

Neil v Neil [2019] EWHC 3330 (Fam)

Family Division, 22 November 2019, Moor J

Deborah Bangay QC for the husband, instructed by Hughmans; the wife in person.

The couple began living together in 1992 and married in 2007. They both had children by previous relationships and one child together. In 2002, they set up a company providing security services. Both the husband and wife worked full-time in the business, with the husband as managing director and the wife as the main administrator, dealing with finances and with full access to all emails. The couple separated in January 2014.

From 24 May to 22 June 2014 the husband and wife attended three mediation sessions, which resulted in a Memorandum of Understanding (MOU) dated 22 July 2014. This was headed 'without prejudice' and stated that it was 'legally privileged and without prejudice. It does not record or create a legally binding agreement between them. They understand that they may take this document to their legal advisors to be used as the basis for a legally binding agreement subject to the advice they receive'. The terms of the MOU were that the family home was to be sold and the net proceeds were to be divided equally, but that the wife would receive the first £1 million from the sale to enable her to purchase a home for herself and the couple's child. If this amounted to more than half of the equity, the difference would be reflected as a charge on her new property in the husband's favour, to be realised only if she sold the property or remarried. The parties' belief, set out in the document, was that there was a net equity of £1.77 million. The document also provided for the couple to retain their home in Spain in joint ownership and eventually share any proceeds of sale. The couple had expressed a wish to have a clean break agreement and the document specifically stated that "spousal maintenance was not considered necessary, due to their professional careers, substantial and equal incomes and assets". At the time, they were each earning a net sum of £8,500 pm from the business although, following the separation, the husband's rent was also being paid by the business, initially at the rate of £2,000 pm but subsequently increased to £4,500 pm. On 1 October 2014, the wife's pay increased to £12,500 pm net, perhaps to reflect the fact that the business was paying the husband's rent. The wife resigned as a director in the course of 2014, but continued to work in the business. Some minor amendments were made to the MOU on 19 December 2014. Sometime before 8 January 2015, the husband agreed separately with the wife that he would pay £5,500 pm towards the expenses of the family home until its sale.

The wife instructed solicitors; the husband did not. On 5 December 2014, the wife told her solicitors that she had reached a verbal financial agreement with the husband. She said she was not seeking maintenance for herself but needed to keep the option open, should her circumstances change. The wife's solicitors prepared a first draft of the consent order for the wife to review, based on her instructions; it stated that each had received £103,000 following an equal division of their savings. It provided for £1 million of the proceeds of sale of the family home to be paid to the wife, with the balance to the husband. There was a recital that the wife would undertake to place a charge on her new property in the husband's favour to the extent that the £1 million she was to receive exceeded her half share. Also included was a nominal periodical payments order until the husband's 65th birthday, the death of either party, the wife's remarriage or a further order terminating payments. A decree nisi was produced on 27 March 2015.

Shortly afterwards, the wife told the solicitors to delete the clause that the nominal maintenance would terminate on remarriage. The solicitors did so, despite this not being possible, as a matter of law. On 5 May 2015, the wife sent the solicitors an email saying that she and the husband had agreed between them that there would be no charge on her new property in the husband's favour. On 6 May, the solicitors sent a further revised draft order that removed the wife's obligation to create a charge over her new property. This draft was then sent to the husband directly by the wife's solicitors; the covering letter referred to the parties having attended mediation the previous year, and having reached agreement. It went on to say that the draft consent order "reflects the terms of the agreement", notwithstanding that it did not do so, particularly in relation to the charge back and the nominal maintenance order. Also, there were a number of significant inconsistencies in the draft, as a result of the recent changes, for example, the draft stated that the net proceeds of sale were to be divided equally but also that the wife was to receive £1 million from the proceeds of sale. Termination on remarriage had been reinstated in this draft. Unfortunately, the husband's response to being contacted directly in this way was a very negative one. By his own account, he deleted the email and failed to respond; he told the wife he did not wish to be contacted by her solicitors again and he was not.

