Neutral Citation Number: [2024] EWFC 342 (B)

IN THE FAMILY COURT
SITTING AT THE CENTRAL FAMILY COURT

Date: 19 July 2024

Before:

DEPUTY DISTRICT JUDGE MARK HARROP

LI v FT (Maintenance Pending Suit: Costs)

- -
Between :

LI — Applicant

- and -

FT — Respondent

- -
- -

Richard Tambling (instructed by **Streathers Solicitors LLP**) for the **Applicant Wife**
Charlotte Jewell (instructed by **Josiah-Lake Gardiner**) for the **Respondent Husband**

Hearing date: 25 June 2024
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JUDGMENT

- -

This judgment was given in private. The judge gives permission 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 this judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Deputy District Judge Mark Harrop:

Introduction

1. On 25 June 2024 I heard an application for interim maintenance (officially known as "maintenance pending suit"). At the end of that hearing I gave an oral judgment, after which both parties invited me to make a costs order against the other. Since the hearing had already run over its two-hour slot, I asked the two barristers to email me short written reasons in support of their position. I now set out my decision and the reasons for it.

2. Following the President's *Transparency in the Family Courts: Publication of Judgments Practice Guidance* of 19 June 2024, I anticipate that this judgment will in due course be published to the National Archives. Given that, I have followed the suggestion at Section 7 that I prepare the judgment anonymously from the outset.

3. This means that, rather than adopting my preferred practice of referring to the parties by their names, I have had to adopt the judicial shorthand of referring to them as "the wife" and "the husband" throughout, as well as allocating them the randomly generated initials LI and FT. I mean them no discourtesy by doing so.

Background

4. The husband works in finance. He earns a gross salary of £350,000 pa (around £18,000 per month net). He also receives bonuses by way of cash and shares. Not all the shares are immediately accessible to him, but when they become so they vest at the same time of year as his bonus is paid, which is February. Last year his cash bonus and vesting shares together added a further £175,000 net to his income.

5. The parties also receive £2,500 per month in rent from various properties they own abroad, although the income from these properties is vastly exceeded by the outgoings on those properties.

6. Until recently, all the family finances had been operated through a number of joint bank accounts, to which both parties had access. The husband also has a number of credit cards for which the wife held second cards.

7. The parties separated during the second half of 2023 and the wife filed for divorce in January 2024. Financial proceedings commenced in February 2024. The First Appointment took place on 10 May 2024, where the husband expressed concern that the wife had already incurred £65,000 in legal fees in respect of the financial proceedings, and over £100,000 in total. By way of comparison, the husband spent £26,000 on legal fees up to the First Appointment.

8. Ahead of the First Appointment, the wife applied for a legal services payment order requiring the husband to provide further sums to fund her legal fees through to the Financial Dispute Resolution appointment. That application was resolved by agreement, with the husband agreeing to provide £42,000 to the wife to meet the cost of the next stage of proceedings.

9. A week after the First Appointment, the husband emptied the joint bank accounts, transferring around £140,000 into accounts in his sole name, and sent the wife an email in the following terms:

> *"As I explain below, I have decided to change the way it works, it is time for us to have separate accounts. Joint accounts … will be out of balance from now on, so I ask that you stop using them with immediate effect to avoid any overdrafts. If you don't I will have to cancel your debit cards too."*

10. He then set out how he had decided the finances would be managed going forward. Henceforth, he would receive his income into an account in his sole name, from which he would continue to pay direct to the landlord the £7,700 rent and utility contributions on the house occupied by the wife and the children, and pay a further £1,000 per month to the wife as maintenance payments. In addition, she would continue to receive the £2,500 per month rent from the overseas properties.

11. The wife did not take kindly to this development, and her solicitors wrote to his demanding that the previous arrangement be reinstated. His refusal ultimately led to her application on 28 May 2024 for:

    i) interim maintenance for herself and the children at £3,587.50 per month;

    ii) the cost of a summer holiday in the sum of £22,150; and

    iii) additionally, maintenance of £7,700 per month – i.e. the cost of her rent and utilities – which she accepted was currently being paid direct by the husband but which she wanted the security of paying herself so that he could not cancel it, or threaten to cancel it, in future.

