Neutral Citation Number: [2021] EWHC 3063 (Fam)

Case No: FD21P00329

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 November 2021

Before:

MR JUSTICE MOSTYN

- -

Between:

MG	**Applicant**
- and -	
AR	**Respondent**

- -
- -

Oliver Woolley (instructed by Blick & Co) for the **Applicant (father, and respondent to the application for security for costs**
Piers Pressdee QC (instructed by Alexiou Fisher Philipps LLP) for the **Respondent (mother, and applicant for security for costs)**

Hearing date: 29 October 2021

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Approved Judgment

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MR JUSTICE MOSTYN

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 child and her parents 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.

Mr Justice Mostyn:

1. In this judgment I will refer to the substantive applicant as the father and to the respondent as the mother.

2. The mother has applied for security for costs.

3. In this judgment I will first set out my understanding of the law applicable to an application for security for costs in a family case. For convenience, I will use male pronouns for an applicant or claimant for a substantive remedy and female pronouns for a respondent or defendant thereto.

4. The power to award security for costs is provided for in FPR Part 20, Chapter 2, rules 20.6 and 20.7. Since the rules were promulgated in 2010, there has not been a reported judgment on an application for security for costs in a family case. This is not surprising, since the purpose of an order for security for costs is to protect a party in whose favour it is made against the risk of being unable to enforce any costs order they may later obtain. In the civil sphere, an award of costs against the losing party is the general rule. However, in the family sphere the normal rule, whether the case is about children or about money, is no order for costs unless litigation misconduct or other exceptional circumstances are demonstrated.

5. Rules 20.6 and 20.7 provide as follows:

> **20.6 Security for costs**
>
> (1) A respondent to any application may apply under this Chapter of this Part for security for costs of the proceedings.
>
> (Part 4 provides for the court to order payment of sums into court in other circumstances.)
>
> (2) An application for security for costs must be supported by written evidence.
>
> (3) Where the court makes an order for security for costs, it will
>
> (a) determine the amount of security; and
>
> (b) direct –
>
> (i) the manner in which; and
>
> (ii) the time within which,
>
> the security must be given.

> **20.7 Conditions to be satisfied**
>
> (1) The court may make an order for security for costs under rule 20.6 if –
>
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
>
> (b) either –
>
> (i) one or more of the conditions in paragraph (2) applies; or
>
> (ii) an enactment permits the court to require security for costs.
>
> (2) The conditions are –
>
> (a) the applicant is –
>
> (i) resident out of the jurisdiction;
>
> (b) the applicant has changed address since the application was started with a view to evading the consequences of the litigation;
>
> (c) the applicant failed to give an address in the application form, or gave an incorrect address in that form;
>
> (d) the applicant has taken steps in relation to the applicant's assets that would make it difficult to enforce an order for costs against the applicant.
>
> (3) The court may not make an order for security for costs under rule 20.6 in relation to the costs of proceedings under the 1980 Hague Convention.
>
> (Rule 4.4 allows the court to strike out a statement of case.)

6. The CPR counterparts of these rules are CPR 25.12 and 25.13. FPR 20.6 and CPR 25.12 are effectively identical. The conditions to be satisfied in CPR 25.13 are similar, but not identical, to those in FPR 20.7. Specifically:

   i) CPR condition (a) - *claimant resides outside the jurisdiction and not in a state bound by the 2005 Hague Convention on Choice of Court Agreements*. This will not be satisfied if the claimant's residence is in a EU member state, Montenegro, Mexico or Singapore. This exception does not appear in the FPR version. Thus, the geographical reach of the FPR version is considerably wider than in its CPR counterpart.

   ii) CPR condition (c) - *claimant is a company and there is reason to believe it will be unable to pay the defendant's costs*. This does not appear in the FPR version. It is unlikely that a company would ever be a claimant in a family case.

iii) CPR condition (f) – *claimant is acting as a nominal claimant and there is reason to believe that he will be unable to pay the defendant's costs*. Again, it is unlikely that a family case would ever be started by a nominal claimant.

iv) The FPR version contains at rule 20.7(3) a prohibition on ordering security for costs in proceedings under the 1980 Hague Convention. This is because such a measure is prohibited under article 22 of the Convention.

These differences aside, CPR 25.13 and FPR 20.7 are identical.

7. The power to award security for costs in civil proceedings has been part of the law for centuries. It is traceable to a statute in the reign of Henry VI (15 Hen 6, c. 4) allowing the Court of Chancery to fix in its discretion security for the defendant's costs and damages. Security for costs at common law emerged in actions for ejectment: see, for example, *Pray v Edie* (1786) 1 TR 267 where the lessor of the plaintiff in an action of ejectment, being resident abroad, was required to give security for costs. The reason that the remedy was developed was to prevent an abuse of process. While a plaintiff has a choice whether or not to litigate, a defendant has no such choice and, in order to avoid default judgment, is compelled to litigate or settle, whether or not the plaintiff has available assets sufficient to pay the costs of a successful defence. From an early stage of our legal history the courts recognised that a plaintiff litigating on a free hit amounted to a potential abuse of process and redressed this by ordering security for costs, both at first instance and on appeal.

8. The remedy was codified in the Rules of the Supreme Court, Ord. 23. It would have been exerciseable, at any rate in theory, in family cases where the Rules of the Supreme Court applied. It is therefore not surprising that the drafters of the Family Procedure Rules should have included such a remedy within the rules. An underpinning principle of the Family Procedure Rules is that, wherever possible, they should, if not mirror, then certainly be aligned with the CPR when covering the same procedural terrain. This is vital in order to allay concerns that family law, and those who practise and administer it, occupy some kind of desert island or legal Alsatia.

