APPROVED JUDGMENT

Neutral citation: [2023] EWFC 284 (B)

IN THE FINANCIAL REMEDIES COURT SITTING IN LEEDS **LS23D00001**

BETWEEN

A S

APPLICANT

AND

R S

RESPONDENT

(Costs: Clean Sheet/General Rule)

Introduction

1. This is my judgment in respect of the discrete point on costs which arose at the end of the formal handing down of my judgment on the leave application made by the Applicant to bring proceedings in this court following earlier proceeding in Malaysia. It is concerned, inter alia, with the interplay between Family Procedure Rule (FPR) 2.3 and FPR 28.3 (4) (b) (ii) and which should take precedence. I should make it clear that this judgment does not go beyond that preliminary issue and should not be taken as indicative or binding in any way as to my eventual decision as to where the costs should lie or if an order is to made at all (as to which I am satisfied I retain an unfettered discretion see paragraphs 13 and 29 below).

2. I have referred to several sources which were not cited during the hearing including, not least, Bennion, Bailey and Norbury on Statutory Interpretation and this judgment is therefore subject to further representations as to my use and inclusion of other texts should this be necessary.

3. The Applicant's interests were again represented by Mr Bickerdike. On this occasion Miss Barrons appeared for the Respondent.

4. Helpfully both counsel have filed skeleton arguments. Unhelpfully, I had not seen Mr Bickerdike's skeleton until this was drawn to my attention during the hearing. This does not reflect on him at all - it had clearly been provided in time but it meant that I was presented with what both counsel agreed was a novel point of law at short notice. I needed further time to reflect hence this written judgment.

5. Such circumstances are typical of the day-to-day pressures faced by the judiciary when documents have neither found their way into the portal nor have been forwarded independently by the court office in advance of the hearing (no doubt as a result of the desperate staff shortages with which the administration is now faced).

6. The question I need to decide is which costs regime should apply in respect of the hearing of an application for leave under the Matrimonial and Family Proceedings Act 1984 ("the 1984 Act").

7. Ms Barrons argues that such applications are not subject to the "no order" rules of FPR 28.3. Instead, she contends they are specifically excluded from the definition of a "financial remedy" contained in FPR r.2.3 (c).

8. Her skeleton submissions then develop the consequences of that in terms of the "clean sheet" approach and the considerations of the Civil Procedure Rules on costs. Such considerations will be the subject of the next hearing.

9. When preparing the case before the hearing and without the benefit of Mr Bickerdike's skeleton this seemed uncontentious. However, Mr Bickerdike has properly drawn my attention to the provisions of FPR rule 28.3 (4) (b) (ii). He prays this in aid to resist the clean sheet approach and the admission of without prejudice or open correspondence. There is, of course the more fundamental issue which he then identifies at paragraphs 6 (iii) of the submissions as to the application of the 28.3 regime such that my starting point should be covered by the "general rule in financial remedy proceedings" that the court will not make an order requiring one party to pay the costs of another.

10. Both counsel accept that there is no decided case on the point, or at least they have not been able to find one. Instead, Miss Barrons, in particular, has referred to various academic texts which, she says, support her position. Otherwise, it appears, I am in uncharted territory. My own research has not thrown up a case on the point.

11. Ms Barrons specifically invited me to consider the commentary in Rayden and Jackson and At a Glance. I referred Counsel to what may be regarded as a contrary position in Financial Remedies Practice. I also referred to the commentary in Jackson's Matrimonial Finance (such as it is) and subsequently I have also reviewed the commentary in the Dictionary of Financial Remedies and Bennion, Bailey and Norbury on Statutory Interpretation . If Counsel feel the need to address me on any authority, not mentioned during the hearing, then they may do so at the handing down of this judgment and I will be open to the reconsideration of the same.

12. Mr Bickerdike commented that applications for leave under Part III are "conspicuously absent" from the fairly lengthy list of proceedings set out in the guidance in the Red Book as not being subject to r28.3.

Rules, Definitions and the Dichotomy.

13. Although FPR rule 28 includes as a separate category the consideration of "costs in financial remedy proceedings" I note the fundamental starting point under FPR 28.1 that…

    "The court may at any time make such order as to costs as it thinks just"

14. In my judgment this basic starting point is not restricted or qualified by the more detailed provisions of FPR r.28.3 and it creates an unfettered discretion informed only by the application of the overriding objective.

