Neutral Citation Number [2025] EWFC 7

Case No: 1715-6903-6004-3295

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16th January 2025

Before:

MR. NICHOLAS ALLEN KC

(Sitting as a Deputy High Court Judge)

Between:

SM

Applicant

- and -

BA

Respondent

(Legal Services Payment Order)

Miss Deborah Bangay KC (instructed by **Rayden Solicitors**) for the Applicant

Miss Sarah Phipps KC and **Miss Jessica O'Driscoll-Breen** (instructed by **Levison Meltzer Pigott**) for the Respondent

Hearing date:

10th January 2025

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Approved Judgment

This judgment was handed down remotely at 10.30 am on 16th January 2025 by circulation to the parties or their representatives by email and by release to The National Archives.

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Nicholas Allen KC:

1) I am concerned with two applications made on W's behalf which were listed before me on 10th January 2025 with a time-estimate of one day.

2) The first was in relation to maintenance pending suit ('MPS'). On 23rd May 2024 W's unissued MPS application was compromised whilst both parties were at court on the basis that H (i) undertook to *"maintain the financial status quo in respect of the payments made by him towards the family expenses and the expenses on the family home, comprising household utility bills, school fees, reasonable medical expenses for [W] and the children and the children's educational costs until further order or written agreement"*; and (ii) agreed to pay W MPS of £29,500 pm.

3) By her application notice dated 23rd October 2024 W sought a determination of the meaning of *"maintain the financial status quo"* and, if I determined it in the way H contended for, she sought an increase in the MPS of £5,400 pm.

4) A second MPS application was made on 6th January 2025 in which W no longer sought such a determination, put forward an interim budget for the first time, and sought the sum of £43,995 pm in addition to H meeting other specified expenditure. It was supported by a statement dated 3rd January 2025.

5) I gave an *extempore* judgment in which I confirmed a preliminary view I had previously expressed by email when the application had first been sent to me – but which Miss Bangay on W's behalf had invited me to reconsider - that this was a fresh application for MPS to which the provisions of FPR 2010 Part 18 applied and procedural fairness required H to have the opportunity to respond.

6) I therefore reaffirmed my preliminary view that W had the choice either to proceed with her original MPS application or, if she wished to pursue her fresh application, for it to be adjourned to another day. Miss Bangay chose the latter. I therefore adjourned and have relisted the same on 11th February 2025.

7) The second application was for a legal services payment order ('LSPO') dated 18th December 2024. W sought an order that H pay £1,121,467 in outstanding and estimated future legal costs as follows:
   a. unpaid invoices: £241,269;
   b. financial remedy upto and including the PFDR Appointment: £651,288;
   c. MPS: £46,668; and
   d. FLA 1996: £181,542.

8) W sought £241,969 to be paid within seven days with the balance of £879,498 to be paid in six tranches of £146,583 pm (the two-day PFDR Appointment before Sir Philip Moor having been fixed on 2nd and 3rd June 2025).

9) W has previously made two applications under the FLA 1996 for occupation orders in respect of the family home. These were compromised on 23rd May 2024 and 10th December 2024. Her third application for such an order is listed on 30th June 2025 with a time-estimate of five days.

10) Miss Phipps described the figures sought on W's behalf as *"staggering"*.

11) H offered to pay W the sum of £250,000 to be funded by the sale of shares sufficient to produce £500,000 of which he would pay £250,000 to his own solicitors and £250,000 to W's solicitors in monthly tranches of £50,000 from February to June 2025 on condition that W did not ask for any further sums for costs before the PFDR Appointment or in relation to any other matters up to and including that date.

12) Having heard submissions, I reserved judgment in relation to this application.

13) In *Crowther v Crowther and Others* [2022] 2 FLR 243 Peel J described the litigation between those parties as *"nihilistic"*. The parties had run up costs of £2.3m in just over two years. In *Xanthopoulos v Rakshina* [2023] 1 FLR 388 Mostyn J described incurred costs of £5.4m and potential future costs of £1.8m and £2.6m (i.e. a total of between £7.2m and £8m) as being *"beyond nihilistic*" and *"apocalyptic"*.

14) In this case, the parties' combined Form H costs (i.e. solely their financial remedy costs) already exceed £675,000 (W having incurred £403,005 and H having incurred £272,658). If this case continues its present trajectory (bearing in mind we are still more than four months from the PFDR Appointment and MPS and FLA 1996 hearings are also listed) similar adjectives may well be appropriate.

15) This case was first listed before me on 23rd May 2024 when I heard the return date of *ex parte* orders made by Ms. Hannah Markham KC (sitting as a Deputy High Court Judge) and Peel J on 14th May 2024. I also gave a judgment which related to the exercise of the court's powers under FPR 2010 Part 3 as revised with effect from 29th April 2024.

