Barristers' Chambers

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Case Update – Issue 10
S v S [2008] EWHC 2038 (Fam) – King J.

Introduction:

1.1 This is the second reported case, the first being **Crossley [2008]** 1 FLR 1467, upon the approach of the Court to case management in circumstances where there exists a factor of 'magnetic importance' within the circumstances, which is accepted as likely to dominate the eventual section 25 exercise at a final ancillary relief hearing and which, therefore, justifies the Court abbreviating the usual procedure under the **r 2.61** of the **FPR**.

1.2 In **Crossley**, the factor in question was the existence of a pre-nuptial agreement after just 14 months of marriage between a very wealthy childless couple. In the present case, it was an Edgar agreement reached between the parties some 3 years beforehand upon the marital breakdown.

1.3 In reality, the cases in which one factor can be said to be of such magnetic importance that the Court can justify restricting the usual procedure under the ancillary relief rules should remain rare. Any consideration of the basic facts of this case and **Crossley** will immediately reveal that the outcome in each was almost a foregone conclusion.

1.4 Of course, it has to be said that the procedure adopted does little more than, essentially, pre-judge the outcome of any final hearing, however much the case management Judge pretends otherwise. This feature was, probably, uppermost in Mrs Crossley's decision not to proceed to a final hearing in her case and may be seen as having similar fatal effects upon the wife's decision in the instant case. Indeed, it is as close as the procedure in ancillary relief gets to a summary judgment.

1.5 Restricted to those few 'almost foregone conclusion' cases, an abbreviated procedure is to be welcomed, but should there be a trend to widen the parameters of this procedure, there would be a real sense of one of the parties not having had a fair hearing. This is, of course, one of the important reasons that the comments of the Judge at a Financial Dispute Hearing remain confidential to the parties, where a settlement at such a hearing cannot be achieved and a final hearing is required.

The Facts:

2.1 The Wife was 58 and the Husband 61. Married in 1975 and separated in 2004, they had been together for almost 29 years. All three adult children of the family were independent. Both had met other partners and the Wife was in cohabitation with hers (See para 2 of judgment).

2.2 The parties held some £78m in asset value. The Husband had been the wealth creator and the Wife the homemaker (para 5).

2.3 The Husband's case was that in a round table conference in November 2005 and in subsequent negotiations thereafter, the parties had reached a concluded agreement from which the Wife had had transferred to her some £34m in asset worth either directly or subject to trust and save for the question of implementing a pension share, the agreement had otherwise been wholly implemented (para 7).

2.4 The Wife submitted that, whilst there had been agreement to a 45% split overall in her favour, there remained a number of significant unresolved issues for adjudication, which had the result, she claimed, that no concluded agreement had been reached and she maintained e.g. trustees would need to be joined in and an application made by her to vary a nuptial settlement (para 9).

2.5 The Wife filed her notice to proceed with the ancillary relief application and the Husband issued a notice to show cause why an order should not be made in the terms of the agreement reached (paras 10/11).

2.6 The matter came before the High Court Judge on a case management hearing subsequent to transfer from the district judge, who had made directions so as to permit either the pursuit of the usual ancillary relief procedure or the notice to show cause. Within his notice, the Husband sought a stay of the ancillary relief application (para 14).

The Hearing:

3.1 The Judge considered that she had on a provisional basis to address the competing merits of the central issues arising in order to determine the case management route most appropriate (paras18 to 20).

3.2 These were whether there was there an agreement, was it to be avoided because of a subsequent change of circumstances and could the terms of the agreement now be implemented, in any event (para 25).

3.3 In her analysis, the Judge concluded that there was 'very strong evidence' to support the Husband's assertion that there was a concluded agreement (para 59). In the

absence of a change of circumstances, at least of the level of a *Barder* event, she was unimpressed by the contention that there was any reason to suggest that the agreement reached had been affected by the passage of time, especially as the Wife appeared to have been relying upon the agreement herself only months before she issued her Form A (paras 60 to 63). Any difficulty in implementation of the original intention of the agreement in relation to the Wife being a primary beneficiary of the settlements established was a consequence of her own actions subsequent to and in reliance by her upon the agreement reached (para 70 and 74).

3.4 The Judge was further unmoved by miscellaneous issues as to alleged non disclosure by the Husband or his alleged financial misconduct. As to the former, she concluded there was provisionally 'scant evidence' (para 79) and as to the latter, the suggestion appeared to be tardy and with an alternative less contentious resolution suggested by the Wife's own counsel (para 82). Any remaining issue was a matter for redress upon implementation (para 87).

3.5 The Judge, therefore, concluded that this was a strong case of a concluded agreement already implemented in the main by both parties and whilst who should bear the costs remained unresolved, the same, as the Wife's advisors had recognised, did not go to the heart of the agreement and could be dealt with in accordance with **Xydhias [1999] 1 FLR 683** as a discrete issue. None of the issues raised appeared to undermine the fundamental significance of the agreement, if it existed and there was, at least, a strong argument that the Wife, under the section 25 exercise, would receive no further relief and an order would be made in the terms sought by the Husband (para 87: Conclusion).

3.6 Having regard to such matters against the wealth and income the Wife otherwise enjoyed, the costs already incurred, the realistic time estimate of the hearing which the Wife sought and the emotional effect the proceedings were having upon the Wife and the family, the Judge concluded, first, that such a course, as argued for by the Wife, was disproportionate and, in any event, the case was 'one of that category of cases' where the existence of the factor of the agreement would be of such 'magnetic importance' that it would '...necessarily dominate the discretionary process' (para 89).

The Directions Given:

4.1 The Judge determined that the appropriate approach was not to stay the ancillary relief application as had been sought by the Husband, but to list the his notice to show cause together with the giving of directions limiting the usual discovery and questionnaires required, since it remained important that the existence of the agreement, if so found, should be considered along with the other factors within the section 25 exercise.

4.2 Further directions were made to ensure that some, although not all, of the miscellaneous issues raised by the Wife could be addressed at the same hearing (paras 90 to 95) with costs reserved.

The Legal Framework:

5.1 Of particular interest, in this judgment, is the analysis of the propositions of relevant law, which it was stated will inform the approach of the Court under the section 25 exercise, whenever it is alleged that there has been a concluded agreement between the parties.

5.2 These are (paras 23/24):-

i) The existence of a concluded agreement is a matter of great weight: see **Edgar v Edgar** and **X and X (Y and Z Intervening) [2002] 1 FLR 508*;*** but c.f **Soulsbury v Soulsbury [2008] 1 FLR 90.**

(ii) The court when considering whether there is an agreement and its effect, if there is, does so, not in isolation, but against the backdrop of s25: *See* **Dean v Dean *[1978] 3 All ER 758*** *and* **Xydhias;** but c.f ***Smith v Smith*** **[2000] 3 FCR 374.**

(iii) An application for a Notice to Show Cause is, therefore, an appropriate means by which an aggrieved party can bring the matter before the court. *See* **Dean v Dean, Xydhias v Xydhias, X and X (Y and Z Intervening)** and **Crossley**.

(iv) Public policy requires the court to consider whether there has been an agreement and also to 'exclude from the trial lists unnecessary litigation'. *See* **Xydhias** *and* **Crossley.**

v) The overriding objective to deal with cases justly, set out in FPR r2.51D, allows judicial case management to seek to save expense and deal with matters in a way that is proportionate to the financial position of the parties and allots an appropriate share of the court's resources. The FPR 1991 are not intended to be a straightjacket precluding sensible case management. *See* **Crossley**

vi) It is not necessary for every detail to have been resolved prior to the court taking the view that there is an agreement to which a party should be held. *The first stage of negotiation, which should then be recorded in a simple heads of agreement, is 'what is the applicant to receive? (p696a). Points of detail can thereafter be determined by the court at an abbreviated hearing.* See **Xydhias** but c.f **Soulsbury**.

vii) In determining whether there has been an agreement the court will look at all the circumstances, including the extent to which the parties themselves attached

importance to the agreement and the extent to which the parties themselves have acted upon it. See **X and X (Y and Z Intervening).**

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