Neutral Citation Number: [2021] EWCA Civ 1184

Case No: B6/2020/1856

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (FAMILY DIVISION)
Mrs Justice Judd
[2020] EWHC 1843 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before:

LADY JUSTICE KING
LORD JUSTICE MOYLAN
and
LORD JUSTICE NEWEY

- -

Between:

KIANOOSH AZARMI-MOVAFAGH	**Appellant**
- and -	
SOROUR BASSIRI-DEZFOULI	**Respondent**

- -
- -

Lucy Owens and Philip Tait (instructed by **Dawson Cornwell Solicitors**) for the **Appellant**
Sarah Phipps (instructed by **Mansouri and Sons**) for the **Respondent**

Hearing dates: 18 May 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:00am on 30 July 2021.

Lady Justice King:

1. This is a second appeal in a straightforward financial remedy case 'marked' as HHJ Robinson put it at the trial, by 'extreme positions and a degree of bitterness'. The judge if anything understated the position; the degree of acrimony on both sides has been such that the parties embarked on a course of litigation which became an exercise in self-destruction. As a consequence, the costs have become so disproportionate relative to the assets that it is now hard to achieve an outcome in this uncomplicated needs case which will not leave each of the parties profoundly discontented.

2. In summary, the judge at first instance made an order providing Kianoosh Azarmi-Movafagh ('the husband') with funds sufficient to buy a modest property and also to pay most of his costs. Sorour Bassiri-Dezfouli ('the wife') appealed on the basis that the husband should not have been awarded anything at all and should bear his own costs. The appeal was heard by Judd J who allowed the appeal and substituted the direct payment referable to the husband's costs which had been ordered by HHJ Robinson, with a charge for the same sum to be secured on the property he would in due course purchase. The husband now appeals against the imposition of the charge. The wife no longer opposes that part of the lump sum intended to be used to buy a property, but submits that the husband should have no contribution towards his costs.

3. The depressing facts of this case have not only brought into sharp focus the issue in this appeal, namely the appropriate treatment of any outstanding costs incurred by the recipient of a needs award, but also serves as a reminder of limits of the role of the Appeal Court, particularly on a second appeal.

Background

4. The husband and wife are both in their 50s. There is one child T who is 8 years old. The parties contracted an Islamic marriage which was then followed in March 2007 by a civil marriage. The marriage ended in December 2017 following two incidents of violence on the husband's part. The husband was subsequently acquitted in criminal proceedings, but a finding was made on the balance of probabilities at the conclusion of a fact-finding hearing in Children Act proceedings, that he had been violent to the wife.

5. The wife is a barrister practising in a modest way. A substantial proportion of her income comes from the rental income she receives from a number of properties she owned prior to the marriage. The wife also owns the former matrimonial home which was valued at £727,000 with a mortgage of £370,000. The total value of the assets (including the matrimonial home) was £2,347,000 (net of capital gains tax) and £1,781,389 (after deduction of the wife's debts of £300,000 and the husband's debts of £257,000). The wife was the breadwinner throughout the marriage.

6. The husband has no assets and currently lives in a rented one bedroom flat and is in receipt of universal credit. During the course of the marriage the husband had a significant caring role for T.

7. Surprising though it may seem, the trial took three full days of court time before the Circuit Judge. The judge found the husband's contribution to the marriage to be significantly more than that alleged by the wife who, the judge said, refused to 'give

the husband credit for anything'. His contribution was however significantly less than that claimed by the husband, who the judge found was 'prepared to exaggerate freely and make grandiose claims that he could not substantiate'.

8. The judge concluded that this was a 'needs' case and that the husband needed £400,000 to buy himself a property which would be suitable for T to come and stay. The judge ordered payment of a further £25,000 to cover costs of purchase and the purchase of a small car. There is now no appeal against this part of the judge's judgment. This court therefore approaches the appeal on the basis that the husband's needs as assessed under Matrimonial Causes Act 1973 s25(2)(b),('MCA') were for a property and associated costs of purchase which needs could be met by payment of a lump sum of £425,000.

9. The judge then turned to the issue of the husband's debts which are further analysed below. The judge said that he recognised the validity of the argument of Ms Owens (who represented the husband and represents him again today *pro bono*) that if there were no provision for the husband's debts, his needs would not be met. The judge went on to award the husband the sum of £200,000 towards his costs making a total lump sum of £625,000.

10. The judge unsurprisingly described the open position taken by the wife at trial (and again at the first appeal) that the husband should leave the marriage with nothing, as 'unrealistic' and concluded by saying that he did not believe the husband should be expected to rent a property and that:

> "I recognise that the sum that I award, complicated as it is by the treatment of the debts, is a low proportion, but I consider it effective to deal with his needs and recognise the balance of the factors under Section 25. "

Costs and Debts

11. As of the 7 August 2019 when the judge made his order, the husband's costs were £186,864 made up as follows: £177,000 + £8,000 for the financial remedy claim, £48,864 for the parallel Children Act proceedings and £13,000 in relation to criminal proceedings. The husband's other debts when added to the costs of the litigation led to a total indebtedness of £257,237.

