

**C v C (MAINTENANCE PENDING SUIT:  
LEGAL COSTS)**

Family Division

Hedley J

21 December 2005

*Ancillary relief – Maintenance pending suit – Application to vary consent order – Payments to fund wife's legal costs*

The parties had been married for 13 years before they separated. There were two children of the marriage, aged 15 and 12 respectively. The wife had been a full time mother and had no earning capacity. By contrast, the husband owned a majority shareholding in one of the UK's fastest growing companies. Those shares had a value of approximately £13m. The parties had negotiated a consent order pursuant to which the husband agreed to provide for annual maintenance pending suit of £40,000 together with an annual figure of £6,000 for the wife's car and all school fees and extras which the husband claimed amounted to £24,000 per annum. The wife applied to vary the order. She argued that her real maintenance needs amounted to £4,000 per month (as opposed to the £3,333 currently payable) and that she needed a further significant sum to enable her to maintain legal representation. During the hearing the wife proposed putting an upper limit on her legal costs of £120,000 and that she give an undertaking to pay the money to her solicitors and to credit it against any costs order that she might ultimately obtain from the husband. The husband argued that there had been no change in circumstances since the original consent order; that he was unable to pay anything beyond the amount he was already paying; and that it was wrong in principle for him to underwrite his wife's legal costs.

**Held** – granting the application –

(1) The court should seek to uphold agreements entered into in arms-length negotiations and with the benefit of legal advice. If the only issue to be determined by the court had been an increase in the monthly maintenance payments from £3,333 to £4,000, the application would have been refused (see para [5]).

(2) The court had jurisdiction to make provision for legal expenses in an order for a maintenance pending suit (see para [13]).

(3) The discretion to include a costs component should be exercised in exceptional cases. All 'big money' cases, of which the instant case was one, were exceptional. In this case, the duration of the marriage, the age of the children and the fact that the vast bulk of the assets were under the control of the husband, coupled with the need for their investigation, made the circumstances exceptional and permitted the court to add a costs component to maintenance pending suit (see para [14]).

(4) The figure of £120,000 proposed by the wife in respect of her costs was not unreasonable (see paras [12]–[15]).

**Statutory provisions considered**

Matrimonial Causes Act 1973, s 31(7)

Civil Procedure Rules 1988 (SI 1988/3132)

**Cases referred to in judgment***A v A (Maintenance Pending Suit: Provision for Legal Fees)* [2001] 1 WLR 605, [2001] 1 FLR 377, FD*Moses-Tagia v Taiga* [2005] EWCA Civ 1013, [2006] 1 FLR 1074, [2005] All ER (D) 57 (Jul), CA*Sears Tooth (A Firm) v Payne Hicks Beach (A Firm) and Others* [1997] 2 FLR 116, FD

*Matthew Firth* for the husband  
*Nicholas Francis QC* for the wife

*Cur adv vult*

**HEDLEY J:**

[1] This is, in substance, an application dated 11 November 2005 by a wife to vary an order of maintenance pending suit made by consent on 10 August 2005. The criteria to be applied are to be found in s 31(7) of the Matrimonial Causes Act 1973 (the 1973 Act). As the hearing finished late in the day, the parties, to save either the expense of returning for an oral judgment or the delay in awaiting a handed down judgment, agreed that I would send to the parties a written ruling by way of concise judgment as long as it was full enough for them to consider (and, if so advised, challenge) my decision. This I now do in, I trust, sufficient detail.

[2] The parties were married in 1990 and separated in September 2003. They have two children, N, aged 15, and G, nearly 13, who live (as they have always done) with their mother in the former matrimonial home. The wife is aged 50 and has for many years been a full-time mother and homemaker. It is not suggested that, for the purpose of this application, she has any earning capacity. The husband is 45 and a business man. He has had a career of varying success and variable health. However, in recent times he has been immensely successful with a company called 'O Ltd', one of the fastest growing UK companies with many overseas subsidiaries. He owns a 72.67% shareholding in a company worth (according to the jointly instructed expert) something of the order of £13m.

[3] The parties negotiated, through solicitors, the consent order of 10 August 2005. That provided for annual maintenance pending suit of £40,000 together with an annual figure of £6,000 for the wife's car and all school fees and extras said by the husband (but doubted by the wife) to come to £24,000 pa. This application has come but a short time thereafter and that is one of the grounds on which it is resisted.

[4] The wife's application is in two parts: first, she says that her real needs for maintenance pending suit amount to £4,000 per month (as opposed to the £3,333 presently payable) and, secondly, that she needs a further significant sum to enable her to maintain her legal representation. That application is vigorously opposed on three grounds: first, that there has been no change of circumstances since the original consent order; secondly, that the husband is in any event unable to pay anything further; and thirdly, that to require the husband to underwrite the wife's costs is wrong in principle.

