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Case No: FD22F00068

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

Royal Courts of Justice
Strand, London
WC2A 2LL

Date of hearing: Wednesday, 10 July 2024

Before:

SIR JONATHAN COHEN

Between:

TRNS

Claimants

- and -

TRNK

Defendants

TRNS v TRNK (No. 2)

MR S. WEBSTER KC, MR J WEBB (instructed by **Charles Russell Speechlys**) for the
Applicant

MR J SOUTHGATE KC (instructed by **Withers**) for the **Respondent**.

Approved Judgment

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SIR JONATHAN COHEN:

1. This matter should have been determined before me on 8 February, when the matter was listed for a one-hour hearing, which was never going to be enough. I took the view that the case was not ready to be dealt with then in the light of a whole series of free-standing arguments which were not fully crystallised or, indeed, evidenced. I acceded to the request made by the applicant (the husband), that the issues relating to security should be dealt with in the context of a commercial arbitration.
2. Of course, that was intended to be the only matter that would be put over, and all other matters were to have been dealt with by the making of a consent order, originally anticipated (although I do not know why) at a hearing on 23 January, but subsequently rearranged. As a result, on 8 February, I adjourned the whole matter until 1 May, and I regret that that hearing did not take place due, as I now know, to a matter I had which was part-heard on circuit in Newcastle, having been rearranged for then, which meant I could not be available to deal with this case.
3. The background to what I am considering is what is described on the title page of the document as "Open heads of agreement", which the parties entered into on 15 December 2023. The parties agree that my goal today is to follow the heads of agreement, and interpret its incomplete terms as fairly as I can in the context of those heads of agreement, and in the context of the case in which I have been fully immersed.
4. I will deal with the issues between the parties one by one. The first issue arises out of the wording of paragraphs 8 and 9. Paragraph 8 of the heads of agreement refers to H (the husband) being able to draw £500,000 per year with any funds extracted over that, being paid towards meeting the lump sum obligations. Paragraph 9 reads as follows,

"Each of the security documents will provide that H will be able to draw up to an agreed amount of £500,000 per annum, which shall cover the totality of value that can be extracted in any one calendar year, whether by cash, loans, benefits in kind, sale shares, share by VAT or otherwise, to include all remuneration."
5. It is completely silent as to whether the £500,000 a year is meant to be net or gross of tax. Of course, what the tax would be, indeed if tax was payable at all, would depend on whether the extraction was by cash or by loan or by benefits in kind or dividends or howsoever. All of these would produce entirely different tax consequences.
6. My clear impression is that the parties never came to any consensus on that. My conclusion is that it should be net, and on this point I am with the husband. I come to that conclusion based on what he has to pay to the respondent (the wife) by way of what I will call "interest payments", but in effect spousal maintenance, payments towards the children, towards their education, as well as his own expenses. I do not think it was properly in anticipation that his total withdrawals or extractions would be limited to £500,000 gross or about half of that figure net. It would leave little for him and compel him to live off capital.

7. The second issue is the right of first refusal. On this issue, I am with the wife. I do not agree with the husband's proposal which, in my judgment, would put the wife in an impossible position. I do not think it is what the parties intended, nor do I think it is fair. He can buy the property if he wishes, if his offer exceeds or equals that of any other prospective purchaser who makes an offer which the wife is inclined to accept; likewise, if she were to sell a part of the property. However, to put her in a position whereby if she receives an offer she would like to accept, she then has to suggest a figure to him, wait whilst there is a valuation of the property if the parties do not agree it, require her to accept whatever the valuers might advise, and then stand by whilst he does what he wants with the property and, indeed, maybe sell it for more. That simply cannot be right, and it puts her in an impossible position in any purchase she wishes to make.
8. If the wife wishes to sell the property, she must offer the husband the chance to buy at the price which the prospective purchaser is prepared to pay. The husband will have seven days thereafter to indicate whether he wishes to buy; if he does wish to buy, he will then have 14 days within which to exchange thereafter, unless a longer period is agreed, which it may well be, and 28 days thereafter, that is 28 days after the 14 days, to complete.
9. The next issue is the one of security, which is paragraph 42 of the order, and whether or not security is needed by way of an undertaking. On this issue, I am with the husband. I think the proposal put forward on behalf of the wife could lead to endless correspondence and litigation. This matter is properly dealt with in the security agreement, and I am satisfied that the contractual relationship which that creates will provide the wife with sufficient protection.
10. The fourth issue was that of spousal maintenance, namely whether the provision should remain in existence, albeit differently expressed in the event that she remarries. I am pleased that the husband has effectively conceded what, inevitably, would be the result if I was forced to decide it. The provision will remain in existence if she does remarry, albeit it will inevitably have to be reframed, not just as far as maintenance, because that comes to an end on remarriage, but some other description, whether interest or otherwise.
11. That brings me onto the fifth issue, that of retained assets, and there are two separate issues there. The first one is who shall have the income until payment of the last of the lump sums. Paragraph 6 of the heads of agreement provides that,

"The W will transfer to H interest in the three entities by no later than the date on which H's obligations under paragraph 8 (that is to pay the lump sums) have been satisfied in full."
12. The position appears to have been that until 2022, the wife was receiving the income from QV XYZ. That income, broadly speaking, was about equal to the tax that she had to pay in Country X in respect of both income and the capital gain made on the shares. These are in her name, she will be taxed on them, and it seems to me proper that she should receive the income on QV XYZ until they are returned to the husband under the agreement.

13. I do not have any figures, at least no precise figures, in respect of what the income and expenses are of the relevant underlying properties. The sums cannot be very large in the circumstances. As I understand it, the husband has been receiving the income and paying the expenses, largely, I imagine, the mortgages on the two properties. In my judgment, he should continue to receive the income in respect of those entities, but he will be solely responsible for the expenses and the tax. To the extent that any tax is levied on the wife as a joint owner, he must indemnify her in respect of that. He takes the income, and so he must take the liabilities.
14. The second issue is whether the three entities can be sold without agreement. The husband argues that he should be entitled to call for their sale, provided that he uses the funds received on account of the lump sums he has to pay. However, that is not what the parties agreed, and in my judgment, short of agreement, the wife will retain the ownership of the three entities until the husband has fully satisfied his obligations under the order.
15. There were some further issues which made me think with some care and difficulty. The completion date: the parties had intended that six months from either 23 January or 8 February, the completion of the transfer to the wife of the matrimonial home would take place. However, that completion was meant to run from date of the final order, and there was not a final order on 23 January or 8 February and nor, unfortunately, was there on 1 May. Mr Webster KC, who appears with Mr Webb on behalf of the husband, says that I should go by the strict letter of what is agreed. Six months means six months, and that means six months from today.
16. Mr Southgate KC, who appears on behalf of the wife, accepts that the husband might need a little time to gather together the funds needed for completion (I will come back to that in a moment), but in broad terms I should take the six months as a period that will be expiring shortly.
17. The sum that the husband will have to produce is somewhere between £1.8m and £1.9m, comprising approximately £1.5m to discharge the mortgage, and £375,000 towards the wife's costs.
18. Mr Southgate says that he can understand that three months or so might be the right period to give the husband in order to raise the necessary funds, but that should not prejudice what the wife is to receive upon the completion of the transfer. Because, from that date the spousal maintenance kicks in, in the sum of approximately £80,000 per month, and that reflects the interest that is payable on the outstanding lump sum. Therefore, although on the one hand she is receiving about £40,000 a month towards the expenses of the matrimonial home, that will double upon the completion taking place.
19. The date that I have chosen for completion is 1 November 2024. I have chosen that date for several reasons. First of all, it is approximately three and a half months (rather than three months) which Mr Southgate suggested might be a reasonable period for the husband to gather together the sums, with which I broadly agree. Secondly, it is six months from 1 May, when but for the unfortunate double booking in my diary, there would have been the making of the final order. There would then have been the conclusion of matters in dispute, rather than today. That is therefore the date which I take. I do not intend to make any special provision in respect of the

£40,000 differential that will arise in the period from 8 August through to 1 November.

20. Should the interest payments be made monthly or annually? Again, this was something that the parties had not turned their minds to, and this is in no sense a criticism of the drafting of the heads of agreement. There are difficult but sensible arguments that have been put forward on both sides. On behalf of the husband, it is said that the money will come from selling or releasing equity from capital assets. His receipt of funds from that source is, and I use my word, "lumpy". On behalf of the wife it is said she is entitled to have a regular income flow, as she would be if maintenance was being paid conventionally.
21. I flirted with the idea that there was something to be said for making the payments quarterly, however, I have retreated from that. My view is that they should be paid monthly with effect from 1 November, for the reason the wife gives. That gives the husband sufficient time, whilst he is making provision for the payment of the mortgage on the matrimonial home and costs, to realise whatever extra sum is needed to tide him over the initial period when the monthly payments kick in.