16) This case is now reserved to me (save for the PFDR Appointment). I have also made orders on 11th July 2024 (when I lifted the stay I imposed on 23rd May 2024), 29th October 2024 (the First Appointment), and 10th December 2024 (when W's second application for an occupation order was compromised).

The law

17) The statutory jurisdiction introduced by way of amendments to MCA 1973 by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 put the previous common law jurisdiction first developed in *A v A (Maintenance Pending Suit: Provisions for Legal Fees)* [2001] 1 FLR 377 on a firmer footing (the common law

jurisdiction having been tethered to MCA 1973 s22).

18) MCA 1973 s22ZA provides the power to make an order or orders requiring one party to pay to the other an amount for the purpose of enabling the other party to secure legal services for the relevant proceedings. S22ZB sets out the matters to which court is to have regard in deciding how to exercise those powers.

19) Several authorities have made it clear that the statutory provisions in essence codify the principles to be collected from the earlier common law authorities (*BN v MA (Maintenance Pending Suit: Prenuptial Agreement)* [2013] EWHC 4250 (Fam), *Rubin v Rubin* [2014] 2 FLR 1018, *Wyatt v Vince* [2015] 1 FLR 972, *AM v SS (Legal Services Order)* [2015] 1 FLR 1237 and *JK v LM* [2024] EWHC 1442 (Fam)).

20) In *Rubin v Rubin* Mostyn J at [13] summarised the applicable principles both substantive and procedural. This guidance is well-known, and I shall therefore not set it out in full although I bear all of it in mind.

21) The making of an LSPO is not opposed in principle on H's behalf. W had been turned down for loans by a litigation funder (Level) and three banks, (RBC, Coutts and Arbuthnot Latham). Her solicitors would not enter a *Sears Tooth* arrangement and have agreed to extend credit only until the determination of the LSPO application. MCA 1973 s22ZA(4) is therefore satisfied. Hence H's offer to realise £500,000 worth of shares and pay this in equal amounts to both parties' solicitors.

22) Much time was spent at the hearing before me in relation to the following aspect of the *Rubin* guidance:

> (ii) Without derogating from that requirement [i.e. the court is required to have regard to all the matters mentioned in s 22ZB(1)–(3)], the ability of the respondent to pay should be judged by reference to the principles summarised in *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family)* [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.'

23) Miss Bangay argued that H's disclosure to date (being his Form E and Replies to Questionnaire) was *"obviously deficient"* and therefore I should make *"robust assumptions"* as to his ability to pay and I was not confined to H's *"mere say-so"* as

to the extent of his income and resources. She also submitted that H was supported through the *"bounty"* of his father. Miss Phipps argued that W did not accept H's disclosure to be truthful which is different to it being deficient. As a result, both counsel 'island hopped' (to use Miss Phipps' phrase) between numerous elements of H's disclosure to date.

24) As a result, many of the submissions came close to those that might be made at the conclusion of a final hearing when the court is being asked to make findings of fact in relation to the computation exercise. They included the meaning of a 2019 Deed of Confirmation and Indemnity (upon which Miss Bangay relied) and a Deed of Trust produced by Miss Phipps for the first time during her submissions (much to Miss Bangay's consternation).

25) I am far from persuaded that such submissions were needed at this interim stage. Based on the ES2 prepared in advance of the First Appointment on 29th October 2024 the parties' have assets of c. £55 million on W's case (a figure which she believes to be materially understated) and c. £16 million on H's case (with one difference being whether H has c. £23 million in asserted loans to his father).

26) Of these figures it is accepted by H that he holds shares which are capable of being liquidated worth c. £10.2 million. It is part of this holding (which I am told remains at a similar value) that H has offered to liquidate in order to pay £250,000 to both parties' solicitors.

27) I accept that liquidating part of this shareholding will impact on H's income (and, on H's case but not W's, that this shareholding provides most of his income). However, it cannot realistically be argued that there are concerns as to the *affordability* of what is sought on W's behalf. Of course, this is just one consideration and I shall go on to consider the others later in this judgment but I do not believe there can be any concern about *"the ability of [H] to pay"* what W seeks. When I raised this with Miss Phipps she submitted that the figure sought by W ought not to be looked at in isolation given H's own legal costs to the PFDR Appointment may well end up being higher than projected, the nature of the litigation was such that the costs on both sides may well escalate significantly, and that selling more shares would impact on the MPS application that I had adjourned and relisted. Whilst this may well all be true, I do not consider that it has any real impact on affordability. Hence my observations above about both counsel's submissions in this regard.

28) I shall now go on to consider the various elements of W's application in turn.

Historic costs – £241,269

29) In *Rubin v Rubin* Mostyn J said as follows:

[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.

