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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2019] EWHC 2135 (Fam)



No. ZC16D00212

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 25 July 2019

Before:

MR JUSTICE HOLMAN

(sitting throughout in public)

BETWEEN :

ROYA SHOKROLLAH-BABAE

Applicant

- and -

KAMBIZ SHOKROLLAH-BABAE

Respondent

THE APPLICANT appeared in person.

MR ALEXANDER CHANDLER (instructed by Pennington Manches Cooper LLP) appeared on behalf of the respondent.

J U D G M E N T

(As approved by the judge)

MR JUSTICE HOLMAN:

- 1 A situation has arisen during the present hearing which is unique in my experience and which is patently deeply regrettable. The short question upon which I now have to rule is whether a judge (namely, myself), who conducted an FDR appointment during the earlier stages of financial remedy proceedings, can later hear and rule upon disputed cross-applications in relation to the enforcement and/or variation of the substantive order which was made after a contested hearing in the underlying proceedings for financial remedies. For the purposes of this *ex tempore* judgment, I will summarise briefly the background facts and context.
- 2 I will, for convenience, call the parties 'husband' or 'wife' although their marriage has now been dissolved by a decree absolute. The parties were married and lived together for about 25 years before separation. They have three children, all now adult. The financial remedy proceedings following their separation and divorce have clearly been protracted and highly contested. By now, both parties seem to have lost count of the number of hearings that have taken place, but they appear certainly to exceed 15 in front of a range of many different judges.
- 3 Between them, the parties appear to have expended at least £2.2 million in costs, almost all of which they still owe to creditors. The wife owes about £300,000 under a litigation loan from Novitas, and still owes her former solicitors, Payne Hicks Beach, a staggering £900,000. The husband owes about £700,000 to a different provider of a litigation loan, and owes his current solicitors, Pennington Manches Cooper, about £50,000. So this Titanic litigation has largely been conducted on credit.
- 4 There was a very long so-called final hearing before Baker J over eleven days spread out between February and April 2018. He handed down a judgment which extends to about 65 closely typed pages on 4 September 2018. There were further hearings in relation to

incorporating and perfecting that judgment into a formal order, and also as to costs, before Baker J, who by now was Baker LJ, in early 2019. There finally emerged on 8 March 2019 (and sealed on 11 March 2019) a long and highly complicated order to give effect to his judgment and decision after a hearing which had first begun on 26 February 2018.

5 As I say, the order is highly complicated, reflecting the complex structure of the financial affairs of the parties and, in particular, the husband, whose business appears to be in property development. As so often applies in the case of property developers, there were (and still are) a number of properties at different stages of development. Very significant borrowing has been incurred in relation to the purchase and development of these properties, some of it secured upon the properties, some of it unsecured. There is obviously potentially a considerable difference between the value of a given property in its undeveloped or partially developed state, and the value which it is hoped it will achieve when any development is completed. It is considerations of that kind which made this case and the resulting order so complicated.

6 A relatively straightforward part of the order is that it required the husband to pay periodical payments to the wife at the rate of £10,000 per month on 4 September 2018 and the 4th of every month thereafter. That has the effect that, by today, he should have made eleven payments of £10,000 totalling £110,000. To date, the only payment he has made at all is one of £2,500 earlier this month. So (as the husband accepts) there are currently arrears of £107,500.

7 Although the order itself was only made as recently as 8 March 2019, just over four months ago, these facts and circumstances have already spawned a host of cross-applications by the parties. The wife has issued a judgment summons which seeks, in form if not in reality, that the husband be committed to prison for non-payment of the maintenance. She seeks an order impounding his passport so that he cannot travel abroad, at any rate until all the arrears

have been paid. She seeks a range of other orders in relation to handing over various works of art, valuable vehicles, and personal number plates, so that she can sell them and apply the proceeds towards the arrears; and she seeks to be in a position to force now the sale of two adjacent properties in the south of France which are at an early state of redevelopment.

8 As so often happens once faced with a judgment summons, the husband, who had previously chosen simply not to make the ordered payments, countered with an application to vary downwards the maintenance, and also to vary certain provisions in relation to those properties in the south of France. He would wish very strongly to resist or prevent any early sale of them, because he believes that if further funds are injected into their redevelopment, he will be able then to sell them at a considerable profit, which he says he would apply both in satisfaction of all the amounts due to the wife, including a lump sum order of £2 million, and also for himself.

