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Case No: 89D0261

Neutral Citation Number: [2023] EWFC 75 (B)

IN THE EAST LONDON FAMILY COURT

6th and 7th Floors
11 Westferry Circus
London
E14 4HD

Date: 9 May 2023

Before :

HER HONOUR JUDGE MADELEINE REARDON

Between :

RL **Applicant**

and -

NL **Respondent**

Mr Obiweluzo for the applicant
The respondent in person

Hearing date: 28 April 2023

JUDGMENT

Introduction

1. The application before the court is an application to set aside a financial remedy order (“the order”) made by District Judge Davies in the Bow County Court on 3.11.95. The applicant (“H”) is RL, who was the respondent husband in the original proceedings. The respondent is NL (“W”) who was the applicant wife.
2. H is represented in these proceedings by his solicitor, Mr Gregory Obiweluzo, who has attended each of the hearings on his behalf. W is a litigant in person.
3. Today’s hearing was listed, on the court’s own initiative, to determine whether H’s application to set aside the order should proceed or be struck out.
4. It has taken far too long to deal with these proceedings, which were issued on 5.4.22 . That is the fault of the court. At the first hearing on 29.11.22 I gave permission to W to file evidence in response to the witness statement filed by H in support of his application. In compliance with that direction, on 13.1.23 W brought in to court, and dropped off at the court office, a set of original documents. Unfortunately she did not retain copies and could not remember what was included in the documentation (the only document she remembered including was the decree nisi).
5. The court lost the documents. That meant that the next hearing, on 28.2.23, had to be adjourned to enable a search to take place. That has now happened but the documents have not been located. My clerk even tried to see whether the court’s cctv could identify the member of staff to whom the documents were handed, but by the time she checked the relevant footage was no longer available.
6. The court’s loss of potentially relevant documentation has added a layer of complication to these proceedings. I have had to take particular care to ensure that fairness to both parties is achieved despite the default of the court. H’s solicitor requested a further adjournment today but I refused that application as I did not think it would serve any useful purpose. I have been told clearly by the court staff that the documents cannot be located. If they have not been located by now, I am afraid there is no real prospect of their being found.

Background

7. The background to this application has been drawn from the accounts of the parties. There is some documentation available to the court (including the order itself) but the historic documentation is limited and incomplete. The original court file was destroyed in compliance with HMCTS’ file retention policy, which provides that where there is no ongoing maintenance payable (as here), financial remedy files are destroyed after 18 years.
8. The parties married in 1982. They had three children. They separated in 1988 when H moved out of the family home, leaving W living there with the children. They divorced in 1995.
9. There is no dispute that a final financial remedy order (then called an “ancillary relief” order) was made on 3.11.95. The effect of the order was to order H to transfer his interest in the family home, a house in Ilford which was held in his sole name, into W’s name. Upon execution of the transfer, there would be a clean break between the parties.
10. For reasons that are not clear to me, but appear to be connected to a loan secured on the property, the property transfer was never executed. W says the mortgage lender no longer exists and despite her efforts she has not been able to trace the current holder of the debt. The

balance of the loan in 1995 was just over £43,000, a relatively modest sum when set against the likely current value of the property.

11. Bow County Court has now closed, but HMCTS was able to locate some documentation that indicates that an application was made in or around 2007 by solicitors acting W, for implementation directions and in particular for a District Judge to sign the TR1 form which would bring about the transfer of the property into her sole name. The documents available include a witness statement of W (undated, but from its content prepared after August 2012) in which she set out the problems she was having executing the transfer due to a lack of engagement from the mortgage lender. In that statement she referred to correspondence between her solicitors and H's. She also set out her account of the process which led to the signing of the consent order on 3.11.95. She said that this was agreed and signed by her and H in front of the District Judge, after negotiations between lawyers.
12. The documents from that later file also include a set of replies prepared in May 1995 by solicitors on behalf of H to a questionnaire produced by W.
13. It is not clear what happened to the 2007 application, which seems still to have been unresolved by 2012. Certainly those proceedings did not result in the TR1 being signed, and according to a Land Registry search conducted in May 2022, the property remains in H's sole name.
14. Since the order was made in November 1995 W has continued to live in the property and has met the outgoings (save that in recent years at least, she told me, she has been unable to make payments towards the mortgage debt for the reasons I have set out above). In accordance with the clean break provision, no maintenance was paid by either party to the other and essentially both have gone their separate ways.

