Neutral Citation Number: [2014] EWHC 2846 (Fam)
Case No: FD11D00892

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 15/08/2014

Before :

MRS. JUSTICE ELEANOR KING DBE

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Between :

H
Applicant

- and -

W
Respondent

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Rebecca Bailey-Harris (instructed by Dawson Cornwell) for H
Mark Johnstone (instructed by Anthony Clapp) for W

Hearing dates: 20/12/13

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Judgment

Mrs. Justice Eleanor King :

[1] This is an application made by the Appellant H that an order for costs to be made against the Respondent W following the husband's successful appeal against an order made in financial remedy proceedings by District Judge White on 20 October 2012. This short judgment should be read along side the substantive judgment in the appeal at [2013] EWHC 4105 (Fam).

[2] At first instance the Learned District Judge made, inter alia, an order for joint lives maintenance and for the payment by the husband to the wife of 25% of his annual bonus, also on a joint lives

basis. H's application for permission to appeal came before Mr Justice Mostyn on 26 June 2013. Mostyn J. gave permission in relation to Ground 1 only of the grounds of appeal namely that:

'The learned District Judge erred and was plainly wrong in awarding the wife 25% of all the husband's net bonuses on a joint lives basis.'

[3] In setting out the procedural history of the case, I said as follows in the judgment:

"[8] In the course of his judgment Mostyn J gave a strong 'steer' that in his view the right solution was for there to be a cap on the share received by W on the H's bonus. To this end he directed that the parties engage in mediation to see if the matter could be resolved consensually and H agreed to bear the costs of the mediation in the first instance. In the event that the mediation was unsuccessful, Mostyn J directed that he would deal with an application by W for a legal costs order in relation to the appeal on paper.

[9] The mediation did not take place as agreement could not be reached as to the identity of an appropriate mediator and W accordingly made an application for a legal costs order. On 30 October 2013 Mostyn J refused her application, saying in his ruling that the W had been unreasonable in her approach to the mediation; first in her insistence on using a top-drawer and top-price mediator and secondly that her insistence on attendance of legal representatives at mediation was neither necessary nor reasonable; in my experience this would be unusual and arguably unhelpful. Mostyn J pointed out that there was still time for mediation to take place. Unfortunately it has not done so and out of this modest matrimonial pot H's costs of the appeal are £22,320 and W's £25,372."

[4] I allowed the husband's appeal on Ground 1 and set a 'cap' on the level of top-up maintenance to be paid by H from his annual bonus; a course predicted by Mostyn J, who had done all in his power to steer the parties towards, what to him, was an obvious outcome of the case. The husband for his part did as the court had suggested and had been willing not only to mediate but to pay the costs of both sides in order for such mediation to take place.

[5] Mostyn J regarded the Ws approach to mediation as having been unreasonable, he refused her application for a legal costs order to fund the appeal and, as I mention in the judgment, emphasised that there was still time for mediation to take place. Notwithstanding his observations the case progressed to a fully contested appeal here.

[6] At the conclusion of the hearing of the appeal I made it clear that I was of the view that the wife's approach to the litigation (even disregarding the fact that she had lost the appeal), meant it likely that the court would make an order for costs against her. Each party has filed lengthy submissions on the issue of costs.

The Law

[7] Ms Bailey-Harris on behalf of the H submits that an appeal to a Judge of High Court Family Division from an order of a District Judge made in financial remedy proceedings falls outside the definition of financial remedy proceedings within FPR 2010 r.28.3(4)(b), with the consequence that the general rule of no order for costs found in FPR r.28.3(5) does not apply.

[8] This, it should be noted, is the approach adopted in the Red Book 2014, the use of the word 'probably' in relation to Appeals within the category of proceedings which are not financial remedy proceedings for the purposes of r 28.3, having been excised in the most recent edition.

[9] An appeal is, however, Ms Bailey-Harris submits, an appeal in family proceedings so FPR r28.1 applies allowing the court to make such orders as to costs as it thinks just.

[10] Ms Bailey-Harris refers the court to Judge v Judge [2009] 1 FLR 1287 and Baker v Rowe [2010] 1 FLR 761 as authority for the proposition that:

i) The critical distinction in determining whether the case falls within FPR r 28(3) is whether the proceedings are in or in connection with financial remedy proceedings.

ii) In cases which fall outside FPR r.28.3, when considering the appropriate order, the court starts with a clean sheet in the exercise of its discretion to order costs.

iii) Under the so called clean sheet approach she submits, success is highly relevant or even decisive, depending on the circumstances: Baker v Row [25] and Gojkovic v Gojkovic (No2) [1991] 2 FLR 233.

[11] Ms Bailey-Harris further draws the court's attention to Mostyn J's obiter observations in a Schedule I case KS v ND (Schedule 1 (Appeal:Costs) [2013] 2 FLR 698.