9. Even so, it is surprising that there is no Practice Direction linked to FPR Part 20, Chapter 2 explaining that the power to award security for costs will inevitably need to be exercised in a somewhat different way to that in the civil sphere in the light of the costs regime being so completely different in the family sphere.

10. In this judgment, I will set out my view as to how the power to award security for costs in FPR 20.6 and 20.7 should be exercised in family cases. I hope that in so doing I will pay proper respect to the civil case law while at the same time recognising and accommodating the fundamental differences between civil and family litigation when it comes to awarding costs.

11. In this judgment I shall address the exercise of the power to award security for costs in the following sequence:

i) First, I shall consider the gateway conditions that need to be satisfied.

ii) Next, I shall consider how the exercise of the discretion to award security for costs justly should properly be exercised. Here, I shall consider:

a) the relevance of the merits of the application, the strength of the defence, and the means of the parties;

b) the likelihood of non-payment of an award of costs;

c) whether the application for security for costs has been promptly made;

d) other discretionary factors; and

e) the amount of the award.

iii) Then I shall consider the procedural requirements for making the application, and, if granted, how security should be given.

iv) Finally, I shall consider how default in complying with an order for security for costs should be dealt with.

The gateway conditions

12. The gateway conditions are matters of fact, not discretion: *Infinity Distribution Ltd (In Administration) v Khan Partnership LLP* [2021] EWCA Civ 565, at [30] per Nugee LJ.

13. **FPR condition (a): the applicant is resident out of the jurisdiction**. This is a matter of concrete fact. Residence for the purposes of this condition should be interpreted to mean habitual residence. For the purposes of the condition, residence outside England and Wales suffices. Thus, residence in the Channel Islands or the Isle of Man will satisfy this condition: *Greenwich Ltd v National Westminster Bank Plc* [1999] 2 Lloyd's Rep. 308. It is uncertain whether residence in Scotland and Northern Ireland will do so; an authoritative decision must be awaited.[1]

14. **FPR condition (b): the applicant has changed address since the application was started with a view to evading the consequences of the litigation.** This requires the court to make a finding that goes beyond an assessment of concrete fact. It requires the court to make a finding as to the applicant's state of mind. It requires the court to be factually satisfied that the claimant not only changed his address since the case started (a simple concrete fact) but additionally, that he did so with a view to evading the consequences of the litigation (a state of mind or psychological fact).

15. In *Aoun v Bahri* [2002] EWHC 29 (Comm) [2002] 3 All E.R. 182 it was held that the consequences of the litigation would extend not only to an order for costs at the end of the day, but also to an award for security for costs itself.

[1] Prior to Brexit, residence in Scotland and Northern Ireland did not satisfy CPR or FPR condition (a), as it was then formulated, as residence in an EU member state was excluded from its ambit. That exclusion has now been deleted. Thus it would appear that residence in Scotland or Northern Ireland will now literally satisfy the condition. However, the Judgments Extension Act 1868, sec 5, provided that a plaintiff resident in Ireland or Scotland should not be required to find security for costs. That Act was repealed 114 years later by the Civil Jurisdiction and Judgments Act 1982, in favour of the EU exclusionary rule. It must be doubtful that when accepting the Brexit amendments which abolished the EU exclusionary rule, Parliament intended that residence in Scotland and Northern Ireland should now fall within the condition.

16. The finding of psychological fact will inevitably bear heavily on the exercise of discretion in the second stage.

17. **FPR condition (c): the applicant failed to give an address in the application form, or gave an incorrect address in that form.** This requires a simple finding of concrete fact.

18. **FPR condition (d): the applicant has taken steps in relation to the applicant's assets that would make it difficult to enforce an order for costs against the applicant.** This condition requires the court to determine concrete facts with an evaluative component. The court has to determine, first, what steps were taken by the applicant and, second, whether those steps had the consequence of making it difficult to enforce an order for costs against the applicant. The second part of the exercise will normally give rise to an assessment of motive, although this is more relevant to the exercise of discretion than to satisfaction of the gateway condition. This condition was fully analysed by Roth J in *Ackerman v Ackerman* [2011] EWHC 2183 (Ch). The steps taken will commonly be the dissipation of assets, their transfer overseas or into the names of third parties, or their transfer or removal to unknown destinations. If the court makes findings of concrete fact that steps of this type were taken, then findings of the consequence of those steps and of the claimant's motives will normally follow as night follows day.

19. The findings that are needed under condition (b) and (d) show that it may be difficult to maintain clear blue water between those gateway requirements in the first phase and the exercise of discretion in the second phase.

Phase 2: Discretion

20. Once the court is satisfied that a gateway condition has been met it moves to the next phase. FPR 20.7(1)(a) prescribes that the court must have regard to all the circumstances of the case and be satisfied that it is just to make the order for security. This is commonly described as an exercise of discretion but the decision whether or not to make an award is more accurately seen as the formation of a value judgment.

The merits of the application and the defence and the means of the parties

21. In the civil sphere the claim is invariably made in a costs-follow-the-event regime. Thus Black LJ stated in *Autoweld Systems Ltd v Kito Enterprises LLC* [2010] EWCA Civ 1469 at [59]:

> "… it must be borne in mind that the design of the rules is to protect a defendant (or a claimant placed in a similar position by a counterclaim) who is forced into litigation at the election of someone else against adverse costs consequences of that litigation"

22. Or as the White Book at para 25.12.2 puts it:

> "The purpose of an order for security for costs is to protect a party in whose favour it is made against the risk of being unable to enforce any costs order they may later obtain. "

23. Thus, if you are dragged into a case against your will as a defendant and you win, then the theory is that you should be almost guaranteed to recover your costs of defending yourself. For this reason, in civil cases the merits of the claim and the defence are not looked into in any depth. It is only where the merits are strongly one way or the other that they have relevance in the discretionary exercise.

24. Therefore, civil case law has stated that the parties and the court should not go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure: *Porzelack KG v Porzelack* (UK) Ltd [1987] 1 All E.R. 1074.

25. In contrast to the civil case law, it is my judgment that in a family case the merits of the application and the strength of the defence necessarily have to be carefully considered. It is only by considering the merits that a view can be taken of the likelihood of an award of costs in favour of the respondent. This is because the default regime in family cases is no order as to costs. This is so whether the claim is about children or about financial remedies: see as to the former, *Re S (A Child)* [2015] UKSC 20; and as to the latter, FPR 28.3(5).

26. In *Re S* at [26] Baroness Hale stated:

> "All the reasons which make it inappropriate as a general rule to make costs orders in children's cases apply with equal force in care proceedings between parents and local authorities as they do in private law proceedings between parents or other family members. They lead to the conclusion that costs orders should only be made in unusual circumstances. Two of them were identified by Wilson J in *Sutton London Borough Council v Davis (No 2)*: 'where, for example, the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable….'"

27. At [33] she stated, however, that "it may be appropriate to order a richer parent who has behaved reasonably in the litigation to pay the costs of the poorer parent with whom the child is to live." I have to admit to being slightly taken aback by this: I have never heard of an actual order for costs being made in a children's case for purely economic rather than merit-based reasons. My attention was drawn to the decision of Ryder J in *EC-L v DM (Child Abduction: costs)* [2005] EWHC 588 (Fam), [2005] 2 FLR 772, where he stated:

> "It should be the expectation in child abduction cases that the usual order will be no order as to costs, but where a party's conduct has been unreasonable or there is a disparity of means then the Court can consider whether to exercise its jurisdiction in accordance with normal civil principles."

Again, I have been surprised to see disparity of means cited as an independent ground for making an order for costs in a children's case.

28. In my experience, orders for costs in children's cases are made only where there has been reprehensible conduct by a party, or where a party's stance has been outside the

spectrum of reasonableness. Where such conduct is shown, the means of the parties are certainly then relevant as ancillary factors in determining whether an order for costs should be made and, if so, in what amount.

29. In financial remedy cases, a similar approach is adopted for final hearings. The general rule is no order as to costs (FPR 28.3(5)) but under FPR 28.3(6) and (7) litigation misconduct can lead to an order for costs being made. Such conduct includes, pursuant to PD 28A para 4.4, a failure to negotiate openly reasonably and responsibly. Before making an order on the grounds of misconduct, the court under FPR 28.3(7)(f) has to consider the financial effect on the parties of any costs order. In my experience that is often deployed to soften the blow of an order for costs against a delinquent litigant; I have never heard of an actual order for costs being made for purely economic reasons. Liabilities for costs are of course routinely taken into account as debts in the main disposal, but that is a quite different thing to making an order for costs for purely economic reasons.

30. In my judgment, the rarity of such orders for costs means that on an application for security, the court has to look carefully at the substantive merits. It is only by doing so that an assessment can be made of the likelihood of an order for costs being awarded. A crucial difference between the family and civil spheres is that a defendant in a civil case enters the fray knowing that if she wins, she will normally get an order for costs. A respondent in a family case enters the fray knowing that if she wins, she will normally not get an order for costs. She will only get an order for costs if, and only if, she can show (a) that her opponent has conducted his case unreasonably, and (b) that he can afford to pay such an order.

31. Therefore, in the exercise of its discretion on an application for security for costs in a family case, the court should first ask whether the substantive application has merit and, second, if so, whether an order for security for costs would likely stifle or inhibit that application, because of the limited means of the applicant. Here, the court has to look critically at the ability of applicant to raise a sum of money to stand as security.

32. If the answer is yes to both those questions, then the application for security should be refused.

33. Even in the civil sphere, it has been held that the overall result requires that the order should be just, and there is a need to avoid injustice to a claimant who has a meritorious claim but who would be prevented or inhibited from pursuing it if required to provide security for costs: *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All E.R. 534, 540, CA. However, the defendant's means are never relevant in a civil application for security. The fact that the defendant is wealthy, and therefore is not in need of a guarantee that a costs order in her favour would be met, is completely irrelevant in a civil case. That is not so in a family case.

34. If the answer is no to either question, the court then has to ask itself whether the respondent, if she successfully defended the application, has a reasonable chance of obtaining an order for costs. Here, the court will have to consider the likelihood of a departure from the normal default rule of no order as to costs. In my judgment, the court should only, in the exercise of its discretion, consider ordering security for costs if it is satisfied that there is a good chance (but not necessarily a probability of more than 50%) of the respondent obtaining an order for costs at the final hearing.

35. In assessing whether the respondent has a good chance of obtaining an order for costs, the court will not only consider the merits of the application and the strength of the defence (including its claims of unreasonableness by the applicant), but also the means of both the applicant and the respondent. It is to state the obvious that if an unreasonable and vexatious applicant has no money at all, then the court is unlikely to make a pointless order for costs against him. A fortiori the court will not make an order for security for costs against him. In the real world, an application for security for costs is only going to be made where the respondent has a credible case that the applicant has the means to put up security.

36. When appraising the applicant's ability to pay an order for costs, and ex hypothesi an order for security for costs, the court should apply the principles in *TL v ML* [2005] EWHC 2860 (Fam) at [124]. Specifically, where the disclosure of the applicant is obviously deficient, the court should make robust assumptions about his ability to pay. Similarly, where it is asserted that an external source of support has been cut off but where there is no clear evidence to that effect from the provider of that support, the court should assume that the source of support will be maintained at least until final trial.

