Trinity Term
[2018] UKSC 38
On appeal from: [2017] EWCA Civ 129

JUDGMENT

Mills (Appellant) *v* Mills (Respondent)

before

Lady Hale, President
Lord Wilson
Lord Carnwath
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

18 July 2018

Heard on 6 June 2018

Appellant
Philip Cayford QC
Sassa-Ann Amaouche
(Instructed by Lodders
Solicitors LLP)

Respondent
Frank Feehan QC
Katherine Dunseath
(Instructed by Osbornes
Solicitors LLP)

LORD WILSON: (with whom Lady Hale, Lord Carnwath, Lord Hughes and Lord Hodge agree)

1. In circumstances in which at the time of a divorce a spouse, say a wife, is awarded capital which enables her to purchase a home but later she exhausts the capital by entry into a series of unwise transactions and so develops a need to pay rent, is the court entitled to decline to increase the order for the husband to make periodical payments to her so as to fund payment of all (or perhaps even any) of her rent even if he could afford to do so?

2. Mr Mills (whom it will be convenient to describe as "the husband" notwithstanding his divorce from Mrs Mills, "the wife", in 2002) appeals against an order for upwards variation of an order for periodical payments against him in favour of the wife. The order for variation was made by the Court of Appeal (Longmore LJ and Sir Ernest Ryder, Senior President of Tribunals) on 1 February 2017: [2017] EWCA Civ 129. By that order, the Court of Appeal allowed the wife's appeal against the dismissal of her application to vary the order for periodical payments by Judge Everall QC ("the judge") in the Central Family Court in London on 9 June 2015.

3. The husband and wife are each aged 52. They were married in 1987. The wife is a qualified beauty therapist. In the early years of the marriage she worked, self-employed, in that capacity. The husband built up a surveying business within two companies which he and the wife owned in equal shares. They had one child, a son, now adult. In 1996 the wife unfortunately suffered a late miscarriage, which precipitated a long period of painful gynaecological difficulties for her. In 2000 the husband left the home in Guildford.

4. On 7 June 2002, in the ensuing divorce proceedings, financial issues were resolved within a consent order. In addition to provision for their son, who was to continue to make his home with the wife and have contact with the husband, the order provided that:

i) the home, vested in the joint names of the parties, should be sold;

ii) its net proceeds should be divided in accordance with a formula which in the event yielded £230,000 for the wife in settlement of all her capital claims against the husband and £23,000 for him;

iii) the wife should transfer to the husband her interest in policies worth £23,000 and her shares in the surveying companies; and

iv) the husband should make periodical payments to her at the annual rate of £13,200 (not index-linked) on the open-ended basis, namely during their joint lives until her remarriage or further order in the interim.

The wife therefore received the vast preponderance of the parties' liquid capital. The value of the two companies was not identified.

5. At the time of making the consent order the wife had represented that ill-health was disabling her from working and that she would need £350,000 with which to purchase a suitable home for herself and their son. The husband had conceded that she then had no capacity to raise a mortgage but had suggested, by contrast, that she could purchase a suitable home for £230,000 or less, in other words free of mortgage. In the event, later in 2002, she proceeded to purchase a house in Weybridge for £345,000 by deploying in effect her entire share of the proceeds of the home and by raising the balance of £125,000 on mortgage.

6. When he learnt of the wife's purchase, the husband, by solicitors, expressed surprise at its high cost and concern about her ability to service a mortgage, let alone one of such size. By solicitors, she replied only that she had not been able to secure reasonably priced accommodation in an area in which it would in her opinion be best for their son to grow up.

7. It is clear that, by the time of her purchase of the house in Weybridge, the wife had begun to work again as a beauty therapist, but part-time.

8. In 2006 the wife sold the house in Weybridge at the price for which she had bought it, namely £345,000. But the sum owing on mortgage had risen by £93,000 to £218,000. Having received written and oral evidence from the wife, the judge found that she had been unable satisfactorily to explain why the sum owing had increased or in what way the increase had been spent.

