Neutral Citation Number: [2020] EWHC 1668 (Fam)

Case No: FA-2020-000002

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2020

Before :

THE HON. MR JUSTICE COHEN

- -

Between :

LP	**Appellant**
- and -	
AE	**Respondent**

Marina Faggionato (instructed by **Withers LLP**) for the **Appellant Mother**
Michael Glaser QC (instructed by **Stewarts Law**) for the **Respondent Father**

Hearing date: 12 June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE COHEN

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

The Honourable Mr Justice Cohen :

Introduction

1. I have been hearing an appeal against the order of His Honour Judge Tolson QC ("the judge"), who on 16 December 2019 refused the application of the mother ("M") for a Legal Services Payment Order (LSPO). She appeals that refusal, complaining both about the way that the case was conducted and its outcome. M was granted permission to appeal the order by Williams J on 3 April 2020. The matter was listed before The President on 5 June 2020 and the hearing started but had to be abandoned when the technology failed. It was accordingly re-listed before me on 12 June 2020.

2. The mother has been represented by Ms Faggionato and the father by Mr Glaser QC. Neither counsel had previously been involved in the case.

Background

3. The parties are unmarried and were in a relationship for some 3½ years between late 2011 - early 2015. They have a child aged 6. Since August 2015 they have been engaged in litigation about her. The litigation has extended also into financial proceedings pursuant to the provisions of schedule 1 Children Act 1989.

4. In October 2018 M claimed that the child had disclosed to her that her father ("F") had been involved in inappropriate sexual behaviour with her. M reported the allegations to Children's Services and the Police. She told F that she would suspend all contact and he applied for a child arrangements order for her either to live with him or in the alternative spend additional time with him. In May 2019 M removed the child to Iran without consent and in breach of her undertaking to the court. An order was made for the child's return.

5. On 5 June 2019 Her Honour Judge Cox, who had largely handled the matter to this stage, ordered F to pay £35,000 inclusive of VAT towards the cost of M's representation, such payment being conditional upon M returning to the jurisdiction with the child. The payment was to cover the pre-hearing review listed for 3 July 2019 and a fact-finding hearing that was listed to take place commencing on 15 July 2019. M and the child did return at the end of June and at the pre-hearing review on 3 July the cheque for £35,000 was duly handed over.

6. The figure of £35,000 was one that was quoted to F by a barristers' chambers for various members of that chambers to act on behalf of M on a direct access basis. M had been instructing both solicitors and counsel and applied for a much larger sum, at its highest £117,000, which would have covered both solicitors and counsel.

7. The sum was intended to carry M through to the end of the fact-finding hearing. It is now accepted that it was never intended to fund proceedings thereafter. The judge in the hearing described it as a war chest, but it is plain and now agreed that this was not an accurate description.

8. In the initial stages of proceedings F had acted using direct access counsel, namely a specialist family QC. His counsel advised that once the allegations of misconduct were raised against him and he was facing a police investigation as well as a fact-

finding hearing in family proceedings, he needed solicitors as well as counsel. He has therefore, from that stage, instructed counsel (the same QC as before) and Stewarts Law, a well-known central London firm with a specialist family department.

9. It is not clear to me why M's funding was limited to the services of counsel only. True it was that she was not facing allegations of sexual misbehaviour, but F had sought a "live with" order, the papers were voluminous, and English is her third language. She had had various solicitors before but for whatever reason had left them.

10. On the first day of what turned out to be a four day trial on 15 July 2019 M parted company with her solicitor and counsel. She says that they applied for an adjournment on her behalf saying that they had not had enough time to prepare and when that adjournment was refused she chose to dispense with their services. It is not necessary to enquire into this any further. It is accepted that her legal fees incurred exceeded the £35,000 allowance, which is not surprising bearing in mind that it was fixed with the instruction of a direct access counsel in mind and instead was used for both solicitors and counsel.