'In my judgment on any financial remedy appeal ... costs should prima facie follow the event. Certainly that would be the position on a first appeal to the Court of Appeal and I cannot see why any different rule should apply on a first appeal to the High Court or the County Court.'

[12] Mr Johnstone on behalf of W, submits that the approach of Ms Bailey-Harris, (and the Red Book), is wrong and that an appeal from a final financial order for spousal maintenance does constitute financial remedy proceedings under r 28.3(4)(b).

[13] An appeal from a District Judge in regard to a final order for spousal periodical payments is, he submits, governed by FPR r 28.3 unless there is an express rule to the contrary. It follows, he says, that an appeal from such an order should also be protected by FPR r 28.3 and costs should lie where they fall, unless the provisions of FPR r 28.3(6) and FPR r 28.3 (7), (allowing the court to make an order for costs where it considers it appropriate to do so because of the conduct of a party on relation to the proceedings), justifies the making of an order for costs on the facts of the case.

[14] In Judge v Judge Wilson LJ, (as he then was), was concerned with an application for costs arising from an application to set aside an order for ancillary relief, (now financial remedy order) he said:

'...[50] Mr Turner invoked Rule 2.71(4)(a) of the Family Proceedings Rules 1991, which provides that “the general rule in ancillary relief proceedings is that the court will not make an order requiring one party to pay the costs of another party”. Mr Seabrook, on the other hand, invoked Rule 44.3(2)(a) of the Civil Procedure Rules 1998, which provides that “the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party”. Counsel’s invocations could not both be valid. So which was valid? Or was neither valid?

[51] In my view the judge was right to reject Mr Turner's argument. Rule 2.71(4) of the Rules of 1991 applies to "ancillary relief proceedings". Of course, as Mr Turner stresses, the wife's aspiration, following any setting aside of the orders made in 2001, was again to proceed with her application for ancillary relief. But her application for an order setting those orders aside was not itself an application for ancillary relief, as defined in Rule 1.2(1) of the Rules of 1991. So, although the proceedings before the judge were in connection with ancillary relief, they were not for ancillary relief. I would have been willing to give the phrase "ancillary relief proceedings" in Rule 2.71(4) a wide, purposive construction so as to include proceedings in connection with ancillary relief as well as for ancillary relief if my view had been that such would better reflect the ruler-makers' purpose. But such is not my view. The general rule in Rule 2.71(4)(a) is only a concomitant of the modern approach in applications for ancillary relief that the sum owed by each party in respect of his own costs will be treated as his liability for the purposes of calculating the substantive award.

[52] The judge considered that, if Mr Turner was wrong, it followed that Mr Seabrook was right. With respect, I do not agree. Rule 10.27(1)(b) of the Rules of 1991 provides that Rule 44.3(2) of the Rules of 1998 shall not apply to "family proceedings". Contrary to the submissions of Mr Seabrook, I have no doubt that, although they were not "ancillary relief proceedings", the proceedings before the judge were "family proceedings" within the meaning of Rule 1.2(1) of the Rules of 1991 and of s 32 of the Matrimonial and Family Proceedings Act 1984 in that they constituted a matrimonial matter within the meaning of paragraph 3(a) of Schedule 1 to the Supreme Court Act 1981.

[53] Thus there was no "general rule" in either direction for the judge to apply to his decision. He had before him a clean sheet; but by reference to the facts of the case, and in particular, the wife's responsibility for the generation of the costs of a failed application, he remained perfectly entitled to record upon it, as he did, that he would start from the position that the husband was entitled to his costs.'

[15] The following year Wilson LJ revisited the question of which proceedings fall within financial remedy proceedings (then ancillary relief proceedings) in Baker v Rowe [2010] 1 FLR 761. Wilson LJ referred to FPR r.2.71(4)(a) now FPR 2010 r.28.3 saying:

'[23] ….As in Judge v Judge, so here: the clear purpose behind Rule 2.71(4)(a) of the Rules of 1991 requires its unfocussed reference to "ancillary relief proceedings" to be construed narrowly; and the proceedings before the district judge, as they ultimately developed, were in connection with ancillary relief but not for ancillary relief."'

[16] I respectfully adopt the analysis of Wilson LJ and construe the phrase financial remedy proceedings narrowly and thus conclude that, in the same way as an application to set aside an order in financial remedy proceedings is in connection with financial remedy proceedings, so too an appeal against an order made in financial remedy proceedings is an application made in connection with ancillary relief/financial remedy proceedings.

[17] Wilson LJ specifically found that the application to set aside, whilst not ancillary relief/ financial remedy proceedings was an application that fell within the ambit of "family proceedings", it therefore followed that the stringent costs provisions found in CPR r.44.3(2) did not apply having been excluded by the old FPR 1991 r.10.27.(1)(b). (now FPR r.28.2(1)).

