Neutral Citation Number: [2024] EWFC 299

Case No: BV19D16832

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2024

Before :

SIR JONATHAN COHEN

- -

Between :

A **Applicant**

- and –

M
[No.3] **Respondent**

- -

Mr S Webster KC & Mr J Rainer (instructed by **Fladgate LLP**) for the **Applicant wife**
Mr D Brooks KC & Mr J McEvoy (instructed by **Marsans Gitlin Baker**) for the **Respondent husband**

Hearing dates: 21 October 2024

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Approved Judgment

This judgment was handed down remotely at 11.00am on 25 October 2024 by circulation to the parties or their representatives by e-mail.

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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. It should be cited as A v M (No.3).

Sir Jonathan Cohen :

1. The primary application with which I have been concerned is the application by H to strike out W's application to set aside a financial remedy order made by Mostyn J on 25 January 2022 on the ground of H's misrepresentation.

The History

2. In October 2021 Mostyn J heard the parties' financial remedy applications following the breakdown of the marriage between W and H. He gave judgment on 5 November 2021. In his judgment he tackled the division between the parties of H's interest in private equity funds which he had established with another founding partner.

3. The formula which the judge adopted in order to determine the marital element is set out at paragraph 15 of his judgment. Put broadly, W was to share in the marital element of H's carry in the funds which was calculated as the period measured in months from the establishment of the fund to the date of trial as a percentage of the total number of months from establishment until the close of the fund, so as to enable her to share in that element which reflected marital carry. Crucial to the calculation was the date of the establishment of the fund and the date of anticipated closure.

4. The dates which the judge accepted were not in dispute at trial. Fund 1 was established in October 2016. Its first close was in March 2017 and the term of the fund was 8 years from the first close. The judge operated on the basis that close would be in 2025, unless extended.

5. It is now common ground that the close was not 8 years from 2017, but in fact 8 years from 2015.

6. It follows that the judge's calculations were wrong because the period of post separation (or post trial) was exaggerated, and the consequence was that the percentage of the value that W received from Fund 1 was under-calculated.

7. H accepts that his evidence to the judge that the fund had some 4 years to run was inaccurate as it had only 2 years from trial (in round figures). He says that this was an innocent mistake made by him as a result of wrong information being recorded by professional advisors in the documents upon which he relied. W says that he must have all along known the truth of the situation, and certainly by the time of trial.

8. The order of the judge further provided for H to give information and documentary evidence of fund activities as set out at paragraph 16 of the order. That information would have enabled W and her advisors to be on the same footing as investors in the fund and to be able to see what steps were being taken and when in respect of the closure and consequent distributions. H failed to provide any such documentation, which left W in ignorance.

9. Following the closure of the fund H paid W what was calculated to be W's share according to the formula adopted by the judge.

10. W felt strongly that H had wrongly construed the Mostyn J order. She wished her interest to be rolled over into a continuation fund which H and his colleagues had established rather than her being compelled to be cashed out.

11. W therefore took out a summons for a ruling to that effect. I shall call her application the construction application. It was issued on 20 September 2023. The matter was allocated to me and was listed for a FDA on 11 December 2023.

12. I have been provided with no transcript of that hearing. I recall that I was concerned on pre-reading that there appeared to be an intermingling by W of arguments which related to her construction application but also a set-aside argument which was not before the court. Many of the questions which W sought H to be compelled to reply to were material to a set-aside application rather than construction.

13. I ordered H to provide certain information by 19 January 2024 and at paragraph 24 of the order I directed as follows:

> "Unless the applicant states by 1 February 2024 that she seeks to either set aside or vary the final order, then this application shall be limited to implementation and enforcement of the Final Order."

14. On 19 January 2024, H provided his disclosure and replies in accordance with my order of 11 December 2024. On 31 January 2024, W wrote with a request for further time to consider the documents disclosed, and by consent the date for W to set out her case on set aside or variation was put back by agreement to 29 February 2024.

15. On 20 February 2024 W, having reviewed H's replies, asked 6 further questions, the material one being that which asked H to explain the discrepancy which had then become apparent that the life of Fund 1 was to expire in November 2023 rather than March 2025, as H's evidence had been. W sought also an extension of the deadline from 29 February to 19 March, on the basis that H would answer the questions put by 5 March 2024.

