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Case No: BV19D16832

**IN THE FAMILY COURT SITTING AT
THE ROYAL COURTS OF JUSTICE**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/08/2024

Before :

SIR JONATHAN COHEN

Between :

A

Applicant

- and -

M

Respondent

**Simon Webster KC & Joe Rainer (instructed by Fladgate LLP) for the Applicant
Duncan Brooks KC & Joshua McEvoy (instructed by Marsans Gitlin Baker) for the
Respondent**

Hearing dates: 30 July – 2 August 2024

Approved Judgment

This judgment was handed down on 1 August 2024 by circulation to the parties or their representatives by e-mail and by 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. Following a hearing in October 2021 and a judgment on 5 November 2021, on 25 January 2022 Mostyn J made a final order following contested financial remedy proceedings between the parties whom I shall call H and W. Mostyn J's judgment was reported as A v M [2021] EWFC 89.
2. The order was very long and detailed and contained at paragraph 25 provision that H "shall pay to [W] lump sums equal to 78.19% of all capital and income proceeds of or any other payments or receipts due or received by [H] from time to time arising out of the Fund I Co-Invest share net of tax..."

And at paragraph 26, "48.53% of [exactly the same phraseology] arising out of the Fund I Carry share..."

3. H was one of two senior partners in a private equity business (X Co). It ran in a typical way: X Co would find institutional investors who would commit to investing capital when X Co needed their funds to make portfolio investments or for running costs. Once the capital had been raised X Co would find suitable investments and buy stakes in them with growth prospects. X Co managed the investment and would take a role on the board of the company in which the investment was made.
4. Individuals at X Co, including H, agreed to commit their own capital as an investment into the fund. When capital was called to make the investment, a small part of that capital was owned by various individuals at X Co. It was this investment, known as X Co Co-Invest share, which W was to share in to the extent of 78.19% of H's receipts.
5. When the investment had grown sufficiently, X Co would sell the investment and funds would be returned to investors, including H.
6. If the fund made a profit above a set hurdle rate, X Co would receive a bonus known as "carried interest (carry)". This would be a percentage of profits above the hurdle rate. W was to share to the extent of 48.53% of H's receipts. If the hurdle was not reached, then no carry was paid.
7. It is unnecessary to consider any other part of the order save as to paragraphs 15 and 16 which deal with implementation of the terms above. So far as I am aware, all other terms of the order have now been complied with.
8. At the time that the matter was before Mostyn J there were two X Co funds, Fund I and Fund II. To reduce the amount of communication between the parties and intermingling of their finances, Mostyn J determined that W's award would be payable only out of H's receipts from Fund I and, doing very precise mathematical calculations, W's potential interest in Fund II was rolled over into the award that she was to receive on Fund I. This explains the size of the percentages.
9. At the time of the hearing Fund I had 4 investments. They had various exit dates in the future, none of which were fixed at the time of the trial, in the sense that they remained capable of extension. Two of the investments were subsequently sold in

their entirety, as was 80% of the third. W received in cash the sums that she was due under the terms of the order in respect of them.

10. The issue with which I have to deal arises out of the remaining 20% of EC which was not realised and the investment in DN which was not the subject of any realisation. These were sold to a new private equity fund, managed by the same X Co team but with a different set of investors, some of whom were new and some of whom had invested in Fund I. The new fund was a continuation fund, which I shall abbreviate to CF.
11. The use of a CF in the industry is widespread. It is commonly found where a fund is ending but it has some assets left which for one reason or another cannot be sold or which it would be inadvisable to sell at the time in question. Unless they are transferred to a CF, those investors who wished to cash out of their investment would be unable to do so.
12. In order to establish a CF, it is crucial to obtain a fair market valuation of the assets to be transferred so that justice is done to those investors who were leaving and those investors who were participating in the CF. There has been no suggestion to me that the valuation exercise was done anything other than in a fair and proper manner, as one would expect from the well-known advisors who were used for this purpose.
13. It is relevant to note that of the external investors in Fund I, 58% chose not to be involved in the CF and 42% chose to be involved. In addition, new investors were brought in.
14. The team members from X Co who had capital invested in Fund I or who held carried interests did not have the same flexibility as the third-party investors to decide whether or not to make an investment in the CF. One of the conditions of the commercial deal between X Co and the third-party investors in CF was that the X Co team had to reinvest their after-tax proceeds into the CF. The extent of their investment was the subject of negotiation and was eventually determined as being at least €10m from the net distributions received by them from their co-investments and carried interests. In H's case, his required initial investment was some €4.08m, with about another €500k subject to call.
15. It is accepted by W that H has, in accordance with the valuation fixed for the departing and continuing investors, paid to W the full value attributable to her share of his interest in the co-investment and carry.
16. W's complaint is that she was not given the opportunity of sharing in H's co-investment and carry in the CF and instead was forcibly cashed out against what would have been her will if she had known that H was to remain invested.
17. By paragraph 16 of the order of Mostyn J, H was required until W had received payment of her full award to provide to W with a whole range of information. H accepts that he was in breach of these disclosure obligations.
18. W says that this was a deliberate breach, intended to keep W in the dark about what was going on, and which deprived her of the opportunity of raising the issues which I now have to resolve before the event, rather than afterwards.