The positions of the parties

15. H's case is that the order should be set aside. In his application (drafted by his solicitor) he said that he had not consented to the order; W did not enforce it; the order is "statute barred" under the Limitation Act 1980; and he is the registered owner of the property.
16. The first paragraph of the skeleton argument filed on H's behalf reads as follows:

"[H] is making application to set aside a financial remedy order of 3rd November 1995.... On the ground that the order was made by fraud, fraudulent non-disclosure or misrepresentation of material facts and that was the reason [H] refused to transfer his legal estate and beneficial interest in his matrimonial property to [W]."

17. As I will explain, I have had some difficulty in understanding the basis on which H says that the order should be set aside.
18. W position is that the order should stand and the part which has not yet been executed, that is the transfer of the family home into her name, should be completed. She asks me therefore to direct H to sign the TR1 form in order to effect the transfer. If he fails to do that, she will make an application for the form to be signed by a judge pursuant to SCA 1981, s 39.
19. At the outset of the first hearing in these proceedings, on 29.11.22, I was informed by H's solicitor that W had agreed that the property would be sold and the proceeds divided equally between the parties. It transpired that this purported agreement had come about during a discussion outside court between W, acting in person, and H's solicitor. When I explored this with W in court it was clear that she had not realised that she did not have to agree to H's

proposal, and in particular that she had not understood that the order of 3.11.95 remained in force and would continue to do so unless it was set aside by the court.

20. The potential for an order striking out H's application was raised by me at the first hearing on 29.11.23, and H was directed to deal with this issue in his skeleton argument.

The law

21. H is the only represented party in this application. Despite my direction, H's skeleton argument prepared for this hearing did not refer at all to the law in respect of applications to strike out under FPR 4.4, and made only minimal reference to the law on applications to set aside financial remedy orders. H's solicitor declined my invitation to address the court further on these issues during the hearing. So the following summary of the law is entirely my own.

22. MFPA 1984, s 31F(6) provides as follows:

“(6) The family court has power to vary, suspend, rescind or revive any order made by it, including—

- (a) power to rescind an order and re-list the application on which it was made,
- (b) power to replace an order which for any reason appears to be invalid by another which the court has power to make, and
- (c) power to vary an order with effect from when it was originally made.”

23. The grounds upon which a financial remedy order may be set aside include fraud (see *Sharland v Sharland* [2015] UKSC 60) and, in the case of a consent order, a lack of valid consent (*MAP v RAP* [2013] EWHC 4784). H seemingly relies on both grounds, as well as others (for example, a limitation point) which have no basis in law.

24. An application to set aside an order where one of the vitiating grounds is said to be present must be made reasonably promptly once the vitiating factor is known. In *L v L* [2008] 1 FLR 26, Munby P cited the following passage from Thorpe LJ's judgment in *Shaw v Shaw* [2002] EWCA Civ 12:

“Given the importance of the overriding principle of finality in litigation, whatever the chosen [procedural] route the court should clearly exact promptitude and censure delay”

and went on to observe:

“The significance of that last observation is illustrated by the fate of the application to re-open a consent order on the ground of non-disclosure in *Burns v Burns* [2004] EWCA Civ 1258, where an otherwise meritorious application was dismissed for unreasonable delay.”

25. FPR 2010, r 4.4(1) provides that in financial remedy proceedings:

“(1) ... the court may strike out a statement of case if it appears to the court—

- (a) that the statement of case discloses no reasonable grounds for bringing or defending the application;
- (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings.”

26. The power may be exercised on application or on the court's own initiative.

27. PD4A gives a non-exhaustive list of examples of when the court may consider that a statement of case discloses no reasonable ground for bringing the application. These include cases where the facts are incoherent and make no sense; cases where the facts alleged, even assuming them to be true, do not disclose any legally recognisable application; and cases where the application cannot be justified, for example because it is frivolous, scurrilous or obviously ill-founded.
28. The “reach” of the court’s power to strike out a statement of case was considered by the Supreme Court in *Wyatt v Vince* [2015] UKSC 14. The Court held that the absence from the Family Procedure Rules of a power to give summary judgment meant that r.4.4(1) should be construed without reference to whether or not the application had a real prospect of success. The “touchstone” for an application to strike out should be whether the application was “legally recognisable”. The Supreme Court explicitly considered, and rejected, an argument that had succeeded in the Court of Appeal, namely that an application which had no real prospect of success could come within the scope of the power under r.4.4(1) because it was an abuse of the court’s process (see Lord Wilson at para 27).
29. In *Roocroft v Ball* [2017] 2 FLR 811 the Court of Appeal held that the approach set out by the Supreme Court in *Wyatt v Vince* should be applied to applications to strike out an application to set aside a financial remedy order, in the same way as it applied to a substantive application for a financial remedy order.
30. So my consideration of H’s application must focus on the coherence of the facts pleaded, and on whether or not those facts can be fitted into a recognisable legal framework.

