



Neutral Citation Number: [2021] EWHC 199 (Fam)

Case No: FA-2020-000129

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
(On appeal from the Family Court at Harrogate)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/02/2021

Before :

THE HON. MR JUSTICE COHEN

Between :

ED Souza
- and -
WD Souza

Appellant

Respondent

Mr G Pengelly (Bar Pro Bono Unit) for the **Appellant**
Mr J Hasson (Direct Access) for the **Respondent**

Hearing dates: 1 February 2021

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HON. MR JUSTICE COHEN

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cohen :

1. This is an appeal from an order of Recorder Salter ("the recorder") dated 9 July 2020. I shall call the parties respectively the wife ("W") and the husband ("H") even though they have now been divorced for over 2 years.
2. By his order the recorder directed the former matrimonial home, in which W and the one child of the family still reside, be sold and, subject to a small adjustment in respect of a costs order, the proceeds be divided equally between the parties. The sale was deferred until the happening of the first of a number of events, the material one being 1 August 2021. In the year until sale H was to make the mortgage repayments and that thereafter he was to pay maintenance to W of £750 pm for the first year and £500 pm for one year thereafter. There are other provisions which are not material. W appeals the order.

Background

3. The parties are aged respectively 43 (W) and 37 (H). They were each born abroad but met in England when working in the hospitality industry. They began to cohabit in late 2006 and married in summer 2007. They have one child born in April 2011 and she is now aged 9¾ years.
4. In July 2015 they purchased the matrimonial home in Harrogate in joint names. They separated in November 2016 and since that time H has been living in rented accommodation in Sheffield with his partner while W remains in the property with their daughter.
5. The parties have had until recently broadly similar work histories. Although neither has English as their first language, they have both made the best of their lives in England and are plainly high achievers in their chosen industry. Unfortunately in current times, that industry is hospitality.
6. The litigation between them that followed their separation and divorce has been protracted and contentious. There was a final hearing of the cross applications for financial remedy orders in September 2019 but the order made by the deputy district judge was the subject of a successful appeal by H and the order was set aside and the matter remitted for a fresh hearing. That hearing was conducted over two days before the recorder and his reserved judgment was issued a fortnight later.
7. The position of the parties was as follows:

Wife's open position

W wished the home to be retained under a Mesher order for a period of 5 years at the end of which W would pay to H a lump sum of £15k but with the option to buy out H. Over the course of this period H was to pay £1350 pm, equating to the current mortgage repayments, plus £250 pm for 30 months followed by a reduced sum of £175 pm for the next 30 months (i.e. £1600 pm reducing to £1525 pm). W was optimistic that over this period of 5 years her income would have grown to a sufficient sum to enable her to take over the mortgage and release H from his obligations under it.

Husband's open position

H sought a sale of the property deferred for 12 months. He would pay the mortgage for up to 12 months but thereafter following sale he offered spousal periodical payments at the rate of £750 pm for 1 year followed by £500 pm for a further 6 months with payments to be on a non-extendable term basis.

8. The order of the recorder was much as H sought, but without the bar on extension of the term of the order for maintenance.
9. When the matter came before me on W's application for permission to appeal, I refused the application on paper, deeming it to be a finely judged matter but one that was in the discretion of the recorder. I was, however, persuaded by W at an oral hearing at which H was not present but had provided a written argument, that her case did have a real prospect of success and therefore the matter has proceeded to a full hearing before me.
10. At the hearing before the recorder W was not represented but Mr Pengelly has appeared pro bono on this appeal on her behalf. H was represented before the recorder by Mr Hasson who also has appeared before me on this appeal without charging for his appearance. Both advocates deserve the highest praise for their commitment to this case and their cogent but realistic arguments that they have put before me.
11. It is often said that dividing very modest sums of money can be much more difficult than dividing large sums. This case is a living example of the truth of that saying. It is typical of the challenging workload which faces the family court on a daily basis.