9. Upon the sale of the house in Weybridge the wife bought a flat in Wimbledon for £323,000, with a deposit of £48,000 and a mortgage of £275,000. The judge therefore calculated that, net of collateral costs of the transactions, about £62,000 of the proceeds of sale had not been used in the purchase of the flat; but he noted that the wife had refurbished it to some extent.

10. In 2007 the wife sold the flat in Wimbledon for £435,000. The sum then owing on mortgage had risen only marginally, namely to £277,000. Instead she bought a flat in Battersea for £520,000, with a deposit of £78,000 and a mortgage of £442,000. The judge therefore calculated that, net of the collateral costs, about £44,000 of the proceeds of sale had not been used in the purchase of the second flat. It is unclear from his judgment how the wife was able to secure, and then to service, a borrowing as high as £442,000.

11. In 2009 the wife sold the flat in Battersea for £580,000 and began to rent accommodation. The judge calculated that, after repaying the mortgage of £442,000 and meeting the collateral costs, the wife received about £120,000 from the proceeds of sale.

12. Between 2009 and 2015 the wife rented six successive properties in London and Surrey.

13. By April 2015, when the judge heard the case, the wife had no capital. On the contrary, she had overdrafts of £4,000, credit card liabilities of £18,000 and a tax liability of about £20,000.

14. Before the judge were cross-applications. The husband had applied for discharge of the order for periodical payments on his payment to the wife of a modest capital sum, say of £26,000; or for a fixed period to be set on her continued receipt of periodical payments and/or for a downwards variation of their amount. The wife had cross-applied for an upwards variation of their amount. Both applications were made under section 31(1) of the Matrimonial Causes Act 1973 ("the Act"). Section 31(7) provides:

> "In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, … [which] shall include any change in any of the matters to which the court was required to have regard when making the order to which the application relates, and
>
> > (a) in the case of a periodical payments ... order made on or after the grant of a decree of divorce ..., the court shall consider whether in all the circumstances and after having regard to any such change it would be appropriate to vary the order so that payments under the order are required to be made … only for such further period as will in the opinion of the court be sufficient …

> to enable the party in whose favour the order was made to adjust without undue hardship to the termination of those payments;
>
> …"

The "matters to which the court was required to have regard when making the order" in 2002, even though it was made by consent, were those set out in section 25(2) of the Act.

15. In his judgment, which was reserved, the judge described the wife's oral evidence as not fully satisfactory. He explained that she had been unable to give him a clear picture of her financial circumstances in the years since 2002; that, apart from her failure to explain the dramatic increase in the size of the mortgage on the house in Weybridge, she had been unable to identify the size of her income from her part-time work in the earlier years, first as a beauty therapist and then for an estate agent. He accepted that between 2004 and 2010 she had undergone no less than seven surgical procedures referable to her gynaecological difficulties and that they had affected her earning capacity at that time. He found, however, that she had exaggerated the continuing impact, five years later, of those difficulties upon her earning capacity. In 2010 she had reverted to work as a beauty therapist. Her accounts for the last available year, namely to April 2014, disclosed an annual income net of tax of about £18,500. She had then been working about three days each week. The judge rejected her contention that ill-health precluded her from working for a fourth day but accepted that she might not be able to attract the extra clients to occupy it. He therefore ascribed to her annual net earnings of only £18,500. The husband contends that it was a somewhat conservative figure; but it is appropriate for an appellate court to adopt it without qualification.

16. The judge found that the husband, by contrast, gave reliable and truthful evidence in all respects. He had remarried and was living with his second wife, their nine-year-old son and an adult step-daughter in a house in Guildford in which, subject to a substantial mortgage, he had a half interest. As in 2002 he had little liquid capital. The judge studied his earned income from the surveying companies. They had suffered a reverse in 2012 but had slowly recovered since then and, as the husband frankly conceded at the hearing, they were likely to be thriving by 2025. The judge ascribed to the husband an existing net annual income of £55,000 inclusive of a small salary which one of the companies chose to pay to his current wife. It may again have been a somewhat conservative figure; but it is again appropriate for an appellate court to adopt it without qualification.