[5] Whilst it may be that a change of circumstances is not necessary to justify a variation (and s 31(7) only requires the court to have regard to it), in my judgment the court should be jealous to uphold agreements freely arrived at in arms-length negotiations with the benefit of legal advice, as this agreement indeed was. If all that had happened was that the wife had discovered that she needed £4,000 per month rather than £3,333 per month, I would have refused her application. Not to do so would infringe without justification the policy of upholding this agreement. In other words, I think the wife's arguable grounds here should be limited to the question of legal costs and that was certainly the predominating feature of the case advanced on her behalf by Mr Francis QC.

[6] Instinctively I found improbable the husband's assertions that he can pay no more. Of course, Mr Firth could properly point to the jointly instructed expert's report which indicated that further income could not readily be drawn from the business, notwithstanding its very large and still growing turnover and its healthy profit state. No doubt part of its success is because of restraint on drawings and the re-investment of profits in the business. Yet the husband manages a lifestyle that befits his station, indulges hobbies and in June 2005 managed to redeem £500,000 of the mortgage that he had taken out on a new house for himself. It is said that in order to fund both his living expenses and his legal representation, he is required to borrow and steadily increase his indebtedness. I acknowledge that I cannot conduct a full investigation of his affairs and I acknowledge that I should not really reach conclusions about his liquidity based on pieces of information selected by Mr Francis unless balanced by those advanced by Mr Firth. It seems to me that all I can do is look at the broad picture, taking into account the expert evidence, the pointers either way identified by counsel and the actual use of money by the husband. As I indicated in argument I was impressed by his ability to redeem £500,000 of a mortgage. In all those circumstances I have concluded that my initial instincts were well founded and that this husband can pay more if he chooses to re-order his business and personal affairs.

[7] In the end the question that has really exercised me is the one of the wife's legal expenses. There are first instance decision like *A v A (Maintenance Pending Suit: Provision for Legal Fees)* [2001] 1 WLR 605, [2001] 1 FLR 377 which suggests that a jurisdiction exists to allow the court to make provision for legal expenses in maintenance pending suit and, as a bald statement of principle, I do not believe it to be controversial. The question is whether it is right here.

[8] Mr Firth says that any such order would be unfair. He says that legal expenses had been considered in the negotiations leading up to the consent order. He says that his client should not be required to indemnify a wife to litigate as she pleases. He says that in any event she has two other courses open to her. Either she could raise money on the security of her half-share in the matrimonial home (that share being worth in excess of £500,000) on the basis that the husband would co-operate in any such arrangement, or she could negotiate an arrangement with her solicitor along the lines contemplated in *Sears Tooth (A Firm) v Payne Hicks Beach (A Firm) and Others* [1997] 2 FLR 116. He acknowledges, of course, that she has no income and no other capital out of which to fund her legal costs.

[9] Mr Francis responds by saying that the court is aiming for fairness whether in pursuance of the Civil Procedure Rules 1988 over-riding objective or the discretionary basis of the 1973 Act. When one looks at this case – needs, resources and contributions – fairness requires that within limits the husband should fund the wife's legal expenses. He says that her solicitors are not prepared to enter into a *Sears Tooth* agreement and not only can they not be compelled to do so but also it would be quite wrong to expect the wife to go and find solicitors who would. Moreover, he says it is quite wrong that the wife should be required to fund her costs by mortgaging the family home when she has no assurances (and she has none) that it will become hers in the end. In other words, were the husband to succeed in demonstrating (as he asserts) his lack of liquidity then she might find herself obliged to sell up to

meet her own costs even though, of course, she would still have enough left to ensure that she and the children were not actually homeless.

[10] The limits proposed by Mr Frances are twofold: first to place an upper limit on her costs of £120,000 so that any more would have to be justified anew; and, secondly, that the order should recite an undertaking from the wife to pay that money to her solicitors and credit it against any costs order she may ultimately obtain from the husband (see *Rayden & Jackson on Divorce and Family Matters* (Butterworths Law, 17 edn), para 16.19). He accepts that costs were considered in negotiations and a figure of £30,000 was mentioned in correspondence. That was predicated, he says, on the basis of a successful financial dispute resolution in November. Now, he says, they are faced with a trial next October, the need to instruct forensic accountants (albeit at present for advice only) and other matters that will require attention. Having regard to what I know of the husband's current costs liabilities, I would not think that £120,000 is an unreasonable sum. For what it is worth, I regard the costs position as representing a material change of circumstance from those that pertained during the pre-August 2005 negotiations.

