esNeutral Citation Number: [2018] EWFC 30

Case No: FD17P00079

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2018

Before :

MR JUSTICE MOSTYN

- -

Between :

	VS	**Applicant**
	- and -	
	RE	**Respondent**

- -
- -

Frank Feehan QC (instructed by **Banks Kelly Solicitors**) for the **Applicant**
Mark Warwick QC (instructed by **BP Collins LLP**) for the **Respondent**

Hearing date: 25 April 2017

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Judgment Approved

MR JUSTICE MOSTYN

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.

Mr Justice Mostyn:

1. These are proceedings under Schedule 1 of the Children Act 1989. On 27 July 2017 Mr Justice Moor made a final order which required payment by the respondent of a large sum. He was also ordered to pay the applicant's costs. The respondent did not comply. The applicant initiated enforcement proceedings. Those came before me on 10 April 2018 when a consent order was made which provided for the means of payment of the sums due. On 25 April 2018 I varied one of the time limits in the consent order.

2. On 10 April 2018 I noticed that both the main and the enforcement proceedings had apparently taken place in the High Court, rather than the family court. I asked Mr Feehan QC how this had happened. He told me that the main case had been started by

design in the High Court, as had the enforcement application. He said that only the High Court could make a charging order.

3. I later had my clerk ask by email for better details of this. Specifically, I wanted to know how the main case had been started in the High Court having regard to FPR 5.4(1) and why it was said that enforcement proceedings had to be in the High Court having regard to FPR 33.1 and 40.4(2).

4. Mr Feehan QC produced a note on 24 April 2018 which explained that the proceedings had started with an application before a High Court Judge for a freezing order. The order was made on 15 February 2017 by Mr Justice Cobb and is headed "In the High Court of Justice, Family Division". Further interlocutory orders, so headed, were made by Ms Justice Russell on 8 March 2017, by Mr Justice Holman on 4 May 2017, and by Mr Justice Bodey on 27 June 2017. However, the final order of Mr Justice Moor on 27 July 2017 is headed "In the Family Court", as is his judgment. It is not possible to tell in which court this case took place.

5. The enforcement proceedings appear to have been issued in the High Court. Orders headed "In the High Court of Justice, Family Division" were made Ms Justice Russell on 8 December 2017, by Mr Todd QC on 23 January 2018, by Mr Justice Keehan on 1 March 2018 and by Mr Justice Holman on 9 March 2018 and 15 March 2018. My own order of 10 April 2018 is so headed, I having been assured by Mr Feehan QC that the enforcement proceedings had been properly issued in the High Court.

6. Mr Feehan QC's note of 24 April 2018 appears to accept that the main case should never have been issued, or proceeded with, in the High Court. He accepts that enforcement proceedings are within the powers of the family court but asserts that because an order for sale of the charged properties would be sought it was right that the enforcement application was brought in the High Court, since FPR PD 40A para 4.1 appears to suggest that only the High Court can order the sale of a property subjected to a charging order.

7. In his guidance dated 28 February 2018 (*Jurisdiction of the Family Court: Allocation of cases within the family court to High Court Judge level and transfer of cases from the family court to the High Court*) the President has sought to clarify the "considerable confusion concerning the extent and exercise of the power by judges sitting in the family court to transfer a case, or part of a case, to the High Court". He spelled out:

   i) It is very important for the family court, which has now been in existence for nearly four years, to gain the respect it deserves as the sole, specialist, court to deal with virtually all family litigation. Except as specified in the Schedule to the Guidance, cases should only need to be heard in the High Court in very limited and exceptional circumstances (para 30).

   ii) There is no justification for transferring a case from the family court to the High Court merely because of some perceived complexity or difficulty. The proper course is to re-allocate the case for hearing in the family court by a "judge of High Court level" or, if appropriate, a judge of the Family Division. It is, for example, virtually impossible to conceive of a divorce or financial remedy case which needs to be transferred from the family court to the High Court (para 30(c)).

iii) When a freezing order is sought, the application should always be heard in the family court, normally at District Judge level, but may be allocated to a judge of High Court level (para 24).

And in para 16 he reminded us of the important terms of FPR 5.4 namely:

> "(1) Where both the family court and the High Court have jurisdiction to deal with a matter, the proceedings relating to that matter must be started in the family court.
>
> (2) Paragraph (1) does not apply where – (a) proceedings relating to the same parties are already being heard in the High Court; (b) any rule, other enactment or Practice Direction provides otherwise; or (c) the court otherwise directs."

8. That rule was not applied in this case. It appears that the applicant believed that she was entitled, as of right, to commence the main case and the enforcement application in the High Court. She and her advisers were mistaken. The rule required the cases to be started in the family court. If the mistake had been noticed the cases should have been transferred back to the family court under the power in section 38 of the Matrimonial and Family Proceedings Act 1984. I did not do so on 10 April 2018 as I accepted (without checking) Mr Feehan QC's submission that the enforcement application had to be in the High Court.

9. Mr Feehan QC now accepts that enforcement proceedings can be initiated in the family court, and of course this is to state the obvious. FPR 33.1 states that the rules about enforcement in that Part apply to an application made in the High Court and the family court to enforce an order made in family proceedings. The specific relief sought by the applicants was a host of charging orders. FPR 40.4(1) states: "An application [for a charging order] must be made to the family court or to the High Court, as appropriate …". But this is subject to FPR 5.4, so unless there are already proceedings in the High Court, the application must be made in the family court.

10. Mr Feehan QC justifies the by-passing of this rule, and the issue of the enforcement application in the High Court, by reference to FPR PD40A para 4.1 which provides:

> "The High Court or, subject to the county court limit, the county court can enforce a charging order by an order for sale. Provision in respect of applications for an order for sale is made in rule 73.10C CPR."

CPR 73.10C provides:

> (1) Subject to the provisions of any enactment, the court may, upon a claim by a person who has obtained a charging order over an interest in property, order the sale of the property to enforce the charging order.
>
> (2) Where the charging order was made at the County Court Money Claims Centre a claim for an order for sale under this rule must be made to the judgment debtor's home court.

> (3) Subject to paragraph (2) a claim for an order for sale under this rule should be made to the court which made the charging order, unless that court does not have jurisdiction to make an order for sale.

11. Mr Feehan QC argues that FPR PD40A para 4.1 and CPR 73.10C only contemplate the High Court or the county court ordering a sale of property the subject of a charging order.

12. I cannot accept this argument. It would mean that the family court in fact has less power that the divorce county courts it replaced. It would be an absurd consequence in ancillary relief proceedings between former spouses for the family court to have the power to order a sale of property at an interim stage under FPR 20.2(1)(c)(v) or section 17 of the 1882 Act, or at a final stage pursuant to section 24A of the 1973 Act, but not in enforcement proceedings following the grant of a charging order.

13. In the Guidance at para 15 the President stated:

> "Section 31E(1)(a) of the 1984 Act provides that "In any proceedings in the family court, the court may make any order … which could be made by the High Court if the proceedings were in the High Court." This does not permit the family court to exercise original or substantive jurisdiction in respect of those exceptional matters, including applications under the inherent jurisdiction of the High Court, that must be commenced and heard in the High Court. It does, however, permit the use of the High Court's inherent jurisdiction to make incidental or supplemental orders to give effect to decisions within the jurisdiction of the family court. Thus, for example, the family court can: (a) issue a bench warrant to secure the attendance of a judgment creditor at an enforcement hearing: see *Re K (Remo: Power of Magistrates to issue Bench Warrant)* [2017] EWFC 27); and (b) require a party to use his or her best endeavours to procure the release of the other party from mortgage covenants: see *CH v WH* [2017] EWHC 2379 (Fam)."

14. In my judgment this analysis applies equally to an application for a sale following a charging order. It is a supplemental order giving effect to the substantive order. If such an application is stated to be reserved to the High Court by procedural rules then the family court manifestly has jurisdiction to make such an order, pursuant to section 31E(1)(a) of the 1984 Act. Therefore, pursuant to CPR 73.10C(3) that application must be made to the family court, it being the court that made (or should have made) the charging order. As drafted FPR PD40A para 4.1 is misleading. It is not to be construed as saying that only the High Court or the county court can order a sale of property the subject of a charging order.

15. This case is a classic example of lawyers rushing off to the High Court at the first sign of complexity. This is a practice that must cease. The family court must be recognised as the sole forum for resolution of all family cases save for those specified in the Schedule to the President's Guidance.

16. My order will provide that if, and insofar as, the case has been initiated in the High Court or otherwise proceeded there (and it is far from clear that it actually has) then it is transferred to the family court.

17. The President has seen this judgment in draft and has approved its terms.