17. At the hearing the wife's then counsel put before the judge a breakdown of what he suggested to be the amount of her necessary annual expenditure. The judge accepted it as "very modest". Exclusive of figures referable to the adult son, the annual total was £35,792, of which £10,200 was for rent. Following deduction of her earnings of £18,500, the wife's annual need was therefore for £17,292.

18. But the judge's decision was not to vary, whether upwards or downwards, the existing order for periodical payments in the annual sum of £13,200. In other words he countenanced a shortfall of £4,092 between the wife's annual need and the husband's obligation to meet it. Why?

19. The answer lies in the judge's analysis of the wife's loss of the capital sum which had been awarded to her in 2002.

20. The judge found that:

i) the award in 2002 would then have enabled the wife to buy a home free of mortgage;

ii) it had however been reasonable for her to be ambitious and to secure a mortgage for the purchase of the house in Weybridge;

iii) thereafter she had not managed her finances wisely;

iv) like others at that time, she had committed herself to borrowings which were too high;

v) it would be wrong to describe her approach to finances as profligate or wanton;

vi) but her needs had been augmented by reason of the choices which she had made.

21. In the light of those findings the judge decided to reject the husband's submission that the wife's need to pay rent of £10,200 should be entirely eliminated from the total annual need which it would be appropriate for him to meet. Nevertheless it was

> "fair that the husband's contribution to the wife's needs should not include a full contribution to her housing costs."

22. If, however arbitrarily, one omits to ascribe any part of the wife's earnings to the payment of rent of £10,200 and treats the rent as entirely subsumed within her residual annual need of £17,292, it is easy to see that the effect of the judge's decision to countenance a shortfall from that figure of £4,092 was to oblige the husband to pay £6,108 towards the rent, or 60% of it.

23. Although the judge had described the wife's schedule of annual needs totalling £35,792 as "very modest" and indeed as "basic", he said that the husband's contribution should do no more than to enable her to meet her "bare minimum needs", which, so he therefore implied, were properly to be reflected in an even lower figure. "The wife", he said, "will have to adjust her expenditure to live within her means."

24. The judge found on clear evidence that the husband could afford to continue to make periodical payments in the annual sum of £13,200. Indeed, although there was no cause for him to make a finding to this effect, it also seems reasonably clear that the husband could have afforded to pay the extra annual sum of £4,092 if it had been otherwise appropriate to order him to do so; it was certainly no part of the judge's reasoning that the husband could not have afforded to pay it.

25. In accordance with his duty the judge then turned to consider the husband's application for him to set a fixed period upon the wife's continued receipt of the periodical payments. But, applying section 31(7)(a) set out in para 14 above, the judge concluded, unsurprisingly, that he could not identify any fixed period as being sufficient to enable the wife to adjust without undue hardship to their termination. It followed that the order should continue to require them to be paid on the open-ended basis, namely during their joint lives until her remarriage or further order in the interim. Although the open-ended basis does not specify a fixed term for the life of the order, the circumstances which it identifies as bringing it to an end, in particular the potential for a further order ending it at any time, show how misleading (indeed, as the husband himself says, how unattractive) it is for some non-lawyers to describe such an order as a meal-ticket for life.

26. Inevitably the judge also concluded that any appropriate capitalisation of periodical payments in that continuing sum and on that continuing basis appeared to be beyond the husband's means.

27. So the judge dismissed both the husband's application and the wife's cross-application.

28. Both the husband and the wife sought permission from the Court of Appeal to appeal against the respective dismissals of their applications. The wife secured permission to do so but, in circumstances which rendered him aggrieved but are no longer relevant, the husband's application for permission was not granted likewise but was listed to be heard by the court at the time when it was to hear the wife's substantive appeal.

29. At the conclusion of the hearing on 1 February 2017 Sir Ernest Ryder gave an impromptu judgment, with which Longmore LJ agreed.