The Resources

12. The matrimonial home is worth just over £350k but is subject to a mortgage of some £250k leaving a net equity of £90k. This is the only capital asset of significance.
13. In March 2007 W purchased a flat in Poland, from where she originates, in her sole name. It was the subject of considerable investigation before and at the hearing below. The case of H was that W had an undisclosed income from the flat and/or that she had re-mortgaged it and failed to disclose what she had done with the re-mortgage monies.
14. The recorder found the flat, as W had said, was occupied by her father rather than let out, but he concluded that W had indeed failed properly to account for the use of the mortgage advances.
15. It is not difficult to see why the recorder reached this conclusion as the credit history appears to show that the capital balance due to the mortgagee at the time of trial was some 23k CHF more than it was when the property was purchased, notwithstanding that every mortgage payment had been paid when due.
16. In addition the recorder found that W had undisclosed bank accounts in England. He found that W had given an implausible explanation in respect of a transfer made to and from her Lloyds account of £2k and of two transfers into two Barclays accounts.
17. The recorder felt unable to place any precise figure on the undisclosed amounts in question but took those matters into account in his overall conclusions in reaching a fair outcome. In reply to a question asked subsequent to judgment, the recorder explained

that these undisclosed funds did not cause him to reach his conclusion that the matrimonial home had to be the subject of an order for sale, but it plainly impacted on his decision as to the division of its proceeds. Indeed he said:

In broad terms the parties already have similar capital, liabilities, pensions and earning capacity. I recognise that on my findings W has unquantified additional capital which she will be able to use to her advantage. I have taken this into account in reaching my decision.

18. W had hard liabilities which the recorder assessed at £36k and H had liabilities of £28k. Both had additional liabilities to friends and family which the recorder analysed as being soft debts and which did not affect the outcome. There has been no challenge on appeal to this finding.
19. The crisis in the hospitality industry caused by Coronavirus has been devastating to W and harmful to H financially. W has been made redundant 3 times in 2 years and has now been out of work now for nearly a year. Her last job was at a salary of only £20k pa, a considerable reduction on what she had been able to earn before.
20. As a result of these vicissitudes, her income at the time of trial was £1045 pm made up of:

Universal Credit	£691
Child Benefit	£89
Child Support	£265
21. The judgment records that W's needs were accepted as being £1876 pm but no one was able to tell me where that figure came from or what it comprised. On the face of it W is living with a shortfall of over £800 pm. It is further assumed that when W leaves the home for rented accommodation, her shortfall will only increase as she will incur the cost of rent, which is likely to exceed the sum that she will receive under the order for maintenance after giving credit for the consequent reduction in her benefits.
22. H has retained his employment and has a monthly average net of some £3275 which leaves him with a shortfall having paid the mortgage on the matrimonial home, child support and his needs which include the cost of renting his new home, albeit with part of the expense being met by his partner who is on furlough.

Application to adduce fresh evidence

23. When I granted permission to appeal I identified three issues for investigation:
 - i) Whether the recorder was right to draw the inference that W had undisclosed funds from the Polish mortgage advance;
 - ii) Whether there was proper evidence that W could rehouse if the matrimonial home was sold;
 - iii) Whether the order for sale was inevitable, as the recorder found, or whether another solution was required to put the child's welfare first.

The Polish Mortgage advance

24. A small clip had been prepared of documents which, bar one important document, had been available to the recorder. I admitted the additional document provisionally before determining its admissibility.
25. Mr Pengelly took me through the documents. It is not necessary for me to go into any detail because Mr Hasson rightly accepted that they show clearly that in fact there were no unaccounted monies. The confusion had been caused by the statements of account failing to explain clearly that the mortgage advance was paid in three tranches and that the apparent shortfall was caused by comparing the sums paid and outstanding with the first tranche rather than the whole of the advance.
26. Mr Hasson also rightly conceded that what the recorder saw as unexplained payments from an undisclosed bank account by reference to certain numbers were not references to other bank accounts but references to transaction numbers, as confirmed by the bank in recent correspondence which I also provisionally admitted.
27. It thus follows that the principal ground along with one of the two subsidiary grounds for the recorder's conclusion that there was undisclosed capital and bank accounts was in error. He did not have the benefit of the clear explanation that I had been given.
28. Mr Hasson said that none of this would have occurred if W clearly put the documents before the court and that she herself has fostered the confusion. It is not necessary for me to make a finding on this.
29. It does the parties no favours if a finding which is shown to be false is allowed to stand. These parties have to continue to work with one another, if only in connection with the arrangements for their daughter, and it would be a lasting sore if this error was not corrected. I therefore allowed the admission of the fresh evidence which was clearly relevant to a central issue in the case.
30. No doubt as a result of this, H very properly accepted that a 50:50 division of the proceeds of sale would not be appropriate and that if the remainder of the order was allowed to stand and the sale took place in 2021, he would accept a division of 70:30 in favour of W.

