Judgments

W v W and another

[2015] EWHC 1652 (Fam)

Family Division

Mr Justice Blair

10 June 2015

Family proceedings - Costs - Order for costs - Order for costs - Following divorce and financial remedies hearing between H, W and second respondent L, W's half sister, costs falling to be decided - Whether and to what extent W and L to pay H's costs - Family Procedure Rules 2010.

Judgment

Patrick Chamberlayne QC and Christopher Wood (instructed by **Blandy and Blandy LLP**) for the **Applicant**

Tim Bishop QC and Geoffrey Kingscote (instructed by **Payne Hicks Beach LLP**) for the **1st Respondent**

Philip Marshall QC and Dakis Hagen (instructed by **Withers LLP**) for the **2nd Respondent**

APPROVED JUDGMENT

I DIRECT THAT PURSUANT TO CPR PD 39A PARA 6.1 NO OFFICIAL SHORTHAND NOTE SHALL BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS HANDED DOWN MAY BE TREATED AS AUTHENTIC.

MR JUSTICE BLAIR:

1. This decision deals with the costs of the claim brought by the applicant husband ("H") for financial remedies against the first respondent, his wife ("W") arising from their marriage and subsequent divorce proceedings. The second respondent ("L") is W's half-sister. This decision follows a hearing on 15 May 2015 dealing with costs and certain other consequential matters that arose out of the court's judgment. Judgment was given on 13 March 2015 following a final hearing of the financial remedies at the end of January/beginning of February 2015. This decision is handed down in anonymised form.

2. As to the facts, in summary, H and W married in Moscow in 2003. There is one child of the marriage, which broke down in 2013. By then, the parties had moved to England, where H comes from. He has never had any personal wealth--the financial resources all come from W.

3. In broad terms, there were two main issues at the final hearing. H claimed that W had substantial undisclosed assets in Russia, and that four properties in England held in the name of L were held by her on trust for W (who as stated is her half-sister) beneficially. The court found against H on the first issue, and in favour of H on the second issue.

4. The court held that the financial resources were £21,648,864. This figure took account of the respective outstanding liabilities of H and W for their legal costs. After a deduction of 25% in respect of pre-marital wealth, the court ordered the payment by W to H of a lump sump of £7,556,725, being half of the balance in addition to the transfer of a property worth £853,125 net. At the hearing on 15 May 2015, directions were given for the payment of that sum, which carries interest at 5% from a date four months after judgment on 13 March 2015.

5. The court's judgment may be compared with the parties' open proposals for settlement put forward shortly before the final hearing. H proposed that W pay him a lump sum of £25m, which he said represented what he might realistically hope to enforce, rather than his full entitlement. W proposed that she pay H a lump sum of £3m, plus the interest in a house in their joint names (worth about £853,000), less her legal fees and L's legal fees. The court's judgment, therefore, awarded H considerably more than W had proposed paying, but considerably less than he said he should receive.

6. The legal costs are substantial. In the parties' respective statements of costs filed prior to the final hearing, H put his costs at £1,060,208.09 (not including any costs of implementation), W put her costs at £1,299,030.23, and L put her costs at £1,241,016.

7. The parties' positions on the costs issues are as follows. In his written submissions for the hearing on 15 May 2015, H sought an order that W and L on a joint and several basis pay him a "stated amount" of £1,020,082 in respect of costs. This was said to be equivalent to 90% of his total costs of £1,133,424, which includes £14,361 incurred in possession proceedings brought against him by L in the Oxford County Court, and £20,000 anticipated enforcement/implementation costs. The term "stated amount" comes from CPR Part 44(6)(b), under which the orders which the court may make under the rule include an order that a party must pay "a stated amount in respect of another party's costs".

8. W submitted that in accordance with the general rule in financial remedy proceedings, the court should make no order as to costs.

9. L submitted that there was no justification for an order for costs which was sought (in effect) on an indemnity basis, and that no order for costs should be made against L in any case, since H's applications for a declaration in relation to the four properties were "family proceedings" to which the "general rule" in CPRr.44.2(2) that an unsuccessful party will be ordered to pay the costs does not apply. Alternatively, it was submitted that any costs order should be limited to the proceedings in relation to the four properties, and liability should be shared with W.

10. Among their objections to H's position as stated in his written argument, W and L pointed out that there was no detailed breakdown of H's costs. Further, until shortly before the hearing, the draft order circulated on behalf of H recorded that there should be no order for costs as between H and L. It is

common ground however that this was due to the temporary disability of junior counsel for H.

