S v M (MAINTENANCE PENDING SUIT) [2012] EWHC 4109 (Fam)

Family Division

Coleridge J

15 November 2012

Financial remedies – Maintenance pending suit – Short, childless marriage – Parties heavily financially dependent on respective families – Whether the judge had erred in granting maintenance pending suit and imposing a freezing injunction on the husband's bank accounts

The Iranian husband and Lebanese wife were married for just over a year and had no children. During the marriage the couple lived with the husband's parents at their property in London and upon separation, the wife moved into a £2.5m property she claimed was intended to be the matrimonial home. The husband claimed that they never intended to live there as it was an investment property bought by his father. The wife claimed the husband was the true beneficial owner. The couple, who were both supported by their families, divorced in 2011. During financial remedy proceedings the husband's father served notice to quit on the wife in respect of her occupation of the property. In response the wife sought an urgent ex parte interim hearing to determine maintenance pending suit. The district judge heard the case 14 days after the application was issued during a 30-minute hearing. Despite the fact that the husband claimed to have no income or assets of his own, the wife submitted that his family were significantly wealthy and should support her. She was granted maintenance pending suit of £750 pcm, plus £2,400 pcm paid direct to her solicitors on account of their costs, plus outgoings on the property. Overall the order was worth £50,000 per year. Following an ex parte application by the wife for enforcement of the order a freezing injunction was made in respect of six bank accounts which held a total of £5,000. The husband appealed against both orders.

Held – allowing the appeal; discharging both orders; awarding the husband his costs in respect of the freezing order and appeal –

(1) In cases where the ultimate payer or source of funds was unlikely to be the respondent himself, the essence of the case was to establish, as clearly as possible, what the true historical position was. In particular, the extent of the provision provided by the family to the payer and the extent to which there had been an established payment stream or other regular financial provision to the claimant in the application. These were not matters which could be dealt with in a 30-minute hearing and required much more than usual attention by the court to try to discern the underlying reality of the past arrangements (see para [35]).

(2) The maintenance pending suit order was plainly wrong. The district judge failed to properly consider the husband's resources and carry out the balancing exercise of his resources and the parties' individual needs. The husband and wife were, and always had been, heavily financially dependent on their respective families. The husband provided almost no support to the wife other than paying back money he already owed and making a few very small infrequent cash payments. The husband's support from the father was confined to paying the husband's debts to avoid prison for VAT fraud or bankruptcy. There was no pattern of regular support in that sense (see para [37]).

(3) In respect of the freezing order there was never any evidence properly before the court of an intention to dissipate. In any event, the husband should have been given proper time to prepare his case. Furthermore, freezing £5,000 in this case was of no practical purpose. As an adjunct to the enforcement process, before the enforcement process had taken place the court needed to be satisfied that enforcement was both

appropriate and possible. Given that the order should not have been made, it could not be enforced and, therefore, had to be discharged (see para [51]).

Cases referred to in judgment
Cordle v Cordle [2001] EWCA Civ 1791, [2002] 1 WLR 1441, [2002] 1 FLR 207, CA
Thomas v Thomas [1995] 2 FLR 668, CA
TL v ML (Ancillary Relief: Claim Against Assets of Extended Family) [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263, FD

Alexander Thorpe for the appellant
Christopher Stirling for the respondent

COLERIDGE J:
[1] This is an appeal by a husband against two orders made by two different district judges at the Principal Registry of the Family Division (PRFD). I say two district judges, but, to be entirely accurate, one permanent district judge and one deputy district judge.
[2] The first order was an order made by Deputy District Judge Crowther on 14 March 2012 in respect of maintenance pending suit payable to the wife. The order is to be found in the bundle and I shall read its terms because they are important. The order reads as follows:

> 'Upon hearing counsel for the petitioner and counsel for the respondent and upon reading the witness statement of the petitioner dated 6 March 2012, (b) the witness statement of the respondent dated 14 March 2012.'

I pause there to underline the closeness of the dates.