30) Thereafter he said as follows:

[16] In both applications the wife seeks to recover costs which have already been incurred in circumstances where there will be no further substantive litigation here whether about the children or about money. In my judgment, in both applications she falls foul of principle (iv). This is not a case where her lawyers are saying that they will down tools unless they are paid outstanding costs as well as being funded for the future. Were her application to be granted it would represent a very dangerous subversion of the exclusivity of the *inter partes* costs powers and principles in CPR Part 44. A shadow or surrogate jurisdiction would emerge. Such a development must be stopped in its tracks.

31) These paragraphs have been the subject of comment in a number of authorities (*BC v DE (Proceedings under Children Act 1989: Legal Costs Funding)* [2017] 1 FLR 1521, *Re Z (Schedule 1: Legal Costs Funding Order: Interim Financial Provision)* [2021] 2 FLR 727, *R v R* [2021] EWHC 195 (Fam), *DH v RH* [2023] EWFC 111, *JK v LM* [2024] EWHC 1442 (Fam) and *KV v KV* [2024] 2 FLR 951).

32) In *KV v KV* Peel J stated as follows:

[28] A question sometimes arises as to payment of costs already incurred prior to issue of the LSPO application. The authorities on this topic are neatly summarised by MacDonald J at paras 33-37 of *DH v RH* [2023] EWFC 111. They are examples of how to exercise the judicial discretion. There is no dispute that in principle an award for past costs can be made. Where, as noted for example in *Re Z* [2020] EWFC 80, the historic costs sought related to sums due to firms no longer instructed by the applicant, Cobb J declined to encompass those costs within the LSPO. Costs in connection with proceedings already concluded may similarly not be readily recoverable, but costs reasonably and legitimately incurred by the present legal team in ongoing proceedings may, by contrast, be justifiably brought within the LSPO application because, as Cobb J said in *BC v DE* [2016] EWHC 1806 at para 22: *"It is neither fair nor reasonable to expect solicitors and the Bar to offer unsecured interest free credit in order to undertake their work…".*

[29] Ultimately, it seems to me, this aspect of the LSPO jurisdiction should be viewed as part of the broad discretion available to judges when determining what LSPO award, if any, should be made, applying the statute and the factors summarised in *Rubin*. The essential question, as MacDonald J put it in *DH v RH* at para 34 is whether *"… 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".*

33) W's solicitors have provided at H's request detailed invoices evidencing her legal costs although these did not breakdown the same between the various sets of proceedings. Miss Bangay informed me that the figure was broken down as to £177,975 in relation to the financial remedy proceedings and £63,994 in relation to the FLA 1996 proceedings.

34) I see no justification for ordering payment of the latter. This is in part because in following the above guidance these are proceedings that have already concluded. However, it is also because both sets of FLA 1996 proceedings to date were compromised on the basis of no order for costs. It would quite clearly outflank or supplant the *inter partes* costs jurisdiction for me now to order these costs to be payable by H. As Miss Phipps submitted W should not recover via the back door those costs which she could not recover via the front door.

35) H's first objection to paying the outstanding financial remedy costs was that on 23rd May 2024 W sought the sum of £185,000 in respect of incurred and future costs (£125,000 and £60,000 respectively) to the end of the First Appointment and H agreed to do so. It was said that if W's solicitors underestimated the costs then this cannot be laid at H's door. H paid what he was asked to pay.

36) There was some argument before me as to whether the £185,000 was an *"on the hoof"* estimate. I found this something of a sterile debate. It cannot be the case that W is in some way bound by the same and I accept that the proceedings have turned out to be significantly more complex than may have originally been envisaged. There is something in Miss Phipps' description of this case as bearing similarities to the many-headed Hydra, including that for every head chopped off it would regrow two.

37) It was also said on H's behalf that it was not accepted that without payment of those costs W would be unable to continue to be represented in these proceedings. In support of this was the fact that W's solicitors had sought £185,000 on 23rd May 2024 (including £125,000 in respect of costs to date), as at the First Appointment on 29th October 2024 £101,871 was unpaid, but it was not until 5th December 2024 that W's solicitors first suggested that they would not continue to act and (it was said) this was a letter clearly written with the LSPO application that soon followed in mind. It was also said that W's solicitors had said they would continue to act as long as the unpaid costs did not exceed £300,000, the historic costs did not need to be paid immediately, and it would not be reasonable to order H to pay them when (i) W had not quantified the sum referable to the financial remedy claim (something which she now has); and (ii) H has already made a contribution to W's costs up to and including the First Appointment and this is in essence a second application for the same period.

38) I am of the view that the £177,975 incurred in relation to the ongoing financial remedy proceedings is *prima facie* recoverable. I am satisfied that without such a payment W

will not reasonably be able to obtain appropriate legal services for the purposes of the financial remedy application. MCA 1972 s22ZA(3) is therefore satisfied. Irrespective of the figure sought and agreed on 23rd May 2024 these are the costs have been incurred. Further, W's solicitors and counsel need not offer unsecured interest free credit in order to undertake their work.

39) I use the words *prima facie* deliberately because of the question as to whether it is appropriate to make a deduction to account for a standard basis of assessment. This was a practice instigated by Cobb J in *BC v DE (Proceedings Under Children Act 1989: Legal Costs Funding)*. There has, however, been some judicial inconsistency thereafter. In *JK v LM* Cobb J summarised the position as follows:

> [28] … Mostyn J said in *Rubin* at 13 (iv) that the LSPO jurisdiction should not be used to *"outflank or supplant"* the costs' jurisdiction in CPR Part 44, however there is varied practice in the Family Division on this point. I made a deduction of 15% in *BC v DE*; a deduction of 30% in *Re Z (Schedule 1: Legal Costs Funding Order; Interim Financial Provision)* [2021] 2 FLR 727 and in *Re Z (No 2) (Schedule 1: Further Legal Costs Funding Order; Further Interim Financial Provision)* [2021] EWFC 72) (ditto). Peel J adopted the same approach in the financial remedy case of *MG v GM* [2023] 1 FLR 253 and likewise in *Xanthopoulos v Rakshina* [2023] EWFC 158, making a deduction of 25%. However in *HAT v LAT* [2023] EWFC 162 Peel J took a different view stating that applying a notional reduction would be wrong as an LSPO is not an *inter partes* costs order, but a solicitor/client sum sought by the applicant to enable her to litigate. Francis J in *DR v ES* [2022] EWFC 62 made no deduction from the award, but in adopting that approach did not appear to consider directly the contrary case law. I return to this point later.
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> [40] … I propose to make a deduction of 15% across the board of the legal services payment order to reflect a modest notional detailed assessment; this was the discount which I applied in *BC v DE* and is at the lowest end of the reported discount rates. As to the principle of this deduction I recognise the variety of views expressed by the judges of the Family Division to which I have earlier referred; I take the view in this case, as in others, that the mother's solicitors should not be entitled at this stage to benefit from what would essentially be an indemnity against all their costs incurred which would be an unusual outcome.

40) Most recently in *KV v KV* Peel J stated:

> [32] To apply a standard basis of assessment discount may be a useful approach or cross check against the reasonable overall figure in some cases, but I do not read any judge in the reported cases as saying that it should be a formula of universal and automatic application. In some cases, it would have the effect of leaving a payee to fund the shortfall out of his/her own resources which may not be possible, or may not be fair to the payee. It may also be unfair to the lawyers who find themselves having to provide legal services at a significant discount. On balance I prefer to look at the sums sought in the round, taking account of all relevant factors and assess an overall reasonable figure, rather than to adopt a standard assessment discount other than as a cross check.

41) One example of where no standard assessment discount was applied in relation to historic costs is *Williams v Williams* [2023] EWHC 3098 (Fam) where Moor J ordered the husband to pay all of the wife's unpaid costs as (at [10]) "*those costs have been incurred primarily as a result of the obfuscation and breach of orders by Mr Williams."*

42) Although I am conscious that I am expressing a view contrary to one expressed most frequently by Cobb J, one of the most experienced and influential judges in the Family Division, I do not consider it is appropriate to make such a discount in respect of historic costs as a matter of principle. In *BC v DE (Proceedings Under Children Act 1989: Legal Costs Funding)* Cobb J justified the discount by reference at [28] to CPR Part 44 and the need therefore to consider *inter alia* whether the costs were reasonably incurred, reasonable in amount and proportionate to the matters in issue.

43) However, these CPR provisions do not apply to LSPOs as they are not costs orders. As Nicholas Mostyn QC (as he then was) said in *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family)* [2006] 1 FLR 1263 at [127] *"[i]t is clear that a costs allowance is not a costs order. It is a maintenance order that enables a party to fund the costs of her case."* In *Currey v Currey (No. 2)* [2007] 1 FLR 946 Wilson LJ (as he then was) expressly agreed with this stating at [32] *"a costs allowance within a maintenance order is not an order for costs"*. Similarly in *DR v ES* [2022] EWFC 62 Francis J said at [58] *"my job … is not assessing costs in that sense of somebody being made to pay an order for costs, it is dealing with debt".* Likewise in *HAT v LAT* [2024] 1 FLR 755 Peel J said at [35] *"[t]his is not an inter partes costs order"*.

44) It is worth noting the context in which Mostyn J said in *Rubin* at [13] (iv) that the LSPO jurisdiction should not be used to *"outflank or supplant"* the costs jurisdiction in CPR Part 44. The financial remedy proceedings had been stayed in favour of California on the grounds of *forum non conveniens* and the mother and children had returned to California pursuant to order made under the Hague Convention 1980. All proceedings in this jurisdiction had therefore concluded. However, the Deputy District Judge excepted from the stay the wife's LSPO application in which she sought to recover costs incurred in the divorce and Hague Convention proceedings. She was not seeking any orders in respect of ongoing costs.

45) It was this exception from the stay that the husband sought to appeal and it is in this context that Mostyn J stated what he did: he was clarifying that LSPOs should not be used to order one party to pay the other's costs in respect of concluded proceedings in which any costs orders would already have been made (save where without such payment the applicant would be unable to secure future representation). Hence this is why Mostyn J stated at [16] that were the application to be granted it would represent a dangerous subversion of the exclusivity of the *inter partes* costs powers and principles in CPR Part 44. Such an order would have supplanted the costs jurisdiction of the judges in those previous proceedings.

46) Cobb J was therefore correct in my view to state in *BC v DE (Proceedings Under Children Act 1989: Legal Costs Funding)* at [25] that *"I therefore do not consider that para [13](iv) of Rubin directly applies to these facts"* – i.e. to an applicant seeking an LSPO in respect of costs incurred and to be incurred within ongoing proceedings. It is therefore difficult to see how paragraph [13] (iv) can then justify a basis for applying a notional assessment deduction to costs in such proceedings.

47) I therefore prefer the approach adopted by Peel J in *HAT v LAT*. I share the view he expressed therein at [35] that a notional reduction is inappropriate as an LSPO *"is not an inter partes costs order where such a deduction is routinely applied. It is a solicitor/client sum sought by W to enable her to litigate in circumstances where she cannot reasonably be expected to access her own limited resources".*

48) In my view, a court should start from a presumption in line with the approach taken by Francis J in *DR v ES* that the costs have been properly incurred and therefore, unless it can be established to the contrary, that these costs should be met under the LSPO.

49) There is no suggestion in this case that the costs have not been properly incurred. I shall therefore order H to pay the historic costs figure of £177,975.

50) There is no prejudice to H in this approach. The position can be adjusted at the conclusion of the case if appropriate given that, in accordance with the guidance given in *Rubin v Rubin* at [13] (ix), it is a condition of my award that W undertakes to repay to H such part of the amount ordered if, and to the extent that, I am of the opinion, when considering costs at the conclusion of the proceedings, that she ought to do so. It is then that the court will be best placed to assess whether the costs incurred were reasonable and proportionate.

Future costs - £651,288

51) W's figure for future costs is broken down as follows:

a. solicitors' fees £321,288 inclusive of VAT (the equivalent estimate for H's solicitors' fees is £181,554);

b. counsel's fees £132,000 inclusive of VAT (the equivalent estimate for H's counsel's fees is £68,700); and

c. disbursements £198,000 inclusive of VAT. This is for shadow experts and private investigators.

52) There has been some variation in judicial approaches to applicant's budgets for future costs. Sometimes the budget has simply been accepted (as in *A v A* [2001] 1 FLR 377 per Holman J and *Williams v Williams* per Moor J). Sometimes the judge has carried

out a detailed consideration of the proposed budget akin to the costs budgeting process in civil cases and explained their reasons for reducing it (as in *LP v AE* [2020] EWHC 1668 (Fam) per Cohen J, *HAT v LAT* per Peel J and *DH v RH* per MacDonald J). Sometimes a broad approach is taken based on the other party's (i.e. the payer's) costs which may result in the sum sought being awarded (as in *Chai v Peng (No. 2)* [2015] 1 FLR 637 per Holman J and *LKH v TQA AL Z (Interim Maintenance and Costs Funding)* [2018] EWHC 1214 (Fam) per Holman J) or may result in a reduction of the applicant's budget (*Re Z (Schedule 1: Legal Costs Funding Order; Interim Financial Provision)* per Cobb J and *MG v GM (MPS: LSPO)* [2023] 1 FLR 253 per Peel J). Sometimes the applicant's costs are limited to the respondent's (anticipated) costs although as Francis J observed in *DR v ES* at [57] it will sometimes be reasonable for the applicant's costs to exceed those of the respondent's particularly initially if the applicant has little or no awareness of the respondent's (often complex) financial circumstances and/or is not commercially aware and so has to ask questions through their lawyers (which may of course mean the respondent's costs may be greater later when preparing detailed answers to the questions raised).

53) In my view it is reasonable to adopt a starting assumption that as officers of the court, the amount sought by solicitors will have been carefully considered and is therefore likely to be reasonable. However, although the practice of costs capping does not exist in the Family Court it is equally appropriate (as Peel J stated in *KV v KV*) that the court should look at the sums sought in the round, take account of all the relevant factors, and assess an overall reasonable figure.

54) Whether and if so to what extent this justifies a departure from the starting assumption will differ from case to case and will include consideration of factors including the history of the litigation to date, the issues the case engages, its complexity, the amount sought, and the likely predictability of the litigation going forward (which in part will depend on the stage of the case reached and over what period of time the costs are being sought).

55) For the same reason I have expressed above, I respectfully likewise disagree in principle with a deduction to account for the standard basis of assessment in relation to future costs (where again there has been some inconsistency in judicial approach albeit such deductions are less common). In my view it is even less justifiable in the case of prospective costs because the CPR Part 44 costs rules relate to an assessment of the reasonableness and proportionality of costs that <u>have</u> been incurred.

56) It is against this background that I assess the £651,288 sought to the PFDR Appointment in this case.

57) It is said on W's behalf that the costs estimate has been carefully drawn. I accept this as a starting assumption. The suggestion made on H's behalf that there are four fee earners working on the case at any given time is said not be the case. Counsel's fees

are higher because W has instructed more senior counsel to act for her and the fees are higher overall because of the extensive work required to get to the truth of H's financial position. W's use of a shadow expert is well known, she will be heavily reliant on their expertise having regard to the complex make up of H's resources, and she has also engaged private investigators in two overseas jurisdictions (one of which is offshore).

58) H's solicitors have estimated his total costs for all aspects of the case to the conclusion of the PFDR Appointment at £286,552 plus experts' fees (of which H is paying 100% in the first instance) of £58,800. H will, therefore, need to find about £310,000 to meet his own fees and the costs of the SJEs.

59) In *HAT v LAT* Peel J observed at [36] that *"[t]he approach to quantum, in my view, is simply whether the costs sought are reasonable, in the context of the nature of the litigation, the issues, the resources, and how each party is approaching the proceedings."*

60) Balancing the competing considerations, I take the view that a figure of £500,000 is the reasonable and appropriate sum to take this case to the conclusion of the PFDR Appointment in early June 2025. This is a reduction of c. £150,000 in the sum sought.

61) I consider this figure fairly reflects the resources (even on H's case), the history of the litigation to date, the issues the case engages, its complexity, and its (un)predictability. I also consider it inevitable that given the nature of this case W's costs are likely to be materially higher than H's at least at this stage of the litigation and hence H's projected costs to the PFDR Appointment provide me with only limited assistance. However, I am also persuaded that with four fee earners working on the case there has been a degree of duplication in the costs sought on W's behalf.

62) For completeness Miss Phipps also submitted that H's payment towards W's costs should be checked by the fact that if paid from the realisation of shares the monies will come from a non-matrimonial source (something which W does not accept).

63) This is a somewhat novel argument. I anticipate it is one made by analogy with the observations made in *N v F (Financial Orders: Pre-Acquired Wealth)* [2011] 2 FLR 533 per Mostyn J at paras [17]–[19] and *WC v HC (Financial Remedies Agreements) (Rev 1)* [2022] 2 FLR 1110 per Peel J at [21] (xvi) that if the source of the wealth from which payment is to be made is substantially non-matrimonial, then it would be unfair not to weigh that factor in the balance when quantifying the applicant's needs.

64) Whether these observations carry across to the quantification of payment of costs from a non-matrimonial source is an interesting question which I do not need to address in this judgment.

MPS - £46,668

65) W seeks £46,668 of which £25,608 is solicitors' costs and £21,000 is counsel's fees. H opposes this claim on the basis that the application is without merit and/or disproportionate.

66) As to the former, it was submitted by Miss Phipps that the costs of the application should be decided once the application has been determined. The LSPO jurisdiction is not a substitute *for inter partes* costs orders. W seeks an order that H pays 100% of all claimed costs, so, in effect, he would be paying W's costs of this application (which has not yet been determined) on an indemnity basis, as well as his own costs of defending the application even if he "wins". This cannot be justified.

67) As to the latter, is said it is not proportionate to spend these sums when W is already receiving £29,500 pm (i.e. £354,000 pa) plus H is paying various household bills, school fees and education expenses and reasonable medical and holiday expenses. It is said that in the words of Moylan J (as he then was) in *BD v FD (Financial Remedies: Needs)* [2017] 1 FLR 1420 an application should only be made where *"on a broad assessment the court's intervention is manifestly required"* and here the court's intervention is manifestly not required.

68) Miss Bangay submitted it is for the court and not H to adjudicate as to whether such claims are without merit. Further she submitted that H has provided no estimate for the fees that he has incurred/will in the future incur in relation to this application.