11. At the hearing, H did not press his application for a summary assessment. He did however press his alternative position, which is that the court should award him costs to be assessed on the indemnity basis ordered against W and L on a joint and several basis. H also contended for a payment on account, which it was submitted should be in a substantial amount.

12. There is no dispute as to the applicable rules.

(1) As between H and W, the general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party (FPR 2010 r.28.3(5)).

(2) Under FPR rule 28.3, the court only has the power to make a costs order in financial remedy proceedings when this is justified by the litigation conduct of one of the parties. When determining whether and how to exercise this power the court will be required to take into account the list of factors set out in that rule (Practice Direction 28A para 4.3).

(3) These factors are failure to comply with the rules, any open offer to settle, whether it was reasonable to raise a particular allegation and the manner in which it was pursued or responded to, any other aspect of a party's conduct in relation to proceedings which the court considers relevant, and the financial effect on the parties of any costs order.

(4) H's application for a declaration in relation to the four properties is not financial remedy proceedings as it is proceedings for a financial order within the terms of FPR 2010 r.28.3(4)(b)(i).

(5) Accordingly, the general rule that the court will not make an order for costs (as per FPR 2010 r.28.3(5) does not apply.

(6) However, H's applications for a declaration in relation to the four properties are family proceedings and so FPR 2010 r.28.2(1) applies.

(7) FPR 2010 r.28.2(1) indicates that the general rule in CPR 1998 r. 44.2(2) to the effect that an unsuccessful party will be ordered to pay the costs does not apply. The effect is sometimes described in the cases as the court starting with a "clean sheet".

(8) CPR 1998 r.44.2(4)-(5), which does apply, provides that in determining the costs issue the court will have regard to all the circumstances including conduct, success, and admissible offers.

13. There is also no dispute between the parties as to the principle that substantial and material non-disclosure by a party may lead to a costs order being made against that party (see *M-T v T* 2013 EWHC 2061 (Fam) at [121], *M v M* [2013] EWHC 3372 (Fam) Eleanor King J, *US v SR* [2014] EWHC 24 (Fam) at [57] et seq. Roberts J).

14. Where the "clean sheet" position pertains, as it does in relation to the declaration in relation to the four properties (which, as explained, are "family

proceedings" but not "financial remedies proceedings"), there was some discussion as to whether the success or otherwise of a party should be taken as the "starting point". In *Baker v Rowe* [2010] 1 FLR 761, there was a difference in emphasis between Wilson LJ at [25], and Ward LJ at [35]. However, the matter was settled (in this court's view) in *Solomon v Solomon* [2013] EWCA Civ 1095 at [22], where Ryder LJ states that, "The starting point for what are described as "clean sheet" cases is that costs follow the event". In any case, it is not in dispute that this is an important factor for the court to take into account (on the facts, Ward LJ treated it as a factor of "overwhelming weight" in *Baker v Rowe*).

15. The parties' arguments may be summarised as follows. H submits that W has been guilty of severe litigation misconduct in concealing the true ownership of the disputed properties, persisting in lies at trial, relying on false documents, and subjecting H to cross-examination on the basis that he was the liar. W, it is submitted, has subjected H to two sets of legal teams, ran a "post-nuptial" agreement argument which was bound to fail, and persistently failed to comply with the first and most important court order, namely to make full and frank disclosure of her assets. As indicated, H submits that W and the second respondent should be ordered to pay his costs jointly and severally and on an indemnity basis. As regards L, he says that she went along with her sister's deception, and gave false evidence to the court in an attempt to mislead it.

16. W's position is that the general rule as to no order as to costs is of critical importance. The court is entitled to adopt an issue based approach to the costs, but it is also quite justified in adopting a broad approach in regarding both parties as being equally responsible (*Evans v Evans* [2013] 2 FLR 999 at [204], Moylan J). In the event, the court's award was significantly closer to the outcome for which W contended than that which H sought. H lost on numerous factual issues, and in particular on whether W had undisclosed assets in Russia, and whether she was at all times the 100% owner of a family company. His claim that she was worth up to US$500m was wild and reckless. W could have sought a costs order for part of her costs against him, but this would dishonour the no-costs principle which governs financial remedy proceedings.

17. L's position is that H cannot justify seeking an order for costs against her in relation to issues which do not concern the four properties. She argues that H could have asserted that the properties were W's resources which would be made available to her if she asked for them. He failed to achieve anything like the £25m lump sum award he sought in his open offer. There should be no order for costs made against L. Alternatively, the costs should be limited to those referable to the declarations in relation to the four properties, limited to the pleaded claims only, and reduced to take account of abandoned sub-issues. There has been no level of unreasonableness so as to justify costs on an indemnity rather than on the standard basis.