19. H says that he overlooked the obligations because both he was extremely busy at the time and in any event regarded them as immaterial in circumstances where W was receiving the full value of her award at the same time as any other departing investor.
20. The amount that W has received in respect of H's co-investment and carry from the Fund I funds is about £9m. I regard it as immaterial as to what I have to determine that this sum was appreciably more than Mostyn J had envisaged. I also regard as irrelevant the emphasis that H puts upon her own and her familial wealth.
21. W also puts weight upon the proximity in time to the establishment of the CF to the conclusion of the proceedings before Mostyn J. I do not agree that that this is relevant to the construction of the order.
22. I agree with the parties that my sole task is to construe the final order, and in particular paragraphs 15 and 25-26. In doing so I am considering whether the order gave W an option to elect to carry over to the CF or whether it required H to pay W lump sums calculated in accordance with the percentages that Mostyn J determined in respect of his interests in Fund I.
23. H and W agree that in the event that W's argument prevails, just under €3m will need to be reimbursed by W to H. There are further arguments, however, between them about the precise sums that are repayable and how interest and an accounting for H's carry receipts from the CF received by him impact upon the calculation. I intend to park those arguments as only arising if I was to take the course that W advances.
24. Paragraph 15 of the order reads as follows:

“Undertaking to give effect to intention to share benefits and not to dispose of resources

By paragraphs 25 and 26 of this order the respondent is to pay to the applicant lump sums determined by reference to his entitlement to the return on his co-investment and receipt of carried interest payments from Fund I. To that end:

(a) The respondent shall not take or permit to be taken any steps which have the effect of undermining or otherwise frustrating fully or partly the intention of the judgment of Mostyn J in this matter namely that the applicant is to receive lump sums equal to 78.19% of the respondent's Fund I Co-Invest share and 48.53% of the respondent's Fund I Carry share net of tax.

(b) It is agreed by the parties that if the respondent takes or causes or encourages any other person or entity to take any step intended to reduce the sum or sums that would otherwise be receivable by the applicant pursuant to paragraphs 25 and 26 below whether in contravention of his undertakings at paragraph (b) below or otherwise (save for steps taken in the ordinary course of business), the sum due under paragraphs 25 and 26 shall be calculated as if such steps had not been taken.

...

(d) The respondent shall not take any steps to restrict the distribution of any capital and income proceeds of Fund I Co-Invest and Fund I Carry which may otherwise be

due to him from time to time and will positively take all steps to give effect to any such distribution.

(e) Unless the applicant is to receive or retain her full entitlement as part of the

transaction, the respondent shall not directly or indirectly set up, or be involved in, or permit the creation of (insofar as he has power to restrict) any alternative partnership, company or other vehicle as may be set to replace Fund I Co-Invest or Fund I Carry and shall not in any event cause or permit (in so far as he has any power to so do) the diversion of any of the capital or income proceeds from Fund I as would have been due to Fund I Co-Invest or Fund I Carry into such alternative or replacement vehicle. If and to the extent that any he does so in breach of his obligations herein, then the definition of “Fund I Co-Invest” and/or “Fund I Carry” at paragraphs 25 and 26 below shall be deemed to include any such alternative or replacement vehicle.”