> 'It is ordered that: permission to the petitioner to amend her Form A to include a property adjustment order in respect of [KH], London SW7.
> (2) With effect from 1 March 2012 the respondent shall pay the petitioner maintenance pending suit until decree absolute and thereafter interim periodical payments during their joint lives until the petitioner's remarriage or further order, payable monthly in advance as follows:
>
> (a) Payments of £750 per calendar month payable by standing order direct to the petitioner.
> (b) Payments equivalent to the monthly costs of the following outgoings in respect of the property [KH].
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> (i) Mortgage.
> (ii) Service charge.
> (iii) Ground rent.
> (iv) Council tax.
> (v) Gas.
> (vi) Water rates.
> (vii) Building insurance.
> (viii) Contents insurance.
> (ix) Any repair costs that may arise in respect of the building and domestic appliances.
> (x) Any redecoration costs that may arise.
>
> (c) Payments of £2,400 per calendar month payable directly

to the petitioner's solicitors on account of the petitioner's legal costs on account of the petitioner's liability for costs in the proceedings herein to be credited against any ultimate liability of the respondent for the petitioner's said costs.

(d) Payment of the invoices of any valuation or other expert evidence obtained by agreement or pursuant to the directions of the Court.

(3) Permission to the respondent to appeal.
(4) Costs in the application.'

The overall value of that order is said to be around £50,000 pa. Plainly the greatest proportion is the payment to the solicitors on account of their costs, namely £2,400 pcm. The payment of the £750 a month amounts to some £9,000 a year and, as I say, the balance is for costs and outgoings on the property mentioned. That is the first order under appeal.

[3] The second is an order of District Judge Bowman dated 22 May 2012. That was a freezing injunction made ex parte and, as Mr Thorpe, counsel for the husband would say, out of the blue following an application by the wife to enforce the maintenance order which I have just referred to. The terms of that freezing injunction I shall not read out in full but the salient and important part reads as follows:

> 'Until further order of the Court, the respondent must not dispose of or in any way deal with the following bank accounts without the written consent of the petitioner's solicitors, save that he may withdraw £100 from an account of his choosing for the purpose of meeting his immediate financial needs.'

There are then listed six bank accounts of well-known English and continental banks which are caught by the injunction; then:

> '(3) Permission to the respondent to appeal.
> (4) Costs in the application.'

It is, therefore, interesting to note that in respect of *both* orders leave to appeal was granted by the relevant judge.

[4] The background to this appeal, and the applications which have given rise to them, is very important and extremely unusual, and the hearings, which were both very short, were also somewhat unconventional in their form. Let me say something about the background to the applications and the history of the marriage.

[5] The husband appellant is 39 and originally from Iran. The wife is 37 and Lebanese. The parties met in the Lebanon in April 2004, now some 8 years ago of course, when the husband was then 31 and the wife 29. Their relationship proper, it seems, began in October of that year. The wife was then living in Beirut. The husband was living in England with his parents in Knightsbridge. In either February or March 2005, the wife moved to London, she says to be near to the husband. The wife moved in to live then with her own mother in her own mother's property in Holland Park in West London. In

August 2006 the parties became engaged and they married on 9 August 2007. In January 2008, some few months after the marriage I emphasise, they first began living together at the husband's parents' address in a flat in E Gardens called 62 KH. In September 2008, the wife went to live at another property, 59 KH, belonging to a company called Switch Investments. The separation between the parties can properly be dated from that date in September 2008, although the parties remained on reasonable terms. In other words, however you categorise the relationship from time to time, the real marriage in this case lasted, at best, a little over a year in duration. There were no children and, according to the husband, the marriage was not even consummated, although that might be disputed.

[6] There is a dispute as to the circumstances leading to the wife moving into 59 KH. The wife asserts that it was part of the longer term plan that they would live together there and that the property was originally bought to be their matrimonial home. The husband vehemently disagrees and says that the wife moved in there unilaterally in September 2008 while he and his parents were out of the country in Switzerland and that she had moved in there entirely off her own bat and without anybody's permission. At all events, since that time the husband has continued to live with his parents and the wife has continued to occupy 59 KH and that is the position as at today.

[7] There is a fundamental dispute about the ownership of that property at 59 KH. The husband says, and has always said, that this is an investment property, bought, paid for and owned by his father long before the wedding; long before the parties even were in a relationship and that that is the true position. The wife maintains that in truth the husband is the beneficial owner and always has been.