Discussion

31. The documents which set out the basis of H’s application are the application form, H’s witness statement in support, and the skeleton argument filed on his behalf.
32. Some parts of H’s case, as pleaded in his application notice (para 15 above), have no foundation in law. Even if W had not applied to enforce the order (in fact it seems that in 2007 she attempted to do so) this would not be grounds for an application to set it aside. There is no provision in the Limitation Act 1980 or elsewhere which would operate to prevent W from seeking to enforce the order. The fact that H was (and remains) the registered owner of the property did not in 1995 prevent the court from making a property adjustment order in W’s favour, and is irrelevant now to the issue of whether or not the order should be set aside.
33. Further, in my view, H’s case is factually incoherent. Different things are pleaded in different documents, and at different points in the same document. Some of these are mutually inconsistent.
34. H’s case, as set out in his skeleton argument and advanced orally today, is firmly based on an allegation of fraud. It is said that during the original financial remedy proceedings W falsely claimed that H had a number of assets (in addition to the family home), including various properties in Nigeria, and that he was a drug dealer therefore “financially sound”. It is said that H denied these allegations.
35. H’s skeleton argument goes on to read, “H was of the view that the legal representatives must have taken those fraudulent claims into consideration when they drafted and filed the consent application.” It is not clear whose legal representatives are referred to: H’s, W’s or both.
36. However in H’s witness statement, which was filed together with his application, there is no allegation of fraud and indeed H says nothing about what happened in the 1995 financial remedy proceedings. Paragraphs 6 – 9 summarise H’s financial position at the time. The next paragraph begins, “As I was in the process of consolidating and refinancing my debt, I received a

property adjustment court order dated 3rd November 1995...". There is no reference in the witness statement to H's participation in the financial remedy proceedings. It is implied, although not explicitly stated, that H knew nothing about the proceedings until he received the order of 3.11.95.

37. The impression that H was unaware of the proceedings is reflected in paragraph 7b of his skeleton argument, which reads:

"The respondent position on this issue was that he did not receive any court notice hence, he never attended the financial remedy hearings and was shocked to receive court order".

38. That impression is directly contradicted in paragraph 9 of the same document which reads:

"It is regrettable that [W] joined issue with [H] with respect to several claims set out in paragraph 5 above without providing documentary evidence with respect to:

- a) Alleged properties in Nigeria
- b) [address] – shop that he rented [...]
- c) Allegation of being a drug dealer"

39. This paragraph can only refer to issues raised in the original proceedings, and the only logical interpretation of what is said there is that H did in fact participate in those proceedings – as indeed is confirmed by the limited documentation available, in particular H's original replies to questionnaire.

40. Nowhere in H's witness statement or skeleton argument is there any reference to the enforcement/ implementation proceedings initiated by W in 2007.

41. Nowhere in any document filed on his behalf does H attempt to give any explanation for the delay in bringing these proceedings.

42. I have done my best at each of the three hearings in these proceedings to make clear to H's solicitor the difficulties I was experiencing in understanding his case. My requests for clarification have fallen on deaf ears. At the hearing on 28.4.23 I formulated the following questions for H, and received the responses set out below:

- a. Question: Is it H's case that he was unaware of the original financial remedy proceedings? Answer: no. He was aware.

My observation: That answer does not make sense when read together with H's witness statement. There is no evidence before the court which sets out H's case on the key issue of the extent of his participation in the original proceedings. Is H saying that he was aware of the proceedings, but not notified of the hearing when the order was made? If so, why has he not said so explicitly?

- b. Question: what is the evidence upon which the allegation of fraud contained in the skeleton argument is based?

Answer: that is a legal issue and not a matter for my client. H is saying he did not sign the consent order.

My observation: H's solicitor was unable or unwilling to explain the evidential basis on which the very serious (and specific) allegations of fraud contained in his skeleton argument were made. Even from the skeleton argument, it is not clear what fraud is being alleged. Even if it is correct that in the original proceedings W made allegations that H had undisclosed assets, the fact of making such an allegation does not amount to fraud. Many spouses in financial remedy proceedings believe that the other spouse has assets that have not been disclosed, and ask questions accordingly. Nowhere in H's

evidence does he say that W made any statement she knew to be false, fabricated any document, or otherwise misled the court. The argument run on H's behalf is therefore inconsistent with his own evidence.