12. To elaborate a little; the financial remedy proceedings were substantially funded by way of a litigation loan of £120,000. In addition, the husband's sister in Australia generously raised £122,560 which was secured by a mortgage upon her home. The money was used substantially towards costs but included an element towards living expenses.

13. So far as the Children Act proceedings were concerned, the husband chose to instruct leading counsel. As already noted, a finding was made that the husband had been violent to the wife on two occasions. This was not however one of those rare cases where the court made an order for costs against the husband in accordance with the principles in *Re T (Costs: Care Proceedings: Serious Allegations not Proved)* [2013] 1 FLR 133 SC *(re T).* Whilst the criminal proceedings led to an acquittal, the husband

who had been entitled to legal aid, had chosen to instruct counsel on a private fee-paying basis.

14. In relation to the financial remedy proceedings, as already indicated the wife maintained her position throughout that the husband should receive no award whatsoever. Further, at what would appear to have been at her instigation, three family members became interveners in the proceedings for a period of time before they withdrew. The wife paid the costs incurred by all involved in relation to what was a pointless and ill-judged foray. The judge in his judgment made no criticism of the amount of costs incurred by the husband in the financial remedy proceedings and noted that the husband's costs were greater than those of the wife, but observed that there was 'some reason for that.'

15. Ms Owens told the court that her stated position in her closing submissions at trial had been that the husband's primary position was that he sought a lump sum sufficient to pay his costs, whilst leaving him with a ring fenced sum with which to buy a house. If the court did not make an order on that basis, Ms Owens told the court at trial, she would be making an application on behalf of the husband for an order for costs on the basis that the wife had been guilty of litigation misconduct.

16. The judge did not address the issue of whether it would have been appropriate to make an order for costs on the facts of the case, rather he dealt with the matter briefly in his ex tempore judgment given at 5.00pm on the final day of the trial as follows:

> "31,….[I] do recognise Miss Owen's argument that if I do not provide for that *[his debts]* I am not dealing with his needs. Although his costs of these proceedings are greater than hers, there is some reason for that, and I am not going to deal with that in a mathematical way.
>
> 32. But I do think that it would be wrong to say that the costs of the criminal proceedings and perhaps some of the costs of the children proceedings should not be his responsibility from his own resources. I will award the sum of £200,000 towards his costs which will go a long way to dealing with them, will certainly allow him to pay off his litigation loan, and will go a long way to pay off his sister. He then has to decide on the balance of what he does with his money between his housing and his payment of the soft debts. That is a matter for him and his sister…"

17. As always in any financial remedy case it is necessary to step back and look at the overall award in order to see whether, first consideration having been given to the welfare of T, the award represents so far as can be achieved, a fair outcome. This was an 11-year marriage with one young child. All the assets are non-matrimonial. The order made was for £625,000 on a clean break basis made up as to £425,000 housing and £200,000 debts. There is no maintenance element included and the husband, then 57 and now presumably 59, was and remains dependent on universal credit.

18. The judge did not fully cross check the award in that he did not, when looking at the proportion of the assets being awarded to the husband, go on to calculate the net effect of the award on the wife, who had her own significant debts largely in the form of costs

totalling £300,433. Using the 'effectively agreed' figures before the judge, the wife after payment to the husband of £625,000 would have net assets remaining of a value of approximately £1,410,000 of which £355,000 is the equity in the former matrimonial home. The wife's rental income would inevitably be reduced as a consequence of raising the lump sum ordered by the court, but she would continue to have her practice at the Bar. The payment to the husband of £625,000 would leave him with £57,000 of debts outstanding.

19. I am conscious that the judge gave an ex tempore judgment late in the day. Nothing I say should discourage judges from exercising this considerable skill in straightforward cases. Reserving judgments in such cases not only leads to delay for the parties, but adds significantly to the workload of the judges who have to produce a refined reserved judgment for the parties, almost always written in the evenings and weekends.

20. In the present case, although the judge did not elaborate on his reasons for making an order that the wife pay £200,000 towards the husband's debt, his reasoning is easy to deduce; without such an order the needs he had assessed could not be met. Further, the judge held that particularly in relation to the criminal and Children Act proceedings, it would not be fair to order the wife to pay a sum representing the totality of the husband's debts. Importantly the judge having decided upon the appropriate sum, then looked at it as a proportion of the totality of the assets. He said that as a proportion the figure was low *(20%: my calculation)* but that that low proportion reflected the fact that all the assets were non-matrimonial.

The First Appeal

21. The matter came before Cohen J for consideration of the wife's application for permission to appeal on 5 November 2019. Cohen J having granted permission to appeal commented as follows: 'I would add only that no consideration seems to have been given to some of the respondent's costs being a charge upon the new property'.

22. The first appeal came on before Judd J on 13 July 2020. The wife was represented by counsel but the husband appeared in person. At that stage the wife continued to argue that the judge had been wrong to find that the husband needed to buy accommodation or, if she was wrong about that, that a sum of £425,00 was excessive. Her final ground of appeal was that: the judge had been wrong to have added the sum of £200,000 for the husband's debts which she said was: 'tantamount to an order that she pay most of his unassessed costs'. The ground of appeal went on: 'In Children Act proceedings the husband had been found to be violent towards the wife'.

23. The husband opposed the appeal. Neither party advocated any form of charge on the property and no submissions were made as to appropriate trigger events in the event of such a charge being held to be appropriate.

24. A substantial part of Judd J's judgment was inevitably concerned with the rejection of the wife's continued opposition to the husband receiving any award whatsoever, opposition which is only now for the first time, withdrawn.

25. Judd J having rejected the submissions of the wife in relation to accommodation, turned to the issue of the husband's debts which she dealt with in the following way:

> "29. I have concluded, however, that there is force in the point that Ms Phipps makes about the issue as to the husband's debt. As would be expected, there were no orders as to costs in the Children Act proceedings, which required a fact finding as well as a welfare hearing. Likewise, as has been submitted, there were no proper grounds upon which a costs order could have been made at the end of the financial remedy proceedings. Whilst the judge acknowledged that it would be wrong to say that the costs of the criminal and some of the children proceedings should not be his responsibility from his own resources, the order he made in fact allowed the husband to recover very much the lion's share of his costs from all the proceedings (and I note that the husband chose to pay his legal costs when he could have obtained public funding in the criminal proceedings). The judge did not really explain why this was, or to set the payment of such a sum in the context of the wife having to pay her own very substantial costs bills and *particularly where the Deputy District Judge had found that the husband had been violent to her by assaulting her on two occasions. (my emphasis)*
>
> 30. I accept Ms Phipps' submission that by making the order he did the judge in fact put the wife in a worse position than if he had simply made a costs order against her. I also accept her submission that what the judge should have done was to balance the decision that he had come to as to the husband's reasonable needs for a property as against his responsibility for meeting his own costs for the litigation in which he had become involved. In this case, the judgments demonstrate that it very much took two to litigate, and at the heart of all the litigation is the great difficulty that they have had in coming to terms with each other."

26. Judd J, in a reserved judgment, allowed the appeal to a limited extent. She did not interfere with the housing budget of £425,000 and concluded that the husband should still be paid the sum of £625,000 so that the husband would not be forced to live in unsuitable accommodation and could repay both the litigation loan and the bulk of the money owing to his sister. The £200,000 referrable to his costs should however, Judd J held, form a charge on the property bought by the husband as a percentage equivalent to the sum that £200,000 would bear to the purchase price 'repayable to the wife on the husband's death, remarriage or permanent cohabitation'. The judge made provision for the charge to be transferred to a subsequent property and also said that given the husband's age, she did not think it realistic for the charge to be realised when T becomes 18.

27. Following the handing down of the judgment, clarification was sought by Ms Phipps who appeared for the wife. Counsel requested further reasons for the judge's decision that part of the lump sum should be the subject of a charge in favour of the wife, specifically because she (Ms Phipps) had not addressed the court on whether there should be a charge and had not been invited to do so.

28. The judge gave her additional reasons. She noted that given the positions of each of the parties it was highly likely that the court would reach a conclusion 'not advocated by

either party'. The provision of a charge, Judd J said was 'in all the circumstances the clearest solution'. She went on:

> "3…[T]he trial judge heard evidence from the husband's sister and accepted it, namely that she had lent him a lot of money, using her home as security, and that she expected to get it back. I do not think it right to go behind that finding, and I do not consider therefore that it would be right for that loan to be secured as a charge against the father's property in preference to the wife.
>
> 4. As to the reasons for the 'trigger' events, the sum required for housing is based upon the husband's position as a single man who is not able to pool his resources with a partner. *Also, I considered that the trial judge was wrong to allow the husband to recover the lion's share of his costs, particularly in circumstances where, in the Children Act proceedings* the *District judge had found that he had assaulted the wife on two occasions*. I do not consider that it would be a fair outcome for the wife's charge to remain in the event that the husband remarries or permanently cohabits. Although the ideal outcome, given the level of acrimony, would allow for there to be complete separation of the parties' finances, there was no easy or ideal outcome possible in this case. Whether or not someone is married or cohabiting is not particularly complicated to determine. If the husband cohabits or marries someone with little or no financial means it would not render him homeless, although he might have to seek a cheaper property. My judgment is that the unfairness to him of this is less than the unfairness to the wife if he should marry or cohabit with someone of means, and she cannot realise the charge." *(my emphasis)*

29. Judd J did not give a reason as to why she preferred a charge as opposed to a direct payment, other than to say that the judge had been wrong to allow the husband the lion's share of his costs in particular in circumstances where there had been a finding of violence against him in the Children Act proceedings. It would seem she approached the case on the basis that a charge was inevitable, the only issue was whether the sister or the wife should have the benefit of a charge.

30. Judd J went on to make an order for costs of £25,000 against the husband because the wife had succeeded in part on her appeal. This figure was to be added to the charge. The total charge was therefore to be £225,000 on a property anticipated to cost £400,000. On today's figures that leaves the husband with equity of £175,000 to rehouse himself in the event that the charge falls in and significantly less if he has not paid off the rest of his debts in the meantime.

31. Both parties now seek to challenge the order of Judd J. The husband filed 7 grounds of appeal which can be summarised as follows:

i) Judd J was wrong to interfere with the judge's discretionary decision in the absence of any error and in circumstances where the result of the new order was to undermine the core purpose of the judge's order;

ii) The judge had been wrong to impose a charge on appeal which neither party had sought either at first instance or on appeal;

iii) The judge was wrong to justify the charge in part on the basis that the husband had been found in the Children Act proceedings to have assaulted the wife on two occasions.

32. The wife cross appeals on the grounds that:

i) The effect of the order is that the wife is required to raise and pay the total sum of £625,000 even though the judge had determined that she should not be responsible for payment of the husband's costs;

ii) The order contravenes the clean break principle and ties the parties together financially, potentially for the rest of their lives;

iii) The outcome was not sought by either party and both parties regard the outcome as unjust albeit for different reasons.

The role of the Appeal Court

33. *Piglowska v Piglowski* [1999] WL 477307; [1999] 2 FLR 7643 HL *(Piglowska)* is a case which has stood the test of time with the judgment of Lord Hoffmann routinely 'cut and pasted' into nearly all skeleton arguments which come before the Court of Appeal in family cases. It is worth however, on the facts of this case briefly returning to an examination of the case as a whole and not just to consider the paradigm passages routinely quoted.

34. *Piglowska* was a small money case in which there were three appeals. The total assets in 1999 were £127,400 and the total costs exceeded £128,000. Lord Hoffmann said that 'something had gone badly wrong'. Permission to appeal had been given not just because of the likelihood that the Court of Appeal had erred in law, but in the hope that the House of Lords 'might be able to reduce the chance of such disasters happening to other people in the future'.

35. Lord Hoffmann referred to Sir Stephen Brown P's judgment in *Marsh v Marsh* [1993] 1 WLR 744 where he had emphasised that whilst the appellate judge is entitled to exercise his or her own discretion, the parties do not begin with a clean sheet and it is the first instance judgment which 'usually sets the agenda for the appeal'. Moving on to the well-known parts of Lord Hoffmann's judgment:

i) 'Firstly, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts';

ii) 'Secondly, the exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is

> particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the District Judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself';

iii) 'Thirdly, the exercise of the discretion under section 24 in accordance with section 25 requires the court to weigh up a large number of different considerations. The Act does not lay down any hierarchy. Many cases involve value judgments on which reasonable people may differ. Since judges are also people, this means that some degree of diversity in their application of values is inevitable and, within limits, an acceptable price to pay for the flexibility of the discretion conferred by the Act of 1973. The appellate court must be willing to permit a degree of pluralism in these matters';

iv) 'Fourthly, there is the principle of proportionality between the amount at stake and the legal resources of the parties and the community which it is appropriate to spend on resolving the dispute'.

36. As Lord Hoffmann said: 'To allow successive appeals in the hope of producing an answer which accords with perfect justice is to kill the parties with kindness'.

37. Since *Piglowska* there have been any number of authorities which have restated Lord Hoffmann's wise words in any number of different ways often emphasising the importance of a proper respect being given to the discretion exercised by the first instance judge. By way of example, in *Re J (Child Returned Abroad: Convention Rights*) [2005] 2 FLR 802 HL, Baroness Hale said at [12] that:

> "12…Too ready an interference by the appellate court, particularly if it always seems to be in the direction of one result rather than the other, risks robbing the trial judge of the discretion entrusted to him by the law. In short, if trial judges are led to believe that, even if they direct themselves impeccably on the law, make findings of fact which are open to them on the evidence, and are careful, as this judge undoubtedly was, in their evaluation and weighing of the relevant factors, their decisions are liable to be overturned unless they reach a particular conclusion, they will come to believe that they do not in fact have any choice or discretion in the matter"

38. Whilst these observations were made in the context of a Hague Convention case, they serve as a firm reminder that the appeal court should only interfere with the decision of the first instance judge if they are satisfied that they were wrong and that their decision was beyond the generous ambit within which reasonable disagreement is possible. Only then is the appellate court entitled to interfere.

39. In my judgment particular caution should be exercised by any judge when hearing an appeal from an experienced specialist Judge in a case such as this where the costs have got out of control with the consequence that the payment of those costs has inevitably had a significant impact on what may otherwise have been the outcome.

The use of deferred charges in financial remedy cases

40. It may be that Judd J felt that the prospect of a charge being imposed as an alternative to a direct payment had been sufficiently advertised to the parties through the medium of Cohen J's case management directions but with respect to her, it was unfortunate that had that been the direction in which her mind was working, she did not invite Counsel to make focused submissions about that possibility.

41. Had she done so, Counsel would have had the opportunity to take the judge to some of the many cases which deal with the making of so called *Mesher orders (Mesher v Mesher & Hall* [1980] 1All ER 126) in order to demonstrate the court's ambivalence towards the use of a deferred charge in matrimonial finance cases, to the point that, whilst they remain a useful tool in certain limited circumstances, it is only rarely that it will be felt that the advantages outweigh the disadvantages of making an order designed to maintain the tie between the parties long after their divorce.

42. In *Mortimer v Mortimer-Griffiths* [1986] 2 FLR 315 CA Parker LJ condemned the use of *Mesher* orders which he regarded as likely to lead to 'harsh and unsatisfactory' results. Lloyd LJ in *Clutton v Clutton* [1991] 1 FLR 242 CA declined to go so far, saying that a *Mesher* order might provide the best solution when children need to stay in the matrimonial home, but that where there was doubt as to the wife's ability to rehouse herself following sale such an order should not be made.

43. Judd J's order did not have the child attaining the age of 18 as a trigger point, but she did incorporate cohabitation. In *Minton v Minton* [1979] AC 593 at 608 HL, Lord Scarman spoke of the reason underlying the principle of a clean break being the avoidance of bitterness. In a case such as this, marked by bitterness between the parties, extreme caution must in my view, be exercised before putting the parties in a situation which will, by continuing a financial link between the parties, serve to feed resentment; the wife at having 'her' money invested in the husband's property and the husband at being under constant surveillance in order for the wife to see if he is cohabiting. Most serious however it might be thought, is the potentially invidious and conflicted position for their child moving between the parties. One fears the grim reality given the history of this case, would be a further round of ruinously expensive litigation.

44. In *Schuller v Schuller* [1990] FCR 623; [1990] 2 FLR 193 CA; Butler- Sloss LJ considered some of the disadvantages of such a charge saying at 199:

> "Secondly, he has retired and if this order was to be made he would find, being retired with the state pension and £1,200 a year from his employment, that he had a small sum of money to deal with any repairs to the house, and that if at some stage he was in need of money for medical attention or nursing home fees, which even in the days of National Health many people might require, on the sale of the property in order to achieve capital he might find himself having to pay out this very major figure to the wife

> although he was still alive, placing him in considerable difficulties.
>
> Another disadvantage of this deferred charge is that under section 25A of the Act as amended it is the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of a decree as the court considers just and reasonable, and again such an order would fly in the face of the duty upon the court to try wherever possible to create a clean break."

45. Picking up the threads of what I said about the role of an appeal court, what Butler-Sloss LJ went on to say in *Schuller,* a decision made over twenty years ago is as apposite now as it was then:

> "Speaking again entirely for myself, I can see that some judges might have made an order on current figures for a lump sum greater than that which the learned judge accepted in this case. As I said during argument, there is no right figure in these cases. It is an exercise of the court's discretion, looking at all the circumstances and taking into account, as was very necessary in this case, not only the very important contribution that the wife made to the marriage but also the resources of both parties, and no one factor can predominate; they must all be put together and balanced together so that the judge may exercise his discretion and come to a figure which he thinks appropriate in the particular case. I cannot for my part say that this judge's figure exceeded the generous ambit of disagreement, nor that, as I have already said, he was plainly wrong, and the Court of Appeal has a limited function. In this court we can only interfere if the decision of the judge does exceed that generous ambit of disagreement, if the judge has erred by taking into account matters which he should not have taken into account, or not taking into account matters which he plainly should have taken into account, or if, at the end of the day, the decision was plainly wrong."

The proper approach to costs in needs cases

46. For the purposes of determining this appeal it is necessary to consider:

    i) The costs regime applicable in financial remedy cases;

    ii) Those first instance cases where the court has grappled with the problem of how to treat the costs of the recipient of a needs award.

Costs in Financial Remedy Cases

47. The current rule is found in the Family Procedure Rules 2010, r.28.3(5) ('FPR') which provides save in certain specified exceptions, that *'the general rule in financial remedy*

proceedings is that the court will not make an order requiring one party to pay the costs of another party'.