11. At the conclusion of the fact-finding hearing the judge determined that the allegations were false but that he was not able to make a finding as to whether they were maliciously caused by M or were the result of over-anxiety. There has been no appeal against that decision.

Recent history

12. On dismissing the allegations, the judge fixed a further hearing for 16 December 2019 with a one day listing when arrangements for the child and division of her time between her parents were to be further considered.

13. In August 2019 M first consulted Withers LLP who came on the record on 10 September 2019. I have been provided with a schedule of their invoices which are as follows:

August 2019	£5,918
September 2019	£7,764
October 2019	£21, 720
November 2019	£29,689
Dec 2019/Jan 2020	£35,867 (combined fee note)

14. I am told that the relatively low fees for August and September 2019 reflect work that was mainly done in connection with the instruction of an expert ordered by the judge at the July hearing. On 16 September 2019 Withers requested confirmation from Stewarts Law that F would cover M's reasonable fees with Withers. On 20 September 2019 Stewarts replied that they would not pay M's legal fees with Withers.

15. I have to say that faced with the response from Stewarts Law in September it was highly regrettable that M's application for a LSPO was not issued promptly. It was

not until 20 November 2019 that an application was filed. In the meantime, further significant legal costs had been incurred, not least in reading into the very large amount of paperwork that had accumulated over the years of this case. In response to the issue of the application, F offered to pay £12,000 (£10,000 + VAT) for a directly instructed counsel.

16. The sum sought by the solicitors in their application was some £99,000 (inclusive of the £12,000 later promised for counsel) which was intended to get them through to the end of the December hearing.

17. The summons requested a hearing date before 16 December but that request was one that was not met by the CFC. Indeed as far as I can tell no hearing date was fixed at all, so that on 16 December, the judge who was expecting to deal with the issue of the child arrangements, found himself confronted also with a LSPO application.

16 December 2019

18. Family lawyers are brought up from an early age not to mix money and children. Sometimes that advice need not be slavishly followed and combined hearings can take place, particularly if a preliminary hearing, but to combine a hotly contested child arrangements hearing with a LSPO application should be avoided. How, I ask rhetorically, can the parties be expected to negotiate constructively over child arrangements in a high temperature case such as this under the cloud of what was known to be an opposed LSPO application? Which is to be dealt with first? If it is LSPO, then it may be that counsel and solicitors will say that they will not stay for the substantive hearing if their application is refused as to do so would simply be to increase the costs exposure. If dealt with subsequently, then of course they run into the argument that no order need be made so as to provide M with representation at the hearing, as that part of the hearing will have concluded.

19. Counsel for M asked the judge to deal with the legal services issue. F had filed no statement of means, and his counsel asked for the issue to be put over, and played no part in the debate between M's counsel and the judge. The transcript shows clearly that the hearing lurched from one topic (child arrangements) to the other (money) and back.

20. The judge very firmly expressed:

    i) His astonishment that fees of £99,000 were being sought, when, in his view, a children's panel solicitor could have carried out the work for no more than about £3,000;

    ii) That it was quite unnecessary for the level of work done by Withers to have been done. They needed to go no further back than his July judgment;

    iii) That the children's guardian's fees were no more than a few thousand pounds and this was a good indication of what was needed;

iv) That it was quite irrelevant what F's fees might have been, not that F volunteered what he had spent on litigation despite repeated asking from M;

v) That in any event M must have had money left from the £35,000 previously awarded to her which she could use.

21. Belatedly in the hearing the mother's counsel asked the judge to put over the LSPO application to another day. However, by that time the judge had the bit between his teeth. He dealt with the application in his judgment in a matter of no more than a few lines:

"17. Turning to a different topic, almost the most controversial point left in the case is whether I should make a legal services order - a fighting fund - in favour of the mother. I am of the view that I should not. Why not? The father has already given the mother a fighting fund in line with the assessment of a previous judge, HHJ Cox, who thought that the shape of the case at that time required that a fund of £35,000 be given to the mother. That occurred. The mother then, for reasons which entirely escape me, decided to dispense with the services of her legal team on the day of the hearing. I was told, surprisingly, that all the money had been spent by that firm. Consequently, all of the father's money was entirely wasted as the mother represented herself.