- c. Question: what is H's explanation for the delay in bringing this application, if he accepts he became aware of the order shortly after it was made in November 1995?

Answer: he was a lay person and unaware of the law. His children are now grown up and he thinks it is time to reach a settlement.

Observation: it was not clear what "law" H needed to know in order to realise that he was dissatisfied with the order (if that is indeed his case). The impression given during this exchange was that H believes his financial claims are still open (see also para 44c below).

- d. Question: what is H's case as to his participation in/ awareness of the 2007 application?

Answer: H's solicitor did not give any answer to this question, although I gave him more than one opportunity to do so. The note I have of the final answer reads, "As far as I'm concerned, [W] and her lawyers made the application for enforcement. [H] refused and no order was sent to him."

My observation: H did not, it seems, take the opportunity to raise any concern about the 1995 order during the proceedings in 2007.

43. Overall it is impossible to construct a case that makes sense from the documents filed on behalf of H. H's witness statement and his skeleton argument are inconsistent with each other, and with the oral submissions made on his behalf. I cannot understand what H says has happened, in 1995 or subsequently. He seems to be putting forward two mutually inconsistent cases: (a) that he was not aware of the proceedings; and (b) that he participated in the proceedings, but they were in some way vitiated by fraud.

44. Without coherence as to the facts, it is difficult to form a view as to whether H's case has any foundation in law. However I make the following observations:

- a. Apart from the assertion that he did not consent to the order, the other three grounds set out in H's application are not, as a matter of law, capable of supporting an application to set aside a financial remedy order.
- b. The application and supporting witness statement contain no allegation of fraud; this was made for the first time in H's solicitor's skeleton argument.
- c. There were points during the submissions made on behalf of H when his solicitor did not appear to understand that the effect of the order of 3.11.95 was to bring about a final resolution of the parties' financial claims against each other: more than once he referred to the "need to reach agreement;" "time to reach a settlement". If one assumes that the conversation between W and H's solicitor outside court before the first hearing (para 19 above) did not amount to a deliberate attempt to put pressure on W, then W's misunderstanding of the position after that conversation may be attributable to a misapprehension as to the law on the part of H's solicitor.

45. I accept that the lengthy delay (27 years) between H becoming aware of the order and issuing this application is, primarily, a "merits" point that is not the focus of this strike-out hearing. However, H's silence on this important point, and his solicitor's failure to give any sensible explanation when asked why there had been such a long delay, are features of H's case that contribute to its overall incoherence. In my view, H's case could be described as weak on the merits if he had included in his evidence an unconvincing explanation for the delay. The failure to engage with the issue of delay at all, anywhere in his documentation, means that the court is completely in the dark as to the merits of H's case on this point.

46. For the above reasons, I am of the view that the case advanced on H's behalf is different in nature from a case that could be described as weak or without a real prospect of success.
47. I have considered the impact of the unfortunate loss, by the court, of the documents lodged by W. It is possible that those documents, or some of them, contained information that might have shed some light on the background to this case. There is therefore the potential for unfairness to either or both parties in dealing with the case in the absence of the documents, although there is no way of knowing which party might suffer the greater prejudice.
48. However it seems to me that it is not unreasonable for the court to expect that H ought be able to explain his own case, even in the absence of the missing documents. After all, when he issued his application he did not know that W had retained any documents and after such a long period of time the likelihood must have been that she had not. Certainly it is not the absence of the documentation that has prevented H from articulating his case.

Outcome

49. The power to strike out a statement of case may be exercised where the statement of case discloses no reasonable grounds for bringing or defending the claim, or where the application is an abuse of the court's process.
50. I remind myself that I am not concerned with the merits of H's position.
51. After examining H's case I have concluded that:
 - a. It is factually incoherent. The factual matrix is internally inconsistent and contains significant gaps.
 - b. The legal basis of the application is not clear. Is this application based on fraud, or an absence of consent? What is H's explanation for the delay?
52. The way in which H's case has been presented makes it impossible for the court to carry out its fundamental task of applying the law to the facts.
53. For these reasons, I am of the view that H's application, taken as a whole, discloses no reasonable grounds for bringing this claim, and the application is therefore struck out.