



Neutral Citation Number: [2023] EWFC 32 (Fam)

Case No: YE14D00591

IN THE FAMILY COURT AT YEOVIL
SITTING AT BRISTOL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2023

Before :

SIR JONATHAN COHEN

Between :

SS
- and -
RS

Applicant

Respondent

SS Applicant in person

MR C NAISH (instructed by **Risdon Hosegood**) for the **Respondent**

Hearing dates: 10 MARCH 2023

Approved Judgment

This judgment was handed down remotely at 10.00am on 16 March 2023 by circulation to the parties or their representatives by e-mail and by anonymised release to the National Archives.

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SIR JONATHAN COHEN

This judgment was delivered in private. 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.

Sir Jonathan Cohen :

1. I have been dealing with three separate applications in this case which have been referred to me by HHJ Skellorn KC (“the judge”). They are as follows:
 - i) The application of the husband (H) dated 21 September 2021 seeking:
 - a) A sale of the marital home
 - b) An order that the respondent wife (W) pay him £80,000 compensation
 - c) The court contact the Woolwich Building Society in respect of the applicant’s credit record.
 - ii) The respondent W’s application of 23 February 2023 whereby she sought the addition of a penal notice to paragraph 4 of the order of the judge which required the applicant to provide an unrestricted email address to HMCTS and W’s solicitors
 - iii) W’s application dated 24 February 2023 whereby she sought to strike out the H’s application on the basis that it had no legal merit and was an abuse of process.

Background

2. On 11 March 2019 a financial remedy order was made on W’s application by the district judge. The only asset of any significance was the former matrimonial home in which W lived with the two school-aged children of the family. The property was low value with an outstanding mortgage of £90,000 and an equity of a little over £37,000.
3. For reasons that are no longer relevant H did not appear at the hearing and the district judge ordered that the property should be transferred to W on her undertaking to use her best endeavours to procure the release of H from the mortgage on or before 1 April 2019 and to indemnify him in respect of any liability arising under it. In the circumstances of the very limited assets in the case and the needs of the children this order was eminently predictable.
4. H appealed the order and his appeal was dismissed by the circuit judge on 4 June 2019. The property was duly transferred to W but she was not able to obtain H’s release from the mortgage.
5. H claims that W failed to use her best endeavours to obtain his release but somewhat paradoxically also argues that so limited were her means that she had no capacity so to do.
6. H’s application has had a tortuous history including two occasions when orders of different district judges have been set aside on appeal by circuit judges on the basis, put broadly, that he had not been given proper notice of hearings or that his communications with the court had not been put before the relevant judge. As a result, it has taken some 18 months before this final disposal. It was his second successful appeal in front of the judge that led her to direct that the matter be heard before a judge of the High Court.

7. There have been two important recent developments:
 - i) On or about 18 January 2023 W finally succeeded in re-mortgaging the property and obtaining H's release from the mortgage;
 - ii) W issued her own application to strike out that of H.

The parties are agreed that I should deal with all matters.
8. H accepts that in the light of the new events I should not order a sale. W has, H says very belatedly, complied with her undertaking. W says that she at all times used her best endeavours. This is not a matter that I can rule upon and was not the subject of argument at the hearing.
9. However, says H he has a proper ground for compensation arising from:
 - i) W's failure to obtain his release from the mortgage earlier which has led him to suffer significant financial loss and:
 - ii) His status as a victim of "domestic abuse" under the Domestic Abuse Act 2021. H claims pursuant to Section 1(2)(b) that W's behaviour is abusive and that he has suffered "economic abuse" in that her behaviour has had a substantial adverse effect on his ability to:
 - a) acquire, use or maintain money or other property or
 - b) obtain goods or services; - see section 1(4) of the Act.
10. H says that his loss was incurred in two areas, namely:
 - i) by not being able to take out a mortgage on another property as he was already the subject of an existing mortgage, in effect debarring him from becoming a property owner and;
 - ii) by having to pay larger sums by way of interest on loans as a result of the poor credit rating that he had incurred as a result of W's failure to keep up with mortgage repayments.
11. He claims that W missed 7 mortgage repayments over the years; she says she was late on 1 payment. Neither party has produced any statements of building society accounts to enable me to make any ruling on the matter.
12. H accepts that he is indeed now off the mortgage and that he himself has never paid any payment to the mortgage company for which W would be liable to indemnify him.
13. In my judgment H's claim is misconceived. There is no power that arises under the Domestic Abuse Act in the way that H argues. A domestic abuse protection order can be made pursuant to section 22 of the Act but there is no provision for the making of financial compensation. In any event, it could not possibly be claimed that even if W had failed to use her best endeavours to obtain his release a claim could arise under the Domestic Abuse Act in these circumstances.

