

TRANSCRIPT OF PROCEEDINGS

Neutral Citation Number: [2019] EWHC 3434 (Fam)

Ref. ZC16D00299

**IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION**

Royal Courts of Justice
Strand

Before THE HONOURABLE MR JUSTICE MOSTYN

IN THE MATTER OF

HASKELL (Applicant)

-v-

HASKELL (Respondent)

MR R BATES appeared on behalf of the Applicant

MR N CUSWORTH QC & MR T HARVEY appeared on behalf of the Respondent

JUDGMENT

31st OCTOBER 2019, 14.48-15.10

(AS APPROVED)

This judgment was delivered in private. The judge gives leave for it 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.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

MR JUSTICE MOSTYN:

1. Yesterday was listed before me the wife's judgment summons alleging the accrual of significant arrears under the order of Lieven J, dated 4 March 2019, which order was confirmed, and the arrears on that date quantified, by Roberts J on 6 June 2019. The terms of the order of Lieven J provided for maintenance pending suit and interim periodical payments to be paid by the husband to the wife of just under £50,000 a month broken down as to £20,000 a month for legal costs, and the balance for the support of the wife and the three children.

2. We do not have a copy of the judgment of Lieven J, although it is reasonable to suppose that she made her order on the basis that it was more likely than not that the significant sums which the husband had been receiving in respect of his various investments scattered across the globe would continue to be paid, as they had abundantly been until comparatively recently. The material lately supplied by the husband demonstrates, as does Mr Harvey's note handed up in final submissions this afternoon, that as much as £85,000 a month was being paid by way of loan repayments from two of the companies of which he was the sole shareholder, namely Bellstar, which owns half a building in Kiev, and Golden Impala, which has interests in mining in Russia.

3. Now those payments have come to an end according to the written evidence of the husband and confirmed by him in his oral testimony. Although he has never asserted that the termination is permanent, his case has always been that he is not a man who is poor, but he is a man who is presently subjected to cashflow difficulties. However, Lieven J plainly assumed that these abundant sums would either continue to be paid or soon revived, but on the husband's case that did not eventuate with the result that he claims to have been unable to have paid the full amount due under the orders.

4. According to the table in paragraph 11 of his witness statement dated 29 October 2019, he has paid about a third of the sums due leaving outstanding over £200,000. Obviously, for somebody in the position of the wife, the primary carer of two small children and the person with responsibility for the care of the disabled child being cared for in Belarus, this is an extremely difficult position to live in. She cannot even plan to live hand to mouth because she does not know what is going to go into the hand to be placed into the mouth.

5. The husband had indicated comparatively soon after the order of Lieven J that he intended to seek a variation, which is his right, although variations of orders that are made pending suit are, for obvious reasons, dealt with only in situations of demonstrated changes of circumstances where it would be unjust to perpetuate what was by necessity a provisional assessment made to abide the final resolution of the case. He, acting in person, failed to pay a fee to issue an application in June, although he did create and serve a statement giving his grounds for variation on 4 June 2019. He managed to make a formal application for variation on 21 October 2019 which he supported with a full statement dated 29 October 2019.

6. Meanwhile, the wife had issued her application for a judgment summons on 27 September 2019. Now, I agree entirely with the view of Johnson Lam J sitting in the Court of Appeal of Hong Kong in *YBL v LWC* [2016] HKCA 629 that variation applications should be heard before, and not together with, the hearing of a judgment

summons. That is a pure view with which I entirely agree. My only modification to that view would be that it could not reasonably be sustained if the court were satisfied that the variation application was no more than a strategic filibuster. Had the husband's application of 21 October 2019 been the only relevant application, then I would have inclined to the view that it probably was strategic in circumstances when it was made hard on the heels of the wife's application for a judgment summons. However, that would not be a fair way of looking at the position because, as I have explained, the application had been prefigured as long ago as 4 June 2019 and only because of administrative incompetence by the husband was not issued at that time. So I do not characterise the application for variation as having been made in bad faith.

7. In such circumstances, I expressed a view yesterday that it was more appropriate for me to hear the variation application rather than the judgment summons, and that was agreed by counsel, and for the remainder of the time available to the court yesterday, the husband was in the witness box being comprehensively cross-examined by Mr Cusworth. That cross-examination however was of an ex tempore nature because, of course, the question of hearing the variation application had been sprung upon Mr Cusworth at short notice. Be that as it may, the husband gave evidence which satisfied me that there were genuine cashflow problems, although I was not satisfied as to either the scale of those cashflow problems or, more significantly, their likely term of endurance.

8. Section 31(2)(a) of the Matrimonial Causes Act gives the court power to vary any order for maintenance pending suit and any interim order for maintenance. Section 31(1) provides that:

“Where the court has made an order to which this section applies, then, subject to the provision of this section [and of section 28(1A) above], the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily.”