9 This considerable range of applications and issues came on for a directions hearing before Williams J on 4 July 2019. On that occasion (as now), the wife, whose solicitors have clearly (and entirely understandably) run out of patience, was acting in person. The husband was represented by counsel who, I am told, was still in her period of pupillage. Apparently, Williams J had obtained from the Clerk of the Rules the present hearing dates of 24 and 25 July 2019 before ever he went into court on this case on 4 July 2019. I am told that he had also obtained my name as the judge who was available and identified to hear all these cross-applications yesterday and today. I am told that when the parties came into court on 4 July 2019, Williams J did say that he had obtained a hearing specifically before myself for 24 and 25 July 2019. So it was that these cross-applications have come before me here, yesterday and today. Profoundly regrettably, nobody noticed, or if they did notice, nobody mentioned, that I was the judge who had conducted the in-court family dispute resolution appointment (the FDR) on 15 December 2017.

- 10 The case began before me yesterday morning. The wife still acts in person. The husband is represented by counsel, Mr Alexander Chandler, who has not previously had any involvement in this case. The underlying papers are, I am sure, formidable, and nobody could reasonably expect Mr Chandler to notice or pick up the fact that I was the judge who had conducted the FDR. There was far more bewildering detail in the case upon which Mr Chandler needed to concentrate.
- 11 If any of the counsel who had appeared at the FDR were still engaged and appearing at this hearing, I have no doubt that any one or more of them would have flagged up at once that I had conducted the FDR and, accordingly, that I could not conduct this hearing. It also goes without saying that if I, personally, had had the least recollection or appreciation before this case began yesterday morning or, indeed, in its early stages yesterday morning, that I had conducted the FDR, I would have said unhesitatingly and without more ado that I was disqualified from conducting the present hearing and that another judge would have to be identified.
- 12 I do not accept any personal responsibility for what has happened. So far as I am aware, there is nothing in any of the highly selective documents that have been prepared for the present hearing which identifies me as having conducted the FDR. As I commented earlier today, in the 18 months or so between the FDR on 15 December 2017 and late July 2019, I have probably conducted hearings in at least 500 cases, some of them long, some of them very short, and not including in that figure the very large number of cases that I consider and adjudicate upon on paper, in particular when sitting in the Administrative Court. So it did not impact upon me for one moment when I embarked upon this hearing that I had conducted the FDR. Frankly, it did not occur to me to enquire whether I had done so, because one is so accustomed to the lawyers for the parties, or the court administration, ensuring, in advance, that cases are not listed before the judge who conducted the FDR.

13 So the case commenced. We had a lot of discussion yesterday about many aspects of this case, and the wife gave significant oral evidence yesterday afternoon. This morning, the husband was in the course of giving his oral evidence-in-chief. I happened to comment to him how regrettable it was that these parties had not been able to resolve their differences by agreement long ago, before so much costs were incurred, which neither of them can apparently afford to pay. The husband then observed that it was I who had conducted the FDR. That, frankly, hit me like a dart. I do not know what the husband might have been planning on going on to say with regard to the course or content of the FDR, for, of course, I immediately stopped him from saying any more. I broke off his evidence altogether whilst I and Mr Chandler, in particular, could take stock of the situation.

14 The Family Procedure Rules 2010 make provision for FDR appointments at rule 9.17. The whole rule is relevant, but the most material parts for the purposes of this judgment are paragraphs (1) and (2). They provide as follows:

“9.17

- (1) The FDR appointment must be treated as a meeting held for the purposes of discussion and negotiation.
- (2) The judge hearing the FDR appointment must have no further involvement with the application, other than to conduct any further FDR appointment or to make a consent order or a further directions order.”

15 Pausing there, I observe at once that paragraph (2) of the rule employs the word “must”. “Must” is a mandatory word which is binding upon the court itself. If the rule had said “The judge hearing the FDR appointment should have no further involvement...” then the use of

the word “should” might have left some residual discretion in the court, or wriggle room. But the word “must” is, in my view, mandatory and excludes discretion.

- 16 The rule says that the judge must have no further involvement “with the application”. The word “application” does not appear to be further defined, although at the very beginning of rule 9.1 there is the following:

“Application

9.1

The rules in this Part apply to an application for a financial remedy.”

