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Issue 44

Guidance on the Practice and Procedure in Legal Services Payment Order Applications

Rubin v Rubin [2014] EWHC 611 (Fam) – Mostyn J.

Introduction:

1. The Guidance on the current practice to be adopted when considering the making of and the adjudication upon applications for a Legal Services Payment orders provided by Mostyn J in the case of **Rubin v Rubin [2014] EWHC 611 (Fam)** will be welcome to both practitioners and the Court. The initial experience of practitioners has been less than positive with the Courts acting far too conservatively with such applications and too frequently denying interim funding for reasons connected more with form and procedure than with the overall merits of the matters dealt with.

The Facts:

2. The husband (American) and the wife (English) had cohabited from 2009. They had signed a premarital agreement in 2011 and married 2 days later in California. In June 2008, the wife gave birth to a daughter in London and in 2011 a son was born to her in California. In October 2012 the family came to England, but the wife then refused to let the children return to California. There followed Hague Convention proceedings by the husband in 2013. Hogg J determined that the children has been wrongfully retained in England and Wales and ordered their return to California in 2014 were they still remain.

3. In May 2013, the wife had issued divorce proceedings and a claim for financial remedies and under the Children Act in London. The husband in the June 2013 filed for divorce in California. The wife then filed in February 2014 in California her response to the husband's divorce petition seeking herself a divorce, a determination in relation to the premarital

agreement and an order allowing her to relocate back to England. The husband then sought to stay the English proceedings which stay was granted by a DDJ but the judge excepted from the stay the wife's application for a Legal Services Payment Order ('LSPO') in relation to her financial remedy costs of £7,268 and she sought her Hague

Convention costs of £21,700 as part of her schedule 1 para 1(2) CA 1989 application – of these latter costs at the hearing the husband made a voluntary payment of £6,000 to cover her Counsel's brief fee leaving a balance thereof amounting to £15,700.

Guidance on Applications for LSPOs:

4. Hence Mostyn J had to deal first with the LSO for £7,268 and second with the application under s15 and Schedule 1 to recover £15,700 and then third with the husband's appeal against the DDJ's order excepting the LSO application from the stay.

In so doing His Lordship recognised that it would be helpful to give general guidance relating to applications for LSPOs both in relation to applicable procedural and substantive principles. The Guidance he has given is as follows:-

i) When considering the overall merits of the application for a LSPO the court is required to have regard to all the matters mentioned in s22ZB(1) – (3).

ii) Without derogating from that requirement, the ability of the respondent to pay should be judged by reference to the principles summarised in TL v ML [2005] EWHC 2860 (Fam) [2006] 1 FCR 465 [2006] 1 FLR 1263 at para 124 (iv) and (v), where it was stated

"iv) Where the affidavit or Form E disclosure by the payer is obviously deficient the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources. In such a situation the court should err in favour of the payee.

v) Where the paying party has historically been supported through the bounty of an outsider, and where the payer is asserting that the bounty had been curtailed but where the position of the outsider is ambiguous or unclear, then the court is justified in assuming that the third party will continue to supply the bounty, at least until final trial."

iii) Where the claim for substantive relief appears doubtful, whether by virtue of a challenge to the jurisdiction, or otherwise having regard to its subject matter, the court should judge the application with caution. The more doubtful it is, the more cautious it should be.

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.

v) In determining whether the applicant can reasonably obtain funding from another source the court would be unlikely to expect her to sell or charge her home or to deplete a modest fund of savings. This aspect is however highly fact-specific. If the home is of such a value that it appears likely that it will be sold at the conclusion of the proceedings then it may well be reasonable to expect the applicant to charge her interest in it.

vi) Evidence of refusals by two commercial lenders of repute will normally dispose of any issue under s22ZA(4)(a) whether a litigation loan is or is not available.

vii) In determining under s22ZA(4)(b) whether a Sears Tooth arrangement can be entered into a statement of refusal by the applicant's solicitors should normally answer the question.

viii) If a litigation loan is offered at a very high rate of interest it would be unlikely to be reasonable to expect the applicant to take it unless the respondent offered an undertaking to meet that interest, if the court later considered it just so to order.

ix) The order should normally contain an undertaking by the applicant that she will repay to the respondent such part of the amount ordered if, and to the extent that, the court is of the opinion, when considering costs at the conclusion of the proceedings, that she ought to do so. If such an undertaking is refused the court will want to think twice before making the order.

