Recovering costs debt: *BC v DE*

The High Court has given judgment in *BC v DE* [2016] EWHC 1806 (Fam) — a legal costs funding application in respect of interim provision to meet an unmarried mother's historic as well as future costs in proceedings brought under both Sch 1 and s 8 of the Children Act 1989. Prior to this case, the most influential authority was that of Mr Justice Mostyn in *Rubin v Rubin* [2014] EWHC 611 (Fam), [2014] 2 FLR 1018. While that was a case brought under the Matrimonial Causes Act 1973, its principles were to extend to non-statutory discretion. Mr Justice Mostyn stated there that: The court cannot make an order unless it is satisfied that without the payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings. Therefore, the exercise essentially looks to the future.' The decision in *Rubin* had meant that until now:

- Applicants were vulnerable to 'historic' costs becoming defined as such through no fault of their own, as a result of court delays and the strategic filibustering of costs determination by respondents. This approach would also have led to delays in the substantive issues being determined as numerous funding applications would need to be made and determined at each stage of proceedings and as each new and unanticipated issue arose.
- There was a risk that lawyers would have to 'down tools' to demonstrate historic costs must be paid, severely prejudicing their client's position.

The basic facts

The father was very wealthy with assets in the hundreds of millions. The mother was entirely financially dependent on him. The parties met in 2006 and had a relationship, cohabiting for a period but never marrying. Their child was born in 2008 during which time they entered into an agreement, on advice, making provision for that child both in terms of housing and income. The agreement was never implemented and the provision made by the father was very substantially higher. That continued until 2014, when following a dispute over arrangements for their child, the father reduced the support to the level prescribed by the agreement. For a period the mother maintained herself and the child from capital available to her but by July 2015 she had run out of funds and was in the midst of proceedings relating to the arrangements for their child. She immediately made a substantive application under Sch 1 to the Children Act 1989 and then an interim application for maintenance and an application for provision for her legal costs in both sets of proceedings and to include her unpaid costs to date. The father cross applied for an order to be made in the terms of the historic agreement. The mother, having no income of her own and making an application for provision for a child was unable to borrow or take up litigation funding.

How the mother's application for costs funding was dealt with by the courts

The mother first came before the Court in August 2015 but, in the absence of the respondent's agreement, could not be dealt with as it was directed that the matter be transferred to the High Court. By this stage the mother had, of course, incurred costs in making her Sch 1 application and interim application as well as in continuing the s 8 proceedings.

The mother's interim application and application for costs funding came before Mrs Justice Roberts in October 2015 and she was awarded 70% of her outstanding legal costs in both the s 8 and Sch 1 proceedings and made provision towards the mother's then estimated ongoing prospective **legal costs in the Sch 1 proceedings. In making her award, Mrs Justice Roberts considered the decision in** *Rubin* and explained the 'need for a level playing field' between the parties. No provision was made for the mother's cost funding in respect of **ongoing proceedings in the s 8 case because the judge did not envisage any further hearings would be necessary. Due to a** lack of court **time the mother's interim** application for maintenance could not be heard and so yet a further hearing was listed **before Mr Justice Holman in February 2016. On that** occasion, interim **maintenance was awarded** but again, due to lack of court time, the question of increasing historic costs had to be deferred to a further hearing in April 2016.

The mother's solicitors increasing concern about the level of indebtedness the mother was **in, the extent that lawyers should be asked to continue to provide credit, and the damage to the solicitor/client relationship this caused was expressed by letter** to **the court as, 'she is beholden to her solicitors to continue acting in circumstances of very significant unpaid costs and because her level of debt and absence of provision impacts on the way in whiclfwe might wish to represent her'.**

In April 2016 the matter came before the court and, again due to lack of court time (and the proximity of the **listed FDR)** while an order for the mother's prospective costs up to the **FDR** was made in full, a further hearing was listed for July 2016 to address the issue of whether the father should fund the mother's outstanding legal costs and further prospective costs.

The hearing for costs funding in July 2016 before Mr Justice Cobb

At the hearing in July, the mother challenged the meaning of 'historic unpaid costs' as had been understood following *Rubin*. An extreme example was that the costs of the preparation for and attendance at the hearing for prospective costs would immediately become historic by **the time** there was a determination. On the mother's behalf, it was argued whether it was reasonable to require lawyers to fund those **costs when no litigation loan provider would and the impact** of that resulting debt, forcing clients to be 'beholden' to their **solicitor, on the** proper and equal representation of the client. The father argued that solicitors took on commercial risks with clients as a matter of **course and** that the ability to apply for funding for legal costs should not be used as a 'commercial "safety valve" to mitigate that risk'.

Mr Justice Cobb found that there should be no logical distinction between allowing prospective costs under this jurisdiction and outstanding costs which have been incurred from the date of the application. In *Rubin* **Mr Justice** Mostyn was dealing with truly `historic' costs in that the proceedings had long concluded and where future proceedings would not take place in this jurisdiction, whereas in this case both sets of proceedings were ongoing. Mr Justice Cobb has, in his judgment, provided important protection for vulnerable clients and their lawyers. **The test** is whether the applicant may reasonably obtain representation. In considering what is reasonable, Mr Justice Cobb found that 'it is neither fair nor reasonable to expect solicitors and the bar to offer unsecured interest-free credit in order to undertake their work; there is indeed a solid reason for lawyers not to have a financial interest in the outcome of family law litigation'.

Crucially, Mr Justice Cobb found that the test for whether an applicant may reasonably obtain representation would not require the applicant to demonstrate that her solicitors would not act without historic costs being paid as this 'would work materially to the disadvantage of the honourable solicitor who is prepared to soldier on (perhaps somewhat against their better commercial judgment) for the good of the client or the case'. This judgment allows equality of arms to the financially vulnerable parent seeking provision for their child or, as put by Mr Justice Cobb, 'a level playing field may not be achieved where, on the one side ,the solicitor and client are "beholden" to each other by significant debt, whereas on the other there is an abundance of litigation funding'.

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Kate Allen and Jessica Reid acted for the mother, instructing James Turner QC *and previously James Roberts at 1 Kings Bench Walk.*