69) I am not satisfied in relation to this aspect of W's application that without payment of this sum W will be unable to continue to be represented. W's solicitors only have to wait a few weeks – i.e. until 11th February 2025 – for this application to be heard. Applications for costs can be made in relation thereto once I have determined the same.

FLA 1996 - £181,542

70) W seeks £181,542 of which £47,502 is solicitors' costs and £133,800 is counsel's fees. H likewise opposes this claim on the basis that the application is without merit and/or disproportionate.

71) Miss Phipps submitted that W's first and second FLA 1996 applications were compromised by consent orders made on 23rd May 2024 and 10th December 2024 and, on the very day the second application was compromised, W stated an intention to issue a third one. It was said that nothing new has happened since the second consent order, and yet W had made a fresh application and requires a five-day hearing of that application. To add insult to injury, W sought c. £181,000 from H to fund it.

72) In relation to this latter point I suggested to Miss Phipps that it was inherent in an LSPO application that a party was being asked to fund an application against

themselves. In response, Miss Phipps sought to draw a distinction between an application such as a financial remedy one which had to be adjudicated upon (if not resolved by consent) in order to determine the division of parties' finances and one which a party had the option whether or not to bring. I can see some force in this submission.

73) It is clear from the guidance as to the approach to quantum given in *HAT v LAT* by Peel J at [36] (cited above) I can take into account (and do) that this is W's third application for an occupation order. In this context Miss Bangay has, however, previously referred me to paragraph 5 of the *President's Practice Guidance: Non-Molestation Injunctions* (July 2023) under the FLA 1996 which states when considering the Domestic Abuse Act 2021 that such an order might be appropriate *"where the initial evidence suggests a pattern of coercive or controlling behaviour, and the court considers it is likely that the applicant could be further coerced or controlled into withdrawing the application …"*. Miss Bangay has said (and I accept) that although this guidance was given in the context of *ex parte* applications, it is pertinent to *inter partes* applications and occupation order applications more generally. W makes allegations of such behaviour in this case. All are denied by H.

74) I can also take into account (and do) that W has accepted (and has apologised to the court) she did not tell the truth to the court (and her solicitors) given that whereas she initially said that H had left the family home after the making *ex parte* order of 14th May 2024 and he did not return until she agreed for him to do so on 17th May 2024 on terms as to occupation of the property, in fact he never left. W's explanation, as set out in her statement of 14th October 2024, is that she was put under a huge amount of emotional pressure from H. H disputes this.

75) It is also the case that this application will be heard after the PFDR Appointment. Mostyn J stated in *Rubin* at [13] (xi) that:

> Generally speaking, the court should not fund the applicant beyond the family dispute resolution (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 s 22ZA(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.

76) These comments were made in the context of considering the progress of a financial remedies application rather than in relation to more than one application progressing in parallel. However they are in my view of more general application. I therefore consider it inappropriate to make provision for the entire costs of a hearing that will not be required if the parties reach an overall agreement before or at the PFDR Appointment. I accept, however, that much of the preparatory work for the FLA 1996 hearing will be done well before the PFDR Appointment including the preparation of further witness statements in response to evidence filed by H and on his behalf.

77) In taking account of the nature of an FLA 1996 application and the issues involved I am also not satisfied the costs of a senior silk can be justified. In my view, W could be more than properly represented at the hearing of such an application by a more junior silk or senior junior.

78) Taking these various factors into account and seeking to balance the same it is appropriate in my view to award £75,000 in relation to this application. I am satisfied that without payment of this sum W would not reasonably be able to obtain appropriate legal services for the application.

79) I have noted above that this application is to be heard over five days (including time for pre-reading and delivery of judgment). I have previously warned the parties (and it is recorded on the face of my order of 10th December 2024) that *"Both parties were made aware by the court that the application is a "clean sheet" case so there will be a soft presumption that costs follow the event."*

80) I will determine this application if contested on its merits and with a wholly open mind. I have however, previously said to H that he might consider moving out on a voluntary basis without making any admissions as to past behaviour.

81) Whether or not H does move out is entirely a matter for him. There can, however, be little doubt that he can afford to do so even on his own assessment of his capital and income position. The atmosphere at the family home (where both parties are subject to undertakings in relation to rooms they can and cannot enter) is no doubt at best tense and at worse toxic. I am sure this must risk impacting on the welfare of the parties' three children, two of whom are teenagers.

82) In saying this I make it clear that it should not be seen as prejudging the application in any way.

83) It is also in neither party's interests that (I am told) W's solicitors wrote to H's solicitors shortly before the hearing on 10th January 2025 complaining about H *"shutting the door in a hostile manner"* and *"slamming a plate onto the table in the kitchen"* and alleging these are breaches of H's undertakings. This type of correspondence simply increases costs yet further.

