subsistence (including their accommodation costs and overheads): and that notwithstanding that H is no longer a permissible recipient of such bounty from NHT in his own right. Indeed it might be difficult for them to justify withholding such benefits from the children if they credit H's presentation of his apparently irremediable plight. A matter, again, for the trustees."

33 Dismissing the wife's claim against this background is a matter of last resort. I am not so pessimistic about the future ability or likelihood of the husband receiving funds that I am prepared to take that step. I therefore adjourn the wife's capital claims, but I will say this: that they are to be dismissed unless an application to restore them is made by 31 July 2022. For the avoidance of any doubt, what is required is that an application is made, not that it be heard, by that date.

34 Legal costs in this case are massive. I have not been given any composite total, but I suspect the two sides' costs must be closer to £2m than to £1m. I accept that further argument should be avoided if possible. What I am going to do is to order the husband to provide the information that will enable the wife to form a view as whether or not to restore her claim in or before July 2022. The provision of information will be far more extensive than before.

35 I make it plain that if the husband does not provide the information, he will only have himself to blame if the application is restored. The same applies to him answering any questions that the wife asks of him to explain what has been provided. I will turn at the end of this judgment to consider the terms of the further information with counsel.

36 I refuse the wife's application that I should admit the husband's statement in these proceedings into the French criminal proceedings that are ongoing there. His statement in these proceedings was required by my order, and I should not put him a position whereby he might have been required to incriminate himself.

37 That concludes the main part of the judgment and I now come to the question of the provision of additional information. Mr Sokol has provided a very detailed list of information that is sought. Mr Wilkinson has provided a written response, for which I am grateful. I shall now consider this issue by reference to those documents.

AFTER DISCUSSION

38 By 1600 hours on the last weekday in April 2020 and annually by the same date up to and including April 2022, the husband shall set out clearly in writing, and deliver to W, details with supporting documentary evidence of any and all changes to his capital income and financial status including, but not limited to: (a) as is already drafted and which, as I see the exchange, is not in dispute between the parties; (b) will read as follows: "A statement supported by documentary evidence of all income of any nature received from 1 June 2019."

(c) will be as drafted but at the end I add these words: "In each instance of (a) to (c) above, bank statements evidencing the same are to be provided. (d) will be as drafted.

39 I remove (e) in its entirety. I amalgamate (f) and (g) to read as follows: "For the information provided in April 2020 the husband shall provide a list of all assets, tangible or intangible, which he has owned since 1 June 2017, exceeding in value the sum of £10,000." By way of explanation, I limit that to the first year because the introduction requires him to report on any changes thereafter.

40 What is drafted as (h) will read: "A list of all real property wherever situated over which H has directly or indirectly an interest, control, or the use thereof from 1 June 2019 to-date, including details of ownership and charges thereon so far as known to the husband."

———————

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge