Barristers' Chambers

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MPS applications – Broad Assessment Only
Rattan v Kuwad [2021] EWCA Civ 1

Introduction:

This case of **Rattan v Kuwad** [2021] EWCA Civ 1 is the first Court of Appeal review of maintenance pending suit in over a decade (see **Moore v Moore** (2009) EWCA Civ 1427), albeit the decision serves to re-emphasise what hopefully all family law practitioners will already know – a knowledge which appears to have been lost to the Circuit Judge ("CJ") involved and a good example why the FRC is a welcome replacement of the old judicial ticketed system when dealing with appeals from financial remedy first instance decisions.

Facts:
The parties had been married c 10 years with one child of the marriage and W had had an older child by a previous marriage. Upon separation W and children had remained at the Fmh.

W applied for mps within her financial remedy application to cover the interim shortfall needs between her income and outgoings, which included the mortgage instalments, claimed essential repairs to the FMH and a school fees order.

The DDJ awarded W monthly mps of £2,850 pm and ordered that the mortgage on the FMH be changed to a fixed rate product to reduce W's monthly income needs by about £600 pm. W's claim for c £3,000 of essential repairs was rejected due to lack of evidence and the DDJ found H's case that he was not presently employed and could not obtain employment to be unclear and confused. In addition, the DDJ expressed scepticism of H's explanation of the transfer of funds to India.

H appealed to the CJ essentially, on basis of the DDJ's alleged deficient financial analysis.

The CJ concluded H's appeal should be allowed on the basis of "*three fatal errors*", namely the "*lack of critical analysis of the wife's*" needs; the inclusion of the school fees; and the assumed reduction in the mortgage instalments of £600 per month. However, whilst the CJ "*was sure*"

maintenance was required he considered he was not in a position to determine the correct sum pending the final hearing.

W's Appeal to Court of Appeal:

W was granted permission to appeal on the basis the appeal raised an important point of principle regarding the approach of the court in determining maintenance pending suit applications; and the wife had a real prospect of success in challenging the decision that the DDJ's assessment was flawed.

Moylan LJ, with whom the other two LJJs agreed, gave the leading judgment. His Lordship stated in regard to the court's mps power:-:-

> " It is intended to provide the court with the ability to act expeditiously and to make an order which meets that need (ie" a real financial need ") at an early stage of the proceedings when the evidential picture might be far from clear. It is a very broad statutory power which extends to the court making such order as the judge "thinks reasonable"."

His Lordship noted the essential requirement of reasonableness pursuant to s **22 MCA 1973** in ordering mps. He acknowledged the case law guidance of **TL v ML** [2005] EWHC 2860, which should be applied according to the circumstances of each case. Indeed, that guidance did "*not detract from the substantive requirement (of* ***s*** **22***) being only that the order must be reasonable*"

His Lordship further accepted as set out in the Red Book that "t*he purpose of an order for maintenance pending suit is to meet "immediate" needs.*"

In Moylan J's assessment the principal issue raised by the appeal was " *what needs qualify as being immediate and how should the court approach the determination of this question*." On that, His Lordship stated:-

> " *In every case the key factors are likely to be the parties' respective needs and resources and, as was also set out in* ***TL v ML****, at [124(ii)], the "marital standard of living" but beyond that, the court's approach will be tailored to the facts of the particular case. In the majority of cases, the family's financial resources are unlikely to be sufficient to enable the marital standard of living to be maintained for both spouses (and the children). However, as a generalisation, the parties' separation does not, of itself, provide a reason for that standard being reduced in the same way that it does not, of itself, provide a reason for that standard to be increased.*"

Moylan LJ summarised the principles derived from other decisions relating to mps applications, being:-

- The "rough and ready" conclusion often required of a court in mps applications when assessing the evidence of income and needs – see ***F v F (Maintenance Pending Suit)*** (1983) 4 FLR 382, at p. 385 Balcombe J;
- The application is intended to deal with interim short term cash flow – Coleridge J **Moore v Moore**;
- There may exceptionally be a reason to critically analyse expenditure as was the position in the "*super-rich*" case of **F v F** above*:*
- In **TL v ML**, Mostyn J had set out the relevant principles, being:-

    i) reasonableness (ie fairness) was the sole criteria under **s 22**;

    ii) marital standard of living was very important – though the exercise was not simply to replicate the same;

    iii) there should be a specific mps budget, excluding capital or long term expenditure – examined critically to exclude exaggeration;

    iv) deficiency in the payer's Form E disclosure should attract robust assumptions about the payer's ability to pay not confined to "*mere say so*" of his income or resources and in such circumstances a court should err in the payee's favour

    v) an unclear or ambiguous position of a historically supportive third party outsider should be resolved in favour of assuming the third party's bounty will continue to final hearing.

Moylan LJ considered the instant case on appeal was not unduly complicated and as such W's outgoings as set out in her Form E were easily appraised as meeting her needs without a specific mps budget presentation. His Lordship emphasised not all budgets require critical analysis:

> *"48…The court is required to undertake such analysis as is sufficient to be satisfied that the ultimate award is "reasonable". In some cases, this might require a detailed examination of a budget, in others, such as the present case, it will be immediately apparent whether the listed items represent a fair guide to the applicant's income needs."*

His Lordship rejected the notion that unless outgoings in W's budget were "*immediate*" or paid monthly they should not be counted – there may be others that require averaging over the relevant period. "I*mmediate*" expenditure in this context meant pending the final hearing. The assessment to be undertaken was a broad one only.

His Lordship considered that the school fees were clearly to be included. If H had not agreed to the reduction of the interim mortgage, as had been possible, then the Court would simply have increased W's mps to account for this.

His Lordship warned that mps applications, being expensive, should only be pursued when on a broad assessment the court's intervention was manifestly required (see **BD v FD (Maintenance Pending Suit)** [2016] 1 FLR 390).

The appeal was allowed with the restoration of the DDJ's mps quantum but

with the extraction of the DDJ's direct order changing the existing mortgage to a fixed mortgage.

Commentary:

The DDJ's approach in this case was manifestly in line with modern financial remedy practice – by contrast, that of an otherwise experienced CJ was wholly out of touch.

The Court of Appeal's decision highlights the following:-

i) mps applications should be pursued only when manifestly or obviously required;

ii) the guidance in **TL v ML** (including the relevance of the parties' standard of living) is important, but does not of itself replace the wording of s 22, which requires an assessment of what is "reasonable" (ie "fair");

iii) in the majority of cases, the Form E list of expenditure will suffice for the assessment required, without more;

iv) the assessment undertaken of the parties' needs should, in most cases, be a broad one only;

v) "*immediate*" needs means those reasonable needs pending the final hearing and not necessarily just the weekly or monthly expenses.

vi) any appeal court in allowing an appeal should itself determine the alternative order.

Addendum

Practitioners may also wish to note another recent case:-

>Where an allegation of fraud is not upheld or withdrawn once made, the Family Court will apply the standard approach in such circumstances against the unsuccessful party of indemnity costs – **Crowther v Crowther** (2020) EWHC 3555

Ashley Murray, Ashley Murray Chambers, Liverpool. **Jan 2021**