16. Although the letter of request was written on 20 February 2024 as a matter of some urgency, it took H's solicitors a week to reply when they said they would not agree an extension of the deadline and that "my client is considering the matters raised in the further questionnaire and will respond in due course". In a further letter written that afternoon, H's solicitors wrote "We view Q1 as a irrelevant or something of a fishing expedition (sic)".

17. On 29 February 2024 W issued an application seeking an order that H reply to the further questionnaire by 19 March 2024 and an extension of the time to confirm whether or not she was seeking to vary or set aside the final order until 2 April 2024.

18. The matter was put before me on paper. The material part of my reply was that "W must elect whether she intends to apply to set aside as ordered. Any application to extend will need to be listed before me".

19. W did not seek any further extension or order in respect of the additional questions. The matter was not raised at the PTR.

20. Between 29 July – 1 August 2024 I heard and considered W's construction application and by my judgment given on 1 August 2024 I dismissed her application. She has applied to the Court of Appeal for permission to appeal and a decision is awaited.

21. On 7 August 2024 W issued her application to set aside the order of Mostyn J. It is that application which H now seeks to strike out.

Discussion

22. The arguments on both sides have been put persuasively and with enthusiasm. They epitomise the difficult issues which can arise in these cases. The points made on behalf of H are as follows:

    i) W logically should have applied to set aside the order either before or at the same time as her construction summons. It makes little sense to rule on the construction of an order if it is to be set aside.

    ii) It was made clear to W that if she wanted to apply for an extension of time she should have done so; she did not.

    iii) W received no relevant new information between 29 February – 7 August 2024. If she was in a position to issue her application on 7 August, then so she was by 29 February.

    iv) As Mr Webster KC candidly admits, W was so focussed on her construction summons that, in his words, set aside was way down her agenda.

    v) If this application had been issued, the court would have managed the case differently and would have been likely to have directed one rolled up hearing dealing with both issues.

23. I regard these as good points. There must be finality of litigation so that parties can move on with their lives. This is an important matter of public policy.

24. I do, however, reject completely the assertion of H that because within the mound of documents produced in this case there was a document or documents which gave the 2023 closing date and thus W was put on notice of that fact. H says that if W had conducted the obligatory due diligence in reading the documents, the correct date would have been revealed to her.

25. There are two main problems with this argument. First, H's argument both by way of statement and presentation to the court at the hearing before Mostyn J was that 2025 was the correct date. It was, after all, his business and he was the one who should know. Secondly, there were many other documents which gave the erroneous date of 2025, all of them provided by H. He cannot put on W the burden of discovering his error.

26. W's argument raises similar points of strength:

    i) The wording of paragraph 24 of my order of 11 December 2023 was focussed. It provides that unless W takes the steps set out, "this application shall be limited to implementation and enforcement". The words "this application" plainly relate to the construction application.

ii) There is no order that sets out that if W did not take the step set out she would be debarred from making a set aside application. It would be wrong to infer such a serious step, when it was not debated or became part of the order.

iii) It is common ground that the Mostyn J calculations were based on wrong information given to him by H. It does not sit well for H to complain if W seeks to remedy the error which he created.

iv) H was repeatedly asked to explain the discrepancy between the dates. He obfuscated before eventually refusing. Only in his statement this month in support of his strike out application has he accepted that his evidence was misleading.

27. I have heard no evidence and I have made no finding at this stage as to whether H did know or should have known that his evidence was wrong.

The law

28. H's application to strike out is based on the following arguments:

i) There was an unless order with which W did not comply. She has sought no relief from sanctions.

ii) Her application is an abuse of the process of the court.

iii) Her application has no real prospect of success and/or discloses no reasonable grounds.

The unless order

29. As I have already pointed out paragraph 24 of the order of December 2023 is limited. It was made so as to define the extent of the argument that was to be considered in the July hearing. No express thought was given or ventilated at the directions appointment as to any subsequent application to set aside. In my judgment an order to bar a set aside for dishonesty must be made expressly. It was not within the contemplation of the court when making the order.

30. As a matter of fact, it is not a debarring order.

31. It follows that I do not consider the Denton criteria apply. Accordingly there would be no requirement for an application by W for relief from sanctions. However for reasons that I will come on to, if the circumstances of the case did require an application for relief, I would grant it.

Abuse of process

32. This is the real substance of the application before me. I have been referred to a number of leading authorities in this area and I have highlighted those passages which are of particular relevance.