30. In his judgment Sir Ernest said that

> i) the judge "did not give any reason why any part of the trimmed budget, that is the wife's basic needs budget, should be cut in explanation of why that shortfall should not be met";
>
> ii) he "did not explain … why she should live below the basic needs budget that he, the judge, had accepted in evidence"; and
>
> iii) his decision that "she would have to adjust her expenditure to reduce those needs" was "a conclusion [which] required reasoning that is not in the judgment".

31. So the Court of Appeal allowed the wife's appeal by varying the order for periodical payments upwards from the annual sum of £13,200 to that of £17,292, backdated to the date of the judge's judgment. It refused the husband's application for permission to appeal to it on the ground that his proposed appeal had no prospect of success.

32. The husband filed a notice of appeal to this court. He challenged the increase in the order for periodical payments directed by the Court of Appeal. But he also purported to challenge its refusal to discharge the order for periodical payments; and, alternatively, its refusal to set a fixed period on the wife's continued receipt of them and/or to vary the amount of them downwards. In these respects he was, however, purporting to challenge the Court of Appeal's refusal to permit him to appeal to itself on these grounds and, by section 54(4) of the Access to Justice Act 1999, no appeal can be brought against a refusal of permission. So the order of this

court was to limit its permission for him to appeal to the single ground whether, in light of the fact that provision had already been made for the wife's housing needs in the capital settlement, the Court of Appeal had been entitled to interfere with the judge's determination not to make full allowance for her need to pay rent in the continuing order for periodical payments. Unfortunately the husband's advisers considered that the terms of the limited grant of permission could in some way prove broad enough to enable them to make submissions at the hearing along the wider lines of his impermissible challenge to the Court of Appeal's refusal to grant him permission to appeal to it. So at an early stage of the hearing the court had to re-emphasise the limited ambit of its inquiry in this particular case.

33. With the greatest of respect to the Court of Appeal, and with (I believe) a full appreciation of the heavy work-load under which it currently labours, it erred in saying that the judge had given no reason for declining to increase the order for periodical payments so as to enable the wife to meet all her basic needs. The judge gave a clear reason which is summarised in paras 20 and 21 above.

34. So the question which the Court of Appeal should have addressed, and which this court should now address, is the question set out in para 1 above.

35. In addressing the question, the court must consider three earlier decisions of the Court of Appeal.

36. First, *Pearce v Pearce* [2003] EWCA Civ 1054, [2004] 1 WLR 68. At the time of the original order in 1997 the wife had owned a flat in Chelsea free of mortgage. Later she sold the flat; depleted the proceeds by an unfortunate speculation in Ireland; and, upon returning to live in London, could only afford to buy a flat in Fulham subject to mortgage. The original order had also provided for the husband to make periodical payments to the wife; and the subsequent order under appeal in 2003 was to capitalise her entitlement to periodical payments, ie to discharge the order for them upon payment to her by the husband of a lump sum in lieu of them pursuant to section 31(7A) and (7B) of the Act. The major significance of the decision of the Court of Appeal lies in its approach to the exercise of capitalising an order for periodical payments. For present purposes, however, its significance lies in its removal of the wife's mortgage repayments from its calculation of the amount of the periodical payments to which, in the absence of capitalisation, she would then have been entitled and therefore of the amount of the lump sum to be paid by the husband in lieu of them. Thorpe LJ said at para 36 that the judge

> "… should not have allowed the wife to discharge her mortgage at the husband's expense. Such an indemnity violates the

> principle that capital claims compromised in 1997 could not be revisited in 2003. There is simply no power or discretion to embark on further adjustment of capital to reflect the outcome of unwise or unfortunate investment on one side or prudent or lucky investment on the other."