[8] There is also an important preliminary point about the husband's medical condition. The husband suffers from high-functioning Asperger's syndrome and depression. This is confirmed completely by agreed reports in the papers. It is very important and explains many of the unusual features in the parties' relationship and, indeed, the husband's behaviour especially in relation to money. Mr Thorpe says he has an obsession with numbers which, of course, is not an infrequent part of that particular condition.

[9] In February 2011, the husband was convicted of making fraudulent VAT claims in relation to property investment activity. He pleaded guilty and was given a 12-month prison sentence suspended. He was also ordered to pay £1.5m in compensation to Her Majesty's Revenue and Customs (HMRC). In fact, the money was paid by the husband's father as part of the deal, as Mr Thorpe put it, with the prosecution and to avoid the husband in this case having to go to prison. The husband's medical condition was very much one of the factors which were taken into account during the trial and clearly helped the husband avoid an immediate prison sentence.

[10] The subject of divorce arose on the wife's side in September 2010. In due course, on 8 July 2011, the wife issued a divorce petition and a decree nisi was pronounced on 1 November 2011. It is clear that there was some correspondence between the parties after the filing of the divorce petition about the financial issues between the parties and there was discussion about disclosure and negotiation. Indeed, a settlement meeting took place but

without success. All of these preliminary discussions coincided with the husband's criminal proceedings and his involvement in them and, as I say, they came in fact to nothing.

[11] Matters came to a head in late February of this year when the husband's father, via Switch, caused a notice to quit to be served on the wife as his patience over her occupation of 59 KH was running out. He was undoubtedly losing a very significant amount in rent by virtue of the fact the wife was occupying that property. It was the service of that document which triggered the wife's application in Form A dated 29 February 2012 and that is also the triggering application for maintenance pending suit. It is, says the husband, of significance that there is no claim in the Form A for a transfer of property order in relation to 59 KH. I think it is doubtful that the application for maintenance pending suit would have been issued had the notice to quit not been served, but I speculate.

[12] Pausing there, it is only right to say that against that background alone, the claim by the wife to long-term financial provision must be very limited. This was a very short marriage, in reality measured in length at about a year. The parties never really cohabited other than at the husband's parents' flat. There was no wealth generated during the marriage. Furthermore, both the husband and the wife are from affluent families who have routinely supported them, although the wife asserts, and I am prepared to accept, that the husband's family is far more affluent than hers.

[13] The wife's team, having issued that application on 29 February 2012, took steps to have it heard urgently. On the very day the Form A was issued, they applied ex parte to the district judge for an urgent interim hearing. The order is again in the papers and is in terms which read as follows:

> '(1) The petitioner's application for maintenance pending suit, including costs, is listed for urgent interim consideration before a District Judge at the Principal Registry of the Family Division on 14 March 2012 at 10.30, with a time estimate of 30 minutes.'

In other words, some 14 days hence.

> '(2) The respondent must attend the hearing listed unless specifically excused by a Judge. A penal notice will be attached to the order addressed to the respondent.
> (3) The petitioner's solicitors shall notify the respondent's solicitors of this order forthwith.
> (4) The petitioner shall file and serve a statement in support of her application for maintenance pending suit only by 12 noon on 6 March.
> (5) The respondent shall file and serve a statement in response by 4 pm on 12 March 2012.
> (6) Costs in the application.'

The district judge was grasping the nettle in a robust fashion, bringing the case on for hearing within 14 days which, as every practitioner knows, is a quite extraordinarily short delay between the issue of the application and the usual time when it would be expected to come on.

[14] So, this activity by the wife's lawyers resulted in the first hearing coming on in double-quick time, some 14 days after the order was made. Both had to produce their evidence within that very short timeframe. In fact, two statements were prepared. The wife's is dated 6 March and the husband's is dated 14 March.

[15] The essence of the wife's case is and was and remains that the husband's family had a very significant fortune, measured in very many millions, and they could and should be expected to support the wife as the husband had always been supported by the family as well. It is fair to say that there is no suggestion in the wife's evidence that the husband had income or available capital of his own. This presentation was completely disputed by the husband. He says, and has always said, that he has no assets and no income and that he has never supported the wife and that, given the length of the marriage and other circumstances, she is not entitled to any support, short term, medium term or long term.