15. Turning then to the interplay of the other provisions informed by the academic authorities in the absence of a clear decision.

FPR 2.3(c)

16. This is the "well thumbed" interpretation section which includes within the definition of "financial remedy"

    *"*an order under Part 3 of the 1984 Act *except an application under section 13 of the 1984 Acts for permission to apply for a financial remedy"* (my italics).

    Consequently, Miss Barrons argues, not unreasonably, that applications for leave fall outside the definition of "financial remedy".

FPR 28.3 (4) (b) ii

17. This provision defines *"financial remedy proceedings"* as meaning, inter alia:

    28.3 (4) (b) ii - an order under Part 3 of the 1984 Act

    There is no doubt that applications for leave under section 13 of the 1984 Act are included in Part 3. Consequently, there is an unhappy tension between FPR 2.3 (c) and FPR 28.3 (4) (b) ii. The fact that FPR 2.3 (c) refers only to "financial remedy" as opposed to "financial remedy proceedings" is of little help. On the face of it the two rules are mutually incompatible.

FPR PD28A 4.1

18. Neither skeleton argument referred to this provision which may perhaps provide some guidance?

    *4.1 Rule 28.3 relates to the court's power to make cost orders in financial remedy proceedings. For the purposes of rule 28.3, "financial remedy proceedings" are defined in accordance with rule 28.3(4) (b**). That definition which is more limited than the principal definition in rule 2.3 (1)**, includes*

    (a)…..

    (b) an application for an order under Part 3 of the Matrimonial and Family Proceedings Act 1984 or Schedule 7 to the Civil Partnership Act 2004, and

    (c)…..

I have emphasised in bold part of rule 4.1 which could be said to support of the proposition that the definition under 28.3(4)(b) is to be preferred to the definition in rule 2.3 when specifically considering rule 28.3 but that the definition in rule 2.3 will be used for other parts of the rules?

The Academic Authorities.

Rayden and Jackson:

19. Although Miss Barrons cites this in support, in fact the extract which she has provided does not give any assistance as it simply recites the rules without any analysis. Under the heading "Costs Regarding Applications for Financial Relief After an Overseas Divorce" it is said

…however, the following applications are excluded from the general "no order" rule and FPR 2010, 28.3 as follows:…

(iii) an application for leave under MFP a 1984 section 13….

20. The editors do not go on to consider 28.3(4) or PD28A 4.1 at all. To that extent it provides little guidance on the issue other than the board statement of the position under FPR2.3.

At a Glance

21. Again, the commentary is unhelpful insofar as it does little more than recite the rule with no analysis. It does at least highlight the problem. Under the heading "The General Rule of Order for Costs for Some Financial Remedy Applications" it is said…

This application of the CPR regime is subject to FPR 28.3, which applies a "general rule" of no order for costs for a limited class of financial remedy proceedings. The financial remedies subject to rule 28.3 are limited to the following….

- *A financial order, except an order for maintenance pending suit, an interim periodical payments order, a legal services payment order or any other interim order made within financial order proceedings (apart from an interim variation order)*
- *An order under Part III MFPA 1984*
- *an order under section 10 (two) MCA 1973*
- *the civil partnership equivalents of the above*

And later in that commentary

the financial applications not covered by rule 28.3, and which are therefore subject to the modified CPR regime are:…

An order under section 13 MFPA 1984 (permission to apply for a financial remedy after overseas proceedings).

Dictionary of Financial Remedies

22. Of all the guidance this may be considered the most helpful while still not providing a definitive answer. There is no reference to costs under the specific section dealing with "Overseas Divorce and the 1984 Act" but there is some reference to the position under this section on "Costs". Under the heading "Costs in Financial Remedy Proceedings" it is said:

Costs in proceedings for a financial order (with some exceptions for which see below) and costs in proceedings for a financial order under Part III Matrimonial and Family Proceedings Act 1984 are subject to the general rule…. that the court will not make an order requiring one party to pay the costs of another party"

a footnote then refers to FPR 28.3 (5).

23. However, it goes on to say under the heading "Costs in other family proceedings"….

The above rules do not apply in certain types of applications, including the following

h) applications for permission under MFP a 1984, Part III….

A distinction is drawn between proceedings "for" a financial order "in connection with" a financial order (to which this rule applies).