37. Second, *North v North* [2007] EWCA Civ 760, [2007] All ER (D) 386 (Jul). In 1981 an order by consent had provided the wife with ownership of a mortgage-free house in Sheffield and of ground rents which generated a comfortable income for her. The order had also included provision for the husband to make periodical payments to her in a nominal sum. In 2000 the wife sold her assets in England and moved to Sydney with "relatively disastrous" financial consequences, which led her to apply for an upwards variation of the order for periodical payments. The Court of Appeal set aside an order capitalising her entitlement to them in the sum of £202,000 and, although not visible in the transcript or in the report, apparently substituted a substantially lower figure. Thorpe LJ said:

> "32. … In any application under section 31 the Applicant's needs are likely to be the dominant or magnetic factor. But it does not follow that the respondent is inevitably responsible financially for any established needs. He is not an insurer against all hazards nor, when fairness is the measure, is he necessarily liable for needs created by the applicant's financial mismanagement, extravagance or irresponsibility …
>
> 33. Thus in the present case the wife's failure to utilise her earning potential, her subsequent abandonment of the secure financial future provided for her by the husband, her choice of a more hazardous future in Australia, together with her lifestyle choices in Australia, were all productive of needs which she had generated and for which the husband should not as a matter of fairness be held responsible in law."

38. And third, *Yates v Yates* [2012] EWCA Civ 532, [2013] 2 FLR 1070. Under a consent order the wife had received a substantial lump sum on the basis that she would use half of it in discharging a mortgage on her home. In the event she had repaid only part of the mortgage debt and had invested in a non-income-bearing bond the sum which she had thus elected not to apply to full clearance of the mortgage. When, later, a judge came to capitalise her right to continuing periodical payments, he included in his calculation of her need the amount of interest payable by her in respect of the residual mortgage debt. The Court of Appeal held that the inclusion had been wrong. Thorpe LJ said:

> "12. … It seems to me little more than common sense that if a recipient of a lump sum twice the size of the mortgage on the final matrimonial home elects to hold back capital made available for the mortgage discharge in order to invest in a bond that bears no income, she cannot look to the payer thereafter for indemnity or contribution to the continuing mortgage interest payments. That seems to me to be an absolutely self-evident point."

Lewison LJ said:

> "21. … the need to pay the mortgage at all arose from her own choice not to apply … the lump sum in discharging the existing mortgage … The financial consequences of her investment choice are her responsibility. It is wrong in principle for the husband to have to continue to fund the mortgage."

39. Mr Feehan QC, who, like Ms Dunseath, nobly appears for the wife without fee, seeks to distinguish the mortgage instalments disallowed in the cases of *Pearce* and *Yates* from payments of rent. I see no relevant distinction. He also submits that, unlike the present case, all three of the decisions concerned the capitalisation of an entitlement to periodical payments and that what was there rightly disallowed was the insinuation into the lump sum thus payable of a sum more reflective of an impermissible second claim for capital provision than of a permissible claim for conversion into capital of an income entitlement. Mr Feehan relies in particular on the statement of Thorpe LJ in the *Pearce* case, quoted at para 36 above. I reject the submission. As the Court of Appeal valuably established in that case, the first step in the exercise of capitalisation is a calculation of the amount of periodical payments to which, in the absence of capitalisation, the payee would then have been entitled. It was in the course of making this calculation that in the three decisions the objectionable elements of the claim were disallowed. Even had there been no capitalisation of the entitlement to periodical payments, those elements would therefore have been disallowed in quantifying the amount of the ongoing order for periodical payments.

40. The cases of *Pearce*, *North* and *Yates* were correctly decided. The answer to the question posed in para 1 above is yes. By its terms that question asks only whether a court would be "entitled", rather than obliged, in the circumstances there identified to decline to require the husband to fund payment of the rent. Its reference to the court's entitlement to do so serves to respect the wide discretion conferred upon it by section 31(1) and (7) of the Act in determining an application for variation of an order for periodical payments. But, in the passages quoted above, the Court of

Appeal has expressed itself in forceful terms; and a court would need to give very good reasons for requiring a spouse to fund payment of the other spouse's rent in the circumstances identified by the question. A spouse may well have an obligation to make provision for the other; but an obligation to duplicate it in such circumstances is most improbable.

41. The judge was clearly entitled to decline to vary the order for periodical payments so as to require the husband to pay all of the wife's rent. The order of the Court of Appeal should be set aside and his order restored.