[16] This was a very significant issue between the parties. The resolution of such an issue would have taxed a specialist judge with time on his hands. Cases which proceed on the basis that someone else can be relied on to pick up the bill require, in my opinion, very close and careful scrutiny, especially where there is no history of regular voluntary maintenance. In fact, as can be seen, the case came on for hearing as a matter of urgency with a time estimate of no more than 30 minutes in front of a deputy district judge with a busy list, it having been specially listed in the way I have described.

[17] The nature of the hearing, as already foreshadowed in the wife's statement, was essentially that the court should look at the underlying wealth and look through the actual and perhaps strict position and especially keep in mind that the husband's father had quite recently bailed the husband out to the tune of £1.5m in relation to his VAT prosecution.

[18] From the word go, the husband's counsel complained that the hearing was far too short and that he needed, and the husband needed, much more time to make a full presentation and that the case should await the Forms E because of the complexity of the case. It was one of those cases, said Mr Thorpe, where the court needed to look in detail at the whole picture and the history. I have the transcripts of both hearings and I do no disservice to either of the district judges if I say that in respect of both there is nothing really that can be categorised as a judgment. It is possible to discern from the overall manner in which the case proceeded, and the transcript of that which I have, some thinking on behalf of the judges but, as I say, I do not have the luxury of a judgment.

[19] I refer to two passages in the transcript which seem to indicate the workings of the deputy district judge's mind and I shall read them. The first is on page nine, internal numbering of the first transcript of the hearing in front of Deputy District Judge Crowther. She says this in the middle of the page:

> 'Yes, I am satisfied from the written evidence that your client is currently in receipt of financial support and if that is the case, and if that is the historic pattern during the marriage, then the wife is entitled to say that in the short term that support must be extended to her. If the historic pattern of support was that it came from his father, there is no reason to depart from that. I am now going to go through her

> expenditure schedule to indicate the way that I deal with short-term emergency maintenance pending suit.'

I pause there to reflect that her statement at the beginning of that quotation that there is a historic pattern during the marriage of support is, of course, completely in issue and was of central importance to any decision. She went on to say this, starting at line 29:

> 'Thank you. I am going to deal with legal costs first. I think the key word in this is "reasonable" and in the circumstances of this case, and it may be that Mr Thorpe is right and the wife's claims will disappear in a puff of smoke when the evidence has been forensically examined. At the moment, I do not consider it reasonable to throw the wife on the dubious charms of the public funding system. She is seeking a very large amount in respect of her costs and also I can sympathise with her desire to stay with her present very skilled solicitors. It may be that it would be better for her to go elsewhere or to extend her borrowings from her family. So I am not going to award her the total of let us call it £4,800. I am going to cut it in half and I think a sum of £2,400 a month to her legal costs would be appropriate.
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> Mr Thorpe clearly is building up a very strong case against her eventual claim and it would be unwise of anybody to build their case, either the husband or the wife, on the suggestion he has made that this is possibly a three-year term order. He may decide to put another case or not so that is not written in stone. I think that in this case the wife needs support. I have been through her budget and I have demonstrated that I adopt, not simply in this case but in almost all maintenance pending suit cases, a very robust pruning exercise. I think, therefore, my suggested figure of £750 a month is appropriate on the basis that the husband pays the expenses.
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> On that basis, looking at the draft order, I am going to say in 2(a) change the 2,600 to 750 and I am going to change in (c) the payments of £2,400 for her legal expenses.'

That was that and it led, as I say, to the orders which I quoted at the beginning of this judgment.

[20] It is not insignificant, as I have already pointed out, to note that the judge was not slow to grant leave to appeal. It is always wrong to draw conclusions from a judge's willingness to grant leave to appeal but it is, as Mr Thorpe pointed out, unusual for leave to appeal to be given in a maintenance pending suit order.

[21] The order was not obeyed and that led to the issue of an application to enforce under the new procedure provided by r 33. That hearing came on on 22 May before District Judge Bowman. Again, the parties attended. The husband and counsel both attended, thinking it was most likely, if not certainly, to be a hearing only for directions, in particular a hearing to discuss whether or not preliminary directions were made for the attendance of the husband on a future occasion as part of the new enforcement process.