33. I start with Johnson v Gore, Wood & Co. [2002] 2AC 1, where Lord Bingham of Cornhill said at paragraph 22:

". . . Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

34. This was expanded upon in Stuart v Goldberg Linde [2008] 1WLR 823 at paragraphs 77 (per Sedley LJ) & 96 (Sir Anthony Clarke MR):

77. *Secondly, as the Aldi Stores Ltd case again makes clear and as Sir Anthony Clarke MR stresses, a claimant who keeps a second claim against the same defendant up his sleeve while prosecuting the first is at high risk of being held to have abused the court's process. Moreover, putting his cards*

on the table does not simply mean warning the defendant that another action is or may be in the pipeline. It means making it possible for the court to manage the issues so as to be fair to both sides.

96. *For my part, I do not think that parties should keep future claims secret merely because a second claim might involve other issues. The proper course is for parties to put their cards on the table so that no one is taken by surprise and the appropriate course in case management terms can be considered by the judge. In particular parties should not keep quiet in the hope of improving their position in respect of a*

claim arising out of similar facts or evidence in the future. Nor should they do so simply because a second claim may involve other complex issues. On the contrary they should come clean so that the court can decide whether one or more trials is required and when. The time for such a decision to be taken is before there is a trial of any of the issues. In this way the underlying approach of the Civil Procedure Rules, namely that of co-operation between the parties, robust case management and disposing of cases, including particular issues, justly can be forwarded and not frustrated.

35. An important caveat to the principle of the desirability of finality in litigation can be seen in the judgment of Andrews LJ in Park v CNH [2021] EWCA Civ 1766 where at paragraph 56 she said this:

The Supreme Court held that in a case where the alleged fraud was not in issue in the previous proceedings, even if the previous judgment has been entered after a trial on the merits, the person seeking to set aside the judgment is not obliged to show that the fraud could not have been discovered before the original trial by reasonable diligence on his or her part. The requirement in Henderson v Henderson (1843) 3 Hare 100 that "a litigant should bring forward his whole case" in the first set of proceedings does not apply in such circumstances, and there are no good policy reasons to allow the fraudulent party to rely upon the passivity or lack of due diligence of his opponent.

36. I refer finally to the judgment of Roberts J in AD v CD [2022] EWFC 116:

84. In terms of abuse of process, the well-established principle is that parties to litigation are expected to advance their respective cases in litigation at a single hearing. Save in special circumstances, the court will not permit the same parties to pursue the same issues in litigation in respect of a claim or matter which could, and should, have been pursued at the earlier hearing. That principle applies whether a failure to pursue matters on a previous occasion was the result of negligence, inadvertence or even accidental omission: see Henderson v Henderson (1843) 3 Hare 100, 115, [1843-60] All ER Rep 378 ("the Henderson principle").

85. A more recent restatement of the principle was set out in a judgment of Pepperall J. In Mansing Moorjani v Durban Estates Limited [2019] EWHC 1229 (TCC) at para 17.4 his Lordship said this:- "Even if the cause of action is different, the second action may nevertheless be struck out as an abuse under the rule in Henderson v Henderson where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all. In considering such an application:

(a)The onus is upon the applicant to establish abuse.

(b)The mere fact that the claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive.

(c) The court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case.

(d)The court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

(e)The court will rarely find abuse unless the second action involves "unjust harassment" of the defendant."

86. Thus in order for W to successfully establish her case in relation to abuse of process as a bar or defence to the current set aside application, she must persuade the court that H is oppressively abusing the court process through repeated challenges relating to the same subject matter. For these purposes she must go beyond showing that it was open to him to raise a particular case in earlier litigation or at an earlier stage of the same proceedings. She must show in addition that his current pursuit of the point or issue is in itself abusive: see In Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2020] 3 WLR 1369. This principle has to be considered in the context of the current set aside application being framed in fraud.

Takhar v Gracefield Developments Ltd [2019] UKSC 13

87. The leading authority in this context is Takhar v Gracefield Developments Ltd and Others [2019] UKSC 13.

The issue in Takhar was the extent to which a party was entitled to rely on evidence of fraud in circumstances where that allegation was not raised in the earlier litigation. The facts in that case involved a litigant against whom judgment was entered in a property dispute who subsequently wished to put before the court evidence that her signature to a central document in the case had been a forgery.