[18] That being so Wilson LJ concluded:

“[24] Thus, as in Judge v. Judge, my conclusion is that the general rule in ancillary relief proceedings, set out in Rule 2.71(4)(a) of the Rules of 1991, did not apply to the issue of costs between the daughter and the son-in-law: for the proceedings were not "ancillary relief proceedings" for the purpose of that rule. Equally, however, the general rule that the unsuccessful party will be ordered to pay the costs of the successful party, set out in Rule 44.3(2)(a) of the Rules of 1998, was also inapplicable: for the proceedings were family proceedings, with the result that, by Rule 10.27(1)(b) of the Rules of 1991, that general rule was disapplied. There is nothing to indicate that the district judge purported to apply the general rule in Rule 44.3(2)(a) but, if and insofar as the circuit judge considered that that general rule was applicable, he was in error. The true position is that, as in Judge v. Judge, there was no general rule in either direction for the district judge to apply to his decision and that he therefore had before him a clean sheet.”

[19] In conclusion, Wilson J considered how success within the proceedings should be factored in to the clean sheet approach:

'[25] Even where the judge starts with a clean sheet, the fact that one party has been unsuccessful, and must therefore usually be regarded as responsible for the generation of the successful party's costs, will often properly count as the decisive factor in the exercise of the judge's discretion.'

[20] The essential feature of the proceedings in the present case is that this is an appeal. Appeals can be made against many different orders and may arise out of many different types of proceedings. Appeals can be launched against a whole range of first instance orders which will have been governed at first instance by any number of rules and procedures. Appeals are a separate category of hearing in respect of which specific rules apply. An appeal is separate from the proceedings the subject of the appeal and is governed by its own rules (here FPR r.30 which, inter alia, gives the appeal court the power to make an order for costs FPR r.30.10).

[21] Respectfully adopting the approach of Wilson LJ in Judge and in Baker, an appeal is in my judgment in connection with and not in financial remedy proceedings and therefore is not subject to FPR r.28.3(5). Nor is the court bound by the general rule that costs follow the event.

[22] It follows that this as this court approaches the exercise of its discretion when deciding what, if any, order for costs it should make it starts with a clean sheet. The success or failure of a party in the appeal whether in whole or in part may not always be determinative, but is capable of being a decisive factor in the exercise of that discretion.

Conclusion

[23] Mr Johnson argues at some length in his written submissions that greater flexibility in relation to mediation on the wife's part would have made no difference and that an early suggestion by H that he might cross appeal indicated that he intended to litigate come what may.

[24] I share the view of Mostyn J that H was unreasonable in relation to the costs of mediation and that for her to expect the husband to pay £2,500 + VAT to have legal representation at the mediation as well as £2,000 + VAT for the mediator was unreasonable. I am puzzled as to how the husband's refusal to pay an additional £3,300 + VAT over and above the quotation that he had of £300.00 per hour + VAT for an experienced solicitor mediator can properly be argued as being hardly suggestive of a desire to compromise.

[25] Mr Johnson further suggests that the husband had not succeeded in his appeal, as the imposition of a cap had not been part of either party's case and had been suggested by Mostyn J and then taken up at appeal by this court. I do not agree, the whole point of Mostyn J's strong steer, and invitation to H to pay for mediation, was to allow the parties to consider the imposition of a cap as a solution to the problem of how to provide a fair level of maintenance in the broadest sense. It was against the backdrop of Mostyn J's steer that the husband agreed to participate in this process and to pay for it; W's insistence upon a mediator and legal team at excessive cost effectively deprived H of an opportunity to resolve matters without the cost of an appeal.

[26] Once the case reached an appeal hearing and the costs had been incurred by H, he was entitled to argue his case as pleaded in his grounds of appeal. The fact that in his open position he did not concede a continuing payment from his bonus providing there was a cap does not detract from the fact that his appeal was allowed.

[27] Mostyn J gave H permission to appeal on one ground and that appeal was allowed to the extent set out in my judgment. I take the view that, taking into account all the circumstances of the case, costs should follow the event and the husband should have his costs.

[28] I note that Mr Johnstone submits that an order that W pay the costs of the H will impact upon her housing budget. I equally note that H made a generous capital settlement to W who has capital in the region of £967,170 (albeit this includes household contents), as against H's £250,000. The impact on the husband of a costs bill of £22,320 is very significant. The total costs of the appeal for both sides amount to approaching £48,000. I take into account the financial impact upon W, it will undoubtedly affect her housing budget but will not mean that she is unable to rehouse herself and pay off her debts.

[29] H succeeded in his appeal and looking at his application for costs against the background of the case as a whole, I have no hesitation in ordering the wife to pay H's costs of this appeal on a party and party basis to be taxed if not agreed.