[22] Halfway through the hearing, the husband found he was confronted by an ex parte application made in the face of the court for a freezing order in

relation to a series of bank accounts in which there was thought to be either £10,000 but more likely in fact by that stage only £5,000. The district judge again took a very robust line and made the order which I have already quoted but in the teeth of protest by Mr Thorpe who regarded himself as having been taken completely by surprise and not being in a position to even begin to address the usual factors which are required before a freezing order is made in any jurisdiction.

[23] Once again, there is no transcript of what might reasonably be described as a judgment. I do not especially criticise the district judge for that. Those of us who practise in this Division know very well that on a true ex parte basis freezing orders are sometimes made merely on the reading of a document and on the attendance of counsel. They do not always give rise to a detailed judgment and that is largely because if the affidavit or other statement in support of the application gives the reason on its face, it is usually a waste of court time solemnly to rehearse the whole evidential basis for the order.

[24] However, as Mr Stirling, who has appeared on behalf of the wife on this occasion, was content to admit, the particular difference between this process and the normal process was that usually an ex parte order runs for a matter of a few days and is then reviewed again inter partes when everybody has had a chance to catch their breath and consider what is the appropriate way forward.

[25] Once again, I have the transcript of the application in front of District Judge Bowman. In relation to the order that she was, by that time indicating clearly that she intended to make, she said this:

> 'There is evidence to support the assertion there is an intention to dissipate assets. There are two bits of evidence. One is the fact that the accounts apparently have gone down from £10,000 to £5,000 in circumstances where your client says he has no money but he is managing to use up six million in the background or whatever the figure was. The second is that there is an absolute determination not to pay and not to have any visible money from which these orders can be satisfied. Now, that is one thing. It is quite different if he were paying a sum of money and asking at the end of the day that the Court take no notice of it. So there is already some evidence that there is an intention not to pay. That is the view I take.'

In fact, it is plain that the husband himself became so agitated at this stage and, as is clear from the transcript, he himself intervened even though he was represented and himself protested to the judge.

[26] It is, as I say, not clear from the transcript quite what the thought process by the district judge was. I think she was taking an extremely robust and pragmatic approach and thought that there would be no harm in a freezing order, in a sense because the husband could rely on the father and make other arrangements to circumvent the order; in other words, by setting up other bank accounts into which sums of money could be paid to enable him to meet his living expenses and the like. Once again, the district judge gave the husband leave to appeal. It is those two 'leaves' which have brought the matter before me.

[27] It is right at this stage to emphasise that this is of course an appeal. It is not the first hearing and I have been rightfully reminded by Mr Stirling of the provisions of the case of *Cordle v Cordle* [2001] EWCA Civ 1791, [2002] 1 WLR 1441, [2002] 1 FLR 207, a very well-known case which governs the principles upon which appeals from a district judge to High Court judge are to be decided. Paraphrasing the very well-known passages, there are two bases upon which a court can interfere with a district judge's judgment in their exercise of his or her discretion. The first is that the judge concerned failed to take into account a relevant factor or took into account an irrelevant factor. Secondly, that the order that resulted was plainly wrong. Mr Thorpe in this case relies firmly on both limbs. He says that in relation to the maintenance pending suit order the deputy district judge failed completely to take any proper cognisance of the husband's ability to pay, especially in circumstances where the money was undoubtedly going to have to come from the father rather than himself. He goes on to say that in any event the decisions, both of them, were, looked at overall, plainly wrong.

[28] Now, in contrast to the hearings which took place before the district judges, the hearing before me lasted some one-and-a-half days and I had half a day to read the papers which of course by now have grown considerably. I have a great deal more information than either of the district judges had. In particular, I have a great deal more background information. I also have detailed written skeleton arguments although I am not going to make very extensive reference to them. I have had the enormous advantage of helpful oral expansion of the written skeletons in what I might describe as an unpressured atmosphere.