48. Whilst the 'no order' principle is the starting, and usually the end, point, the court does retain the jurisdiction to make costs orders in financial remedy proceedings pursuant to FPR r 28.3(6) *'because of the conduct of a party in relation to the proceedings (whether before or during them)'.* The court is given assistance as to the proper approach to the making of such an order for costs in FPR 28.3(7) which provides:

> "7) In deciding what order (if any) to make under paragraph (6), the court must have regard to –
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> (a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;
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> (b) any open offer to settle made by a party;
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> (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
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> (d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;
>
> (e) any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and
>
> (f) the financial effect on the parties of any costs order."

49. Of importance is the Practice Direction FPR PD 28A which applies to costs in financial remedy cases and has particular resonance in the present case. FPR PD 28A para.4.4 provides that:

> "In considering the conduct of the parties for the purposes of rule 28.3(6) and (7) (including any open offers to settle), the court will have regard to the obligation of the parties to help the court to further the overriding objective (see rules 1.1 and 1.3) and will take into account the nature, importance and complexity of the issues in the case. This may be of particular significance in applications for variation orders and interim variation orders or other cases where there is a risk of the costs becoming disproportionate to the amounts in dispute. The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs. This includes in a 'needs' case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court. Where an order for costs is made at an interim stage the court will not usually allow any resulting

> liability to be reckoned as a debt in the computation of the assets."

50. If a costs order is made against one of the parties as a consequence of their conduct, the court will need then to decide upon which basis those costs should be determined; standard costs or indemnity costs. It is not necessary for the purposes of this judgment to set out the relevant considerations which determine which of those assessments apply other than to note that the difference as between standard and indemnity costs is set out at CPR 44.3(2) and (3) as:

> "2) Where the amount of costs is to be assessed on the standard basis, the court will –
>
> (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
>
> (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.
>
> 3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party."

51. In *JM v CZ (Costs: ex parte order)* [2014] EWHC 1125 Fam; [2015] 1 FLR 559 at [26] Mostyn J worked upon the basis that the 'standard' basis which is by far the more usual form of order made, is commonly assumed to equate to approximately 70% of the overall costs bill.

First instance authorities

52. Ms Owens took the court to three cases where the payment of debts referrable to costs has recently been considered by specialist financial remedy High Court judges at first instance. They are: Francis J in *WG v HG* [2018] EWFC (Fam) 84; [2019] 2 FCR 124 *('WG v HG')*; Holman J in *Daga v Bangur* [2019] 1 FLR 1340 *('Daga')* and Cohen J in *MB v EB (No 2)* [2019] EWHC 3676 (Fam) 3676; [2020] 1 FLR 1086 *('MB v EB')*.

53. All these cases turn on their own individual facts and in my judgment the most significant principle to be drawn from them, either individually or collectively, is that the judge at first instance has a wide discretion as to the extent to which it is appropriate to order an enhanced lump sum to a party in receipt of a needs award designed wholly or in part to satisfy their outstanding costs bills.

54. *WG v HG* was a case where the wife who was the receiving party, had adopted a wholly unrealistic open position and whose costs were excessive. Francis J said at [91]

> "91. Against that, people cannot litigate on the basis that they are bound to be reimbursed for their costs. The wife has chosen to instruct one of the highest regarded and consequently one of

> the most expensive firms of solicitors in the country. Whilst I have no doubt that the representation has, at all times, been of the highest quality, no one enters litigation simply expecting a blank cheque. A judge, in a position as I am now in, is facing the invidious position of seeing his or her order undermined by the extent of litigation loan or costs liability. If, here, I make no provision for the wife's costs or litigation loan, then half of the Duxbury fund will be wiped out and she will be left with insufficient money to manage, according to my assessment. Doing the best that I can to recognise that her costs are excessive, to recognise that she has presented an unreasonable case in financial remedy proceedings but to recognise that her *Duxbury* fund cannot be completely undermined and that the husband's offer was too low, I am going to add to the lump sum, already referred to above, an additional £400,000 which is a little bit less than half of the total sum due."

55. The judge's decision must be seen in context; first and foremost the judge held that the wife had incurred a substantial part of the costs unreasonably (which was not the case in the present appeal); the judge notwithstanding that that was the case, nevertheless gave her a lump sum of £400,000 in addition to that required for her assessed needs. Whilst that inevitably meant that her needs as identified by the judge were not wholly satisfied, it should be understood that the order was made in the context of the case and that the impact upon the wife must be considered against the background of her receiving a property mortgage free worth £1.65m and a *Duxbury* fund of £2m to produce an income for life of £90,000 pa. Francis J went on:

> "93. The wife will, therefore, have to find some £500,000 in order to fund that part of the costs which I am not ordering the husband to pay. I recognise that this will deplete her *Duxbury* fund. I have very carefully considered whether this is fair. It might be said that I have assessed her needs at a given figure. If I have done that, then how can I leave her with a lower sum which, by definition, does not meet her needs? This conundrum happens in so many cases. People who engage in litigation need to know that it has a cost. The wife may choose to sell the property at some point in the future converting part of the value of it into a *Duxbury* fund. She may decide to use the property to generate some income rather than simply installing her own staff into it. She will have to make the sort of decisions about budget managing that other people have to make day in day out, but I am satisfied that people who adopt unreasonable positions in litigation cannot simply do so confident that there will be an indemnity for the costs of the litigation behaviour, however unreasonable it may have been.
>
> 94. The consequences of the above will be that the wife will have a *Duxbury* fund not of the £2 million that I intended but of about £1.5 million. This will generate for her less than £75,000 a year net, for life. This is a small fortune for most people. Parties

> cannot spend £1 million on their representation without being prepared to face the consequences of their decision to incur that level of expenditure."