88. The Supreme Court held that where a judgment had been obtained by fraud in circumstances where no allegation of fraud had been raised at the trial which led to that judgment, a party seeking to have that judgment set aside did not have to show that the fraud could not, with reasonable diligence, have been uncovered in advance of the first judgment.

…

95. Thus, to summarise and drawing these legal strands together:-

(i) The principle established in Takhar is that there is no rule per se that a lack of diligence in a first, or previous, claim leads to a 'blanket ban' on bringing a subsequent claim to set aside an order or judgment which the claimant can properly allege was obtained by fraud.

(ii) Abuse of process in the context of a strike-out application informs the exercise of the court's procedural powers. Those procedural powers have been codified in the context of financial remedy proceedings by FPR r 9.9A and para 13.8 of PD 9.9A as set out above.

(iii) It is clear that, in this context and on the facts of the present case, it is not enough for the purposes of his set aside application for H merely to allege that the 2016 consent order was obtained by fraud or nondisclosure. Para 13.8 is clear in its

terms. Whilst the case management powers conferred on the court must always be exercised lawfully in accordance with substantive law and with a careful and critical judicial eye on the overriding imperative to achieve a fair outcome, those powers are wide and afford the court a considerable discretion including a power to strike out or summarily dispose of an application to set aside.

(iv) These powers form part of the wider jurisdiction of the court to protect its process from wasteful and potentially oppressive duplicative litigation even, as Lord Sumption acknowledged in Takhar, in cases where the relevant question was not raised or decided on the earlier occasion.

(v) There is an important principle engaged in terms of achieving finality in all litigation. In the context of family litigation, it has long been recognised that continuing, and often ruinously expensive, litigation can impact on parties in a wholly disproportionate manner. In sanctioning the court-mandated final 'clean break' now encapsulated in s 25A of the Matrimonial Causes Act 1973, Parliament intended to avoid the personal, emotional and financial disadvantages of leaving former spouses and their children locked in damaging litigation. Finality in judgments leads to certainty. Where one or both parties is engaged on a commercial enterprise and/or intends to commit his or her future energies towards developing a business, it is important in the wider sense for all property issues to be resolved in order that third party commercial interests are not subsequently impugned.

Determination

37. I have found this a finely balanced exercise. I have to weigh competing factors. W could and should have brought her application to set aside earlier. By not doing so she has extended this litigation unnecessarily, with all the consequent expense, both financial and emotional. I am not satisfied that there is a good reason for her failure to bring the claim earlier.

38. On the other hand it is common ground that W has ended up with a smaller award than she would have received if H had not given false information to the court.

39. I have to balance the prejudice that W's inaction has caused H with the prejudice caused to W if her claim is struck out notwithstanding H's conduct and the judicial error which flowed from it and his lack of openness thereafter.

40. In these circumstances I conclude that I should not strike out W's application as an abuse of the process of the court. My decision is consistent with the ratio of Sharland v Sharland [2015] UKSC 60. It does not sit easily with me to say that an admitted wrong should be unable to be corrected except in the clearest of circumstances, which in my judgment do not arise here. Insofar as there has been an avoidable duplication of costs, that is something that I can deal with at a later stage.

No real prospect of success

41. I do not regard H's argument on this to have merit. I accept that W's pleadings of dishonesty, such as they are, are deficient but, her argument that H must have been aware of his false presentation bearing in mind the steps that were taken to establish a

continuation fund within months of the conclusion of the proceedings before Mostyn J is one of a number of arguments that gives rise to an arguable case.

42. I accept that I have the power to strike out the application for no real prospect of success as provided by FPR 4.4 but its exercise on the facts of this case would plainly be wrong.

Mediation

43. This case cries out for mediation. H will argue, I am told, that if the case is reopened as to the calculation of W's interest in Fund 1, he will argue that the judge seriously over-valued his interest in Fund 2. I know nothing about the detail of it other than it appears to be common ground that the fund has underperformed.

44. I will need to hear from counsel as to whether any such mediation takes place before or after the Court of Appeal has ruled on my determination of the construction summons. However the benefits of such mediation are obvious and the body language of the parties in court indicated to me that they agree. I have the power to adjourn proceedings for that mediation to take place, and it is a power that I intend to exercise having considered with counsel when an appropriate time would be.

45. For all the reasons given I dismiss H's strike out application.