

S v B (Ancillary Relief: Costs)

[2005] 1 FLR 474

09/09/2004

Barristers

Private: Jonathan Cohen QC

Court

Family Division

Facts

The husband and wife were married for less than 3 years. The wife lived with the child of the family, now aged 3, in the former matrimonial home, which was free of mortgage and had been valued at £720,000. The wife earned £16,000 pa net at the time of the hearing. The husband lived in a one-bedroomed property, his equity in which was estimated at £56,000. The husband had been a merchant banker, earning large sums, but had been redundant for over a year. The husband had savings of about £378,000. At the time of the hearing the wife's total outstanding legal costs were £121,000 and the husband's £55,000; between them they had already paid over £100,000. In part the level of costs was attributable to an investigation instigated by the wife into loan repayments from the husband to his parents; ultimately the judge concluded that these repayments were genuine. The judge awarded the wife a lump sum representing 66% of the net proceeds of sale of the matrimonial home, or £465,000, whichever was the higher (with the expectation, on the current valuation, that the wife would receive £475,000), ordered the husband to make nominal periodical payments for an extendable period of 10 years, and decided that there should be no order for costs between the parties. The husband appealed, arguing that the lump sum award was too high, that the wife's entitlement should not, in any event, be linked to a percentage of the net proceeds of sale, that the husband should have been entitled to a charge against the wife's new property, that her claim for periodical payments should have been dismissed and that an order for costs should have been made in his favour. The value in the matrimonial home had risen to an estimated £817,000 since the hearing. The wife's earnings had increased to £18,000 pa net which, together with £5,000 pa from the husband in periodical payments for the child and £1,000 child benefit, made her total net household income £24,000. The husband had not found employment, and had been borrowing to support himself, but the equity in his home was now estimated at £66,000. There had been additional costs arising both from the appeal and from an ongoing contact dispute between the husband and wife.

Held

Held – allowing the husband's appeal in respect of the costs decision and charging the wife's new home in respect of her liability to him in respect of costs and dismissing the remainder of his appeal –

(1) The lump sum award was not too high. The judge's lump sum award was intended to include the

wife's housing fund, and to allow for the wife's outstanding costs of the financial proceedings and, provided that when he came to determine any issue as to costs he bore well in mind what he had done, the judge was fully justified in thus including the costs (see paras [26], [27]).

(2) Lump sums to be paid out of the proceeds of sale of a home as yet unsold were now often, almost usually, fixed by reference to the home's estimated value. The justification was that if house prices increased between valuation and sale, it was not only the price of the matrimonial home which would go up, but also the price of the new property to be purchased. The ostensible injustice to the husband in the wife's greater share of the increased value was moderated by the increase in the husband's equity in his own property (see paras [28], [31]).

(3) The judge's refusal to grant the husband a charge over the wife's new property was (leaving aside the issue of costs) justified by the consideration that, as the likely primary carer of a young child, the wife was likely to make a substantial and protracted contribution to the welfare of the family and that, although she would need to work full-time, her responsibilities towards the child would shackle her ability to apply herself unconditionally to the development of a really successful career. Although the level of acrimony between the parties also militated against an ongoing charge, that would not have been sufficient reason on its own to decline to grant one (see paras [34], [35]).

(4) The nominal order for periodical payments was not appealable as, even though it might have been preferable to have dismissed the wife's application, the nominal order was not plainly wrong. However, the circumstances in which it would be apt to vary the order were very unlikely to arise (see para [36]).

(5) When the judge had made no order as to costs, the judge was proceeding on the usual, but in this case invalid, assumption that the effect would be that the wife would bear her own costs, momentarily forgetting that, by virtue of other orders referable not to principle but to practicality, the husband was already paying at least all the wife's costs on the standard basis. The effect of the judge making no order as to costs was not (as he said he intended) to punish the wife for her error in pursuing an issue; it was to punish the husband (see para [45]).

(6) Exercising the discretion afresh, while it was reasonable for the wife to have conducted some enquiry into payment from the husband to his parents, the enquiry and, therefore, the costs had become completely out of proportion. A charge in favour of the husband over the wife's new home in the proportion that £112,000 bore to its purchase price was the only way to avoid injustice (see paras [46]-[48]).

Per curiam : this appeal was an excellent advertisement for the proposed reforms which, when they took effect, would introduce the general principle that there should be no order as to costs in the absence of unreasonable conduct in relation to the proceedings. Of equal significance would be the suggested provision that noCalderbank offer could be taken into account in any determination as to costs (see para [49]).

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