18. The court's conclusions are as follows. As to non-disclosure, the judgment states that there had in fact been considerable disclosure by W, though it had not fully extended to the extent of the assets held by the family company. The issue was not so much one of hiding assets, but more as to whether assets held by parties were to be regarded as W's assets. In those circumstances, non-disclosure is not a determinative factor on costs.

19. Nor does H's submission relating to his cross-examination have much weight.

The fact that there were two sets of legal teams followed from the nature of the relief sought, and though the "post-nuptial" agreement argument was weak, it was a matter of legitimate comment that H was prepared to negotiate on the basis of an agreement which would have given him £3m plus a property worth £800,000, and it did not take up much time overall.

20. The court did not accept H's submission that W had substantial undisclosed assets in Russia. It was held that evidence of lifestyle did not support apparent estimations of wealth by the bank concerned, which were in any event inconsistent and unverified. H was right to treat the bank material as containing important evidence, but on balance it was of limited value in computing the financial resources. It was that evidence that gave rise to the asserted figure of US$500m, which bore no relationship to the court's computation of W's assets at just over £21m, or indeed H's open proposal.

21. On the other hand, the court largely accepted H's case that the four properties in England were held by L as bare trustee for her half-sister W. H's characterisation of their arguments is not however accepted. The assertion that L was the beneficial owner of the properties failed, but that does not in itself make it, as it was put, a "big lie". There were however other features of the case of W and L which are relevant (see below).

22. As to L's submissions, the court does not accept that it was unreasonable for H to claim that the four properties were W's assets as opposed to resources which were available to her. He was entitled to make this claim, and it succeeded. Nor does some lack of clarity in H's pleaded case have any impact on the costs, nor (as it was put) that allegations were "junked wholesale". The court does however accept her contention that, on any view, her liability should not extend to the costs of argument as to the Russian assets.

23. Because H did not succeed in his case that W had substantial undisclosed assets in Russia, but did succeed in his case that the four properties in England held in the name of L were held by her on trust for W, there is force in W's submission that the general rule should apply, and the court should make no order as to costs.

24. There are, however, substantial reasons why an order for costs should be made in H's favour in respect of the case relating to the four properties. These are as follows:

(1) As to property one, a significant part of the case put forward by W and L was based on a loan agreement and a later document cancelling the loan, both created in Russia. Although W called a Moscow lawyer who testified as to the contemporaneity of the two documents, there was a complete absence of supporting material relating to their creation. His evidence that the documents were prepared on the dates stated was not accepted, and the court concluded that they had the hallmarks of documents intended to explain the transfer of substantial funds to W to purchase the property in question, and its subsequent transfer to L. (The court did not however find that W had concocted them for the purpose of these proceedings, nor did it need to do so.)

(2) As regards properties two and three (which go together) the purchase price was routed through accounts with two different banks in Moscow, converted into roubles, then into euros, then back to sterling before

being paid to the conveyancing solicitors. The inference drawn was that this was to hide the source of the money.

(3) The fourth property in L's name was bought for more than £6m, but based on her answers given in evidence, the court held that it was a fair inference that she knew little about the property that she claimed to own beneficially.

25. Having regard to these matters, the court considers that W and L should pay a proportion of H's costs (see CPR r.44(6)(a)). The costs order will be joint and several, because these points were in effect advanced jointly. There is a case for ordering 50% of H's costs to be paid, but after careful consideration the court has concluded that this would not fairly reflect the fact that H failed on his case as to undisclosed assets in Russia.

26. In making its order, the court has taken account of the factors set out in FPR r.28.3 and in CPR r.44.2(4)-(5). Taking all relevant factors into account, the court's order is that W and L should pay 25% of H's costs, on a standard basis, to be subject to detailed assessment if not agreed. H's costs in the Oxford County Court are to be added to his costs in the High Court proceedings for these purposes.

27. The parties should try to agree the figures and avoid the need for an assessment. There is no point in incurring further legal costs when the broad parameters of the numbers are clear. The parties can safely assume that on an assessment on the standard basis, a proportion of H's overall costs would be irrecoverable. Experienced practitioners such as those acting for the parties in this case are well used to this kind of calculation.

28. So far as time for payment and interest on unpaid costs is concerned, this will be subject to the same provisions as the court has laid down in relation to the lump sum award. An order for payment on account will not be made in this case, because to be dealt with fairly, that issue should have been raised prior to the hearing, and it was not.