IMPORTANT NOTICE

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published. The identity of the child, Z, may not be disclosed by name or location. His anonymity 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.

Neutral Citation number: [2022]EWHC 278 (fam)

Case No: FA-2022-000083

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

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The Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 2 November 2022

Before :

Mr Justice Moor

- -

Between :

Tony Stacey

Appellant

-and-

Lucy McNicholas

Respondent

- -
- -

Mr Stuart McGhee of Counsel (instructed on a Direct Access basis) for the **Applicant**
Mr Kelan McHugh of Counsel (instructed on a Direct Access basis) for the **Respondent**

Hearing date: 5th October 2022

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JUDGMENT

MR JUSTICE MOOR:-

1. I have been hearing an appeal against an order made by HHJ Reardon sitting in the Central Family Court on 21 December 2021. Sir Jonathan Cohen gave limited permission to appeal on 14 July 2022.

2. The case concerns a child, Z, who is now aged 7. The Appellant, Mr Stacey, is Z's father. The Respondent, Ms McNicholas, is his mother. I propose to refer to them throughout this judgment as "the father" and "the mother" respectively. I do so for the sake of convenience and mean no disrespect to either by so doing.

3. The parents cohabited but never married. They separated in March 2018. Regrettably, there has been very significant litigation between them ever since. There is a Child Arrangements Order in place. I have not seen a copy of the order but I understand that Z spends alternate weekends and one weekday per week with his father as well as half of the holidays. It follows that the resident parent is the mother.

4. The appeal is entirely concerned with finances. After the separation, the mother and Z lived with the maternal grandmother for a time before moving to rented accommodation at a cost of £2,500 per month.

5. The mother applied for financial provision for Z pursuant to Schedule 1 of the Children Act on 5 September 2018. There was a three-day final hearing before O'Leary DDJ in June 2020. The Deputy District Judge gave judgment on 1 July 2020. She found that an appropriate housing fund for Z and his mother was between £525,000 and £550,000. The mother had to deploy her existing capital resources towards the purchase. She was found to be able to raise £150,000. The Judge ordered that the father pay a lump sum of £350,000 to the mother outright. This was as a result of a finding that the father had invested money on the mother's behalf. There was then to be a further lump sum of £50,000 on what I might call standard Schedule 1 terms. In other words, this fund was to be held in trust and revert to the father on Z's independence. There was to be simple interest on the lump sums after 42 days. Interest on £350,000 at the Judgment Debt Rate of 8% would be £28,000 or £2,333 per month. As I understand it, the eventual date for payment was 29 December 2020.

6. Initially, on separation, the father paid £6,000 per month to the mother until February 2019 when he reduced the payment to £2,000 per month. He stopped this payment in June 2020. From August 2020, he paid £803.80 per month. This reduced to £335.19 per month in October 2021 and it is now £263.45 per month. I assume the latter three figures were pursuant to CMS assessments but I may be wrong. In any event, there is no doubt that these

figures are not sufficient to cover the mother's rent for a home for herself and Z.

7. The father filed a notice of appeal in July 2020 although the order of O'Leary DDJ was not perfected until 17 November 2020. For reasons that I do not entirely understand, his application for permission to appeal was not heard until 3 September 2021. Recorder Nice granted permission to appeal solely as to the outright payment of £350,000. She refused permission to appeal as to the level of housing need and the father's ability to pay.

8. In the interim, the mother applied on 26 May 2021 for further Schedule 1 provision to cover her rental payments pending receipt of the capital provision made by O'Leary DDJ.

9. The application was heard by HHJ Reardon on 1 December 2021. She directed that the father pay a further lump sum of £42,500 by 12 January 2022 to cover the rent for the period prior to the hearing date. She then directed a series of lump sums of £2,500 per month from 17 December 2021 until the capital was paid as per the order of O'Leary DDJ. The father was to pay the mother's costs in the sum of £3,600.