18. In those circumstances, it would require compelling reasons, in my judgment, for me to require the father to pay again. This is more especially so as he has voluntarily agreed to pay for mother's representation today in the sum of £12,000, an amount which in ordinary circumstances ought to be more than capable of paying for the entire proceedings to this point and, I sincerely hope, to the end of them all together.

19. In those circumstances, there is no need for me to analyse further the quantum of the claim to a fighting fund. I will for the present trust the father to adopt a reasonable approach in future and I see no reason why I should compel him to pay further sums beyond those he has already paid."

22. I have considerable sympathy with the judge in one sense. He should never have been put in the position that he was in of having to deal with this application. However, having said that I disagree with his reasons:

i) M was confronted not only with leading counsel but also a leading London law firm acting for F.

ii) The scale of the case was such that it could never have been managed by counsel alone.

iii) The judge did not take into account that F had on 29 November 2019 issued and restored his own application for a "live with" order. It could hardly be said that the stakes were not high for M as well as F.

iv) The fact that a children's panel solicitor might do the work more cheaply is neither here nor there; representing a young child in these circumstances is a very different undertaking to representing a parent.

v) The suggestion that the solicitor should not read the file, would be in my view a recipe for a negligence claim. True that they might be able to take the proceedings before 2019 at a gallop, but the files could not be ignored.

vi) The reference by the judge to the sum of £35,000 as being a fighting fund is mistaken. He was correct to say that M had said that it was all used but it never was a fighting fund intended to cover M beyond the July hearing. Whether or not it was "entirely wasted as M represented herself" is immaterial in circumstances where she was again represented.

vii) Whilst the fact that M had dispensed with her previous solicitors might be relevant to the quantum of an order, it was irrelevant to her need for representation.

viii) It was not an answer for the judge to say that he would trust F to adopt a reasonable approach in the future. The issue had to be tackled rather than simply inviting the parties to enter into further litigation if agreement was not reached.

23. I agree with the judge that there does not need to be parity between the legal costs of the two parents. The sums spent by F on his lawyers is not conclusive of what M should spend on her lawyers. But, it is indicative of the complexity of the case. With great difficulty I extracted from Mr Glaser that F's costs were some £560,000, albeit that an element of that was spent in dealing with the criminal investigation. He was not able to say how much was spent on each part of the case, but it is obvious that the substantial bulk must have been spent on the family proceedings. So far as M's costs were concerned, F had paid £35,000 prior to the July hearing. I do not know what she paid prior to that but it must have been far less than F had spent.

24. Mr Glaser sought to argue that the appeal should not be allowed because the judge, if properly applying the law would have reached the same conclusion. I shall deal with what would be a proper award in due course, but it is clear to me that this appeal must be allowed. The judge's approach and reasoning to the issue was one which involved him taking into account matters which he should not have taken into account and ignoring matters that were plainly relevant.

25. This appeal has been fought tooth and nail. It is a sad reflection that these parties have spent £112,000 in arguing over some £87,000 (£99,000 less £12,000). Of the sum spent, £46,700 has been spent by M and £65,700 by F. Self-evidently, this money would have been far better spent on compromising the appeal.

26. Following the aborted hearing in front of The President there was an exchange of emails with counsel in answer to the question raised by him as to whether, if, the appeal was allowed, the matter should be remitted or dealt with by the judge hearing the appeal. The President expressed the preliminary view that to remit the matter would simply create more expense and delay and I respectfully agree. In anticipation of this issue outcome, F filed a statement setting out his financial position in response to that which M had put before the court in December.

Further developments

27. At the hearing on 16 December the judge fixed a further review date for 15 June 2020. It was thus known that these were continuing proceedings.