12. The parties went on to exchange a number of open proposals to attempt to settle the application:

    i) On 29 May 2024 the husband offered the sum of £6,000 for a summer holiday, noted that the wife was already receiving £3,500 from the rent and maintenance combined, and confirmed he would continue to meet the rent and utilities until after the FDR. He repeated this proposal on 4 June 2024;

    ii) On 17 June 2024 the husband increased his proposed holiday sum to £10,000;

iii) On 19 June 2024 the wife rejected the £10,000 and asked for £16,000;

iv) On 20 June 2024 the husband dropped his proposal back to £6,000 to account for his growing legal fees. He confirmed that he would increase maintenance by £87.50 to match the wife's request for £3,587.50. There was no shift regarding the rent and utilities.

The Maintenance Hearing

13. The application came before me on 25 June 2024. I gave full reasons for my decisions in an oral judgment that I will not repeat here, but the thrust of my decision was as follows:

(1) Interim maintenance

14. The total amount of £3,587.50 was barely more than the £3,500 the wife was already receiving from the combination of rent and £1,000 per month from the husband. The husband had already agreed to pay the additional £87.50. Given the rent was not necessarily reliable, however, it was preferable that the husband receive the rent and pay a fixed amount of £3,587.50 to the wife each month as global maintenance for herself and the children.

(2) Holiday fund

15. I refused this on two grounds. First, I found that the sum sought was in the nature of an interim lump sum, which the court does not have jurisdiction to order.

16. Even if it could have been classed as maintenance, however, it was unaffordable. That is superficially surprising in the context of a £400,000 pa net income, and so I repeat my reasoning below.

17. In my experience of applications like this one, where a large part of the payer's income is received annually as a bonus, applicants often seek well over half the respondent's monthly salary. When they do, they invariably point to the respondent's annual earnings and to the lifestyle they perceive the respondent to be living. In doing so, what often gets overlooked is the cash flow deficit that their proposal creates in the family finances. Too often, applicants fail to recognise that if they get what they ask for the family will run out of money long before the next bonus is paid.

18. After going through the remaining savings, accounting for the school fees, the mortgages and outgoings on the rental properties, and the husband's own housing costs, it was quite apparent that these parties are at real risk of running out of money before February's bonuses arrive, even without having to find an extra £22,150 (or even £16,000) for a holiday.

19. Indeed, at current levels they are likely to find themselves reliant on the sale proceeds of one of the rental properties to get them through to the end of the year in the black. It is hoped that this can be concluded over the summer and will release £70-80,000 before tax. The sale is not guaranteed, however, and I did not consider it appropriate for the court to gamble this family's financial security on it completing as anticipated.

(3) Maintenance for Rent and Utilities

20. Although the husband had not suggested that he would stop meeting these costs, I considered that his actions in emptying the joint accounts without warning and unilaterally imposing a new regime under which he held the purse strings was controlling. As such, the wife's fears that he might in future take further steps, such as withholding or threatening to withhold funds to punish her behaviour, were not without foundation. I ordered that he should pay the £7,700 monthly rent and utilities

payment to the wife as maintenance on the condition that she would then be responsible for paying it on to the landlord.

21. Both parties considered themselves substantially vindicated by my decision and sought an order that their costs of this application be paid by the other.

Costs

22. Rule 28.1 of the Family Procedure Rules 2010 empowers the court to make such order as to costs as it thinks just.

23. The general rule against costs orders being made in financial remedy proceedings is expressly disapplied by rule 28.3(4)(b)(i) in applications for maintenance pending suit. Instead, Part 44 of the Civil Procedure Rules 1998 applies but with some rules, including rule 44.2(2), explicitly excluded.

24. Since the general rule in civil proceedings – that the unsuccessful party will be ordered to pay the costs of the successful party – appears at CPR 44.2(2), this means that neither general rule applies in applications for interim maintenance and the court starts with a "clean sheet".