The likelihood of non-payment of an award of costs

37. Assuming that the court is satisfied that there is a good prospect of the respondent obtaining an order for costs, it then has to go on, as part of the discretionary exercise, to consider the likelihood of non-payment by the claimant of a costs order against him. Here, the defendant need only adduce evidence to show that on objectively justified grounds relating to obstacles to, or the burden of, enforcement, there is a real risk that he will not be in a position to enforce an order for costs against the claimant and that, in all the circumstances it is just to make an order for security*: Bestfort Developments LLP v Ras Al Khaimah Investment Authority* [2016] EWCA Civ 1099; [2018] 1 WLR. 1099) per Gloster LJ at [77]. The defendant does not need to demonstrate that it is more likely than not (i.e. a probability of more than 50%) that there would be substantial obstacles to enforcement; rather, she needs to demonstrate only that there is a real risk of this. Once a real risk has been found to exist, it would be a mistake for the court then to grade the risk and to discount the costs to be secured rateably: *Danilina v Chernukhin* [2018] EWCA Civ 1802.

38. Where the gateway condition was (b) or (d), the court will already have made findings which will likely have gone a long way, if not all the way, to proving this real risk.

Whether the application for security for costs has been promptly made

39. The civil authorities emphasise that an application for security for costs should be made as soon as the facts justifying the application are known. Delay in making the application may lead the court when exercising its discretion to refuse to order security, or only to award partial security. Partial security may be a proportion of the total costs past and future; or it may be only future costs. The vice of a late application was well described by the Deputy Judge in *Re Bennet Invest Ltd* [2015] EWHC 1582 (Ch) where he stated:

> "The later that an application for security is made, the smaller is the opportunity for the claimant to consider his choice of putting

> up security in order to continue his claim or withdrawing it in order to avoid further expense."

Other discretionary factors

40. In *Sir Lindsay Parkinson & Co v Triplan Ltd* [1973] Q.B. 609 Lord Denning MR identified certain additional factors as militating against an award of security for costs. These included not only delay in making the application, but the terms of the open offer made by the defendant, and the fact that the claimant had a bona fide claim which they should not be forced to abandon for lack of means.

41. It is fair to say that the case law does not disclose that the terms of an open offer made by the defendant have been relied on in subsequent cases.

The quantum of the award

42. FPR 20.6(30(a) states that where the court makes an order for security for costs, it will determine the amount of the security. This aspect of the exercise – how much – is purely discretionary, rather than evaluative. The civil authorities state that the starting point will be the defendant's approved or agreed costs budget. The court may then in a robust, broad-brush manner, impose a percentage discount to reflect the uncertainties of litigation, including the possibility of early settlement and the fact that the costs budget may well include some items which the claimant could later successfully challenge on a detailed costs assessment inter partes. Alternatively, the court may order security for the whole amount to be paid in instalments as the case progresses. Security may be awarded up to a certain point in the proceedings, such as the pre-trial checklist stage.

43. In my judgment, when it comes to assessing the quantum of security for costs in a family case, and the terms on which that quantum should be provided, the court should generally follow the guidelines for the award of a costs allowance under section 22ZA Matrimonial Causes Act 1973 as set out in *Rubin v Rubin* [2014] EWHC 611 (Fam) at [13]. For convenience I have set out those guidelines in the appendix to this judgment. Specifically:

    i) When assessing the ability of the claimant to pay the court should follow the approach in guideline (ii). However, as explained above, the court is not going to be considering quantum unless it has already been satisfied that there is a good prospect of an order for costs to be made in the respondent's favour. The court would only have reached that conclusion if it was satisfied that the applicant had the means to pay an order for costs. Therefore, by this stage of the exercise the ability of the claimant to pay will have been established.

    ii) The approach to historic costs in guideline (iv) will need to be modified as the objective of an order for security for costs is not to ensure that the applicant can obtain legal services for the proceedings but rather to guarantee payment of an order for costs against the applicant should one be made. Therefore, it is entirely legitimate to include historic costs in an order for security, although as a matter of discretion the court may decline to award security for them, for example, if the application was made unduly late.

iii) Guideline (ix) (undertaking to repay if required to do so by the court) will not apply.

iv) Guideline (xi) should be followed and security for costs should only normally be granted up to the FDR in a financial remedy case. In a children's case security for costs should normally in the first instance be granted only up to the pre-trial review (or equivalent).

v) Guideline (xii) should be followed: security should normally be provided in monthly instalments rather than in a single lump sum.

Making the application

44. The application should be made in a financial remedy case in Form D11 and in a children's case in Form C2, and the Part 18 procedure should be followed. The application notice should state which of the gateway conditions is relied on. FPR 20.6(2) requires the application to be supported by written evidence. That evidence should set out all the facts relied on if gateway condition (b) or (d) is pleaded. It should provide details of the amount of security sought. Historic costs should be broken down and future costs should be carefully estimated. In a financial remedy case more detail will be needed than that required by Form H.

45. The written evidence must contain a statement of truth.

How security should be given

46. FPR 20.6(3)(b) states that where the court makes an order for security for costs, it must direct the manner in which and the time within which security must be given. CPR PD 4A includes Form PF44 which suggests that the order should state:

> "1. The claimant gives security for the defendant's costs [of the claim] [until *(specify stage in the claim)*] in the sum of £… [by paying the sum of £… into the Court Funds Office] by *(date)* [(by lodging with the Defendant's solicitors a bankers draft *(describe form of bankers draft)*] [in the following manner *(describe)*].
>
> 2. All further proceedings be stayed until security is given."

47. Obviously, this form of order should only be considered where a single payment for security has been ordered, and even then to impose a stay until payment may well be inappropriate. It is completely inapt if monthly instalments have been ordered.

Standing back

48. Once the court has followed the path I have set out above, it must, before it makes an order for security, stand back and satisfy itself that what it is going to do is just. In a children's case, while the paramountcy principle is not directly in operation, the criterion of justice, and the terms of the FPR overriding objective, require the court to be satisfied that what it is proposing to do is consistent with the best interests of the children, or at least not contrary to their interests.

Default

49. Form PF44 goes on to suggest that the order should include the following:

> "Unless security is given as ordered,
>
> (a) The claim is struck out without further order, and
>
> (b) On production by the defendant of evidence of default, there be judgment for the defendant without further order with costs of the claim to be the subject of a detailed assessment."

50. In *Radu v Houston* [2006] EWCA Civ 1575 Waller LJ doubted whether it was appropriate to make an order in that case in the unless form. He held that an order for security is intended to give a claimant a choice as to whether they put up security and continue with their action or withdraw the claim. That choice is meant to be a proper choice. An order to raise a large sum of money should not be made subject to the unless sanction until the claimant has been given a real opportunity to find the money. Waller LJ considered it preferable to adopt instead the practice of the Commercial Court. There, orders for security do not usually provide for the claim to be struck out without further order. Instead, the other party is given liberty to apply to the court in the event of default. This enables the court to put the paying party to their election to pay or not to pay, and then if appropriate to dismiss the claim.

51. Waller LJ was clear that if an unless order was made, the period for complying with it should be generous. He stated:

> "The making of an order for security is not intended to be a weapon by which a defendant can obtain a speedy summary judgment without a trial."

52. In my judgment, the Commercial Court practice should certainly be followed in family cases. In the event of default, the respondent should apply to the court for consideration of what measures should be taken in the light of the default. At that hearing the court should decide if the substantive application should be summarily dismissed in the light of the default. I note that FPR 20.7 concludes with a parenthetical reminder that FPR 4.4 allows the court to strike out a statement of case. However, that rule does not apply to FPR Parts 12 to 14. Most applications in children's proceedings, like the father's in this case, are governed by Part 12. Notwithstanding the absence of an explicit power in the rules to strike out the claim, that power is implicit in rule 20.6(3)(b). Further, the court has a general power summarily to dismiss a meritless claim: *Re C (Family Proceedings: Case Management)* [2012] EWCA Civ 1489, [2013] 1 FLR 1089 per Munby LJ at [14]; *SZ v Birmingham City Council and Others* [2021] EWFC 15. In my judgment FPR 20.6 and 20.7 would be fatally undermined, indeed largely rendered meaningless, in children's proceedings if there were no power to enforce a default by dismissal of the substantive proceedings. However, before summarily dismissing an application in children's proceedings the court would need to be satisfied that such a sanction was in the best interests of the children, or at least not contrary to their interests.

Pulling the threads together

53. On an application for security for costs in a family case, the following steps must be taken and the following principles applied:

i) The court must find as a fact which gateway condition applies.

ii) The court must have regard to all the circumstances in order to determine whether to make the order for security would be just. In making that determination the court will form a value judgment until it reaches the stage of quantification of the amount of security, where it will exercise a true discretion.

iii) If the applicant has a meritorious case and is of limited means so that the imposition of an order for security would hinder or stifle his substantive application then it would not normally be just to make an order for security.

iv) Subject to para (iii) above, the court must have regard to the merits of the substantive application and to the strength of the defence, as well as to the means of the parties, in order to determine if the respondent has a good chance of being awarded an order for costs at the final hearing of the substantive application. If the court concludes that the respondent does not have that good chance, then it would not normally be just to make an order for security.

v) When assessing the ability of the applicant to pay an order for costs and, ex hypothesi security for those costs, the court should apply the principles in *TL v ML* at [124] and make robust assumptions about his ability to pay where his disclosure had been deficient or where he maintains that a source of support has been cut off.

vi) If the court determines that the respondent has that good chance, it must then be satisfied by evidence adduced by her that there is a real risk (albeit not as high as a 50% probability) that she will not be in a position to enforce an order for costs against the applicant. Findings as to gateway condition (b) or (d) are likely to be highly relevant to the assessment of this risk.

vii) In determining whether it would be just to make an order for security the court will pay particular attention to whether the application for security was made promptly. It may not allow historic costs if the application for security was made unduly late.

viii) If the court decides to make an order for security it will fix the amount in a robust, broad-brush manner, deploying a wide discretion. Historic costs are fully claimable. The evidence of the respondent seeking security must provide full detail of claimed historic costs and a detailed estimate of future costs.

ix) The court may reflect future litigation uncertainties, as well as potential reductions on a detailed assessment, in a percentage discount from the sum claimed.

x) In the first instance, security should only be provided in a financial remedy case up to the FDR; in a children's case it should be provided up to the pre-trial

review (or equivalent). Security should be payable in monthly instalments rather than in a single lump sum.

xi) Before making an order for security, the court must finally stand back and satisfy itself that what it is going to do is just. In a children's case the court must be satisfied that what it is proposing to do is consistent with the best interests of the children, or at least not contrary to their interests.

xii) In the event of default in the provision of security there should not be an automatic strikeout of the claim. Rather, the respondent should be entitled to apply urgently for a hearing at which the court will consider what measures should be taken in the light of the default. Such measures will include a summary dismissal of the substantive application, but in children's proceedings the court must be satisfied that such an order is in the best interests of the children, or at least not contrary to their interests.

This case

54. This case concerns an eight-year-old child, M. Her mother, the respondent in these proceedings (but the applicant for security for costs) was born in Lebanon but moved to Canada aged three, where she grew up. She obtained Canadian citizenship in 1994. She moved to London in 2007. She met M's father, the applicant in the proceedings (the respondent to the application for security for costs) in 2012. He is a dual Saudi-British national. The mother and father began cohabiting and formed a Muslim marriage, which is not legally recognised in England.

55. M was born 6 June 2013. She has dual British-Canadian citizenship.

56. The parties separated shortly after M's birth. The father commenced proceedings under the Children Act 1989 for a Section 8 Order. On 25 November 2015, at a dispute resolution appointment, His Honour Judge Cryan made a final order providing for M to remain in the mother's primary care and for the father to have weekly contact. The order recorded M as being habitually resident in England and Wales.

57. Parallel proceedings for child maintenance under Schedule 1 to the Children Act 1989 had been commenced by the mother. At the final hearing on 16 December 2016, the father was ordered to pay an outstanding interim lump sum and costs orders. His liability in respect of that order at the present time, with accrued interest, is £54,583. In addition, the father has fallen into arrears with the periodical payments obligations under the order and owes £50,400 in that regard.

58. It is the mother's case that in October 2017 she took M to Dubai for a two-week holiday for her to visit her father, and that she did the same in April 2018. The father says that the purpose of the mother's visits was to relocate there and to resume cohabitation with him. The mother claims that on the latter occasion the father seized the passports of her and M, stranding her and M in Dubai. This is also disputed by the father. No findings of fact have been made in relation to these issues.

59. Eventually in May 2019, the mother got hold of M's passport. She obtained exit visas and a travel document for herself. On 30 May 2019, she fled with M to Lebanon and

from there to Canada arriving on 9 June 2019. The mother and M have been there ever since – a period of 2½ years.

60. The father applied in the Superior Court of Justice of Ontario for a 'non-Hague' return order of M to Dubai. This was granted by Nakonechny J who applied the 1980 Hague Convention by analogy. She determined that M was habitually resident in Dubai prior to her removal to Ontario; that she would not suffer serious harm if returned to Dubai; and that she should therefore return there by 23 September 2019.

61. The mother appealed that order to the Court of Appeal of Ontario. The appeal was allowed on 15 April 2020; the single judgment was given by Fairburn JA. Essentially, he held that the first instance Judge had erred by treating the father's application as if it were governed by the 1980 Convention; that there was a dispute as to whether the UAE would apply a best interests approach if the child were returned there; and that substantial weight should have been given to the consent order in London made by Judge Cryan on 25 November 2015, 4½ years earlier.

62. The central ratio of the decision of Fairburn JA was that the case should have been returned to the Central Family Court in London for determination. This is quite difficult to understand, although it must be noted that the mother through her counsel seems to have been arguing for that result. M had not been in London since April 2018, two years before the Court of Appeal gave its decision. Since then, M had been in Dubai until the end of May 2019, and thereafter in Canada for nearly a year. Her prior historic habitual residence in England had surely long evaporated.

63. Nonetheless, the Court of Appeal of Ontario concluded not only that the order returning M to Dubai could not stand, but that there would be an order made staying the father's return application on the condition that he promptly commence a similar proceeding in the Central Family Court. The Court of Appeal added provisos that:

    i) if the English court declined to take jurisdiction, the father could apply to the Ontario court to lift the stay and seek a rehearing of his original application; and;

    ii) in the event that the father brought further proceedings in the Ontario courts, nothing would prevent the mother from bringing her own application in respect of M.

    The father was ordered to pay the mother's costs in the sum of $37,500, which he has not paid. The father applied for permission to appeal to the Supreme Court of Canada; this was dismissed with costs, which also have not been paid.

64. The father's overall debt to the mother exceeds £127,000.

65. On 29 April 2021, the mother applied in Ontario for orders in respect of M including an order for the Ontario Court to assume jurisdiction and to make an order superseding the order of Judge Cryan and giving her sole decision-making responsibility and primary residence for M.

66. On 28 May 2021, a few weeks after the mother's application, but over a year after the decision of the Court of Appeal in Ontario, the father made the substantive application before this court. It seeks:

> "An order pursuant to the inherent jurisdiction of the High Court that the child is forthwith returned from Toronto, Canada to Dubai, UAE."

67. As to the claimed jurisdiction of this court the application states:

> "The child is a citizen of the United Kingdom. The child permanently relocated from England to Dubai with the respondent in April 2018. In May 2019, the respondent abducted the child and they are currently in Toronto. The child was habitually resident in Dubai immediately prior to the abduction."

68. The matter came before a deputy High Court judge on 23 July 2021. The mother had applied for a *Hadkinson* order debarring the father from proceeding with his application until he had discharged the costs and lump-sum orders, and the arrears of periodical payments, outstanding against him. This application was dismissed with costs.

69. On 25 October 2021, the mother made her application for security for costs. Her application notice relied on condition (a), the father being resident in Dubai. The mother's solicitor, Susan Philipps, made a witness statement in which she explained that the mother had paid £34,560 in costs to that point and owed £2,325 in unpaid costs. The estimate for costs to the end of the final hearing was £47,000.

70. The matter came before me on 29 October 2021. It seemed to me there was a gaping deficiency in both the application for security for costs and its defence in that neither party had given any evidence about their current means, or of costs that had been incurred and paid historically. I therefore adjourned the matter for evidence as to means to be given and for supplemental written submissions to be made. I also made other case management directions.

71. The mother's witness statement explains that her total incurred costs in the current proceedings had risen to £54,216. She says:

> "To pay these, I have had to crowd fund and/or beg from friends and family. Some will no longer take my calls as they are fed up with me asking them to help me fund my legal costs."

She states that she has no assets. She states that her home belongs to her fiancé as does the car that she drives. She works in her fiancé's coffee shop three days a week and receives child benefit of $600 per month.

72. She explains that her total costs in the English proceedings between 2014 and 2016 were £217,000. Of this, some was paid by the father pursuant to court orders; some was borrowed from friends and family; some remains unpaid as detailed above.

73. The father states that he is a self-employed property development consultant and that he takes home after tax in Dubai about £10,000 a month. He says he has rent of £3,000 per month. He has minimum monthly expenses on top of about £2,000 per month and that his surplus goes to meet his legal fees. He says he has no assets apart from personal belongings and a car. He acknowledges his debt to the mother but claims he is unable to discharge the liabilities as he does not have the funds to do so.

74. He states that his costs in the Children Act proceedings, both under section 8 and Schedule 1 came to approximately £400,000; his costs between 2016 and 2021 in England for Schedule 1 proceedings and for assistance with the Canadian proceedings were £212,000; his costs in the Canadian proceedings were £190,000; and his costs incurred here since May 2021, £35,000. An extraordinary total of £837,000. He says that his father paid all of the Canadian fees and the English fees after 2016 and a proportion of the earlier English fees. He says:

> "My father has reached the end of his tether – he is no longer prepared to meet any of my legal fees, nor do I consider that I can ask my father to continue to be financially responsible for me in any way."

75. But he adduces no evidence from his father. He says he borrowed £50,000 from a friend to pay the 2016 costs. He says he has met his own legal fees since May 2021 from his income.

76. In his supplemental submission, Mr Pressdee QC refers to the mother's evidence which belies the father's crude estimate of £400,000 of fees in the first phase of the proceedings in England. She produced a letter from the father's then solicitors, showing that up to August 2015 he had spent nearly £500,000 on costs. Thus, Mr Pressdee QC submits that overall, the father must have spent near on, if not more than, £1 million on litigation over M. Further, he points out that on his own evidence, the father could not have paid £35,000 of costs from his income since he started proceedings at the beginning of June 2021.

77. The overall sum now claimed by the mother both in respect of historic and future costs is £87,635.

My decision

78. I now make my decision by reference to the criteria in paragraph 53 above.

i) The father is resident in Dubai and therefore condition (a) is satisfied.

ii) I am satisfied, having regard to all the circumstances, and specifically for the reasons set out below, that it would be just to make an order for security for costs.

iii) I do not consider that the father has a meritorious case which would be stifled or hindered if an order for security for costs were made. The only basis on which he can ask the court to exercise jurisdiction is pursuant to the *parens patriae* doctrine based on M's British citizenship. I have recently analysed this jurisdiction in *SS v MCP (No. 2)* [2021] EWHC 2898 (Fam). After examining all the relevant authorities, I held that I was bound by the clear principles enunciated by Moylan LJ in *Re M (A Child)* [2020] EWCA Civ 922, [2020] 3 WLR 1175. I summarised those principles in paragraph 33 thus:

> "It is clear from the judgment of Moylan LJ in *Re M* that the burden of surmounting the substantive threshold falls on the applicant. He has to show that there are circumstances here

> which are sufficiently compelling to require or make it necessary that the court should exercise its protective jurisdiction. The burden is to demonstrate that a crisis has erupted and that in consequence the child has suffered, or is at risk of suffering, serious harm, of the type, as Sir James Munby P suggested, that would engage articles 2 or 3 (i.e. a threat to life or of inhuman or degrading treatment). In *Re M (Wardship: Jurisdiction and Powers)* [2015] EWHC 1433, the President stated that he did not need to consider whether the jurisdiction would be exercisable where the risk to the child is of harm falling short of harm of the type that would engage Articles 2 or 3 of the Convention. In my judgment, if Moylan LJ's substantive threshold is not to be robbed of meaningful content, the bar must be set at that level of harm. That level is not positioned at the "very extreme end of the spectrum" (see *Re M* at [105]) but rather at a point which rightly reflects the criteria of caution, circumspection and necessity. It also gives effect to the key underlying principle that the jurisdiction is protective in nature to be exercised in a supporting, residual role (ibid at [107]).”

The father has not persuaded me that he has even an arguable case to justify the invocation of this doctrine.

iv) I acknowledge that the father was, in a way, forced to litigate here by virtue of the decision of the Court of Appeal of Ontario. However, that does not alter the fact that his case is a very stiff challenge indeed. I consider his case to be weak and the mother’s defence to be strong. The case is about an issue of jurisdiction, not of merits. It is impossible to see how M needs the protection of this court. She does not need protecting at all. If any orders are to be made regulating her relationship with her parents, then they should be made by the court of her habitual residence, namely Ontario. In my estimation, the father should have accepted at the earliest opportunity that he was likely to lose, and submitted to judgment to that effect here, so that he could under the proviso of the Court of Appeal of Ontario, start the relevant proceedings in that jurisdiction. I conclude that at the final hearing the mother will have a solid argument that the father’s stance is outside the spectrum of what is reasonable and that therefore, exceptionally, there should be an order for costs in her favour, which costs, incidentally, she urgently needs. Accordingly, I am satisfied that she has a good chance of obtaining such an order for costs.

v) I do not accept that the father does not have the means to pay an order for costs, if one were made, or to satisfy an order for security for those costs. If he wishes to rely on the alleged turning off of the tap by his father, then he should have adduced evidence to that effect directly from his father. He has managed to find a phenomenal amount of money to litigate hitherto.

vi) I am satisfied, if an order for costs were made, the mother would find herself in a position where she could not enforce, or would face significant obstacles in enforcing, that order. The facts speak for themselves. The mother is owed £127,000 in unpaid costs and maintenance which the father has consistently refused to pay and which the mother has been unable to enforce.

vii) The application for security for costs was not made promptly. In my judgment, that should be reflected in a reduction in the sum claimed.

viii) The amount claimed is £87,635. In my judgment, the figure is properly evidenced and justified. The costs claimed are objectively reasonable.