28. Towards the end of March 2020 M sought to return to Germany but was not allowed to take the child with her. In consequence the child has been living with her father now for some months. The hearing fixed for 15 June has been moved to 31 July 2020. In late May 2020 the judge at a telephone hearing directed that the child should continue to live with F for the time being and in addition to the re-arranged July hearing has fixed a two day hearing for 14/15 September. There are, therefore, two further rounds of proceedings to take place.

29. Mr Glaser sought to dissuade me from venturing any further than the ambit of the appeal, but eventually accepted that this would only create problems. In the current climate there is no prospect of a LSPO hearing taking place in the CFC in sufficient time before the July hearing date. It would be hugely wasteful of the parties' resources to seek to have a further hearing. He likewise accepted that I should deal with the question of costs cover for the September hearing provided I took into account the risk that either the July or September hearings may not in fact take place and that money should not be ordered in respect of hearings that might not happen.

The parties' cases

30. On behalf of M it was said:

    i) That she needed representation every bit as much as the father and equality of arms. This was never a case for counsel only and she needed solicitors as well;

    ii) If (as should have been the case) M's claim for legal services funding had been heard at any time before 16 December 2019 it would inevitably have succeeded. It would be unfair if it failed purely because it was not heard before the hearing. M's solicitors deserve credit for continuing their work notwithstanding the absence of an order, rather than being penalised;

    iii) Her costs were a small fraction of those of F.

31. On behalf of the father it is said:

    i) It could not possibly be argued on behalf of M that she could not obtain proper legal representation for the hearing without a LSPO because the fact is that her lawyers did attend at the hearing and represented her in its absence;

    ii) In any event F's financial resources were no stronger than that of M and an order was not justified;

    iii) F had done all that was necessary, namely by agreeing to pay the fees that would have been incurred for counsel acting on his own. Under no circumstances should he be liable for the costs of M going to a central London firm, particularly in circumstances where she had in the past been represented by high street firms;

iv) It would be highly unfair that he should have to pay more money in circumstances when it was her false allegations that led the father to incur such substantial legal fees. Without prejudice to that contention he was prepared to offer £25,000 inclusive of VAT to cover M's legal fees for the forthcoming July and September hearings;

v) What M was asking the court to do is to make a costs order by the back door.

32. Figures that I have quoted above exclude the costs of the appeal which must remain at large.

The law

33. The leading authority in this area remains Rubin v Rubin [2014] 2 FLR 1018 where at paragraph 13 Mostyn J set out the principles applicable to applications for a LSPO pursuant to s 22ZA of the Matrimonial Causes Act 1973. It is paragraph 13(iv) of his judgment which has been the focus of this appeal, although I must touch on 13(v). They read:

iv) The court cannot make an order unless it is satisfied that without the payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings. Therefore, the exercise essentially looks to the future. It is important that the jurisdiction is not used to outflank or supplant the powers and principles governing an award of costs in CPR Part 44. It is not a surrogate inter partes costs jurisdiction. Thus a LSPO should only be awarded to cover historic unpaid costs where the court is satisfied that without such a payment the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings.

v) In determining whether the applicant can reasonably obtain funding from another source the court would be unlikely to expect her to sell or charge her home or to deplete a modest fund of savings. This aspect is however highly fact-specific. If the home is of such a value that it appears likely that it will be sold at the conclusion of the proceedings then it may well be reasonable to expect the applicant to charge her interest in it.