24. The narrative then goes on to specify applications which have been treated as proceedings either "about" or "in connection with" (rather than "for") a financial order. Amongst this category and closest to a leave application are "preliminary issue applications" and "notice to show cause"

Such cases are known, in cost terms" as "clean sheet cases" because neither the general rule in financial remedy proceedings nor the general rule in civil proceedings that the "unsuccessful party will be ordered to pay the costs of the successful party" applies.

The difficulty with this analysis is the bold statement that "applications for permission under MFPA 1984 Part III are not subject to the general rule".

This is in direct conflict with FPR 28.3 (4) (b) ii which rule could be said to be equally clear insofar as applications under section 13 clearly fall within Part III of the 1984 Act and so arguably should be treated in accordance with the usual regime.

25. There is no difficulty in excluding the other types of application specified because they are not included in the definition of "financial Remedy proceedings". The problem with section 13 leave applications is that it could be said there is a foot in both camps.

26. Although Mr Bickerdike did not himself refer to any other academic authorities during the hearing, I drew counsel's attention to the commentary in the **Financial Remedies Practice 2023/24** at paragraph 28.12 onwards.

Paragraph 28.13 reads…

It will be seen below that this principle of costs following the event remains alive and well for a swathe of financial remedy applications, but not perhaps the most common of all, namely a substantive application for a financial order (including an application for a financial order following an overseas divorce and the variation order). For such an application FPR 28.3 (5) provides that the general rule is that the court will not make an order requiring one party to pay the costs of another party.

27. The text then goes on to describe these as being "mainstream proceedings". As such they are distinguished from what are described as the "excepted proceedings" which are considered at paragraph 28.20 which analysis includes applications under section 13 of the 1984 Act so that again this distinction is highlighted.

28. I did note the reference to the decision of Mr Recorder Allen KC in CW and CH 2022 EWFC B1. Since this refers to MFPA 1984 Part III, I hoped it may provide a steer. Unfortunately it became clear that Recorder Alan KC was only required to consider *interim applications* under the Matrimonial and Family Proceedings Act 1984 and not the question of leave. However, on a wider issue I respectfully disagree with Mr Recorder Allen KC as to his analysis of the exercise of the general discretion. At paragraph 140 he states:

> *140 The starting point is set out in FPR r.28.1 namely that the court may make any order as to costs "as it thinks just". Although neither counsel addressed me on the applicable rules in my view this application is thereafter governed by the costs rules set out in r.28.2. As a consequence:*
>
> *a) the costs are not governed by the 'general rule' set out in r.28.3(5) that the court will not make an order requiring one party to pay the costs of another party;*
>
> *b) the CPR costs rules set out in Part 44 apply but r.44.2(2)(a), which provides a 'general rule' that the unsuccessful party will be ordered to pay the costs of the successful party, does not apply; and*
>
> *c) the position is therefore a 'clean sheet' - as so described by Wilson LJ (as he then was) in Judge v Judge [2009] 1 FLR 1287 and Baker v Rowe [2010] 1 FLR 761 - as neither the 'no order for costs' presumption nor the 'costs prima facie follow the event' presumption apply.*
>
> *141 I am therefore to have regard to all the circumstances and the matters set out in r.44.2(4) and r.44.2(5). There have, however, been a number of cases as to the relevance in the exercise of the judge's discretion that one party has been successful and the other unsuccessful in a 'clean sheet' case. These include Baker v Rowe, KS v ND (Schedule 1: Appeal: Costs) [2013] 2 FLR 698, Solomon v Solomon [2013] EWCA Civ 1095, and H v W (No. 2) [2015] 2 FLR 161. In essence they conclude that, as in Gojkovic v Gojkovic (No. 2) [1991] 2 FLR 232 per Butler-Sloss LJ,[26] there remains a starting point that costs 'follow the event' even in a 'clean sheet' case albeit the presumption may be somewhat 'softer' and therefore more easily displaced.*

29. My concern is the use of the word "governed". If the basic starting point under FPR rule 28.1 is to be displaced and "governed" by the other rules then this would have been made clear. In my judgment the other provisions of FPR 28 will *inform* the approach to the exercise or discretion but will not "govern it". The discretion is unfettered.

