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Case No: FA-2023-000141

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2024

Before :

SIR JONATHAN COHEN

Between :

THE INCORPORATED TRUSTEES OF GREAT CALLING MINISTRIES WORLDWIDE	**Appellant**
- and -	
AUGUSTER OMONIGHO IRABOR	**1st Respondent**
FRANCIS OSEYOMON IRABOR	**2nd Respondent**

- -

Mr M Horton KC (instructed by A. Vincent Solicitors Ltd) for the Appellant
Mr B Molyneux KC, Mr T Urwin & Mr J Switalski (instructed by KSFLP Ltd) for the 1st Respondent
Mr T Oguntayo (Direct access counsel) for the 2nd Respondent

Hearing dates: 25 & 26 March 2024

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Approved Judgment

This judgment was handed down at 10.30am on 11 April 2024 by circulation to the parties or their representatives by e-mail and by eventual release to the National Archives.

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SIR JONATHAN COHEN

This judgment was delivered in public and may be published.

SIR JONATHAN COHEN:

Introduction

1. This is an appeal with permission of Mostyn J against the order of Recorder Willetts made on 25 May 2023 in financial remedy proceedings. By his order the recorder ordered the respondent husband ("H") to pay the applicant wife ("W") a lump sum of £750k. In addition he made an order for the payment of W's costs by H in respect of a preliminary hearing issue and 50% of W's other costs subject to detailed assessment. He also discharged an interim charging order made in favour of the intervener in respect of the former family home. The orders were made on a clean break basis.

2. The intervenor is the appellant in this appeal. I shall call the intervenor "the church". H was a founder of the church and has received sums of money from the church by what was found to be by way of loans. The status of the loans and whether or not they were ever expected to be repaid were core issues in the proceedings.

3. I am grateful to all counsel for their helpful and high-class submissions.

Chronology

4. H and W were married in 2008 and they have 4 children aged 14, 13, 11 and 8.

5. In February 2013 the church was established in Nigeria and H was one of the founders. The trustees of the church were H, W and H's sister. W was removed, and now only H's sister remains as a trustee.

6. On 30 December 2013 H was offered a substantial loan by the church so that he could move to England and escape the threats of a militant organisation in Nigeria. One week later the first loan agreement was entered into by which the church agreed to lend H Naira 550m by way of loan. This was transferred to H's account in the approximate sum of $1.56m in July 2014 and used to purchase 6 Daisy Close, a 5 bedroom family house in London, in H's sole name for £950k.

7. Soon afterwards the family relocated to the UK and claimed asylum. As I understand it, both H and W have been granted asylum, in W's case with permanent leave to remain. As neither H nor the church attended this hearing other than through counsel, I was not able to ascertain H's precise status.

8. Notwithstanding this bounty, H determined to purchase another property, a flat in Goldhawk House. The purchase price was £365k. H had intended to buy it himself but was the victim of a fraud and needed another £220k to complete. Within a very short time of applying to the church for a further loan the funds were provided in the sum of £220k.

9. Both properties were purchased unencumbered in the sole name of H. Within days of completion of the second purchase, the parties separated.

10. In June 2017 the first loan became due for repayment, its term having been 42 months from its grant. It was not interest bearing.

11. In November 2017 the parties were divorced in Nigeria and shortly thereafter the church requested a restriction on the charges register of Daisy Close. Less than a week later it sued H in the Nigerian courts for the monies owed under the 2014 agreement. The church and H very quickly reached settlement and judgment was entered in the Nigerian court for the sum lent. W was not a party to the proceedings and knew nothing of them.

12. On 13 December 2018 DDJ Whiteley gave W leave to issue proceedings under Part III MFPA 1984.

13. At the first appointment of those proceedings the church was given leave to intervene, a direction that was repeated on 16 September 2019. The two orders make it clear that the issue for the court to determine was whether the church had a beneficial interest in either of the two properties which were registered in the sole name of H. The trial process became very extended for reasons that do not matter for the purposes of the appeal and after a 4 day hearing a written judgment was handed down by HHJ Mitchell on 9 March 2022.