- 17 If one turns back to the interpretation rule at rule 2.3 of the Family Procedure Rules 2010, one sees that “financial remedy” means “(a) a financial order”, and then a range of other listed orders. The words “financial order” mean, amongst other things, “a variation order”. So the word “application”, where it appears in rule 9.17(2), certainly does not end with the making of a so-called final financial remedy order. It certainly extends also to subsequent applications to vary. It seems to me obvious that the purpose and policy of rule 9.17(2) must extend not only as far as the so-called final hearing of a substantive application, but also to subsequent issues including the working out of an order, or enforcement of an order, and, indeed, variation. It is obvious that if a judge who has heard privileged matters or privileged concessions at an FDR appointment cannot hear the subsequent substantive application for a financial remedy, he cannot hear either some application, for instance with regard to enforcement, that follows on.

- 18 The footnotes to rule 9.17 in the Family Court Practice 2019, under the heading “Further judicial involvement”, refer to the authority of *Myerson v Myerson* [2008] EWCA Civ 1376, [2009] 1 FLR 826. *Myerson v Myerson* is, indeed, a very well-known authority to all judges and specialist practitioners who practise in the field of matrimonial financial remedies. No

later authority is referred to in the Family Court Practice, and in the short time available since this development, now about three hours ago, neither Mr Chandler nor I myself have been able to find any authority subsequent to *Myerson*.

19 In *Myerson*, there had been an FDR before the exceptionally experienced family financial judge, Baron J. At the conclusion of the FDR, it appeared that agreement had been reached. Unfortunately, when the lawyers came to draft a more detailed order to give effect to that agreement, difficulties began to emerge, in particular with regard to an issue of security. That led to delays, and during the period of delays, as Thorpe LJ put it at paragraph 7 of his judgment:

“7. Outstanding issues were now escalating beyond the nature and extent of security for future lump sum instalments.

8. Unfortunately for the parties, the structure and worth of the husband’s fortune had been hit by the earthquake of the global financial crisis.”

20 The upshot was that, some months later, the matter was listed again before Baron J with a view to her determining a number of disputed issues. Counsel on behalf of the husband objected to Baron J dealing with the matter at all, on the ground that she was debarred from doing so by the then equivalent and identical rule to the current rule 9.17(2). Consistent with an earlier decision of her own, Baron J rejected that objection and indicated that she intended to hear the matter and rule upon the disputed issues. There was then a very rapid appeal to the Court of Appeal, heard within a day or two. The Court of Appeal did, however, reserve its judgment for about three weeks. So the judgments in *Myerson v Myerson* are considered, reserved judgments, after due time for consideration. All three Lords Justices disagreed with the decision and ruling of Baron J, and the appeal was allowed.

21 The leading judgment is clearly that of Thorpe LJ. Lawrence Collins LJ stated at paragraph 33:

“I agree that the appeal should be allowed for the reasons given by Thorpe LJ...”

Goldring LJ said at paragraph 37:

“I have had the advantage of reading in draft the judgment of Lord Justice Thorpe, with which I am in full agreement.”

It thus seems to me that the authoritative and governing judgment in *Myerson* is clearly that of Thorpe LJ, with whose reasons the other two Lords Justices expressly agreed.

22 It seems to me that, for present purposes, the two critical paragraphs in the judgement of Thorpe LJ are paragraphs 26 and 28. Paragraph 26 reads as follows:

“26. I am in no doubt that [counsel for the appellant husband] is correct in his submissions as to the proper interpretation of the rule. The underlying policy of the sub-rule is clear. Litigants distrustful of each other and made anxious by the complex tactics of contested litigation must be confident that conciliation within the court proceedings guarantees them the same confidentiality that they would enjoy had the dispute been referred by the judge to mediation by a mediation professional. So the intention and the meaning of the sub-rule are clear. The judge who has been armed to conciliate by the provision of all the privileged communications can only do one of three things, that is to say set up a further FDR appointment, make a consent order or make an order for further directions, practically speaking directions for trial.”

23 Pausing there, it seems to me that in that paragraph Thorpe LJ is deliberately and expressly aligning in-court “conciliation” by a judge with out of court private mediation by a non-judicial mediation professional. It is, of course, an axiom that private mediation professionals have no power or jurisdiction later to vary any order or to make any orders by way of enforcement, but the sense of what Thorpe LJ says in paragraph 26 is that once a judge embarks on an FDR, he, as it were, steps right out of the court arena (apart from his power to make a consent order or further directions) and ceases to have any role or power as a judge in the matter at all.