[11] One of Mr Firth's complaints (and as a matter of fact it is true) is that the wife has only disclosed one attempt to raise money. In fact she has raised £23,000 towards her costs from Butterfield Private Bank. He says she could do much better and offers Amalfi by way of example. He may be right. However, the question remains (in the absence of any assurances from the husband) as to whether it is right to require her to raise money on the security of her share in the home and sole guaranteed asset.

[12] Both parties invited my close attention to the recent Court of Appeal decision in *Moses-Tagia v Taiga* [2005] EWCA Civ 1013, [2006] 1 FLR 1074 (*Tagia*). Its facts were highly exceptional and wholly different from this case. Nevertheless it did involve maintenance pending suit which covered legal costs. The jurisdiction to make such orders was recognised and the need for them explained by Thorpe LJ. In para [25] he said this:

'But times have moved on. In the 1970s, a petitioner who had no assets and whose only prospect of affluence lay in the outcome of her application for ancillary relief, could easily find specialist solicitors who would pursue her claim on legal aid. That world has long since gone. In those days, a number of the leading specialist ancillary relief firms could, as a matter of public duty, take on an admittedly small number of legally-aided cases. Leading firms that would not take legally-aided clients invariably had an arrangement to pass such cases to highly competent firms that would do legal aid. All those support systems have disappeared. The modern reality is that the highly specialist solicitors and counsel necessary for the conduct of big money cases will no longer do publicly-funded work. So, if the applicant has no assets, can give no security for borrowings, cannot guarantee an outcome that would enable her to enter into an arrangement such as that which was upheld in *Sears Tooth (A Firm) v Payne Hicks Beach (A Firm) and Others* [1997] 2 FLR 116 then there is no source of funding of the litigation other than the approach to the court for a maintenance pending suit that will include a substantial element to fund the cost of the litigation. Obviously, in all these cases the dominant safeguard

against injustice is the discretion of the trial judge and it will only be in cases that are demonstrated to be exceptional that the court will consider exercising the jurisdiction. But, I am in no doubt that in such exceptional cases, s 22 of the Matrimonial Causes Act 1973 can in modern times be construed to extend that far.'

Mr Firth draws attention to the words '... has no assets, can give no security for borrowings ...' and says that that is not this case, and thus no such order can properly be made. Mr Francis says that these words are illustrative not definitive and that such an order can be justified in this case.

[13] This is a case of husband and wife who over the years have by agreement so ordered their affairs that all their assets (other than the former matrimonial home) are under the control of one party. The purpose of ancillary relief orders is to ensure their equitable distribution in accordance with the principles and purposes of the 1973 Act. For that to be done, it is desirable (and perhaps even essential) that both parties should have access to high quality professional advice in which they have confidence. That can only be achieved by the wife if either she mortgages her half-share in the former matrimonial home, or her costs are substantially contributed to by the husband. If she mortgages her interest in circumstances where (as here) no other capital provision is currently guaranteed (because the husband's position is that he can raise none) she risks her and the children's occupation of that home. In a case such as this I regard that as wholly unfair. Moreover, the strong probability is that the husband will in the event have to pay her reasonable costs but if he does not have to do so because, for example, her litigation behaviour is found to be unreasonable, it will be possible to protect his position, through her interest in the property, against any sums which he has laid out by way of maintenance pending suit.

[14] I do not accept Mr Firth's restrictive interpretation of the words of Thorpe LJ in *Taiga*, but prefer the approach of Mr Francis that the learned Lord Justice is doing no more than describing one exceptional scenario. In one sense all these 'big money' cases are exceptional. Certainly the facts of this case with a 15-year marriage, two minor children and the vast bulk of the assets under the control of one party and the need for investigation of them makes this case exceptional and permits this court to add a costs component to maintenance pending suit.

[15] Accordingly I have decided that the order of 10 August 2005 should be varied to the extent (and only to the extent) of adding a legal expenses component to it. I find the figure of £120,000 for the wife's overall costs is not unreasonable. She has already raised over £20,000. In my judgment the balance should be spread over the 10 months between now and the trial by adding the sum of £10,000 per month to the current sum of £3,333, such variation being effective from the date of the first payment due for January 2006. Of course, if the husband wishes to make the sum of £100,000 available by other means, he should be allowed to do so. The order should contain the recital by way of undertaking set out in para [10], above. The costs of this application should, of course, be costs in the ancillary relief proceedings. The parties are invited to submit a minute of order to implement this judgment.

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Hedley J

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*Order accordingly.*

Solicitors: *Dawson Cornwell* for the husband  
*Anthony Collins & Co* for the wife

ROBERT CROSSLEY  
*Law Reporter*