14. The findings that the judge made included:

    i) Legal and beneficial ownership of both properties remained with H, not the church;

    ii) Accordingly the equity in each property would be available for distribution between H and W in their financial remedy proceedings;

    iii) The loans were not shams but were genuinely made;

    iv) Both loans were wholly uncommercial, not providing for interest to be paid or security provided;

    v) The 2014 loan document describes it as "a friendly loan" and the Nigerian settlement agreement describes it as "a soft loan";

    vi) Each loan could only be described as "the softest of loan with in reality there being no expectation that H could manage repayments of the scale needed";

    vii) The church would not require repayment of either loan for the foreseeable future so as to prejudice H's interests;

    viii) And so accordingly, both properties were available and within the courts discretion when the court exercises its powers under MFPA.

15. As soon as the judgment was received the church applied to register the Nigerian judgment in the High Court. I am told that the explanation is that it was only upon receipt of the judgment that the church realised that it did not have the security which it had previously believed to be the case.

16. In due course an interim charging order was made and the application for a final charging order was transferred to the family court at Plymouth to be considered alongside the financial remedy proceedings.

17. It was those proceedings that came to be heard by Recorder Willetts in March 2023 with his judgment following two months later.

The assets

18. The value of Daisy Close was agreed at £1.176m (being £1.2m less sale costs). The Goldhawk House flat was agreed to have a value of £380k gross, £372k net. The total amount said to be due to the church by way of loans was £1.274m.

19. There were no other assets of significance. W had debts amounting to £110k being £50k legal fees, £59k student loans and a small sum of council tax arrears.

20. By the time of the trial W was living in an unsatisfactory 3 bedroom council house in the South-West with all 4 children. She was dependent on benefits. She was completing a course of further education.

21. H on the other hand was living in the former family home at Daisy Close. He was spending a significant amount of his time in Nigeria. He played a minimal part in the children's lives and was not paying child or spousal maintenance.

The positions of the parties

22. W's position at trial before the recorder was that she sought £750k and her costs of the proceedings. H's offer was that W should receive the proceeds of sale of Goldhawk House. In each instance there was to be a clean break.

23. The church sought a final charge over Daisy Close.

24. At this appeal hearing the church's position had modified slightly. Mr Horton KC who appeared on behalf of the church repeated the offer formerly made by H that W's needs were properly met by the receipt of £372k from the flat proceeds. But, if the court took the view that the needs of W and the children required a larger sum, then the church would accept the provision for W of such additional sum by way of a Mesher type order, on the basis that upon the youngest child reaching the age of majority, the surplus that W had received over and above the proceeds of sale of the flat should revert to the church.

The issue

25. Although expanded by Mr Horton KC and Mr Oguntayo, whose position was similar to that of the church, the submissions in support of the appeal broke down into 3 categories.

    Res judicata/estoppel

    i) Was the recorder bound by the finding of HHJ Mitchell that the debts were soft and would not be called in to H's prejudice, or should he have revisited them in particular in the light of the attempt by the church to enforce by way of charging order;

    ii) Were the findings of HHJ Mitchell to be categorised as res judicata;

iii) It never having been argued before the recorder, should he have looked at the matter afresh and as if the issue had not been already been determined by the judge;

iv) Does it actually make a difference in the light of the party's current positions and other arguments.

26. W's needs:

Did the recorder properly assess W's needs. The criticisms made by the appellant cover the following issues:

i) He took a bracket for housing of £525-£675k without any more precision than that. Thus it is said that there is no clarity as to the assessment of W's housing needs;

ii) W's debts were put at £110k. £50k were her legal costs and £59k her student loan plus interest. In ordering a lump sum which appears to have been calculated to enable the student loan to be repaid, there is no explanation as to why this debt was not left as a liability since it will only be repayable if W earns a good income;

iii) It appeared that the recorder had double counted W's costs, including them as a liability, but then going on to make a costs order in respect of all her costs of the preliminary issue and half her other costs to be paid by H in addition to the lump sum;

iv) The recorder allowed for a "Besterman cushion", without explanation and using a concept which has long fallen out of fashion.