x) The court should make clear in its ruling or judgment which of the legal services mentioned in s22ZA(10) the payment is for; it is not however necessary to spell this out in the order. A LSPO may be made for the purposes, in particular, of advice and assistance in the form of representation and any form of dispute resolution, including mediation. Thus the power may be exercised before any financial remedy proceedings have been commenced in order to finance any form of alternative dispute resolution, which plainly would include arbitration proceedings.

xi) Generally speaking, the court should not fund the applicant beyond the FDR, but the court should readily grant a hearing date for further funding to be fixed shortly after the FDR. This is a better course than ordering a sum for the whole proceedings of which part is deferred under s22ZA(7). The court will be better placed to assess accurately the true costs of taking the matter to trial after a failed FDR when the final hearing is relatively imminent, and the issues to be tried are more clearly defined.

xii) When ordering costs funding for a specified period, monthly instalments are to be preferred to a single lump sum payment. It is true that a single payment avoids anxiety on the part of the applicant as to whether the monthly sums will actually be paid as well as the annoyance inflicted on the respondent in having to make monthly payments. However, monthly payments more accurately reflects what would happen if the applicant were paying her lawyers from her own resources, and very likely will mirror the position of the respondent. If both sets of lawyers are having their fees met monthly this puts them on an equal footing both in the conduct of the case and in any dialogue about settlement. Further, monthly payments are more readily susceptible to variation under s22ZA(8) should circumstances change.

xiii) If the application for a LSPO seeks an award including the costs of that very application the court should bear in mind s22ZA(9) whereby a party's bill of costs in assessment proceedings is treated as reduced by the amount of any LSPO made in his or her favour. Thus, if an LSPO is made in an amount which includes the anticipated costs of that very application for the LSPO, then an order for the costs of that application will not bite save to the extent that the actual costs of the application may exceed such part of the LSPO as is referable thereto.

xiv) A LSPO is designated as an interim order and is to be made under the Part 18 procedure (see FPR rule 9.7(1)(da) and (2)). 14 days' notice must be given (see FPR rule 18.8(b)(i) and PD9A para 12.1). The application must be supported by written evidence (see FPR rule 18.8(2) and PD9A para 12.2). That evidence must not only address the matters in s22ZB(1)-(3) but must include a detailed estimate of the costs both incurred and to be incurred. If the application seeks a hearing sooner than 14 days from the date of issue of the application pursuant to FPR rule 18.8(4) then the written evidence in support must explain why it is fair and just that the time should be abridged.

The Decision:

5. Because there were no further substantive proceedings, according to Mostyn J both applications for costs funding breached the guidance given over historic costs at (iv) above. His Lordship was not prepared to allow any inroads into the exclusivity of the inter partes costs powers and principles in CPR Part 44 by way of a 'shadow or surrogate jurisdiction', as it would be 'unprincipled' to allow the wife's claims to succeed where there were to be no further proceedings in this jurisdiction.



He further confirmed the position that the LSPO powers did not extend to Sched 1 CA applications, the Inheritance (Provision for Family and Dependents) Act 1975 or Part III Matrimonial and Family Proceedings Act 1984. All such applications for costs funding would remain an interim application governed by the principles set out in **Currey (No 2)** [2006] EWCA Civ 1338. He also granted the Husband's appeal against the exception granted to the LSPO application by the wife when the petition had been stayed since such a stay also would stay all subsidiary ancillary applications for financial relief and all applications for interim orders and reliefs.

Ashley Murray

April 2014.

And Finally:

The '*For the Love of Money*' morning Seminar, which takes place on the **8th May 2014** at the **Atlantic Towers Hotel, Chapel Street, Liverpool** has been so popular with solicitors that the expected attendance figures originally planned for have now been increased to enable those solicitors, who have not yet done so to book their places.

The cost of the Seminar attendance and lunch with wine is **£45 (including vat)**.

There is a booking form available on www.ashleymurraychambers.co.uk website – please send the forms to Ashley Murray, 7 the Oaklands, Brookside Farm, Old Lane, Pulford, Chester CH4 9EW – any enquiries; please telephone **0151 559 3285** or email Ashley at ashley@amchambers.co.uk.

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