9. The way the case had been argued by both counsel, certainly by Mr Harvey and to some extent, although perhaps not to the same extent, by Mr Bates, was to see the court's powers as being limited to the binary choice of whether to vary the order for maintenance pending suit as to quantum or not. I expressed the view yesterday that a third way of dealing with the case was to seek what I described as a stay, but which I should perhaps more accurately have categorised as being a suspension of sums due pending a private FDR. The concept of a private FDR was agreed by the parties and the parties have agreed that Mr Marks QC will conduct a private FDR on 13 December 2019. In colloquy with counsel yesterday, I expressed the view that Mr Marks QC would be pre-eminently qualified to conduct a private FDR in this case and that if anybody could find a way through to a fair solution it would be him.

10. I have received submissions from Mr Harvey as to the requirements that need to be demonstrated on a successful variation application. Where the application is to vary an interim order made pending suit, then if a variation is to be ordered it must be a clearly

and distinctly proved that there has been a change of circumstances of a serious nature. This much is clear from the decision of the Court of Appeal in *Morris v Morris* [2017] 1 WLR 573 and the decision of Charles J in *G v G* [2003] 2 FLR 72. So there must be a material change of circumstances proved by full and compelling evidentiary disclosure. I agree with Mr Harvey that there is not a sufficiency of evidence to reach the threshold in those authorities for the purposes of making an order which varies the existing maintenance pending suit order so as to permanently discharge the liabilities thereunder.

11. However, I expressed the view in submissions, and I maintain the view, that a lesser degree of change of circumstances, and a lesser sufficiency of proof, is needed to be shown where the relief sought is suspension rather than variation. The reason why a lesser change of circumstances and a lesser degree of evidential proof is needed are almost too obvious to state. The answer is that the suspension does not eliminate the liability; it merely defers it to a later date. In those circumstances, the court exercises its discretion where it is satisfied in my judgment that there is a real risk, to use the language commonly used in public law cases, that there has been a halt to the resources that had hitherto been judged to be available to meet the order for maintenance pending suit.

12. On the basis of the evidence that I read yesterday on paper and heard from the witness box, I am satisfied that there has been a sufficient change of circumstances and a sufficiency of evidential proof to justify a suspension rather than a variation. The suspension in question will be accompanied by conditions which are made pursuant to Family Procedure Rules 4.1(4)(a) which provides that:

“When the court makes an order, it may –
 (a) make it subject to conditions, including a condition to pay a sum of money into court; and
 (b) specify the consequence of failure to comply with the order or a condition.”

13. The orders that I will make will be subject to the conditions set out below. If the conditions are breached then the suspension will be lifted and the sums that are due under the order of Lieven J, as capitalised by Roberts J, will all become due. I have directed that the matter should be restored before me on 16 December following the private FDR. If the suspension has been automatically lifted by virtue of a breach of the conditions then the judgment summons will undoubtedly be pursued and the husband should be warned that the court will take a rigorous view of the position. I am not prejudging, of course, any defences that the husband may put up in relation to an application for imprisonment for debt under the Debtors Act. I am simply saying that if the terms of suspension are breached then the husband must expect to justify it fully.

14. I will suspend the orders subject to the following terms and conditions. First, that by 14 November 2019 the husband should pay direct to Mr Marks’ clerk, and this way VAT will be avoided, £9,000 as the fee for the private FDR. Second, by the same date he should pay £24,000, being £20,000 plus VAT, to the wife’s solicitors for the purposes of representation of the wife at the private FDR. Third, he must pay a total of £50,000 inclusive of VAT by 14 November 2019 to the wife’s solicitors in partial satisfaction of

the arrears of the LSPO which was ordered by Lieven J. That sum is appreciably less than the sum that is due and the wife's solicitors will no doubt decide how much of that will be paid in partial satisfaction of their debt of costs and how much will be paid in partial satisfaction of the debt of costs of counsel. But £50,000 is in my judgment a reasonable sum having regard to the resources in the widest sense available to the husband which principally at this point would seem to be the largesse of his father although, for reasons which I have explained, the husband is hopeful that that will be temporary.

15. The husband will pay by way of maintenance for the wife and the children the following sums. On 1 November, that is to say tomorrow, he will pay £4,000. On 1 December he will pay a further £4,000. He will pay on 1 November 2019 \$2,900 to the wife's mother for the care of the disabled child and he will pay the same amount on 1 December. I agree with Mr Bates that it is in a way pointless for the husband to pay more rent at the moment. He has offered to pay £6,000 in rent but that is only half of the sum that is due and a contribution of that amount is hardly likely to make much of an impact on the view of the landlord as to whether or not to pursue a possession order. However, in order to avoid further classes of bad debts arising, I order that between now and the private FDR, the husband must pay all the utilities on the wife's property. Those are the terms of the suspension.

16. The costs of the variation application will be reserved. The costs of the wife's judgment summons will not be dealt with today because they will be adjourned along with the judgment summons.

17. That concludes this judgment.

(There followed further proceedings – please see separate transcript)

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge