Equality of arms

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Can one recover historic costs with a legal services payment order?

In *BC v DE* [2016] EWHC 1806 (Fam), a decision of Cobb J, the mother sought a legal services payment order (LSPO) that the father pay her historic costs of approximately £141,000 and her prospective costs to the final hearing in February 2017 of approximately £154,000 in parallel proceedings brought under both Schedule 1 to, and s8 of, the Children Act 1989. The father accepted that *CF v KM (Financial provision for child: Costs of legal proceedings)* [2011] 1 FLR 208 meant that the court had jurisdiction to make an LSPO in respect of the costs of both the Schedule 1 and the section 8 claims. The father opposed the application in respect of recovering the historic costs.

The 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 only child was born in 2008, during which time they entered into an agreement, on advice, making provision for the 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 Schedule 1 and then an interim application for maintenance and an application for provision for her legal costs in both sets of proceedings that included 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.

The application

The mother's application first came before the court in August 2015 but, in the absence of the father'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 incurred costs in making her Schedule 1 application and interim application, as well as in continuing the section 8 proceedings.

The mother's interim application and application for costs funding came before Roberts J in October 2015. She was awarded 70% of her outstanding legal costs in both the section 8 and Schedule 1 proceedings, and provision was made towards her estimated prospective legal costs in the Schedule 1 proceedings. In making her award, Roberts J considered the decision in *Rubin v Rubin* [2014] EWHC 611 (Fam) of Mostyn J, which was the most influential case prior to this one. She 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 section 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 Holman J 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 she 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: "she is beholden to her solicitors to continue acting in circumstances of very significant unpaid costs and her level of debt and absence of provision impacts on the way in which we 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 law until *BC v DE*

The origins of the common law LSPO jurisdiction are found in *A v A (Maintenance pending suit: Provision for legal fees)* [2001] 1 WLR 605. In *A v A* Holman J permitted the wife to receive a legal costs funding payment that covered both prospective and outstanding costs – no distinction had been made between the two.

The costs allowance test for making such provisions was also said to be one of "reasonableness" in each particular case. In *G v G (Maintenance pending suit: Costs)* [2003] 2 FLR 71 Charles J did not appear to distinguish between outstanding and prospective costs liabilities in making his award for legal costs funding. In *Currey v Currey (No 2)* [2007] 1 FLR 946 Lord Wilson explained the overarching principle to be applied in a costs allowance is to demonstrate that the applicant "cannot reasonably procure legal advice and representation by other means".

In matrimonial and civil partnership cases, the common law LSPO jurisdiction has now been replaced by s22ZA of the Matrimonial Causes Act 1973 (inserted by s49 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012). The principles in a case concerning the common law jurisdiction are the same, with some modifications, as those under s22ZA (see Lord Wilson in *Wyatt v Vince (Nos. 1 & 2)* [2015] 1 WLR 122 and following the analysis of Mostyn J in *Rubin*). The father sought to rely on what Mostyn J had said in *Rubin* at paragraph 13(iv):

> "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. It is important that the jurisdiction is not used to outflank or supplant the powers and principles governing an award of costs in CPR Part 44. It is not a surrogate inter partes costs jurisdiction. Thus a LSPO should only be awarded to cover historic unpaid costs where the court is satisfied that without such a payment the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings."

Mostyn J had rejected the legal costs funding application in *Rubin*, as he saw it as a means of recouping the costs of either or both of the concluded claims (child abduction and divorce). In *MG & JG v JF (Child maintenance: Costs allowance)* [2016] 1 FLR 424 Mostyn J returned to the principles he had set out in *Rubin*, but did not expand their reach or applicability any further.

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, such as a result of court delays and the strategic obstruction 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 and potentially leading to more litigants in person.

The hearing for costs funding

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. There was an argument that, without a payment being made towards her historic costs, the mother's solicitors were unlikely to be able to continue to provide their services in the future, and the mother would be severely prejudiced by this, unable to obtain the services of other lawyers with such significant debts. 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".

Outcome

Cobb J granted the mother's application. He 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. *Rubin* was distinguished from this case on its facts because Mostyn J was dealing with truly "historic" costs in that the two sets of proceedings had long concluded and where future proceedings would not take place in this jurisdiction. In *BC v DE* both sets of proceedings were ongoing and thus the costs were reasonably and legitimately incurred. In assessing the mother's claim Cobb J also deducted 15% of the costs sought, to reflect a notional standard basis of assessment.

Comment

This judgment provides important protection for vulnerable and impecunious clients. The test is whether the applicant may reasonably obtain representation. In considering what is reasonable Cobb J found "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, Cobb J found that the test for whether an applicant may reasonably obtain representation would not require them to demonstrate that their solicitors would not act without historic costs being paid (such as "downing

tools") 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 also placed significant importance on the need for "equality of arms" to the financially vulnerable parent seeking provision for their child, or as put by Cobb J:

> "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".

This case also helps to remove historic costs from the negotiations and the control that one party may have over the other.

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