14. H's claim for compensation for W's alleged breach of her undertaking is similarly misguided. There is no question that H has made any payment to the mortgage. H says that is not the end of the matter and he refers me to the specific terms of the order which reads as follows:

AND UPON the respondent undertaking to the court:

. To use her best endeavours to procure the release of the applicant on or before 1 April 2019 from any liability under the legal charge secured on the former matrimonial home ... and in any event

. To indemnify the applicant against all such liability

which he says should be read so as to cover any loss he has suffered from her failure to remove him from the charge earlier.

15. This is a mis-reading of the provision. The indemnity "against all such liability" plainly refers back to "any liability under the legal charge". It is not to be read any wider than that.
16. If H has suffered any loss from W's default, and it is important to note that W denies both the default and any loss suffered by H, his remedy was to apply for an order for sale. That he duly did and it is his misfortune that it has taken so long for the application to be heard. But, he has no free standing claim for economic loss.
17. Part of H's complaint is clearly directed against the original order in 2019. He says that the district judge should never have made an order which left H on the mortgage in circumstances when W never had the capacity to secure his release. He complains strongly that the court never obtained a mortgage capacity report which would have shown, he says, W's inability to obtain the release.
18. H asks me to give general guidance about the production of such reports in circumstances such as this. I decline to do so. The order was made and H's appeal against it was unsuccessful. I would go no further than to say that it appears unwise for the district judge to have allowed such a very short time frame for W to obtain the release. Whether any time frame was appropriate is debatable.
19. The court has no power to award compensation. H's attempt to persuade me that I should read into the principle of "compensation" as set out in *Miller; McFarlane* [2006] 1 FLR 1186, the power to make such an order in these circumstances was ingenious but mistaken. A case in which compensation is awarded is vanishingly rare and likely to be confined to the very specific circumstances that arose in *McFarlane*.
20. In short, there is no merit in H's application and I strike it out.
21. As is obvious, I have no power to make a direction to the Building Society but, the parties agree that I may include in the order a recital in these terms:

H complains that his credit rating has been damaged by reason of W's failure to make mortgage repayments on time. Whether his complaint is accurate or is, as W alleges, inaccurate the court records that:

- i) as from 11 March 2019 by court order W was solely responsible for making the mortgage repayments on the property and that any default thereafter should not prejudice H's credit rating; and
 - ii) H has been removed from the mortgage on 18 January 2023.
22. H has still not complied with the requirement imposed upon him to provide W's solicitors and the court with an unrestricted email address. He says that now the proceedings have come to an end the obligation to do so has expired. H is a determined litigant and the order of HHJ Skellorn was not limited in its obligation. I hope that this is the end of litigation but I shall order that no further application in respect of the former matrimonial home or any debts or loss said by H to arise from the failure of W to obtain his release from the mortgage at an earlier date is to be issued by the court or proceeded with if he has not complied with the order to provide an unrestricted email address.

Costs

23. W asks for her costs of the proceedings which are just shy of £12,000. H's response is that:
- i) It is not his fault that the litigation has become so tortuous and taken so long;
 - ii) When he made his application he was still on the mortgage and it was only the events of the last two months which have made his application for a sale hopeless. W responds by saying that she has had the stress of facing up to a claim which in many respects was misguided.
24. On 9 February 2023, one month before the hearing, W informed H that he had been removed from the mortgage and he was asked to withdraw his application. He declined. He should have accepted the suggestion and thus avoided the expense attached to this hearing.
25. Since that time W has incurred £2,500 in respect of counsel and £2,500 in respect of solicitor costs, in each instance plus VAT. In principle there is no reason why H should not pay those costs as the loser. These are not proceedings to which the presumption of no order applies.
26. W asks in addition that she should have the costs of preparing bundles for earlier hearings and other preparatory steps taken in connection with them.
27. I have decided to take a broad approach to this issue. I balance against each other the discount applied on a notional assessment of costs against the costs incurred prior to 9 February 2023. I bear all these factors in mind and the order that I make is that H should pay the sum of £4,500 plus VAT (total £5,400) towards W's costs.