[29] A number of things have also happened since the hearings in front of the deputy district judge and the district judge. First, the Forms E which Mr Thorpe was protesting were crucial to a proper evaluation of the husband's position have now been filed and are in the papers before me. Secondly, I have a detailed statement from the husband's own father. That is a crucial piece of evidence because it is, of course, from the father that any income flow ultimately must derive. He has made it plain in his statement to the court that he has no intention of providing further resources to his son except now on a strict needs basis to cover his immediate living expenses. I pause there to reflect that that is not an unreasonable position to take when one realises the amount of money he has had to pay out on his son's behalf, particularly in relation to failed business ventures and the criminal prosecution.

[30] Furthermore, since the maintenance pending suit hearing, the notice to quit which was served and the possession proceedings have been transferred to this Division to be dealt with as part of the financial proceedings. In other words, the wife is not in imminent danger of removal from her home where she has been for over 4 years, the factor which undoubtedly played the single most important part in the original thinking behind the issuing of the application for maintenance pending suit.

[31] The husband's case on the appeal can be put quite shortly. Mr Thorpe says that the hearing itself was a travesty and there was a complete failure to carry out the basic exercise of establishing the husband's ability to pay. In his written skeleton argument that he filed originally with his notice of appeal he put it in this way under paragraph seven:

> 'The Court was plainly wrong to make an order against the appellant in circumstances in which during the short childless marriage to the wife the appellant had never provided any financial support to his wife and in circumstances where the wife had always provided for herself either by her own efforts or through support from her wealthy family. In such circumstances, there was no status quo for the Court to protect and the Court was plainly wrong to make an order that effectively changed the circumstances upon which the parties had historically provided for their respective support.'

He then, in the written skeleton, sets out the factors which normally the court needed to take into account before making a costs allowance and says that none of these matters were properly considered by court. Then he says by way of sweep-up at para 11:

> 'Irrespective of the wife's failure to meet the conditions required prior to the Court making a costs allowance, the Court was plainly wrong in all the circumstances of the case to provide for such an allowance in the circumstances of the case, particularly …'

Then under a series of bullet points he says this:

> 'This was a short, childless marriage. The parties had separated in 2008, within nine months of the marriage. There had been no financial support, excluding the wife's unilateral occupation of the appellant's father's property during the relationship. The appellant had no income and no capital. The wife was not restricted in any way from providing for her own support. The appellant had just been convicted of serious charges and subject to a substantial compensation order. The wife's claim was extremely limited in any event.'

Then at para 12 he says:

> 'The Court was plainly wrong to make a costs allowance of £30,000 pa when the totality of the wife's claim might equate to a maximum of £50,000 or 18 months of payment but would probably not occasion any order at all.'

[32] Collecting the essence of what is said in the written documents and what has been said to me orally, so far as the costs are concerned no consideration of the prerequisite factors was carried out by the judge before the order was made. In essence, the husband has nothing which he can call his own and his father had made it clear that he would not support his son in the circumstances that I now know about. So far as the freezing order is concerned, it is emphasised on his behalf that there is no evidence of an intention to dispose, much less dissipate these sums in the bank account because the only evidence was that the balance seems to have been reduced by the payment of a debt flagged up in the Form E of some £5,000. In particular, it is emphasised that procedurally speaking he should have had a chance to meet the case properly before any order was made.

[33] The wife's case in essence is that it would be wrong for the court to interfere with a discretion properly exercised by the district judge. Mr Stirling says this: that if you look at the overall picture, either the husband can pay or, if not, it is likely that his family will. The district judge, he says, was entitled to take a robust approach, as she indicated, and give his client in the circumstances of this kind of case the benefit of the doubt. She was entitled, says Mr Stirling, to reach the conclusion that she did on the evidence that was before her, in particular the evidence about the payment of the husband's very substantial debt to HMRC.

[34] So far as the making of the freezing order is concerned, I think I do Mr Stirling no disservice if I say that he was constrained to admit that the process was, to say the least, a little unusual but he says that no harm was done and the district judge was entitled on the evidence to find that there had been dissipation and, therefore, there was a risk of future dissipation.