The hearing before me

25. Mostyn J having retired, the case was allocated to me. Both parties had the benefit of the same representation by leading counsel as they had at the hearing before Mostyn J which took place in October 2021 and which subsequently led to the order of 25 January 2022. They had each acquired juniors for the hearing before me.
26. The written and oral submissions that I heard on both sides were of the highest quality.

The case for W

27. W’s case by the time of trial had been clarified following case management orders made by me. She made it clear that she was not seeking to set aside or vary the order of Mostyn J but was seeking to implement it in accordance with what she said was his clear intention.
28. In the light of the agreement between the parties that the sole issue was the construction of the order, I declined to permit oral evidence. I had previously adjourned this issue until I had had the opportunity of proper pre-reading of the case. It was clear to me having done so, that oral evidence would not advance the case and that W’s objective, in seeking to cross examine H was only in reality either to substantiate her claim that H had failed to give proper information and documentary evidence as required by paragraph 16 of the order, which he admitted, or to seek to garner evidence for a subsequent possible set aside application. Having expressed my preliminary view, W did not press the issue further.

W’s case

29. Her case in summary was as follows:
 - i) Mostyn J had concluded that in the absence of significant liquidity and the difficulty of valuing the assets, he was driven to make a Wells sharing order in respect of Fund I.

- ii) The Wells order was one that would achieve fairness between the parties. His anticipation was that over the course of 4.5 years H would be able to bring to the market the investments in Fund I.
- iii) The whole rationale of the order was to give H the time with his colleagues to build up the value of the assets in Fund I.
- iv) Because it was impractical or impossible to transfer to W part of H's shareholding, her award had to be structured as a percentage of H's receipts.
- v) Whilst provision was made in the order which would bar H from diminishing the funds which he would receive and into which W would feed, no consideration was given to the possibility of any part of the investments in Fund I being transferred to a continuation fund.
- vi) It was inconceivable that the judge would have given to H alone the power to decide to buy out W's share at a time of his choosing. W was entitled to a share of the fund at the time that H became entitled to payment rather than some artificial date of H's election.
- vii) H's interpretation of the order means that he alone will take the growth in the CF.
- viii) H had no choice but to invest in the CF. W should not be deprived of the opportunity of sharing in that growth.
- ix) A change in structure does not unravel the scheme of the order.
- x) W should not be treated differently to any other investor. She was a shadow partner of H but unlike any other investor was deprived of the information of what was going on. She should not be the worse off for being a shadow partner rather than a shareholder.
- xi) CF has only two investments, namely DN and the rump of EC. These are assets which were part of Fund I and is simply a continuation under a different form of that entity in which Mostyn J had granted her a share of H's receipts.

H's case

- i) This part of the order is clearly a contingent lump sum order. It is not an order that gives W an interest in any of the underlying the assets and nor is or was she capable of requiring an interest in either the capital or income funds.
- ii) H's obligation to pay the lump sum on the happening of certain events is mandatory; if he was not to pay her the share which the judge ordered, he would be in breach.
- iii) If H did not pay as the order set out, W could enforce payment.
- iv) The words of paragraphs 25 and 26 of the order are very clear; H must pay lump sums equal to the proceeds "due to or received by [H] arising out of [the capital or income received]". This was mandatory.

- v) The order obliges H to extract funds as soon as he can and to take all steps necessary to achieve the distribution of capital and income proceeds to him.
- vi) H received funds from the sale of his interest in the capital and the carry funds. He paid to W, as she accepts, the full sum to which she was entitled in respect of these receipts.
- vii) If he had rolled over W's proportion of what he invested in CF, rather than paying her its value, he would be breaching the order.
- viii) By claiming a quasi-proprietary interest in the underlying assets of Fund I, W is seeking to change the terms of the order.
- ix) It is to be noted that of the investors in Fund I, 58% chose not to invest in CF whilst 42% did invest. Those who did not invest were replaced by new investors. Both the exiting and continuing investors accepted the value attributed to their interest which was identical with that which was applied to W's percentage interest.
- x) The terms of the order are clear. All that happened is that W has received her award sooner than was anticipated.