56. In *MB v EB* Cohen J took the view that the case should have been easy to settle; the husband already had suitable, mortgage free, housing and therefore only his income needs remained to be satisfied which was done on the basis of £25,000 pa for life which converted into a *Duxbury* figure of £325,000. In achieving this order, the husband had spent £650,000 in costs of which the wife had already paid £236,000. The judge concluded that there was no reason why the husband should expect the wife to pay his costs unreasonably incurred. The judge however gave the husband an additional £150,000 which was approximately the amount of costs which he had incurred at the time when the wife had made an open offer. The husband was therefore awarded a lump sum of £485,000. That meant that the wife had in total paid £386,000 (£236,000 plus £150,000) towards the husband's costs in addition to her own costs of in excess of £600,000.

57. *Daga* from which Miss Phipps seeks comfort, is the only case brought to the attention of the court where the court refused to make any order in respect of the husband's debts, which debts were entirely referrable to costs.

58. In *Daga* Holman J dismissed all claims by either party. Holman J said that the parties having chosen to live throughout their married life in rented accommodation, the husband did not need to buy his own home and that on his net income of £130,000pa he could afford to sustain a very good lifestyle, entirely comparable to that which the parties had enjoyed during the marriage without the need for capital provision. The husband's unsuccessful claim had focused on two trust funds of which the wife was a beneficiary. Holman J in declining to make any award said at [67]:

> "67. I conclude that the husband simply does not have any objective, reasonable or justifiable need for £2.5 million, £1 million or any other lump sum from the wife. His only pressing need is to clear his debts, but they are entirely referable to the costs which he has incurred in these proceedings. If I were to order her to pay to him a lump sum with which to pay off those debts, that would be tantamount to making an order for costs in his favour, which could not be justifiable."

59. Significantly, in none of these cases would the recipients' security of accommodation have been jeopardised as a result of the order made by the court. *Daga* was a very unusual case on its facts. In my judgment, of more assistance in considering the approach taken to this issue in the few reported cases is the fact that in *WG v HG* and *MB v EB*, notwithstanding the fact that the recipient had acted unreasonably and run up wholly unjustified costs, the court nevertheless awarded an additional sum in order to ameliorate the impact of costs on their needs award and in neither case were the housing needs of the receiving party put at risk.

Discussion

60. At the heart of the submissions made on behalf of the wife is that HHJ Robinson had been wrong to make an order which effectively left the wife in a worse position than

she would have been in had an order for costs been made against her. Whilst she accepted that the exercise was a discretionary one, the exercise of that discretion must, Ms Phipps submitted unexceptionably, be fair and reasons given for the decision.

61. Ms Phipps submits that neither party proposed a charge and neither party made submissions on a charge until after Judd J's judgment was handed down. Neither party she reminded the court considered a charge to be an appropriate outcome and both parties agree it to be antithetical to a clean break. The wife submitted that the court should allow the appeal and cross appeal but in the exercise of its discretion reduce the lump sum payable to the husband to £425,000 leaving him responsible for the payment of his costs in their entirety.

62. Ms Owens submits that the fact that the husband's debts were referable in the main to costs, does not provide an established or justified restriction on the judge's discretion. There is she says, no rule requiring the first instance judge to carry out an analysis by reference to the principles applicable to costs orders when deciding whether or not to make a needs award for payments of debts referable wholly or in part to costs. Ms Owens goes further and submits that it is 'entirely conventional' for judges to award payments for debts referrable to costs in needs cases under both the MCA and in Schedule I cases.

63. It is undoubtedly the case that there is no specific rule requiring the first instance judge to carry out an analysis by reference to the principles applicable to costs orders and in my judgment to do so would not be compatible with the wide discretion of the judge to determine the extent of a party's needs and the extent to which they should be met. Having said that, in my judgment in cases where it is argued that an order substantially in excess of the sum required to meet a party's assessed needs is sought in order to settle the outstanding costs (or debts referrable to costs) of that party, the judge should:

    i) Consider whether in any event the case is one in which consideration should be given as to the making of an order for costs under FPR 28(6) and (7) in particular by reference to FPR PD 28 para 4.4;

    ii) Whilst not carrying out a full costs analysis, the judge should have firmly in mind what the order which they propose to make by way of additional lump sum to meet a party's costs would represent if expressed in terms of an order for costs. To do this would act as a cross check of the fairness of the proposed order.