24 Paragraph 28 reads as follows:

“28. However, where the contract presented to the judge at the conclusion of the FDR is incomplete in the sense that there are subsidiary or peripheral issues to be agreed, or determined by the court in default of agreement, it is otherwise. Where, as here, the parties did not reach agreement as to the nature and extent of the security, the dispute must be listed before another judge. So too must issues of enforcement be listed before another judge. Equally subsequent applications to vary or set aside the consent order achieved at the FDR appointment must be listed before another judge.”

25 Technically, *Myerson* did not concern “issues of enforcement” nor issues of “variation”, but it seems to me that those last two sentences in paragraph 28 are the clearest possible express authority of the Court of Appeal (agreed by all three Lords Justices), which, although technically obiter, are binding upon me. So it seems to me that the binding effect of *Myerson* is that a judge, or the judge, who conducted an FDR at an earlier stage of financial remedy proceedings is completely debarred or precluded from hearing applications as to enforcement or variation, even after a substantive financial order has been made. As I have

said, it seems to me that that must also necessarily follow from the underlying policy of the FDR procedure, because if privileged matters might even theoretically impact upon a judge hearing the substantive case, they may impact no less upon him hearing enforcement or variation proceedings later.

- 26 Not long after *Myerson* was heard and reported, there was published the “Financial Dispute Resolution Appointments: Best Practice Guidance” issued by the Family Justice Council in December 2012, itself prefaced with a foreword by Thorpe LJ. At paragraph 10 of that Best Practice Guidance, there is stated that “as a starting point” certain matters should be explained by practitioners to their clients prior to the FDR. One of those matters, at subparagraph (iv), is:

“The privileged and ‘without prejudice’ nature of an FDR appointment and its associated negotiations should be fully explained. The most obvious associated feature of this is that the judge conducting the FDR will give an indication to the parties as to the likely outcome were the case to progress to a final hearing but thereafter will not be permitted to have any further involvement in the case: see r 9.17(2)...”

I mention that in that passage, the guidance has slipped from the use of the word “application”, which appears in the rule, to the more generic words “the case”. That guidance remains current.

- 27 I have to say, as a judge specialist in financial matters who frequently hears financial cases here at the Royal Courts of Justice, that it has been my experience and understanding ever since *Myerson* at the latest (now over ten years ago) that it is simply axiomatic in this building that once a given judge has conducted an FDR, he simply cannot have anything further whatsoever to do with the case apart from conducting a further FDR, or making a consent order as indicated as exceptions within rule 9.17(2) itself.

- 28 As I have already said, if it had been drawn to my attention earlier that I had conducted the FDR in this case, I would without hesitation, and indeed without giving a judgment of this kind, have simply said that I, unquestionably, could not deal with these applications. However, that is not what happened, for, as I have explained, nobody drew my attention to the fact that I had conducted the FDR, and by late morning today, the case was very deeply under way. There had been much discussion and argument. The wife had given all her evidence and been cross-examined upon it, and the husband had given all, or nearly all of his evidence-in-chief, although he had not by then been cross-examined by the wife.
- 29 Faced with this hiatus, both parties, the wife in person and the husband through Mr Chandler, have very strongly urged that I should waive or overlook the rule and nevertheless continue with the present hearing. The wife, in particular, is desperately concerned about her financial position, and fears that one or more of the various properties (including her home) may soon be repossessed. Further, the husband, in addition to all his other costs that I have mentioned, has incurred no less than £68,000 including VAT since 1 April 2019. Some of that relates to an unsuccessful application to the Court of Appeal for permission to appeal from the substantive order of 8 March 2019, but most of it relates to preparation for, and incidental to, these applications and this hearing.
- 30 So the question is: does rule 9.17(2) admit of any exception, or permit waiver by the agreement of both or all parties to the proceedings? Mr Chandler submits that it does, or may do, and appropriately draws my attention to the overriding objective in rule 1 of the Family Procedure Rules 2010 and, in particular, the provision of rule 1.2 which provides that:

“1.2 The court must seek to give effect to the overriding objective when it–

- (a) exercises any power given to it by these rules; or

(b) interprets any rule.”