The applicable law

30. The parties agree that the law is helpfully summarised in Barnard v Brandon [2023] EWHC 3043 (CH) where Richards J said this:

No doubt by coincidence, the sole authority to which I was referred on the proper approach to the construction of court orders, was my own judgment in Banca Generali SPA v CFE (Suisse) SA and another [2023] EWHC 323 (Ch). All parties were agreed that I should follow the approach set out in paragraphs [18] to [22] of that judgment. Ignoring those principles that are applicable to the construction of injunctions which are not applicable in the present case (there being no dispute as to the meaning of paragraphs [10] and [11] of the Trial Order) the parties' common approach can be summarised as follows:

i) The sole question for the court is what the Trial Order means. Issues as to whether the Trial Order should have been made and, if so in what terms, are not relevant to construction. The court should not succumb to any temptation to stretch legal analysis to capture what are seen as the merits or lack of merits of the case that led to the making of the Trial Order.

ii) The words of the Trial Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context, and with regard to the object of the Trial Order.

iii) The reasons the Judge gave for making the Trial Order in his judgment or judgments are an overt and authoritative statement of the circumstances which the Judge regarded as relevant. Those reasons are admissible for the purposes of construing the Trial Order.

iv) However, caution should be exercised before engaging in an excavation and analysis of the parties' submissions to the Judge to discover their motives for seeking particular orders with a view to construing the Trial Order. That runs the risk of being a difficult and dubious exercise with parallels to admitting evidence of negotiations in construing a contract.

My Conclusion

31. H's failure to provide information and documentary evidence as required by paragraph 16 of the order is regrettable, but it does not affect the issue which I have to determine. It will be likely to impact on the issue of costs, but it does not affect the construction that I have to give to paragraphs 25, 26 and 15 of the order.
32. The order is clear: H's obligation is to pay the appropriate percentage of the proceeds due to or received by him from respectively the co-invest or carry funds net of tax and transactional costs.
33. This is exactly what he did. W received full value for her interest. Having paid W, the fact that he invested, as a matter of obligation, some of the proceeds into the CF does not lead to any requirement for him to give W the same opportunity.
34. Paragraph 15 of the order provides for various steps that H must not take. These are anti-avoidance provisions prohibiting H from taking steps which might have the effect of reducing what W would receive under the terms of the order. There is no evidence that H has taken any step which would have the effect of frustrating the judgment "that the applicant is to receive lump sums equal to 78.19% of the respondent's Fund I Co-Invest share and 48.53% of the respondent's Fund I Carry share net of tax." Indeed W accepts that this is what she did receive.
35. Paragraph 15 d) is not to be ignored. This bars H from taking any steps which might "restrict the distribution of any capital and income proceeds ... which may otherwise be due to him ... and will positively take all steps to give effect to any such distribution". In other words, H must make the distribution at the earliest opportunity.
36. Paragraph 15 e) prohibits the diversion of the proceeds. It cannot be argued that paying W her share of the proceeds amounts to a diversion.
37. As Mr Webster KC rightly pointed out, no one in 2022 gave any thought to the establishment of a continuation fund. What has happened was not foreseen. I do not agree with him that it follows that if Mostyn J had been asked to consider this possibility he would have given W the opportunity to roll over her interest into the CF. Nor, should I enter into such surmise.
38. At the root of W's complaint is the fact that she has been deprived of the opportunity of investing in a fund which at its inception had the hope of making significant returns. Indeed, it appears that the hope/expectation may have been well-founded. But, I regard this as not material to the outcome of this application:
 - i) The words of the order are clear. That the event was not foreseen is not a ground for going behind the words.

- ii) Whilst the hope/expectation might turn out to be justified, it is equally possible that it will turn sour.
 - iii) I see no unfairness arising from how things have turned out.
39. I have reminded myself often as argument developed that I am not dealing with a set-aside or variation application. Mr Webster repeatedly took me to documents which he says point to H having been less than frank with the court when he gave evidence in 2021 and/or before the order was perfected in January 2022. I do not regard this as helpful in construing the order.
40. It follows for all these reasons that I dismiss W's application for an order (or more properly a declaration) that she is entitled to an interest in the CF (or a percentage of H's interest in the CF) to the same extent as Mostyn J ordered in respect of Fund I.