Jackson's Matrimonial Finance (10th edition)

30. With no disrespect to the authors and editors the least helpful was Jackson's Matrimonial Finance (10th edition) which on this topic states

> *19.27 Prior to the FPR 2010 coming into force, the general rule of "no order as to costs" did not apply to Part III applications this has now changed. Costs are now governed by FPR 2010, part 28 and PD 28A.*
>
> This perhaps does at least acknowledge that a conscious decision was made by the rules commission to bring such applications within the new regime (as to which see later).

31. The analysis in the **Financial Remedies Handbook** (Roger Bird and Sophie Harrison) is silent on the point as is **Matrimonial Property and Finance** (Peter Duckworth) which, despite providing a helpful narrative as to the practicalities and principles to be applied, with a long list of supporting decisions, does not mention costs.

Bennion, Bailey and Norbury on Statutory Interpretation.

32. Chapter 15 deals with mistakes in legislation and the presumption that the court is to apply a "rectifying" construction. The analysis is clear and concise and is set out below.

Section 15.1: Presumption that court to apply a rectifying construction

It is presumed that the legislature intends the court to apply a construction which rectifies any error in the drafting of the enactment, where required in order to give effect to the legislative intention.1

Comment

There are occasions when, as Parke B said, the language of the legislature must be modified, in order to avoid inconsistency with its manifest intentions.2
Drafting errors occur, and often escape everyone's eyes until spotted by some alert observer. This has always been so – Blackstone remarked that 'in one statute only, 5 Anne, c 14, there is false grammar in no fewer than six places, besides other mistakes'.3
The basic test

In order to construe an Act in such a way as to correct a drafting error, the court must be abundantly sure of the following matters:

- *(1) the intended purpose of the provision in question;*
- *(2) that the drafter and the legislature inadvertently failed to give effect to that purpose in that provision;*
- *(3) the substance of the provision the legislature would have made (though not necessarily the precise words it would have used) had the error in the Bill been noticed.*

This test was set out in the leading case of Inco Europe Ltd v First Choice Distribution4 where Lord Nicholls said:5

''I am left in no doubt that, for once, the draftsman slipped up. The sole object of paragraph 37(2) in Schedule 3 was to amend section 18(1)(g) by substituting a new paragraph (g) that would serve the same purpose regarding the Act of 1996 as the original paragraph (g) had served regarding the Act of 1979. The language used was not apt to achieve this result. Given that the intended object of paragraph 37(2) is so plain, the paragraph should be read in a manner which gives effect to the parliamentary intention ...

I freely acknowledge that this interpretation of section 18(1)(g) involves reading words into the paragraph. It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, Statutory Interpretation, 3rd ed. (1995), pp. 93–105. He comments, at p. 103:

""In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as

much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.""

This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation…

Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In Western Bank Ltd. v. Schindler[1977] Ch. 1, 18, Scarman L.J. observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation. None of these considerations apply in the present case. Here, the court is able to give effect to a construction of the statute which accords with the intention of the legislature."

The test set out in this case has been widely applied in the common law world.

Delegated legislation

The principles set out above apply also to drafting errors in delegated legislation.

The text then goes on goes on to give example of cases as to the application of the test. There is a footnote to the reference to "delegated legislation" which reads as follows.

R (Confederation of Passenger Transport UK) v Humber Bridge Board [2003] EWCA Civ 842, [2004] QB 310, [2004] 4 All ER 533 at [36]; R (on the application of Kelly) v Secretary of State for Justice [2008] EWCA Civ 177. In R (Noone) v Governor of Drake Hall Prison [2010] UKSC 30 Lord Mance suggested (at [75]) that the Inco approach was 'more readily applicable' to delegated legislation.

It is trite for me to observe that the Family Procedure Rules 2010 are delegated legislation - Statutory Instrument 2010/15.

My Decision

33. I come back then to my basic starting point which I take to be is the wide discretion granted by FPR 28.1. The other rules are then intended to provide clarity as to how that discretion should be applied.

34. As I have already observed such discretion must be applied in accordance with the overriding objective which, pursuant to FPR r 1.2 is engaged whenever the court

a) exercises any power given to it by these rules; or,
b) interprets any rule.

35. The various subcategories under 1.1 (2) do not help. In particular the requirement to ensure that parties are on an equal footing cannot, of course, impute any suggestion that this would be achieved by making no order for costs and hence relying on the general rule.

36. I am required to deal with the case "justly", having regard to any welfare issues involved. I interpret this so as to reinforce the way in which the court should exercise its discretion when such discretion is given by the rules, as in this case by FPR 28.1. It does not entitle me to re-write the rules to say something they do not *(cf Vinos v Marks and Spencer PLC [2001] 3 All ER 784)*.

37. I have reflected on the possible "pros and cons" which could be advanced to support one regime or the other (although such submissions were not made by counsel).

38. Supporting the proposition that such leave applications are not covered by 28.3 are the following:

- FPR 2.3 says so by excluding such applications from the general definition of "financial remedy"
- that they are discreet and freestanding applications to be dealt with proportionately and usually on paper (although this may lead to a set aside application which would be treated in the same way).
- Similarly, to preliminary issue applications they may be considered as being applications "about" or "in connection with" a financial order.
- That the risk of costs orders been made may discourage unmeritorious applications.
- That the applicant should be encouraged in the "normal" case (i.e. when the case is dealt with on paper only) to be open with the court as to the full circumstances and to otherwise avoid adverse cost inferences on a successful set aside application.

39. In support of the proposition that leave applications are covered by 28.3 are the following;

- FPR 28.3 (4) (b) (ii) says so insofar as it refers to an order under Part 3 of the 1984 act and Section 13 most definitely falls within Part 3.
- The reference in FPR 28.3 (4) (b) (ii) to "an order under Part 3 of the 1984 act" is not qualified in any way (as it could have been) so as to mean a substantive order once leave has been granted.
- The more restrictive analysis in PD28A4.1
- It may be said that it is undesirable and illogical to provide a different regime? Consider the case of an applicant who succeeds at the leave stage but ultimately fails at the substantive stage. It sits uncomfortably that such an applicant could make out a case for their costs at leave stage but that the successful respondent may be refused their costs at the second because of the presumption under FPR 28.3(5).
- That the only loosely analogous scenario relating to financial remedy proceedings and leave, at least that I can think of, would be in connection with an appeal in which case the costs are at large not only at the permission stage but also at the substantive hearing therefore providing consistency of approach to both limbs of the application.

40. It may be thought that the competing "pros and cons" are balanced. However, it remains that there has been a mistake in the rules as they in conflict with each other, and this uncertainty

could never have been intended. I therefore turn to the analysis in Bennion. The starting point is a presumption that the legislature intends the court to apply a construction which rectifies any error in the drafting of the enactment, where required in order to give effect to the legislative intention.

41. This is an informed by the test in *Inco Europe Ltd v First Choice Distribution*. If I am to substitute my own analysis that I must be "abundantly sure" of the following matters:

    a) the intended purpose of the provision in question;
    b) that the drafter and the legislature inadvertently failed to give effect to that purpose in that provision;
    c) the substance of the provision the legislature would have made (though not necessarily the precise words it would have used) had the error in the Bill been noticed.

42. Taking as my starting point the definition of "financial remedy" under FPR 2.3 the drafter considered the orders which were available under Part III of the 1984 Act and went on to specifically exclude leave applications under section 13. It seems to me that this was an informed decision and was the underlying intended purpose of that provision.

43. Turning then to FPR28.3 (4) (ii): this appears to have been drafted with less thought simply encompassing, as it does, the whole of Part III of the 1984 Act. I am satisfied that the intended purpose of the legislation is that Section 13 was to be excluded because this required a conscious decision to draft the exception in that way. Clearly this was not considered when drafting FPR28.3 (4) (ii) as otherwise the exception would have been repeated. In my judgment it could not have been the intention of the rules committee having created a specific exception that this could then be thrown into doubt by another and incompatible "all-encompassing" definition. In my judgement FPR28.3 (4) (ii) is the provision in error and, applying the threefold test in *Inco Europe Ltd v First Choice Distribution:*

a) the intended purpose of the provision in question was to exclude leave applications

b) the drafter inadvertently failed to give effect that purpose (or at least caused the ambiguity) when drafting FPR28.3 (4) (ii)

c) that the substance of the provision the legislature would have made is simply to have repeated the exception made for applications under Section 13 when drafting FPR28.3 (4) (ii).

44. Having decided this preliminary point I will deal with further submissions as to costs at the handing down of this judgment which will be fixed in accordance with the order made on subject to the availability of Counsel and by way of a remote hearing.

District Judge Troy

6th November 2023