ix) My judgment is that there should be a reduction to reflect the lateness of application; the uncertainties of litigation; and the prospect of a reduction on a detailed assessment. I award security for costs in the sum of £50,000. That will cover all the mother's future costs and make a contribution to some historic costs, should an order for costs be made.

x) It is too late now to order monthly instalments, as the final hearing is listed to be heard in just under a month's time. The security of £50,000 is to be provided by a bank transfer to the mother's solicitors to be held by them to the order of the court to abide a possible order for costs in the mother's favour. The security is to be provided within 14 days. I am amply satisfied that this is within the means of the applicant. I do not order a stay of the proceedings pending the provision of security.

xi) I stand back and ask myself whether it is just that an order for security for costs should be made and whether this is consistent with the best interests of M. I answer both questions positively. I am strongly satisfied that the mother has a solid claim to an order for costs, should the father's application be dismissed, as I am expecting it to be. I am satisfied that it is in M's interests that her mother should be able to resist what is a dubious claim by her father and that this should be facilitated by her lawyers who should be paid for their services. I apprehend that it is distinctly possible that the mother's lawyers will not be prepared to act without the security. I am in no doubt that it would be contrary to M's interests for her mother to be unrepresented at the final hearing.

xii) If the applicant defaults in making the payment, there will not be time for the matter to be brought before the court prior to the commencement of the final hearing. Instead, the judge hearing the final hearing should decide preliminarily if the father's application should be summarily dismissed in the light of the default. That judge would have to be satisfied that such a peremptory order was not contrary to M's interests.

79. That is my judgment.

Appendix

Rubin v Rubin guidelines

i) When considering the overall merits of the application for a LSPO the court is required to have regard to all the matters mentioned in s22ZB(1) – (3).

ii) Without derogating from that requirement, the ability of the respondent to pay should be judged by reference to the principles summarised in TL v ML [2005] EWHC 2860 (Fam) [2006] 1 FCR 465 [2006] 1 FLR 1263 at para 124 (iv) and (v), where it was stated:

> "iv) Where the affidavit or Form E disclosure by the payer is obviously deficient the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources. In such a situation the court should err in favour of the payee.
>
> v) Where the paying party has historically been supported through the bounty of an outsider, and where the payer is asserting that the bounty had been curtailed but where the position of the outsider is ambiguous or unclear, then the court is justified in assuming that the third party will continue to supply the bounty, at least until final trial."

iii) Where the claim for substantive relief appears doubtful, whether by virtue of a challenge to the jurisdiction, or otherwise having regard to its subject matter, the court should judge the application with caution. The more doubtful it is, the more cautious it should be.

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.

vi) Evidence of refusals by two commercial lenders of repute will normally dispose of any issue under s22ZA(4)(a) whether a litigation loan is or is not available.

vii) In determining under s22ZA(4)(b) whether a Sears Tooth arrangement can be entered into a statement of refusal by the applicant's solicitors should normally answer the question.

viii) If a litigation loan is offered at a very high rate of interest it would be unlikely to be reasonable to expect the applicant to take it unless the respondent offered an undertaking to meet that interest, if the court later considered it just so to order.

ix) The order should normally contain an undertaking by the applicant that she will repay to the respondent such part of the amount ordered if, and to the extent that, the court is of the opinion, when considering costs at the conclusion of the proceedings, that she ought to do so. If such an undertaking is refused the court will want to think twice before making the order.

x) The court should make clear in its ruling or judgment which of the legal services mentioned in s22ZA(10) the payment is for; it is not however necessary to spell this out in the order. A LSPO may be made for the purposes, in particular, of advice and assistance in the form of representation and any form of dispute resolution, including mediation. Thus the power may be exercised before any financial remedy proceedings have been commenced in order to finance any form of alternative dispute resolution, which plainly would include arbitration proceedings.

xi) Generally speaking, the court should not fund the applicant beyond the FDR, but the court should readily grant a hearing date for further funding to be fixed shortly after the FDR. This is a better course than ordering a sum for the whole proceedings of which part is deferred under s22ZA(7). The court will be better placed to assess accurately the true costs of taking the matter to trial after a failed FDR when the final hearing is relatively imminent, and the issues to be tried are more clearly defined.

xii) When ordering costs funding for a specified period, monthly instalments are to be preferred to a single lump sum payment. It is true that a single payment avoids anxiety on the part of the applicant as to whether the monthly sums will actually be paid as well as the annoyance inflicted on the respondent in having to make monthly payments. However, monthly payments more accurately reflects what would happen if the applicant were paying her lawyers from her own resources, and very likely will mirror the position of the respondent. If both sets of lawyers are having their fees met monthly this puts them on an equal footing both in the conduct of the case and in any dialogue about settlement. Further, monthly payments are more readily susceptible to variation under s22ZA(8) should circumstances change.

xiii) If the application for a LSPO seeks an award including the costs of that very application the court should bear in mind s22ZA(9) whereby a party's bill of costs in assessment proceedings is treated as reduced by the amount of any LSPO made in his or her favour. Thus, if an LSPO is made in an amount which includes the anticipated costs of that very application for the LSPO, then an order for the costs of that application will not bite save to the extent that the actual costs of the application may exceed such part of the LSPO as is referable thereto.

xiv) A LSPO is designated as an interim order and is to be made under the Part 18 procedure (see FPR rule 9.7(1)(da) and (2)). 14 days' notice must be given (see FPR rule 18.8(b)(i) and PD9A para 12.1). The application must be supported by written evidence (see FPR rule 18.8(2) and PD9A para 12.2). That evidence must not only address the matters in s22ZB(1)-(3) but must include a detailed estimate of the costs both incurred and to be incurred. If the application seeks a hearing sooner than 14 days from the date of issue

of the application pursuant to FPR rule 18.8(4) then the written evidence in support must explain why it is fair and just that the time should be abridged.