W's rehousing

31. H produced several particulars of properties for rent which had led the recorder to conclude that W could move into rented accommodation with the child for about £700 pm.
32. W sought to adduce a range of letters showing that as a tenant on benefits it would be extremely difficult for her to obtain any sort of satisfactory rented accommodation. A substantial deposit would be required; a guarantor would likely to be necessary; and if she were to put herself on the housing list with the local authority, W would be likely to have to move into temporary accommodation and would experience a very long wait before she and the child would find anything remotely suitable.

33. I agreed to permit that this new evidence should also be put before the court. It seemed to me that having concluded that an adjustment to the award was necessitated by the false conclusion about undisclosed assets I would be risking replacing one wrong result with another if I did not let this new evidence be admitted.
34. I accept that W is currently in a situation where it will be particularly hard for her to find suitable alternative accommodation. She is financially at her weakest and without employment will struggle to persuade a landlord that she is a reliable tenant. I have to have as my first consideration the welfare of any child that has not attained the age of 18. It cannot be in her interests to force a sale at this particular stage unless there is really no alternative available.

Is a sale inevitable?

35. H's objections to the retention of the matrimonial home were that:
- i) It was too big comprising 4 bedrooms, albeit W said that the smallest was no more than a box room;
 - ii) The mortgage was unsustainable at £1350 pm and even if the property were re-mortgaged, if that were possible at a lower figure, it would still be too expensive;
 - iii) If he remained on the mortgage, he would not be able to start out again;
 - iv) He needed his share of the proceeds to clear his debts.
36. In my judgment the recorder was not only entitled to but right to conclude that a sale of this property is inevitable. Each party is running at a significant deficit. Each party has debts that have to be met. I cannot see any circumstances in which W's income is ever likely to enable her to obtain the release of H from the mortgage on the matrimonial home. To defer the sale for 5 years will simply aggravate the financial difficulties of the parties and that sooner or later the property will have to be sold.
37. Even with the obtaining by W of employment, when it comes, as I am sure it will, there will still be very likely to be a deficit of expense over income. I do no one any favours if I leave each party with an ever increasing overdraft and debts being unmet.
38. The recorder recognised these facts and he rightly said that the fact that this property is W's dream home is something that is unsustainable in the long-term.
39. I cannot imagine that when the recorder delivered his judgment in July 2020, he could have thought that the effects of the pandemic would still be every bit as bad in February 2021, if not worse, as they were then. I have to deal with the situation as it now is and it would not in my judgment be fair on W or in the interests of the family, particularly the child, if I were to force the property to be sold forthwith in accordance with the order. For a relatively short period, the present financial situation can be sustained.
40. There are few judges with more experience of money work than the recorder who heard this matter. I have hesitated and thought long and hard before interfering with his order. This applies particularly in circumstances where this case has become so protracted. However, having reached the decision that its terms have to be revisited in the light of

the misunderstanding that led to him over-estimating W's resources, I need to take an overview of the whole of the financial situations of the parties.

41. In my judgment the correct course is for the date of 1 August 2022 to be substituted for the date of 1 August 2021. That means that W has 18 months in which either to sell the property or, unimaginable as it would now appear to be, put herself in a financial position whereby she could buy out H. But, it gives her time to find employment and get herself back on her feet financially without perpetuating the current deficit beyond breaking point.
42. It was not a part of the grounds of appeal that the income order should be disturbed. Mr Pengelly has complained about the deficit which W faces but it does not seem to me that H's situation is any significantly better and I cannot see how I can re-visit the order for maintenance in circumstances where I have not been fully addressed upon it and the parties are incapable of explaining the underlying basis for it.
43. It follows from the foregoing that I dismiss the outstanding application made by H to take over conduct of the sale, which application has been adjourned generally pending the outcome of the appeal.
44. The parties have sensibly agreed that there shall be no order for costs.
45. I therefore allow this appeal. I order that the sale of the matrimonial home shall be deferred for a further year. H's proposal of a division 70:30, subject to the small adjustment for a previous costs order made, seems to me to be appropriate.
46. On current figures and after the small adjustment in respect of an old costs order to which I referred earlier, the amount that H receives from the sale will approximate to the amount of his outstanding hard loans and permit him to start out clear of debt and the amount that W receives will enable her to clear her loans and provide a useful surplus of some £25k, more than sufficient for a deposit on a new rented property.