31 Mr Chandler submits, in essence, that I can and should interpret rule 9.17(2) as if there is some exception to it when both parties seek to waive the rule and rely upon the fact that a hearing is already well under way and costs have obviously been incurred. This is a possibility which was alluded to by the Court of Appeal in *Myerson*. On the facts and in the circumstances of *Myerson* itself, one party, the husband, was strongly objecting to the FDR judge, Baron J, continuing to deal with the matter. So everything which the Court of Appeal said with regard to waiver of the rule is, of course, completely obiter, but it appears that some consideration was given to it in argument.

32 At paragraph 31, Thorpe LJ said:

“During the course of argument there was some discussion as to whether, despite the terms of the rule, the parties might, for whatever reason, prefer the determination of the FDR judge on subsidiary issues that could not be agreed and therefore apply for the issue to be listed before the same judge.

That issue does not arise on the present appeal and I would prefer to express no opinion on the point.”

33 Pausing there, insofar as Thorpe LJ was contemplating that there might even be some scope for waiver, he was doing so in the context of “subsidiary issues”. It does not seem to me that the present highly conflicted and polarised issues with regard to enforcement (including an application for committal to prison under a judgment summons) and variation can be regarded as “subsidiary issues” in the sense in which Thorpe LJ used that phrase in paragraph 31.

34 Lawrence Collins LJ did go further. He said at paragraph 35:

“35. [The rule] provides that the judge hearing the FDR appointment ‘must have no further involvement with the application’ except in the specified cases. Although the point does not arise for decision in the present case, it seems to me that there are grounds for concluding that the parties may waive the prohibition...

36. ...The policy behind the rule is to encourage settlement and in particular to protect without prejudice communications. That policy is not undermined by allowing the parties to waive the requirement.”

35 Those observations are, of course, entirely obiter; but it does, with respect, seem to me that if the requirement of the rule can later be waived, that might seriously undermine the “guarantee” to which Thorpe LJ had earlier referred in paragraph 26 of his judgment in *Myerson*, and also the very clear explanation that is required to be given to parties by their legal advisors under paragraph (10)(iv) of the Best Practice Guidance. It seems to me that if there is any room for waiver, that requires to be written into the rule itself or, at the very least, made clear in advance to parties as a result either of clear judicial decision or, possibly, some amendment of the guidance. But, as it seems to me at the moment, any subsequent waiver at all would run totally contrary to the absolute prohibition that the rule currently provides, as all judges and, I believe, practitioners have regarded it for at least the last ten years.

36 Goldring LJ also referred to the possibility of waiver at paragraph 61 at the very end of his judgment. He said there:

“...There was some discussion as to whether as a consequence of sub-paragraph 2 [the judge] did not have the jurisdiction to hear the case at all, whether or not the parties consented. We have heard no detailed submissions on this aspect, which does not arise here. Plainly, if the parties

consent to the FDR judge continuing to act, very different considerations may apply. What the position then is must be for future consideration.”

- 37 I have, in the limited time available to me, given very careful and anxious consideration to whether, building upon what Lawrence Collins LJ had said at paragraph 35 and 36 and Goldring LJ had said at paragraph 61, I might hold that the requirement of the rule can be waived by the parties. Whilst in some circumstances at some future date it may be open to the Court of Appeal to develop the jurisprudence in that way, it currently seems to me that it is not open to me to do so. Those observations in those paragraphs are entirely obiter. As I have said, it seems to me that the policy as described by Thorpe LJ in paragraph 26 and his very clear statements in the last two sentences of paragraph 28 simply preclude waiver.
- 38 For those reasons, and as it has now emerged (and has been checked and verified) that I did hear the FDR between these two parties on 15 December 2017, I conclude that the mandatory effect of rule 19.7(2) is simply that, as the rule says, I must have no further involvement with this matter at all. Judges have many powers and discretions under rules of court to relax, or even waive altogether, the impact of many rules upon a party or parties. But where a rule says, without discretion, that a judge must not do something, he must not do it. In a sentence, he must obey the law.
- 39 For that reason, I propose to bring this hearing now to a complete halt. Anything that I have said during the course of the hearing, including indications that I gave as to the manner in which I intended to deal with some of the applications, are, in my view, complete nullities. This will have to go back to be heard from scratch before another judge on a date just as soon as it can be fixed.

CERTIFICATE

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