Neutral Citation Number: [2014] EWCA Civ 1767

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE PRINCIPAL REGISTRY

FAMILY DIVISION

(HER HONOUR JUDGE PLUMSTEAD)

Royal Courts of Justice

Strand

London, WC2A 2LL

Wednesday, 10 December 2014

B e f o r e:

LORD JUSTICE McFARLANE

Between:

RABIA

Appellant

v

RABIA

Respondent

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Mr V Le Grice QC and Mr Nichols appeared on behalf of the **Appellant**

The **Respondent** did not appear and was not represented

J U D G M E N T

(Approved)

LORD JUSTICE McFARLANE: This is an application for permission to appeal brought by a husband following the conclusion of financial remedy proceedings which were hotly contested between himself and his former wife. The final hearing of these issues was conducted before Her Honour Judge Plumstead sitting at the Principal Registry of the Family Division and the judge gave her judgment on 23 October 2013. Very promptly, the husband issued his notice of appeal, but unfortunately it has taken over a year to get to this stage, this stage being the oral renewal of the permission application following a refusal of permission on paper by Fulford LJ on 28 July 2014.

It is accepted that Fulford LJ on that occasion, for whatever reason, did not have the full clip of relevant documents. It is therefore understandable, both to me and in the submission of leading counsel, Mr Valentine Le Grice, that the judge considered that there was no reasonable prospect of appeal.

Happily, today I have had the benefit of the full skeleton argument prepared by Mr Le Grice, who did not appear below but leading Mr Nichols who did, a succinct counsel's note in support of the renewal and also the full submissions made by the opposing counsel Mr Firth, including a document that came to be known as Table J during the course of the proceedings in which Mr Firth had drawn together relevant entries from the husband's bank accounts in order to develop a picture of his overall wealth.

It is not necessary, happily, for me in this short judgment to descend to detail in describing the finances of the couple because much of the judge's findings in respect of that are not the focus of the potential appeal.

The background can be shortly stated. The parties met following or around the time of the ending of the husband's first marriage and also coincidentally around the time that he ceased to be employed by British Gas. The termination of his employment with British Gas triggered a pension entitlement which comes to feature to a modest degree in the determinations of the judge. Thereafter, the husband set up a company called Entrac Petroleum Limited, which I understand trains and provides technicians and consultants to work in the petroleum industry, much of the work being undertaken abroad.

The couple have three children aged between 11 and 14. One presents a serious parenting challenge because sadly of a diagnosis of ADHD and autism and there are concerns about the educational needs of another of the three children. The children live with their mother predominantly. The couple separated in March 2012 and thus the marriage was some 14 years or so in length.

The judge had to consider a number of properties. The values of them were agreed and only one of them was subject to any mortgage. That was a property in the wife's name and she had in recent times taken out a mortgage of £100,000 in order to provide funding for her legal costs. The other properties that were owned by the couple, including the former matrimonial home which was valued at £1.9 million, had been provided by wealth coming from the husband.

The hearing, which was listed for 5 days, lasted 7 and much of the time at the hearing seems to have been taken up with investigations into the husband's wealth, because his stated position before the court was that he did not have any personal interest in the company Entrac Petroleum Limited and indeed a house that he purchased in recent times following the separation and transferred into his brother's name was also a property in which he had no interest.

There had been a wholesale failure by the husband to provide any meaningful disclosure in the course of the proceedings. Thus, counsel for the wife had, as the judge describes, to undertake the exercise of painstakingly putting together a jigsaw puzzle of such information as was known in order to see if an overall picture could be discerned from the result of that exercise.

In the event, the judge took a broad brush to the distribution of assets, but stated that her aim was to provide an equal share for each, a 50/50 split.

The primary vehicle by which she achieved a distribution was to transfer the husband's half interest in the former matrimonial home to the wife. The judge also made a periodical payments order in favour of the wife which was open ended. As a result of the husband's conduct during the hearing, it was ultimately accepted on his behalf that, given the judge's findings, there would be an order for costs against him. The judge ordered costs on an indemnity basis which she assessed as £140,000.

Now, although this is an application for permission to appeal, the husband does not, as he might have wished to have done as a litigant in person, seek to challenge each and every one of the judge's findings and her conclusions. Mr Le Grice and Mr Nichols I suspect have brought wise counsel to prevail upon the focusing of the appeal. In effect, three separate points are taken.

The primary point concerns the overall distribution of assets as achieved by the judge's order. The point put simply is that of the, as I might call them, known knowns, that is the assets in this jurisdiction that were easily able to be valued and totted up and also figures indicating the profitability of the company over the previous 2 and half years, the judge's allocation of resources was not fair and produced an outcome which gave the wife 65 per cent of the assets and the husband only 35. Arithmetical calculations appear in the amended grounds of appeal and the skeleton to establish that percentage.