Both the wife and the husband signed the draft order; she returned it to the solicitors on 18 May 2015. On 4 June, the draft was sent to the court to be made and sealed. However, it was recalled within a few days by the wife's solicitors, because of issues relating to the wife's efforts in the meantime to obtain a mortgage large enough to buy the property she wanted. In her efforts to persuade the bank, the wife had sent the bank an unsigned version of the draft consent order, which had been altered to include substantial periodical payments of £66,000 pa (£5,500 pm) from 1 April 2015. The bank had then asked to see a draft signed by both parties plus an email/written consent from the husband to confirm that he was happy with the settlement. The wife emailed her solicitors on 10 June to say that there had been a development and that the financial agreement had to be changed to reflect it, saying the husband's "current maintenance payments to me of £5,500 pcm will continue after the Decree Nisei and until I remarry." She asked for the document to be recalled, amended urgently and returned to the parties for signing. She also emailed the husband asking him to email the bank and say "that you are in agreement with our financial settlement including a monthly alimony payment of £5,500 after declaration of the Decree Nisei". The husband claimed that he had never received this email and that the wife must have deleted it before he read it and also must have sent the subsequent emails purportedly from his address, confirming that he agreed with the revised settlement. One of the emails sent from the husband's account confirming his agreement spelt Decree Nisi as "Decree Nisei". The solicitors queried the wife's instructions, noting that the husband's salary was lower than the wife's, but nonetheless followed them. The clause referring to equal division of the net proceeds of sale of the family home was removed and the new figure for periodical payments was inserted. The order was also redrafted to reflect the intervening sale of the Spanish property. The final version of the document, apparently signed by both parties, was sent to the wife's solicitors on 30 June. The wife received her mortgage offer on 6 July. The final consent order was dated 8 July 2015.

The net proceeds of sale of the family home were £1,348,930; these were all paid into the wife's account. The husband never received the £348,930 excess (the wife transferred only £100,000 to him) and the wife refused to put a charge in his favour on her new property.

There were significant problems in the couple's working relationship after this, with accusations and counter-accusations about funds being extracted from the business. In June 2016 the wife's access to the business server was terminated and the husband instructed his solicitors to request payment of £248,931 said to be owed. The wife's solicitors responded with a request for £82,500 in arrears of periodical payments. The husband's solicitors responded that the consent order they had been sent bore "no relation to that which (the Husband) thought he had agreed with your client". Proceedings had by now been issued in the Chancery Division in respect of the business, including allegations of misappropriation of funds and an alleged raid on the business premises. The business went into administration. The Chancery Division litigation was compromised in August 2017 on the basis that the wife paid £177,500 to the administrators.

In September 2017, the wife sought to enforce the arrears of the periodical payments set out in the consent order, and ongoing maintenance of £5,500 pm. The husband applied to set aside the order on the basis that it had been obtained by forgery and fraud; he essentially sought what the wife should have paid him from the proceeds of sale. While he acknowledged that he had agreed help the wife by guaranteeing £5,500 pm of mortgage repayments, he said had not agreed to pay her this sum in the form of periodical payments. In January 2018, a judge found the wife to be in contempt of court, including serving a witness statement exhibiting forged documents, use of a forged document in court, knowing it be forged, and lying on oath. The wife filed for bankruptcy on 5 February and was made bankrupt on 6 March. Meanwhile, in the family proceedings she admitted that she had used forged documents but was sentenced to 8 months' imprisonment in any event and was also ordered to pay indemnity costs. She was released from prison on 6 June 2018. She paid nothing towards the costs.

On 6 September 2018, the wife applied for maintenance pending suit, relying on her bankruptcy and receipt of benefits. The district judge found that there was prima facie evidence of fraud sufficient to pierce legal professional privilege in order to permit sight of the communications between the wife and her solicitors; both the solicitors and the bank were therefore required to disclose their correspondence. The case was transferred to the High Court. The husband was now chairman of a new company which supplied security and other staff to clubs and restaurants in the West End. The wife was in receipt of benefits, having sold her new home and transferred over half of the equity to her then boyfriend, allegedly in repayment of a debt. By 30 May 2019, the wife's trustees in bankruptcy had identified unsecured creditors of £551,705.

The High Court judge allowed the husband to rely on the MOU, made various significant findings against the wife, concluding that her conduct came within the scope of s 25(2)(g) of the Matrimonial Causes Act 1973; he set aside the element of the consent order that did not match the MOU and ordered the wife to pay the husband about £500,000, including costs; he finished by dismissing the wife's application for ongoing maintenance.

The court made a number of important findings against the wife, including that she had got her solicitors to amend the MOU in the first order, by deleting the charge back and including nominal maintenance of £1 per annum. Without having heard from the wife's solicitors, the court found it almost impossible to see how they could have said in their email to the husband that the resulting draft consent order reflected the terms of the MOU. This letter from the solicitors had nevertheless been an open acknowledgment that the parties had reached a binding agreement that the wife wanted incorporated into a consent order. She could not rely on her own deceit to back away from that acknowledgment by an attempt to say she was only agreeing to the arrangements set out in the MOU if there was no charge back and nominal maintenance was included. If the husband had instructed lawyers, the wife's deceit would have been exposed, but this did not justify her deceit in any way. The husband had signed the first consent order thinking it was in accordance with the MOU. The wife had then engaged in a series of frauds on the bank to obtain the size of loan that she wanted. This had required an approach to the solicitors to get the consent order changed. It was quite remarkable that the solicitors had not even tried to contact the husband at this point, particularly as they had needed to get the existing order back from the court. It was only natural for a firm of solicitors to believe what their client said, but everything had come from the wife and there had been no direct check with the husband at all as to a maintenance order that was, on the face of it, surprising, given their client had the higher income, as they themselves had noted. Although it was possible that the husband had signed the final draft consent order (rather than his signature being forged by the wife), the court was sure he would not have been aware of what he was signing but would have thought he was guaranteeing a loan/mortgage. The husband had been very naïve. The wife had been thoroughly dishonest. His naivety was not a crime and was often a feature of financial remedy proceedings. Equally, dishonesty was, regrettably, a regular feature of financial remedy proceedings but this court had never before come across a court order obtained by fraud in the way that this order had been. It was conduct of the most serious nature as provided for by s 25(2)(g) of the Matrimonial Causes Act 1973. The husband was entitled to a set aside of the consent order dated 8 July 2015 on the basis he had applied for. The wife owed the husband £248,930, which she must pay within 28 days. Thereafter, interest would accrue at 8% per annum. [77]-[79]

The case of *Kingdon v Kingdon* [2010] EWCA Civ 1251 was authority for the proposition that the court did not have to set the case down for a rehearing after setting aside some part of a consent order, if it was clear as to the correct outcome. The court could now rely on the MOU because the privilege that attached to it had been waived by the wife when the solicitors wrote saying that the parties had been able to reach an agreement and they had therefore drafted a consent order reflecting the terms of the agreement. Given her conduct, the wife could not be heard to say that this had been on the basis of nominal maintenance because it had not. It had been a clean break. The only reason why a clean break order had not been made in 2015 was because the wife had been twice deceitful as to the matter. First, she had told her solicitors that the parties had agreed to nominal maintenance when they had not. Second, she had told them that the husband had agreed to substantive maintenance, when he had not. She could not benefit from her own deceit. [82]-[84]

The details of the husband's current financial circumstances were unknown. The court had not directed him to file a Form E. Assuming that, as the wife alleged, he was doing

exceptionally well, and even that he had a huge income, there was no realistic prospect that this wife would ever get a substantive maintenance order against this husband. Her conduct had been egregious. The court could not and would not ignore it. If she had not engaged in this conduct, a clean break would have been made long ago. She had brought all her current difficulties upon herself, having originally had an excellent income from working in the business. She had been found to have behaved in a disgraceful manner in the Chancery litigation and, whatever had happened prior to her leaving the business, she had ended up in prison entirely as a result of her own actions. It was almost inevitable that she would owe the husband a very large sum of money indeed, once his costs, assessed at £250,000, were taken into account. It was inconceivable that a judge would order the husband to pay this wife maintenance without allowing him to deduct the money he was owed by her, given her conduct. The court could not see how the wife could ever succeed in obtaining a substantive order against him that he would actually have to pay. The husband had certainly had to borrow significantly to fund this litigation and this would be relevant to the quantum of any maintenance award, even if the wife got over these hurdles. Importantly, if the court allowed the wife to proceed with a claim for maintenance, it would be allowing her to benefit from her fraud. Whilst this was a long marriage with a child, the wife's conduct was the magnetic factor that, in effect, trumped everything else. Finally, the cost, expense and emotional strain of a further hearing would be enormous and would not achieve anything. The court therefore replaced the maintenance paragraph in the consent order with a clean break order in life and death. The rest of the order stood, but with a declaration that the wife owed the husband £248,930 in relation to the equity in the family home. [85]-[87] [90]

The court was not presently minded to report the wife to the DPP although it undoubtedly would have done so had she not already served an 8-month sentence for contempt (albeit for contempt committed after the fraud found proved in these proceedings). The case was to be reported without anonymisation, particularly given that the judgment in the Chancery Division proceedings was already in the public domain, although the identity of the wife's solicitors would be anonymised, as the court had not heard from the firm during the trial. [88] [89]