34. Sub-paragraph (iv) was the subject of further consideration by Cobb J in BC v DE [2017] 1 FLR 1521. His consideration of the difference between historic and outstanding cost is to be found at paragraphs 24 – 26:

24. On the significant point of principle in issue in this case, my view is as follows. In Rubin, Mostyn J was not considering legal costs funding in ongoing proceedings; he was dealing with truly 'historic' costs which had arisen in two separate sets of proceedings (i.e. divorce and child abduction), which had, importantly, concluded. The financial proceedings had been stayed (proceedings were now ongoing in California), and the mother and children had returned to California, pursuant to orders made by Hogg J under the Hague Convention 1980. There was, as Mostyn J observed, no further litigation in this country, and no litigation in prospect. I consider that Mostyn J was right to reject a legal costs funding application as a vehicle to recoup the costs of either or both of these concluded claims. But that type of application is distinguishable from the type of situation here, where the legal costs

funding claim arises in relation to costs reasonably and legitimately incurred within ongoing proceedings prior to the determination of the legal costs funding application. I draw support for this distinction by the following:

i) In A v A (specifically referred to as the 'seminal' decision at that point by Wilson LJ in Currey v Currey No.2 at [14]), Holman J permitted the wife to receive a legal costs funding payment which covered both prospective and outstanding costs; he made no distinction between prospective and outstanding costs. The outstanding costs liability was then c.£40,000, incurred since the discharge of the wife's legal aid certificate (which had only occurred when an order for maintenance pending suit had been made by the husband to the wife in that case); counsel for the husband in that case, as Mr. Chamberlayne in this, had argued that solicitors should be willing to wait for their costs and run the risk of not recovering them, as many other solicitors in their position have had to do. Holman J rejected that argument, observing that "we live in times of high overheads and a close eye on cash flow. There is a real risk that if wives (for it is usually wives) cannot obtain some funding as they go along, solicitors simply will not be willing to act for them at all"; that is the obvious risk here too;

ii) In G v G (above) Charles J did not appear to distinguish between outstanding and prospective costs liability (in that case, an aggregate of £120,000) in making his award for legal costs funding at £10,000 per month;

iii) That Roberts J, obviously aware of the decision in Rubin, made an order in relation to outstanding costs in this litigation and in the associated section 8 proceedings in October 2015 in the sum of £77,994.

25. I therefore do not consider that paragraph [13(iv)] of Rubin directly applies to these facts.

26. I would just make this further point. I would not regard it as necessary for an applicant to demonstrate that his or her solicitor has actually 'downed tools' or will do so before he or she could legitimately make an application for a legal costs funding order where 'historic' costs have been incurred. Such an approach could be problematic. I agree with the essence of Mostyn J's approach – namely that a clear case would need to be shown that the solicitors are reaching the end of their tolerance – but the approach described in [16] of Rubin ought not to be applied too strictly, otherwise it would work materially to the disadvantage of the honourable solicitor who is prepared to soldier on (perhaps somewhat against their better commercial judgment) for the good of the client or the case.

35. I respectfully agree with the interpretation of Cobb J. I stress that the costs in this case all relate to the very issue that was the subject of the hearing for the judge and which continue to be the issue in the forthcoming hearings. These were unpaid costs as contrasted with historic costs incurred in different and concluded proceedings.

36. Applying the principles set out in the authorities I come to the following conclusions:

i) If M’s solicitors had issued their summons promptly then, subject to quantum and means, an award would undoubtedly have been made;

ii) It is inconceivable in a case of this nature that, unless counsel were to say that he would happily act on a direct access basis on his own, an award would not encompass both the costs of solicitors and counsel; not only were both necessary but it would also lead to a level playing field;

iii) The summons that was issued on 20 November was far too late. When it is apparent that a LSPO is required in an ongoing case the application should be made and determined well in advance of the substantive hearing;

iv) It would be wrong for this claim to fail simply on the basis that it was not heard prior to 16 December. If that was the law it would put the solicitors and counsel in an impossible situation. They would have had to down tools as they could not take the risk that the application would fail on that ground alone; not only would it leave M unrepresented but it might have led to the hearing having to be aborted and the child's future remaining in limbo;

v) It cannot be suggested that the solicitors carried on the work in contemplation the fees would never have been paid. They must have been aware that there might be a shortfall but they can never have expected that their continuing work would be totally unremunerated.

