



Neutral Citation Number: [2020] EWHC 3696 (Fam)

Case No: BV17D16308

**IN THE FAMILY COURT**  
**Sitting at the Royal Courts of Justice**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/12/2020

**Before :**

**THE HON. MR JUSTICE COHEN**

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**Between :**

**FRB**  
**- and -**  
**DCA**  
**(No. 3)**

**Applicant**

**Respondent**

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**Mr R Todd QC, Mr N Yates QC (instructed by Vardags) for the Applicant**  
**Mr S Leech QC, Mr D Bentham (instructed by Payne Hicks Beach) for the Respondent**

Hearing dates: 7 December 2020  
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**Approved Judgment**

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
**THE HON. MR JUSTICE 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.

**The Honourable Mr Justice Cohen :**

1. I have before me various applications arising out of the order for financial remedies made in this case on 27 March 2020. I shall as before refer to the parties as H (the husband) and W (the wife).
2. My order resulted from longstanding financial remedy proceedings which commenced on 27 June 2017. The final hearing took place over three weeks in January – February 2020. My draft judgment was circulated on 28 February 2020. It was formally handed down on 30 March after making a couple of small amendments arising from the hearing on 27 March.
3. In the course of the judgment I made a series of condemnatory findings in relation to H's disclosure and honesty. I also made findings against W but these are not relevant for current purposes. The effect of the order was that H should pay W £64 million, comprising the matrimonial home mortgage free (£15 million) and a lump sum by instalments totalling a further £49 million.
4. When the matter came before me on 27 March 2020, Mr Todd QC, acting on behalf of H with Mr Yates QC, applied informally, i.e. without any application having been issued, for me to defer handing down judgment on the basis that the economic effects of Covid-19 were such that the basis of the order was likely to be fundamentally undermined and that the court should not make any final order but adjourn the case until September 2020. I refused Mr Todd's application and the draft order was then the subject of debate between counsel during the hearing.
5. I had in my judgment at paragraph 218 expressed my anxiety about the paucity of evidence as to liquidity. Mr Caldwell, SJE accountant, had not been asked to report on it and it received passing reference only in his report. I raised in my judgment the possibility of there being a transfer of assets between the parties so that H had the option of converting some of the award he had to pay from cash into shares. At the hearing on 27 March he chose not to take up that invitation.
6. The payment of the lump sum was to be made by instalments as follows:
  - a) The sum necessary to redeem the borrowing on the family home was to be paid within six months and the property then transferred. The outstanding mortgage was approximately £12m;
  - b) £30m to be paid within six months of the date of the order;
  - c) £19m to be paid within 18 months of the date of the order.

It is to be emphasised that these dates for payment were those which H himself volunteered in the hearing.

7. The order went on to provide that in the event of late payment of b) or c) interest would be paid at the rate of 4% pa or such higher rate as the court may subsequently order and that in the event of failure to pay the instalment of £30m on time, then the whole of the balance would become payable.

8. I ordered that pending payment H should pay certain bills and expenses relating to the former matrimonial home, the mortgage repayments, and periodical payments to W at the rate of £720,000 pa to be reduced pro rata by the proportion of the amount of £49m that had been paid to W. I also made an order for child periodical payments and school fees which is not relevant for these purposes.
9. On 18 August 2020 the Court of Appeal refused H's application for permission to appeal my substantive order. Since I made the order, H has not paid anything at all in respect of the lump sum and neither has he transferred the property nor redeemed the mortgage. He has paid the periodical payments as ordered.
10. On 28 September, just two days before the payment of the first instalment of the lump sum and redemption of the mortgage were due, H applied to vary the order both as to overall quantum and as to time for payment. In addition, he subsequently applied for an order that the decree nisi be made absolute, but that application was not proceeded with and he seeks to have that adjourned generally and W asks that it be dismissed. I consider that it should be dismissed rather than left dormant, although that would not inhibit a reapplication if appropriate.
11. On 20 November W applied for:
  - i) An increase in the rate of maintenance paid to her to £2.5m p.a;
  - ii) Interest on all three unpaid lump sums together with an increase in the rate from 4% to the judgment debt rate of 8%;
  - iii) A legal services provision order in the approximate sum of £1.4m.

H's application to vary

12. H's application to vary has been put on the basis of a variation or alternatively that the lump sum provision be set aside and re-quantified on a Barder event basis.
13. I accept that the court has jurisdiction to entertain H's claims and that he is not estopped from proceeding with them by reason of his failed application on 27 March 2020 to defer the hand down of judgment.
14. H's application is supported by his 11<sup>th</sup> statement dated 24 November 2020. In it he asserts that "A large proportion of the assets ascribed to me at the final hearing are, unfortunately, held in countries, or are underpinned by businesses, which have been amongst the hardest hit globally during the course of this crisis. The same is true of assets held by my wider family. I set out in this statement my understanding of the current position, broken down by country and industry."

He goes on to say at paragraph 10 "In summary, however, I am not in a position to make payment of the lump sum provision provided for within the final order, due to the enormous reduction in my financial worth, and that of my family, but which I am currently unable to fully quantify. Furthermore, I believe that this entirely unforeseen and unforeseeable course of events fundamentally undermines the fairness of the award."

15. A striking feature of his statement is how very little of it relates specifically to the assets which I found to either belong to H or in which he has an interest. Paragraphs 30 – 35 deal with his interest in three publicly quoted companies, Company A (BVI), Company C (BVI) and Company R (BVI); no more than about 10 paragraphs thereafter touch upon what I found to be H's assets and part of the marital acquest.
16. The whole of the rest of the statement concentrates on the macro-economic situation arising from Covid-19. He ends the statement by saying, "I ask this court to now make directions for the revaluation of the relevant assets by the single joint experts so that it can consider my variation application in the light of these new values and the now much reduced liquidity."
17. The only assets for which H provides any figures are the three quoted companies. One of them, Company C (BVI), in which H holds a significant shareholding, did drop nearly 50% by value but it is now down by just 5%. Company A (BVI) has, he says, dropped by 77% but this is a small company in the great scheme of H's wealth. Company R (BVI) has, according to H, had its market capitalisation value significantly decreased as many investors withdrew their funds, but that does not in itself mean that H's interest has been significantly reduced in value.
18. The remaining references that H has made to his assets are general in the extreme. He points out that some tenants of properties that he owns or in which he has an interest have given notice and/or have struggled with their rent. Hotel occupancy has fallen, and I accept that it follows that as earnings have decreased, so would the value of H's hotel owning companies have been reduced. But H does not seek to put any figures before the court. Likewise, the changed occupancy and expenses of running his care homes are likely to have had an effect on value, albeit not one that H seeks to particularise.
19. It is against that background that H says that there should be a complete revaluation of all the assets in the case. In his application he seeks that 10 properties not previously valued should be valued. They comprise land and improvements in the UAE, Philippines, New Delhi and London, as well as plant, machinery, office equipment and vehicles. Two care home business in England, a London property and no less than 25 businesses, many of them with related entities, are to be revalued. H cannot shirk from saying that what he seeks is effectively a complete rerun of the whole of the valuation exercise, albeit set against the background of the findings that I have made as to ownership.
20. The revaluation is in fact in one important way greater than that first conducted, as the value at trial of some companies was assessed by taking a sample of properties and extrapolating. H now wants all the properties to be valued/revalued to provide greater accuracy. It follows that this would be a massive exercise, costing some £300-400,000 plus taxes and expenses and would take six months to complete on the timescale put forward by H.
21. It is also important to add that H envisages that he will need to have input into the valuation process so that he can explain the various transactions that have taken place over the course of the last year as some assets are no longer held within the entities that were valued by the experts in preparation for the main hearing. This is an

inherently unsatisfactory prospect in the light of the findings that I made about H's credibility.

22. The court's powers to vary the quantum and timing of the payment of lump sums by instalments are well known. It is not necessary for me to review the authorities at length. In *Westbury v Sampson* [2002] 1 FLR 166, the Court of Appeal said this:

*"[18] ... the jurisdiction created by s 31(1) of the Matrimonial Causes Act 1973 (below) not only empowers the court to re-timetable/adjust the amounts of individual instalments, but also to vary, suspend or discharge the principal sum itself, provided always that this latter power is used particularly sparingly, given the importance of finality in matters of capital provision.*

*"[57] Nevertheless, given the constant emphasis in the authorities generally on the need to uphold the finality of orders intended to be final, including orders as to capital, it seems to me that very similar considerations ought in practice to be applied under s 31 as those laid down in *Barder v Caluori* ... any rate as regards varying the overall quantum of a lump sum order by instalments (as distinct from re-timing or 're-calibrating' the instalments).*

*[58] The re-opening under s 31 of the overall quantum of lump sum orders by instalments, especially when made as part of a package intended to be final (and all the more so when ordered by consent following an agreement) should only be countenanced when the anticipated circumstances have changed very significantly, and/or for cogent reasons rendering it quite unjust or impracticable to hold the payer to the overall quantum of the order originally made.*

*[59] This formulation gives a little more latitude as regards s 31 of the Matrimonial Causes Act 1973 than do the *Barder* conditions for the grant of leave to appeal out of time; but that must I think follow from the statutory requirement under s 31(7) that the court is to consider 'all the circumstances'." [emphasis added]*

I respectfully agree that it would be exceptional for the court to vary the quantum of lump sums in circumstances markedly different to those that would justify a *Barder* variation.

23. W asks that I take an abbreviated approach to H's application as was taken in cases such as *T v M* [2014] 1 FLR 380 and *Joy-Morancho v Joy* [2018] 1 FLR 727 in which the court summarily dismissed an application to vary. This case differs somewhat, as rather than just being an obvious attempt to vary a very recent order, as was the case in *Joy* and *T v M*, this application is set against the background of world events which give what could be respectability to the argument.
24. W also refers me to *Myerson v Myerson* (No. 2) [2009] 2 FLR 147 where a husband chose to retain rather than share his investments and instead pay a lump sum and was then faced with a dramatic reduction in the value of his asset base when the share price collapsed. The court refused to interfere on the basis that this collapse was not a fundamental change of circumstances and the husband could, if appropriate, seek to vary the order in respect of the outstanding instalments. It was a material fact that there, as here, the husband chose to pay a capital sum rather than transfer assets in kind.

25. I ordered H to file evidence in support of his application. I have carefully read his statement and listened to the submissions made on his behalf, and in particular have done so in the context of deciding whether I am in a position to determine his application on the material before me, or whether I should embark on the detailed exercise that H wants so as to provide, he hopes, substance to his application.
26. In my judgment it is not proper for the court to accede to H's application to vary the quantum on macro-economic grounds. If H wishes to assert that there has been a fundamental change in his worth so as to justify a reopening of the inquiry, then it is up to him to provide prima facie evidence. It is trite to say that the pandemic has affected different sectors in different ways. Some, such as hotels and airlines, which make up part of the wealth of H and his family, will undoubtedly have been negatively affected but so varied are his interests that it is far from obvious that there has been a collapse in his global fortune.
27. It is significant that H has chosen not to provide the material which I regard as crucial. There are no trading figures, no profit and loss accounts, no underlying documentation, and no valuations; in short there is an almost complete absence of matter which could establish or even raise a prima facie case for the court to be satisfied that there are grounds for belief that H's wealth has been significantly reduced. It is not sufficient for H just to invite the court to look to the general global financial situation. If that was the case, huge numbers of cases would be being reopened on no basis other than the fact that further inquiry might reveal something specific.
28. I also bear in mind that H has given no indication in his statements of what he says he is worth and what he can pay and when. All I know is that in H's skeleton argument in support of permission to appeal he rejects my findings in toto. He has not explained how he proposed to pay the lump sum that in March he offered within 6 months and why that is now impossible.
29. H's application becomes even more unattractive when one adds that the valuer would be likely to be provided with inadequate information, as was the case with many of the assets which he sought to value previously, and/or the account of a witness who I found to be unreliable.
30. I have also considered the topsy-turvy financial times in which we now live. The major stock market indices are now at a high level and have rebounded to above their pre-Covid-19 levels. A valuation done today would inevitably be even more speculative than that done in a pre-Covid time. It would almost certainly be overtaken by events in the period before a further hearing in about 9-12 months' time. Most commentators believe that at some stage within the next couple of years the world economy will be back to where it was. It is essential to view H's application in the long term as well as in the short term.
31. Having read and heard what is said on behalf of H and considered the factors mentioned, I have come to the view that he has not shown a proper basis for reopening the award. I have considered whether I should adjourn the application to permit H an opportunity to put in further evidence, but H did not ask for me to take that course.

32. For all these reasons I dismiss H's application, but with this proviso. I accept that H may, at least in theory, be able to argue that the timing of the payments of the lump sum should be re-calibrated. It is not an argument that he has begun to be able to employ before me so far for the reasons given.

W's applications

33. I turn now to W's applications and I shall deal together with her first two applications, namely for an increase in the rate of maintenance pending suit/ periodical payments and for interest on the three unpaid lump sums. I deal with them together both because it is important to look at the situation in the round but also because by paragraph 9 b) of my order the maintenance is to be reduced pro rata by the proportion of the amount of the lump sum that has been paid.
34. W asks that her maintenance should be increased to £2.5m p.a. She bases that on the addendum to my judgment where for the purposes of enforcement under the Lugano Convention I fixed her maintenance need at £2.5m p.a. and subject to a multiplier of 9. Mr Todd is right to say that the context of that paragraph is all important and I was not saying that this is the level of income which is appropriate to meet her day-to-day expenses and certainly not on an interim basis.
35. Mr Todd is also right to draw my attention to the fact that W has been living off a lesser sum than the £60,000 pm which I provided her with (together with £5,000 pm by way of child maintenance). She says that she has only done so because this has been a year in which the Coronavirus restrictions have severely limited her lifestyle, because she was caught by the lockdown and had to spend 6 months in India where her expenses would have been much less, and by not spending any money on her home by way of improvements/ updating.
36. W asks also for interest on all three unpaid lump sums. She says, and I accept, that without some incentive H will pay nothing. I simply do not believe that he was and is incapable of making a payment on account. The time frame for payment was, as I have said before, the one that he chose.
37. I need to bear in mind the current rates of interest that are available, which are, of course, less than 4% which I ordered to be paid. On the other hand, if W had received her award, she would have had the opportunity to invest it and in a rising market might make significantly more by way of return. I am not prepared to increase the rate of interest to the judgment rate because in the current economic climate I would regard such an order as excessive. It is appropriate that H should pay 4% pa on the sum of £30m. I confine the award to the second tranche. I do not attach interest to the first tranche because H will be continuing to pay the mortgage on the matrimonial home and W is not in reality being kept out of that element of her financial award. Nor am I willing to award interest on the third tranche. That liability arises solely by reason of his non-payment of the second tranche when in other circumstances it would only be payable from 30 September 2021. Again, in the current financial circumstances I would regard the immediate award of interest on the sum of £19m as oppressive.
38. It follows that the interest on £30m at 4% gives rise to a liability of £1.2m pa or £100,000 pm.

39. This takes me to the issue of whether the interest should simply be rolled-up or whether it should be payable on a monthly basis. It is agreed by both parties that as there has not been decree absolute the interest on the lump sum is only payable when payment of the lump sum is due (see section 23(6)(b)(1), which provides:

*Where the court makes an order ... for the payment of a lump sum ... and that sum or any part of it shall be paid by instalments, the court may order that the amount deferred or the instalment shall carry interest at such rate as may be specified by the order from such date ... until the date when the payment of it is due.*

So, says Mr Todd, any interest payment has to accrue rather than be payable before decree absolute. The remedy is for W to apply for decree absolute.

40. It is unattractive for H to use his own default to seek to compel W to apply for decree absolute. She has not done so for various reasons, including that it is one small hold that she has over H, in that H wishes to remarry. It does not seem to me that she can be criticised for taking that stance.
41. This brings me back to the question of interim maintenance. H does need to be given an incentive to make payment. I can see nothing wrong in principle in an appropriate case such as this, for me to say that the maintenance pending suit should be increased by £1.2m pa in addition to what would otherwise be payable under the order, backdated to 30 September 2020.
42. I will receive concise written submissions as to the impact that this should have on the quantum of the current order and on the payment of household expenses, put by H in his 12<sup>th</sup> statement at a little over £15,000 pm inclusive of school fees and by W (through counsel's note just received) at ca £25,000 pm.
43. H in his 12<sup>th</sup> statement says that his income has been reduced to the sterling equivalent of £1.89m. I note this figure, but I give it little weight. This family throughout the marriage lived at a standard way in excess of any disclosed income. In my judgment I found that the parties were living at a rate of between £5–10m p.a. and likely to be at the upper end of the bracket. I am satisfied that the sum that I am awarding is one that is payable by him without leaving him in a situation of need.
44. I bear in mind in coming to that conclusion that H has chosen recently to take a lease of an apartment in one of the most prestigious and expensive blocks in Monte Carlo. Notwithstanding that he has the use and shared ownership of a substantial property just along the coast in France, he has with his new partner rented this new apartment at a figure which he does not disclose in his statement. I do not see how in the circumstances he can claim hardship.

#### W's application for Legal Services Order

45. W's application comprises the following elements.
- a) Outstanding legal fees (as revised) of £253,389
  - b) £174,942 in respect of Financial Remedy Proceedings up to and including this hearing



- c) £357,882 in respect of continuing costs in the variation application. This will now fall away.
  - d) £368,554 in respect of a dispute to be heard next year arising out of the ownership of artworks
  - e) £188,899 in respect of Children Act proceedings due also to be heard next year.
46. W has savings of just over £500,000 of which a little over £300,000 has been accrued in about the last year.
47. H says that I should make no order on the following bases:
- i) She can get the money from her parents
  - ii) She can borrow against Property 11 (London)
  - iii) She could if she had wished had the matrimonial home transferred to her and thus have the ability to use that as security to obtain a loan from a commercial lender.
- He did not challenge the figures claimed by W for her costs.
48. W says that her parents are not willing to provide her with funds. I see no reason why they should. It is correct that they apparently provided her with about £1m in the first round of the litigation for her to obtain the services of a financial advisor/investigator. I accept also that they would be in a position to help her financially if they so wish, but they are under no liability to do so and I have no reason not to accept W's statement that they are not willing to do so.
49. I found that the flat at Property 11 (London), although registered in W's name, was her parents' and was not an asset that she had received any benefit from. Just as her parents are unwilling to assist her in lending her money, I must accept also that Property 11 (London) is not available for her to borrow against.
50. Mr Todd's main attack was against W's refusal to accept the transfer of the matrimonial home. That argument needs to be seen in the context of what H actually offered. H has offered to transfer the home to her but leaving it subject to a mortgage in these terms: H would borrow €6m against a property in France held in the joint names of H and W and use €4.9m of that sum to discharge what would be about 1/3 of the mortgage on the matrimonial home and provide €1.1m to put towards W's costs. In exchange he expected W to transfer to him her interest in the French property.
51. I am not surprised that W found this an unattractive proposition. Under my order she was only to transfer the French property to H after he had made all the payments that were due from him.
52. I am of course familiar with the cases such as Currey [2007] 1 FLR 946, Rubin [2014] 2 FLR 1018 and LKH v TQA [2018] EWHC 1214 (Fam). Each case is to an extent fact specific and on the facts of this case I am of the clear view that it would be entirely inappropriate to expect W to charge what little money/assets she has in

respect of the further litigation when I have found H to be wealthy and deceitful and when he has failed to pay any part of the lump sum. In so far as she does have money in her bank account, that is already largely spoken for to pay the £230,000 loan that she received from her cousin and the £66,000 odd that she owes to a commercial lender. She should not be expected to denude herself of all funds.

53. I accept W's evidence that she has drawn a blank with three well-known commercial lenders and has no other source of funds for the outstanding litigation and legal expenses that she could reasonably obtain.
54. I regard it as appropriate in the context of this case that H should pay the following:
  - i) The sum of £289,362 in respect of the unpaid costs. However, he should get credit for that sum against the final payment of the lump sum. These costs would not have been the subject of an order and would have been paid by W out of the sums H should have paid. It is not appropriate to expect W's solicitors to extend credit to their client in the context of this case when H is quite able to make the payment.
  - ii) So far as the costs in the financial remedy proceedings are concerned in the period up to and including this hearing are concerned, they will no doubt be the subject of an application and I adjourn the question of how they are dealt with until I hear from counsel on that aspect.
  - iii) The art dispute is a hold-over from the main matrimonial proceedings. This issue had to be put off because the Art Foundation was not a party to the matrimonial proceedings, and it seeks to assert ownership. H says that I should treat the parties as if engaged in a normal commercial dispute in which each party must make their own provision for financing. In many circumstances that argument would have force but not in this case. However, I agree with H that it is perfectly possible to envisage circumstances where W may fail in her claim in respect of the artwork and be subject to a claim by the other parties for their costs of that litigation. Equally, she must be put in a position where she can participate in the litigation. I therefore direct that H must provide her with litigation funding but on the basis that the issue of costs remains completely open and that W must be prepared to repay the funds if so ordered.
  - iv) The Children Act costs arise in the context of proceedings where H seeks to take the child of the family abroad in circumstances where W is concerned that H may not return the child to her and/or use him as a pawn in any financial enforcement proceedings. That being the dispute between the parties, it seems to me again appropriate that H should fund W's costs.
55. I shall of course be on guard to ensure that there is no double counting between a Legal Services Payment Order and any cost award made within the various applications that I have determined in this judgment.
56. I will receive further submissions as to timing of these payments.