27. The balancing exercise

The third avenue of attack is the appellant's assertion that the recorder never carried out the balancing act between the rights of the creditor and the needs of W. The church referred me particularly to the dicta of Balcombe LJ in Harman v Glencross [1986] 1 All ER 545 where at page 559 he said this:

The questions arose (i) when, if at all, was it appropriate for the court to consider the wife's position when deciding whether to make a charging order in respect of a matrimonial home and (ii) if it was appropriate, how were the interests of the wife and children to be balanced against the interests of a creditor.

28. The same line of authority can be seen in the Austin-Fell v Austin-Fell [1992] All ER 455 where Waite J said as follows:

Harman v Glencross makes it plain that there will of necessity be instances where wives and children will have to accept a degree of hardship for the sake of justice to the husband's creditors. It would, however, in my judgment be an exercise of discretion unfairly harsh to the wife and unduly favourable to the judgment creditor to force her at this stage to move to another area, or to a different part of the country altogether, in search of cheaper housing, and to leave behind her mother, her pupils

and the schools which have become familiar to her girls, all for the sake of ensuring immediate payment of the bank's debt.

In these circumstances the court (continuing the journey down guideline (3)) is required to make only such order as may be necessary to protect the wife's right to occupy the matrimonial home (with the children where appropriate). The guideline makes it clear that the right of occupation to be thus protected is not in the ordinary way to be permanent occupation. That must necessarily follow from the indication given immediately afterwards in the next sentence of the guideline, that where (as here) the creditor asks, in the alternative to immediate enforcement, for a Mesher type of order, such an order ought not to be refused save in exceptional circumstances. The circumstances of the present case certainly include unusual features. The remarkable resilience and determination shown by the wife in recovering from the consequences and shock of the husband's business failure is one of them. They cannot, however, in my judgment be described as exceptional in the sense in which that term is used in the guideline. I am therefore bound to make a Mesher type of order if that seems appropriate.

In my judgment it does. The necessity to pay off the bank's debt in ten years' time, with the interest that has accumulated in the mean time, may no doubt be expected to involve the wife in a degree of hardship, just as the necessity to wait ten years for its money may be expected to involve a degree of hardship for the bank. A postponed enforcement order nevertheless represents the fairest balance between the competing claims of wife and creditor, in the endeavour which the court has to make to give some effect to both, and that is the order which I propose to direct.

The judgment of the Recorder

29. The recorder held himself bound by the decision of HHJ Mitchell. He described the application for a charging order by the intervenor as "opportunistic". The church disputes that description and says that it was only upon receipt of the judgment on the preliminary issue that it became necessary to take steps to protect what the judge found to be its debt.

30. Mr Oguntayo correctly referred the judge to the authorities just cited. The recorder distinguished those authorities on the basis that unlike the lender in those cases, the court had found that the intervenor would not take steps that would prejudice H's financial position and that its position was wholly dissimilar to that of the commercial lenders who were the creditors in the cited cases.

31. Alternatively, the recorder concluded that:

    i) This was an exceptional case, the facts of which set it aside from the usual charging order application and the legitimate needs of W and the children required access to the equity in Daisy Close;

    ii) Section 1(5) of the Charging Orders Act 1979 provides that:

    In deciding whether to make a charging order the court shall consider all the circumstances of the case and, in particular, any evidence before it as to -

(a) the personal circumstances of the debtor, and

(b) whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order.

In consequence, the recorder found that the intervenor could not be considered a "bona fide judgment creditor" and that on the facts of this case the interests of W and the children must take priority over those of the intervenor.

32. The net effect of what the recorder determined was "a division (which) would equate to roughly an equal division of the available assets and safeguard the children's housing and welfare needs which is my first consideration". This arithmetic only works if liabilities are excluded.

33. It is clear from the judgment that the housing fund, unspecified as it was, was to provide a 5 bedroomed house. This would allow each of the children to have their own bedroom. No consideration was given in the judgment to the making of a Mesher order so as to release funds when the children reach the age of majority.

Discussion

34. Res judicata/estoppel: I regard this argument as sterile. Whilst the recorder appears to have felt that the issues were already determined by HHJ Mitchell, it is evident that he reached his conclusion on the facts and matters as they appeared to him. In particular, it is clear that he had regard to all the circumstances of the case, as required by both Section 25 Matrimonial Causes Act and Section 1(5) Charging Order Act 1979. The discussion is sterile because the real issues that arose below and which arise on this appeal are:

i) How the balance was struck between the competing claims of the judgment creditor and W; and

ii) Whether, having described the case as a needs case, the recorder overcalculated the extent of W's needs.

These were not issues which were to be determined in the preliminary issue and which were dealt with by the recorder.

35. The case of the church is that its debt, secured by an interim charging order, received minimal consideration by the recorder.

36. The recorder distinguished the present case from Austin-Fell and Harman on the basis that:

i) The judge had found that the church would not require repayment of its loans for the foreseeable future so as to prejudice H's interest.

ii) That finding was confirmed by the church's position before the recorder, namely that it was content for H to retain possession of Daisy Close with a deferred sale only taking place on the majority of the youngest child, thus giving H the sole use of a property only intermittently occupied by him when in England for a further 11 years.

iii) No interest or occupation rent was being paid by H notwithstanding the terms of the agreement with the church which required him to make quarterly payments.

iv) It would be wholly erroneous to compare the church to a mortgagee or other commercial lender.

v) Far from this being a usual charging order application, this was an exceptional case which required W and the children to access the equity in Daisy Close.

37. It is always dangerous to extract a word or phrase from reported cases so as to establish a principle. But, I note in particular the following:

a) At 559 d Balcombe LJ in Harman v Glencross says that "it seems to me that it would require exceptional circumstances before the court should make an order for the outright transfer of the husband's share in the house to the wife, thereby leaving nothing on which the judgment creditors charging order can bite" (Emphasis added)

b) In Kremen v Agrest [2013] 2 FLR 187:

[13] These passages support the conclusion that when striking a balance between the interests of the judgment creditor and those of the wife, the interests of the judgment creditor should be respected, save to the extent that it is necessary to override them in order to make appropriate provision for the wife and any minor children. In some cases that can be achieved by an order postponing the sale of the property (usually known as a Mesher order – see Mesher v Mesher and Hall [Note] [1980] 1 All ER 126), or in a more extreme case by withholding a charging order altogether and transferring the husband's interest to the wife free of any encumbrance. (Emphasis added)

c) At paragraph 21 in Kremen v Agrest Moore-Bick LJ explained what made that case "an exceptional case", namely that the creditor had lent money in circumstances where he must have been aware that there was at least a risk that the transaction would be challenged and might be held to have been ineffective. He was therefore the author of his own misfortune.

38. I agree that this was an exceptional case. The position of each of the parties needs attention.

39. The church: The evidence of the church before the judge was given by a Mr O. At paragraph 24 of his judgment HHJ Mitchell deals with his evidence. Mr O had next to no knowledge of the functioning of the church and was unable to give any helpful information about its finances. However, he confirmed that despite having been a trustee, W was never a decision-maker or played any sort of executive role and was not privy to the church's dealings.

40. The basis on which the church was able to provide such large sums of money on such favourable terms to H was unclear. The church had never produced any accounts.

41. The church is described as a charity. It was certainly that, as far as H is concerned, as the judge described it as "perhaps startling that neither loan provides for any interest to be paid at all and in neither respect was security provided". No attempt to raise the issue of repayment was made until July 2017. By then the parties had separated.

42. The placing of a restriction against the former matrimonial home was found by HHJ Mitchell to be done as a collaborative act with H's help and assistance "the restriction tellingly contained H's own email address as the contact address for the church".

43. The church had failed to comply with discovery orders made in the preliminary issue proceedings. Before the recorder, the church was not bound to give disclosure but it did not put forward any need-based argument for repayment of the loans.

44. The recorder was deeply unimpressed with H's disclosure. He described H as being unwilling to provide any particulars of his movements, his income and his means and the recorder drew the clear impression of H having access to funds as and when required from various undisclosed sources.

45. The recorder went on to say that it was clear to him that H was content that a veil of secrecy enveloped his financial affairs. In the financial remedy proceedings he was prepared to hang "on the coat tails of the intervenor's application for a final charging order". H and the intervenor for all practical purposes were one.

46. It follows from all the findings made by the judge and then by the recorder that the recorder was entitled to treat this case as exceptional and invade the monies obtained from sale of the matrimonial home to the extent that was proper to meet the needs of W and the children.

47. In considering the recorder's judgment I am referred to the case of Volpi v Volpi [2022] 4 WLR 48 and in particular the head note:

The approach of an appeal court to an appeal on a pure question of fact is a well-trodden path with the following well-settled principles: (i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong. (ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court unless it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached. (iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it. (iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him. (v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable. (vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual

analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract (post, paras 2, 67, 68).

Although the passage cited above is taken from the head note, it is a comprehensive summary of well-established law.

48. To those words, I would add these: it is important to look at a judgment as a whole. There should not be undue attention given, even in a reserved judgment, to an infelicity of expression.

Calculation of W's needs

49. The recorder did not provide the breakdown of the figure of £750k awarded to W. However, it is clear from his judgment that it comprised 4 factors:

   i) A housing fund;

   ii) The sum W needed to pay her costs;

   iii) Clearance of her student loan;

   iv) A Besterman cushion.

50. The particulars of housing provided by W for her own occupation were 5 in number and, discounting the outlier, they fell within the bracket £525-£625k. They were mostly 5 bedroom houses.

51. Bearing in mind the ages of the 4 children and that they were of different genders, it is not unreasonable that each should have their own bedroom. In particular, the size of some of the bedrooms in the particulars were very small and there would be no prospect of adolescent children sharing them. The judge was plainly entitled to prefer W's particulars to the meagre homes put forward by H in the bracket £300-£350k.

52. Mr Horton asked me to take the middle figure in the bracket of £575k. To that he added the outstanding costs of £50k and thus concluded that W should have the use of £625k rather than the £750k allowed by the recorder.

53. I do not accept Mr Horton's submission that the recorder was wrong in principle to allow W £60k to clear her student loan and other debt. I accept that other tribunals might not have arrived at that decision, but it is within the proper discretion of the recorder to conclude that a student loan should be cleared. It is not for an appeal court to substitute its own discretion for that of the trial judge.

54. In particular, I take the view that the recorder was entitled to assess W's needs generously. This was a case where H had access to undisclosed funds. He had the sole use of a 5 bedroomed house in London. He had managed to buy himself a new car for £45k. He was paying nothing towards the support of the children or their mother. That she was on a very tight budget and substantially dependent on benefits were factors that fed into the recorder's reasoning.

55. I accept that the recorder might have explained his calculations of need with more clarity and could have arrived at a lower figure than £750k. But, he was the trial

judge and the figure that he arrived at was not obviously significantly in excess of W's needs.

56. There is one qualification which needs to be made. In making orders for costs in addition to the lump sum, the recorder had double counted. This was readily accepted by Mr Molyneux KC and is best dealt with by W's undertaking not to enforce any order for costs made to date in this matter.

Mesher order

57. I was troubled by the absence of apparent consideration of a Mesher order which is a device frequently used in charging order cases. Indeed Mr Horton KC, contrary to his client's substantive case, postulated that if I took the figures he provided at paragraph 52 above, everything over and above the equity in the flat should be the subject of a deferred charge.

58. The problem with this argument is that it was not raised before the court below. The only argument put forward on behalf of H/the church was that W should be limited to the proceeds of the flat which net of her legal costs would produce £320k, a figure plainly inadequate for her housing. It is hard to be critical of the recorder for not considering a matter that was never put to him.

The position of the church

59. It is argued on behalf of the church that the result leaves it, as the provider of funds, with no means of recovering its loan. I do not accept that. The effect of the order is that instead of the church receiving some £1.1m from Daisy Close, it will receive £370k from the flat and the balance of £420k from the Daisy Close surplus. This goes a long way to repaying the church. It was always the case of the church and H that as the properties appreciated in value, the sums loaned would increasingly be covered. The effect of the judgment is simply that the church will have to wait longer than otherwise would have been the case.

60. In addition, H had what the court found to be undisclosed funds and income to which the church could seek resort.

61. H's needs are of course met. He has the use of the remaining funds loaned by the church, which have been found not to be the subject of a reclaim to his prejudice.

62. Tellingly, he has not filed a notice of appeal from the recorder's order, albeit he supported the appeal of the church.

63. It follows therefore that save as to the adjustment to the costs element of the order, the appeal is dismissed.