37. In my judgment it is not an answer to this situation for F to say that counsel and solicitors were present and did their work and that therefore there was no need for a LSPO. That M could have obtained an order if the application was heard on 15 December when the solicitors could argue that they would not attend the next day if there was not an order made, or if it was heard the day following the hearing when she could have said that her solicitors would no longer continue to act in the forthcoming proceedings unless their unpaid costs were met, shows why the argument is untenable.

The parties' means

38. M's situation is relatively straightforward. She is the owner of an apartment in Germany which has an equity of around £200,000. She rents it out on Airbnb to pay the costs of the apartment.

39. She earns a very modest income as an artist and is otherwise supported by F who provides her with maintenance provision and pays her rent and associated expenses in London, where she has been based so that the shared care arrangement can operate.

40. There is no question of her being able to afford her own legal representation unless her home in Germany, which is also her studio, were to be sold. Plainly that could not happen overnight.

41. F's position is more complicated. He was very successful in the world of financial services before setting out to run his own business. He owns one-third of a business; his aunt and uncle own one-third and a finance house owns the other third.

42. He draws a very small salary in line with the minimum wage as the business is still in start-up. The company buys ground rents (freehold property) which it then sells as packages. If two forthcoming tranches of sales happen then he will be seeking a very substantial bonus of £500,000 and his income will increase to £300,000 p.a. Thus it

is, he will either be likely to come into significant sums of money or will remain poorly remunerated.

43. He has been bankrolled by his aunt and uncle to whom he is indebted in the approximate sum of £640,000. They are prepared to help him with his liabilities, enabling him to preserve his savings which if all brought onshore are worth some £377,000 net of tax on remittance. Plainly, that sum is available to F to put towards M's legal costs if he was so minded.

44. His living expenses run at around £150,000 p.a. of which much is committed to providing M with accommodation and meeting the child's needs, as well as his own.

45. It would not be proper for the court to expect F to pay for the cost of M instructing yet another firm of solicitors, their reading into the case and taking instructions on matters that would have been well known to previous solicitors. The combination of that fact, which must have occupied much of the early work, and the delay in issue of the application excludes her ability to recover in respect of Withers' fees that were charged before the end of October 2019.

46. I do not have a breakdown of the fees incurred in December prior to the hearing, so I can only guestimate. I have decided to allow for half the November work, as much of it was pre-issue, and assume the same sum being incurred in the first half of December so as to make a reasonable sum for F to pay towards M's solicitors for the work up to and including 16 December, to be £30,000 inclusive of VAT. I regard that as a fair sum in the circumstances.

47. So far as the future is concerned, M puts in a budget of just under £89,000 inclusive of VAT. Of that sum £23,400 reflects counsel's fees exclusive of VAT.

48. F's offer of £25,000 can thus be seen to be consistent with his previous approach, namely to pay the direct access costs of counsel only. I do not think that that is a proper way of going forward. M should be entitled to the services of both counsel and solicitors, in the same way that F will enjoy.

49. In my judgment it would not be reasonable to expect F to pay for a partner at the rate of £620 per hour or for hearings and conferences to be attended by both the partner and associate. I shall have to take a broad view of this, and I reduce the amount for solicitor's costs to £22,500 plus VAT.

50. Instead of allowing £25,000 inclusive of VAT as F proposes, I allow £40,000 plus VAT through to the end of the proceedings, being broadly £22,500 towards solicitors and £17,500 to counsel. However, this must be broken down. It seems to me that approximately two-thirds of the cost relate to the September hearing and only one-third to the July hearing. The sum referable to the September hearing shall not be payable until 14 August 2020, that is one month before the hearing date, and if it becomes apparent that that hearing will not take the form or length currently anticipated then there will be liberty to the parties' to apply, at short notice in respect of that hearing. If a hearing cannot be obtained in the CFC, I will myself conduct a short hearing in the second half of August.

51. I accordingly allow the appeal in the terms outlined and make a LSPO to cover the future costs. I expect counsel to seek to agree a schedule for payment.