The point being made, and made firmly and clearly, is that the judge was wrong to assume further wealth that was not part of the schedule, the Table J, that is the accumulation of the known information.

How the judge got to the figure that she arrived at was to assume some notional value for the unknown unknowns, or at least the known unknowns, which was an attempt to evaluate wealth in the husband's hands as a result of the trading of the company in relation to its dealings abroad, about which there had been limited disclosure. This came to be known as the category B wealth in the proceedings. The judge was encouraged to approach this element of the case on the basis that is set out in Mr Firth's closing submissions, which, in the bundle I have, begin at page 164.

It is of course entirely proper for a court facing stoic non-disclosure such as this to consider drawing adverse inferences against the party who is failing to come clean and give open and full disclosure.

A useful description of the court's approach appears in the judgment of Mostyn J in the case of NG v SG [2011] EWHC 3270 (Fam). I am not going to labour this judgment by repeating what Mostyn J says there, but he sets out the stepping stones that a court must traverse before it can make an inference.

Although Mr Firth in paragraph 17 of his document itemises some dozen or more elements of the evidence which indicate non-disclosure, Mr Le Grice submits that these really are repetitious and lacking in substance when one looks at them in detail and that they are insufficient in terms of their solidity to provide the necessary stepping stones, to use my phrase, to allow a court to draw an inference.

The only one of the dozen or so that Mr Le Grice accepts does have some substance is (g) in the list which refers to the demonstrated track record of turnover and profits for the offshore company, which as I have indicated was known at least to a period of time for 2 and a half years prior to the hearing.

Those submissions were set out for the judge and she approached her analysis of the position in the following terms in this regard at paragraph 67 of her judgment:

"Mr Firth's submission is that the wife should take the most practical option, which is that she should be awarded, in addition to her own half, because it is in their joint names and there is a declaration of trust accordingly, she should have his half of the family home; and that in consideration of that being a property which, once the children are independent, will be in excess of her reasonable needs, that should form her security by way of pension for the future and therefore should compensate her for, one, a substantial reduction in the amount that she will receive by way of periodical payments, for which Mr Firth could have argued, had she taken less capital, and which would provide her with

security and security in an enforceable form, because I share Mr Firth's scepticism about his willingness to comply with any order of the court which will bring money other than from UK apparent sources, and which the court has to consider. Mr Firth divided his assertions as to:

ï capital as to what she can see, category (a) and

ï what the court should be satisfied there exists, category (b)

by proper inferences from the evidence that I have heard and from the deficiencies in disclosure which have been so sharply illustrated in this case. His analysis is an entirely sensible one and that is why he puts his case as it is."

The judge comes back to the position at paragraph 76, where in short terms she says this:

"So far as capital provision is concerned, I direct that the property known as "9 St Leonard's Road" be transferred forthwith into the wife's sole name, and insofar as any other claims for capital, all other claims for capital will be dismissed. She will therefore retain the other property in her sole name and 9 St Leonard's Road. He will retain the business onshore and offshore and his flat at 19 Sandgate House and the house at Peel Close, Woodley in Reading."

Although in the grounds of appeal it is argued that, whilst the judge sets out Mr Firth's submissions, she does not expressly say that she finds that the factors that Mr Firth sets out are established but then goes onto make the inference that she does. The clear implication of the judgment is that she did accept Mr Firth's submissions and that is why she made the order that he was arguing for.

The effect of the judge's stance in this regard is to introduce into the balancing exercise an additional £300,000 or so of undisclosed assets for the husband. That figure, once it is put into the value of the overall capital, does bring the figures down to a 50/50 split rather than 65/35.

So the point, put simply after my long winded explanation of it, is that the ground simply was not there for the judge to make such an inference that this man had an extra £300,000 available to him and for that to go into the pot. Mr Le Grice rightly says that the courts work on probability not possibility or hope and that the judge overstepped the mark in this case.

Whilst I understand the submission that is made, I am afraid I do not accept it. All I have, and for that matter all Mr Le Grice who was not there below has, is the judge's judgment and the list of factors that Mr Firth adumbrates in his closing submissions. There is a wealth of detail that sits below that.

This highly experienced family judge, well aware of the approach of courts to evidence and inferences, was satisfied that it was appropriate to infer from the detailed circumstances of the case and the overall litigation stance of the husband that there was something of the order of another £300,000 available to him but not disclosed in order to allow her to look to achieve her target of a 50/50 split by transferring the house entirely to the wife.

On appeal, I cannot see that this point has any reasonable prospect of success. A husband who chooses to approach the litigation in the way that this husband did has to run the risk of inferences being made against him. An inference in the scheme of this case, given the comparative values of the other properties, of an additional £300,000 does not seem to me to be an exorbitant conclusion for the judge to have come to.

I turn more shortly to the other points in the case. The second point relates to the pension. That was a pre-acquired asset. It came into payment and had been earned by the husband before he had even met the lady who became his wife and certainly before the marriage. So it should not have gone into the pot for calculation.

The judge refers to the pension at paragraph 65 in these terms:

"In addition, there is the value of the husband's pension in payment, the transfer value as of 24th July last year having been given as £557,641. Because it is a pension in payment, it can only be seen as future income, although it illustrates the difference between the parties."

She does not refer to it again as an asset in the case, but the submission is made and the ground of appeal is pleaded on the basis that the judge did bring it into the capital equation. The basis for that submission is to be found in Mr Firth's closing submissions at paragraph 16 where, in a long and complicated sentence, in brackets, the following phrase appears: "Of the resources in the case, including pensions."

Mr Le Grice submits that it was a necessary plank in the structure that Mr Firth had erected that the pension was included and the judge's endorsement of Mr Firth's structure by effectively making the order that he was seeking must by implication have brought the pension in as well.

I am afraid I do not agree. The judge expressly says that the pension can "only" be seen as future income. She in her mind was not bringing the pension in as a capital asset.

It will be said on behalf of husband, well, how could she justify the order that she made then given that Mr Firth did bring it in? Long and complicated though the sentence in paragraph 17 in Mr Firth's document may be, it is not a precise calculation. The pension is referred to in passing in brackets in the way that I have described. It does not seem to me that on appeal it would be possible to say that this pension was in some way the tipping point that made the judge's inference that there is another £300,000 available and something that she would take into account.

The pension value of the pension fund as at the year before the hearing was £557,641. If the judge had been taking that into account in any real way, the figures in the case would have changed quite radically. That was not the way she approached it.

Inevitably, because of the non-disclosure, her outcome was to a degree rough and ready in the sense that she had to take an overall ballpark view. The reference in brackets to the pension in Mr Firth's document does not indicate to me that the judge was in error or arguably in error because she expressly dealt with the pension in a different way.

Finally, the point is made about costs. Put simply, it is this. In the calculation of the assets that was placed before the judge, and that she accepted, had the wife's house, upon which the £100,000 mortgage was charged, in as a net figure. That is after the mortgage had been deducted. That is how it sat in the overall table. That reduced the actual capital by £100,000, therefore £50,000 of that notionally being something that would have been to be accounted for towards the husband. At the end of the case, the judge then orders the husband to pay £140,000 costs, very close to the figure that the wife was seeking.

The submission is made that this was really double counting and that the judge should have reduced the indemnity costs figure, against which Mr Le Grice accepts he cannot argue, by £50,000 and ordered that it should only be a recovery of £90,000.

It is not clear whether that submission was put in terms to the judge at the time that the costs argument was made, but I conclude that it probably was. Mr Nichols who sits behind Mr Le Grice this morning is able to point to this precise issue being flagged up in his opening note at the beginning of the hearing. He believes, although he cannot recall, that he would have mentioned it orally to the judge. I readily accept that account from him.

The point does not surface expressly in the judge's judgment, but the judge does say this at paragraph 83:

"I bear in mind two things. The first is that her unpaid costs should have added back into them, in my judgment, the costs that she has borrowed in order to do it, because otherwise it would undermine the purpose of the financial distribution that I have made because, in my judgment, I took into account the potential of the income from that rental property as an important part of the income, given the limited

periodical payments order given the level of profitability of Entrac Petroleum Limited historically and projected into the future is a modest order indeed."

So she had an account of the borrowing and its effect.

The judge obviously knew the order that she had made. Indeed, at the time she was making the order and conducting her analysis of the overall balance, she knew that there would be a costs issue because both counsel had indicated that that was likely to be the case, one way or the other depending on the judge's findings.

Although I see the point that is being made, I cannot see that this is a point that would have success on appeal. It is well-known that appeals on the issue of costs alone are unlikely to succeed before the Court of Appeal. A judge has a wide discretion in the matter. The issue that is raised now was well-known to the judge. Mr Nichols says he raised it with her and she then made the order that she did.

The difference is no doubt important to the husband at £50,000, but it is one that I cannot see has a reasonable prospect of being successful pursued on appeal.

So, despite my gratitude to Mr Le Grice for his clear and succinct submissions, I am afraid I conclude, in like manner to Fulford LJ, that this appeal has no reasonable prospect of success and so I refuse permission to appeal.