

**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