[35] The law in this tricky area is set out in a number of cases and much reference has been made to them in the hearing before me. I do not propose to quote from them. In particular, I have been referred to *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263, a careful judgment of Mr Nicholas Mostyn QC, as he then was. He emphasises the need to take a step-by-step approach in cases of this kind where the ultimate payer or rather source of funds is unlikely to be the respondent himself or herself to the application. It seems to me of the essence in these type of family money cases to establish as clearly as one can what the true historical position is. In particular, the extent of the provision provided by the family to the payer and, just as importantly, the extent to which there has been an established payment stream or other regular financial provision to the claimant in the application. Those are not straightforward matters, as those of us who deal with these cases know only too well. They are certainly not matters which can be dealt with in a 30-minute hearing. They require much more than usual attention by the court to try to discern the underlying reality of the past arrangements.

[36] The case of *Thomas v Thomas* [1995] 2 FLR 668 has been referred to but that seems to me to be of very little importance in this particular situation. Again, before the approach recommended by *Thomas v Thomas* is adopted, there must be good evidence to enable the court to conclude that if they make an order which requires third parties to act, there is some reason and confidence to believe that the order will be obeyed. More often than not, that is in relation to claims where in the background there is a trust or other vehicle in which the respondent to the application has some interest.

[37] I have had a chance of looking at the financial position of the parties in a way which I am quite sure the district judges did not have. The position in fact, as I am now confident in finding, is that they are and always have been very heavily dependent on their respective families. Secondly, the husband has provided almost no support to the wife other than paying back money he already owed her and making very few small and infrequent cash payments. So far as the husband's own father's support is concerned, that has been largely confined to paying the husband's debts to avoid prison or bankruptcy. There is no pattern of regular support in that sense although it is right of course that in a paternal sense the father is not going to see his son on the street.

[38] These are the conclusions that I have come to having had, as I say, the chance, which the district judges did not have, to consider this matter with some care.

[39] First, maintenance pending suit applications of this kind are very far from simple. This one fell into the category of cases where support for the husband had always come entirely or almost entirely from his father. Cases of this kind require more than usual analysis if an order is to be made which can then lead to Draconian enforcement processes.

[40] Secondly, the time estimates for both these hearings were ridiculously short. The district judges were both struggling, as is clear from the transcript, from the word go with busy lists. I think Mr Thorpe told me that in both cases they came on towards the end of the day. Neither delivered anything which can be categorised as a judgment. The hearings proceeded with comments being made on the hoof by the district judges culminating in the orders which I have referred to. There is no real information as to how they exercised their discretion in either case, unless I read almost entirely between the lines and make assumptions as to what they must have found. That, in my experience, is a dangerous practice in circumstances like this.

[41] Thirdly, there was pressure on everybody, as is clear from the transcripts. I am satisfied that the process leading to these orders or, rather, the lack of it lies at the root of the problems which are here.

[42] Fourthly, I, by contrast, have had the advantage of the time to read and the time to hear argument properly over a day-and-a-half.

[43] Fifthly, things have also altered. I have the Forms E which paint a full picture. I also have an affidavit from the father and I know that the notice to quit is on hold until the final hearing.

[44] Sixthly, the background to this application was crucially important. There is, indeed, a real possibility that the wife will get nothing or next to nothing in the end. The facts do not easily lead to the assumption that the husband will be expected to provide significant financial support to the wife either by way of capital or income.

[45] Seventhly, in any event, as at the moment the wife is getting very real and valuable support because she is living rent-free in a £2.5m flat in Knightsbridge and will remain there, it seems, until the final hearing. In addition, service charge, water and tax are being paid, not out of kindness by the husband's father but because he has contractual obligations so to do and will continue to do so in order to avoid the risk of forfeiting his lease. However, one way or another, the wife is getting this benefit and has done so now for 4 years.

[46] Eighthly, so far as the maintenance pending suit application was concerned, there was a huge gulf in evidence about the level of support to the husband and from the husband to the wife. That could not be resolved in 30 minutes. The financial history was crucial to the finding where dispute as to the level of support past and present existed.

[47] Ninthly, it was simply not good enough just to look at the wife's needs. Especially in this kind of case, the husband's ability to pay was crucial.

[48] Tenthly, on the basis of the evidence available both then and in particular now, I have no hesitation in saying that this order was plainly wrong. The district judge failed properly to consider the husband's resources and carry out any balancing exercise of his resources and the parties'

individual needs. She was, in my judgment, blinded by an aura of wealth which is referable certainly to the father but about which there can be no certainty as to the future other than the husband will not be left on the breadline.

[49] Eleventh, the occupation of 59 KH constitutes sufficient interim provision until the final hearing. The wife herself will continue to be supported by her family as she has already always been.

[50] Twelfthly, by the same reasoning the costs order is flawed. The husband simply does not have the ability to meet it and he never did.

[51] Thirteenth, so far as the freezing order is concerned, there was never any evidence properly before the court of an intention to dissipate. In any event, the husband should have been given proper time to prepare his case. Furthermore, freezing £5,000 in this case is of no practical purpose. That is not what this case is about, as Mr Stirling was sensibly forced to admit. As an adjunct to the enforcement process, before the enforcement process had taken place the court needed to be satisfied that enforcement was both appropriate and, indeed, possible. Given as I find that the order should not have been made, it cannot be enforced and, therefore, must be discharged.

[52] In my judgment, this case is a graphic illustration of the very real pressures on the family court at this particular time. The real cause of the problem here I find was a lack of proper court time. I have little doubt if I had been put in the invidious position that these two district judges had been put with a very limited time, I might well have jumped to the conclusions that they did. On reflection, I am satisfied they were both wrong. No judge should be expected to make an important decision as was required here and when the resources available were very far from obvious during a 30-minute hearing and, no doubt, without any proper time even to read, let alone consider, such papers as they were.

[53] Accordingly, both appeals will be allowed and the orders discharged ab initio.

Discussion on costs

[54] Following upon the judgment I gave this morning, application is made by the husband for his costs in two circumstances. One, he says he has been successful in the appeal. Two, he says, by way of additional makeweight point, last week he wrote a letter offering to compromise the appeal on the basis of no order as to costs if the appeal effectively was allowed.

[55] Mr Thorpe says no one could have been fairer or more reasonable than his client in his approach to this. The appeal having been allowed, he should be entitled to his costs, although he does say he would be prepared for them not to be enforced until the matter has been concluded.

[56] I think the costs fall into two parts. There are the costs of the maintenance proceedings and the appeal and the costs of the freezing application and then the appeal. I think they need to be looked at separately.

[57] Mr Stirling, in response to Mr Thorpe, urges me to say no order as to costs because, he says, the wife has been very disadvantaged. She has had to move her solicitors and it is only at the very last minute that she has been represented, if I may say so, extremely ably by him on a direct access basis.

His assistance has been invaluable to the wife, I have no doubt about that, and will be in the future. He says that the proper order here would be no order as to costs.

[58] I do not think that is, upon reflection, a proper order to make against the background of this very hard-fought litigation where everybody does know that there are risks involved in fighting these cases, particularly a case like this which has a complicated factual history.

[59] On reflection, I am satisfied that the husband has made out his case for the costs in relation to the freezing application and the appeal against the freezing order very strongly indeed. I have already criticised the making of that order and the way in which it came about. It is not the wife's fault at all but there it is. It is certainly not the husband's fault.

[60] I shall, indeed, make an order that she pay the costs of, and associated with, the appeal against the freezing order, not to be enforced without the leave of the court and not before the conclusion of the final hearing.

[61] So far as the maintenance application is concerned, I shall simply reserve the costs of that. Those costs are, I suspect, the lion's share of the costs in any event. That is what the main part of the argument was about. I do that because, as Mr Stirling pointed out to me this morning, without in any way necessarily agreeing with him, he may want the opportunity to demonstrate from new documents that the original order or something like it in relation to interim provision was correct. Or something like it, as I say. If that was the case, it would or it might impact upon the costs order that I make so I will reserve the question of costs.

[62] Unquestionably, the wife is at risk so far as those costs are concerned but I do not think it is as straightforward as the costs in relation to the freezing order. I would like the chance to look at the whole thing when I know a little bit more about how the litigation proceeds from here and whether any further orders are made in the wife's favour upon the sort of basis which Mr Stirling was urging upon me towards the end of this morning.

[63] I shall reserve those costs. I will deal with them at any stage that it can be raised in front of me as part and parcel of a settlement or as part and parcel of any further hearing and/or at the final stage.

Order accordingly.

Solicitors: *Levison Meltzer Pigott* for the appellant
Harding Mitchell for the respondent

SAMANTHA BANGHAM
Law Reporter