25. The surviving parts of CPR 44.2 say:

> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
>
> (5) The conduct of the parties includes –

> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

26. The clean sheet approach has been described as being a *"soft-costs-follow-the-event"* regime, although the authorities vary on whether a parties' success leads to a 'starting point' that they are entitled to their costs (e.g. *Judge v Judge* [2008] EWCA Civ 1458, per Wilson LJ) or whether, as Ward LJ said in *Baker v Rowe* [2009] EWCA Civ 1162 (at [35]), a judge *"could not properly ignore the fact that one side had won and the other had lost but that is not determinative nor even his starting point. It is simply a fact to weigh."*

27. In any event, it is not obvious in this application which party has won and which has lost.

28. The husband argues that this was fundamentally an application for the cost of a holiday, an application which has wholly failed. More than that, he made an open offer of £6,000 the day after the application was filed which, in hindsight, the wife clearly should have accepted (he even later increased that offer in the hope of avoiding a hearing). In respect of the other limbs of the application, he says that the total amount to be paid was entirely agreed ahead of the hearing, and that the requests to change the structure of how that was to be paid were a late addition introduced by Mr Tambling to give a veneer of legitimacy to an otherwise doomed application.

29. The wife, on the other hand, argues that this application was principally concerned with reclaiming her financial security in circumstances where the husband had unilaterally withdrawn her access to the family money, and that the holiday fund was the ancillary application.

30. Having reviewed the correspondence that passed between the parties since mid-May 2024 I accept the wife's account that this application came about as a result of her understandable indignation at the husband's actions. While he did make various offers regarding funds for a holiday, there was no suggestion at any stage that he would countenance any change to the new separate accounts regime that he had imposed.

31. Instead, the letters set out to justify why the husband decided to separate out the finances in the way that he did. I accept that the reasons given are not without merit. What is objectionable, however, is the way that he imposed those changes, without warning and without agreement. This is a case where both parties have lawyers who have been in almost continuous communication for many months. The parties had even been at court a week previously for the First Appointment and the issue was not raised. It was a controlling action undertaken because, it appears to me, the husband had concluded that only he could be trusted to manage the family finances responsibly. He must have anticipated it would outrage the wife, and to some extent he has brought upon himself what has followed.

32. The wife, however, did herself no favours. The application for a holiday fund should not have been brought. Its effect was to distract attention from her core complaint and make it harder for the parties to agree a way forward. She was clearly wrong to pursue this point all the way to a hearing, particularly given the offers made by the husband along the way.

33. Above all, however, I am dismayed by what has been incurred in legal fees contesting these points. In little over a month the wife has spent nearly £27,000 in bringing the application and the husband nearly £12,000 in defending it. That could have paid for the disputed holiday nearly twice over or, as the husband points out, met a term's school fees.

34. Furthermore, while I did allow the wife's application to restructure the maintenance once the issue came before me, I am far from convinced that it was a proportionate application to bring when no threat or suggestion had actually been made that the husband would not continue to pay the bills and utilities as he had always done. The wife has paid an awful lot of money for what may amount to no more than a little peace of mind.

35. Looking at the broader context, this couple have now spent between them over £130,000 and are barely past the First Appointment. The wife's legal fees in this application, as in the proceedings as a whole, are more than double those of the husband's. It is not immediately obvious to me why that should be and suggests a difficulty in approaching the case in a pragmatic and proportionate way. The parties should not need reminding that their resources are finite, and that every pound they spend fighting each other is a pound that will no longer be available for them and their children.

36. Looking at the situation in the round, and considering in particular the factors listed at CPR 44.2(4), I consider that both parties bear some responsibility for this application reaching a contested hearing, that both failed to make reasonable concessions that could have avoided (or reduced the scope of) the hearing, and that having come to court for determination both have succeeded in part and lost in part. Overall, I

struggle to find either of them significantly more culpable than the other such that it would be just to impose a costs order one way rather than the other.

37. I therefore conclude that each of the parties should pay their own costs of this application. If that burden falls more heavily on the wife than the husband then that is a consequence of the more expensive way that she has chosen to pursue it, which should not be his responsibility.