64. In the present case Ms Phipps argues that the order made by the judge at first instance approached that which would have been made had an order for costs been made on an indemnity basis. This she submits is manifestly unfair even if contrary to her submission, some lesser amount should have been awarded partially to cover the husband's debts. In my judgment the fact that the proposed award might on the facts of a case amount to the equivalent of an indemnity costs award may be a powerful argument and is undoubtedly a matter which the judge should take into consideration, but it is not a cap on the judge's discretionary power to make such award as he or she determines will meet the needs of one of the parties. Similarly, the fact that one or other party has run up unreasonable costs will be taken into account, but does not act as an absolute prohibition on the making of an enhanced lump sum as demonstrated in the cases analysed below.

65. In my judgment none of the three cases referred to by Ms Phipps in support of her primary submission that no award should have been made towards the costs of the husband are of assistance to her case. In *WG v HG* and in *MB v EB* notwithstanding that in both cases the recipient of the award had taken wholly unreasonable stances in the litigation and run up excessive costs, the judge gave them each a substantial additional lump sum towards the settlement of their debts which were referable to costs. In each case the recipient had mortgage free, secure accommodation.

66. In *Daga* the decision not to award the husband a lump sum of £72,000 to clear his net debts did not undermine his housing needs as Holman J found that he did not need owner occupied accommodation and he had in any event a net annual income of £130,000.

67. I accept the submission of Ms Owens that the position of the husband in *Daga* was in stark contrast to the position of this husband as the decision whether or not to award the husband a sum which would substantially pay his debts and certainly all his 'hard' debts was made precisely so that his housing need for owned accommodation could be met at or close to, the level at which Judge Robinson had assessed them. Further unlike the husband in *Daga* whose need was only for rented accommodation and whose net annual income was approaching double his outstanding debt, the husband in the present case has no income and no provision was made for maintenance in the order. He therefore has no other possible means of servicing or repaying his debt other than from his housing fund.

68. Ms Owens crisply summarised her case saying that the judge was entitled to award the husband a sum towards his debts particularly in circumstances where, unlike *WG v HG* and *Daga* the husband's litigation conduct was not criticised, the level of his costs was not criticised and he needed substantially to clear his debts in order to meet his basic housing needs.

Conduct

69. I accept the submission of Ms Owens that Judd J was in error when she referred to and seemed to take into account in support of her setting aside the judge's order, that there had been a finding made against the husband that he had been violent to the wife on two occasions. It goes without saying that I am in no way minimising the seriousness of any domestic abuse let alone the violence perpetrated by the husband upon his wife.

70. It is however the case that in respect of costs, the judge in the Children Act proceedings could have made an order for costs against the husband if she felt the case fell within the principles of *re T* and she did not do so. Further in relation to the financial remedy proceedings, the fact of the violence would only be taken into account if the nature of it amounted to conduct for the purposes of MCA s25(2)(g). It is accepted by both sides the MCA s25(2)(g) bar is set very high and conduct is only rarely relevant to the discretionary exercise if it is so obvious and gross that it would be 'inequitable to disregard it': see *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618, [2006] 1 FLR 1186 HL.

71. The wife had every opportunity to run conduct, directions were made to permit her to do so following a failed financial dispute resolution ('FDR') hearing. An order was made that should the wife continue to seek to run a conduct case, she was to file a

statement by 7 May 2019 addressing her allegations of conduct. No such statement was filed and conduct was not pursued on her behalf at trial and was not therefore considered by the judge.

72. As Ms Owens pointed out Judd J made reference to the finding in the context of her allowing the appeal, not once but twice. In those circumstances I cannot do other than conclude that Judd J impermissibly allowed the fact of that finding to influence her decision notwithstanding that there had been no finding of 'conduct' for the purposes of the financial remedy proceedings.

Conclusion

73. Whilst understanding entirely the desire of Judd J to achieve a result which she believed to represent a fairer outcome than that reached by Judge Robinson, in my view the order made by Judge Robinson which allows the parties to achieve a clean break, cannot be regarded as being outside his wide discretion such that it was appropriate for his order to be altered on appeal.

74. Further, Judd J was in error in making an order placing a charge on the husband's property without having heard submissions on the point and in circumstances where neither party sought such an outcome. I note that Judd J said that it was likely that she would make an order not wanted by either party, but that does not mean that such an order (particularly one as here which is regarded by many as outdated and by all to be one that is only rarely used) can be made without the parties having the opportunity to make submissions in respect of the same. For the reasons set out in this judgment, the findings of domestic abuse made against the husband do not justify making what would otherwise be an inappropriate order.

75. It follows that in my judgment the appeal against the judge's order imposing a charge on the property the husband hopes to buy will, if my Lords agree be allowed.

Lord Justice Moylan:

76. I agree.

Lord Justice Newey:

77. I also agree.