84) On 9th January 2025 (i.e. the eve of this hearing) I understand that H offered to move out of the family home on a date between 1st August 2025 and 30th September 2025 if an agreement was reached on the basis of equal shared care arrangements in relation to the children. Miss Bangay said this amounted to no offer at all as W was the primary carer of the children and H was a largely absent father (an allegation which is disputed on H's behalf).

85) If H does choose to vacate the family home voluntarily, he can be assured that it will have no impact whatsoever on my determination of the financial remedy proceedings.

86) If the FLA 1996 application is compromised, no doubt this will include agreement in relation to the appropriate treatment of my award of costs in relation thereto.

Summary

87) H shall therefore pay W's solicitors £177,975 in relation to historic costs, £500,000 in relation to future financial remedy costs, and £75,000 in respect of FLA 1996 costs – i.e. a total of £752,975. This compares to the £1,121,467 sought and the £250,000 offered.

88) To adopt the wording of MCA 1973 s.22ZA(3) I am satisfied that, without the amount, W would not reasonably be able to obtain appropriate legal services for the purposes of the proceedings. This amount also satisfies the following observation in *BC v DE (Proceedings under Children Act 1989: Legal Costs Funding)* per Cobb J at [22]:

> 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.

89) This is the figure that strikes the balance of reasonableness in this case in what is a question of funding, and not any determination of ultimate costs liability.

90) The sum of £752,975 shall be payable as follows (i) £177,975 within 21 days; (ii) £460,000 in four equal tranches of £115,000 on 1st February 2025 – 1st May 2025 inclusive; (iii) £40,000 on 1st June 2025; and (iv) £75,000 on 8th June 2025 (thereby reflecting both the fact that the PFDR Appointment has been fixed for 2nd and 3rd June 2025 and that the bulk of the FLA 1996 costs are counsel's fees).

Conclusion

91) I return to what I said at the outset of this judgment in relation to the costs of these proceedings. Miss Phipps submitted that W's belief seems to be she can spend what she likes on this litigation, and litigate without any regard to proportionality and H (or, she seems to think, his father) will be required to write a cheque to cover it. She states that W needs to be disabused of this notion.

92) I do not know whether this is W's belief. If it is, it should not be.

93) As Francis J observed *WG v HG* [2018] EWFC 84 at [91] *"people cannot litigate on the basis that they are bound to be reimbursed their costs … no one enters litigation simply expecting a blank cheque."*

94) Both parties need to be aware that I shall have no hesitation in making an *inter partes* costs order at the conclusion of these proceedings if pursuant to FPR 2010 r28.3(6) I consider it appropriate to do so because of their conduct in relation to the proceedings (whether before or during them). Pursuant to sub-paragraph (7) in deciding what order (if any) to make under paragraph (6), I must have regard *inter alia* to (i) any open offer to settle made by a party; (ii) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (iii) the manner in which a party has pursued or responded to the application or a particular allegation or issue; and (iv) any other aspect of a party's conduct in relation to proceedings which I consider relevant.

95) Were I to make such an order against W it could mean repayment of some of the sums I have ordered to be paid at this interim stage. As I have said, it is a condition of my order that W gives the undertaking as set out in *Rubin v Rubin* at [13] (ix) to repay to H such part of the amount ordered if, and to the extent that, I am of the opinion, when considering costs at the conclusion of the proceedings, that she ought to do so.

Addendum

96) I circulated this judgment in draft on 14th January 2025.

97) In her response Miss Bangay confirmed W intended to make an application for the costs of the LSPO application and for these to be summarily assessed. She invited that I deal with this by way of concise written submissions. Miss Phipps suggested that the issue be dealt with at the conclusion of the MPS hearing on 11th February 2025. I shall adopt this latter course which is likely to be more cost effective than directing separate written submissions.

98) I only note at this stage that Mostyn J stated in *Rubin* at [13] (xiii) as follows:

> 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 a 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.

99) In my email of 14th January 2025 and having considered the *Practice Guidance: Transparency in the Family Courts: Publication of Judgments* issued by the President of the Family Division on 19th June 2024 I gave notice of my provisional intention to publish this judgment so that the parties had the opportunity to make representations in relation thereto in accordance with paragraph 3.13 thereof. Neither counsel opposed publication in their respective responses.

100) Having carried out the *"balancing exercise"* set out in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 (and summarised in *Re J (A Child)*

[2014] 1 FLR 523 per Sir James Munby P) which has regard to the interests of the parties and the public as protected by ECHR Articles 6, 8 and 10, considered in the particular circumstances of this individual case, the judgment shall be published on an anonymised basis. I have made a few minor amendments to the draft judgment as requested by Miss Phipps to that end.

101) That is my judgment.

NICHOLAS ALLEN KC

16th January 2025