10. In her judgment, HHJ Reardon noted that the CMS assessment had been approximately £300 per month. Although it was being challenged by the mother, this was below the maximum assessment such that the court did not have jurisdiction to award periodical payments. She did say that it was impermissible to use lump sum orders to circumvent the provisions of the Child Support Act and that a court cannot disguise maintenance as lump sums. Having said that, she distinguished what she was being asked to do on the basis that there was a clear distinction between housing provision and maintenance. The mother was entitled to rent a property pending payment of the lump sums and that should be covered by the father until he paid.

11. The father filed a Notice of Appeal on 22 December 2021. He contended that there was no jurisdiction to make the order as the series of lump sums were disguised maintenance payments prohibited by the CSA. He also argued that the trial process was unfair and that further lump sum provision was wrong in the circumstances of the case.

12. His earlier appeal against the order of O'Leary DDJ was heard by HHJ Harris on 11 January 2022. A compromise was reached. The mother, in my view rightly, conceded that the outright lump sum ordered by O'Leary DDJ was made without jurisdiction. The mother had not made a civil claim in relation to money allegedly owed to her. Her only claim was pursuant to Schedule 1 and there is binding authority that, save in exceptional circumstances, provision for housing should not be provided outright. In consequence the appeal was allowed. The effect of doing so was to remove the interest provision on the lump sums. The total award of £400,000 remained in tact but on a reversionary basis. This sum was to be paid by 12 April 2022. A further hearing was listed on 22 April 2022. The mother was to pay the father's costs of the appeal in the sum of £10,421 with interest at 3%.

13. On 22 January 2022, the father applied for a stay of the payments pursuant to the order of HHJ Reardon pending his appeal and an extension of time if it was required. The mother applied the same day to enforce the order of HHJ Reardon.

14. Sir Jonathan Cohen first dealt with the father's appeal on paper on 12 April 2022. He refused the application for a stay. He found it impossible to make any sense of the application as he had not, at that point, seen the two main judgments. He noted that there was a further hearing before Judge Harris on 24 April 2022 and wondered if any renewal of the application for permission to appeal should await the outcome of that hearing.

15. It appears that terms of an order were agreed on 24 April 2022 before Judge Harris although I do not believe there is a final order in place. Moreover, it is clear that, as so often, the details of the trust have not been finalised. It follows that I do not believe there is in place, at least at present, an order that provides for interest on late payment. It would be logical if such an order was eventually made, at least from 22 April 2022.

16. The mother's application for enforcement was heard by Hudd DJ on 5 May 2022. She made interim charging orders on various properties in which the father has an interest.

17. The Father filed a second appeal notice on 9 May 2022. There was a further application for a stay and an application for permission to appeal out of time. The point was made that any delay was due to the father misunderstanding what he was expected to do, given that he was a litigant in person. Again, the central theme of the document is the contention that there was no jurisdiction to make the order, on the basis that it was periodical payments in disguise, as evidenced by the fact that it had to be a series of monthly lump sums. It was further said that it was wrong to consider a further application when the original order was subject to appeal. Finally, it was contended that a payment for rental payments that had already been paid by the mother could not be for the benefit of the child. I have to say I do not understand that argument but it does not matter as the father does not have permission to appeal on that ground.

18. Sir Jonathan Cohen considered the matter again on 8 June 2022, also on the papers. He granted permission to appeal solely in relation to the element of the lump sum that related to the period up to 29 December 2020, the date on which the payments were originally due to be paid. He noted that this could have been raised before O'Leary DDJ. He then made a number of observations. The housing fund was expressly provided for the benefit of the child. The mother would not have had to rent accommodation but for the needs of the child and the expenses of doing so were for the benefit of the child. He took the view that there was nothing wrong in principle with the provision of a past housing element being made in circumstances were the housing fund would otherwise be eroded by the unforeseen rental payments necessitated by delay in paying the housing fund. He did not consider this to

be the provision of maintenance through the back door in a manner not permitted by the CSA. The law expressly permits multiple applications. There was no basis for going behind the findings of fact of both O'Leary DDJ and HHJ Reardon as to ability to pay. There was nothing unfair or wrong about the procedure adopted by the judge.

19. The father sought an oral hearing which took place before Sir Jonathan on 14 July 2022. The earlier order was varied. The father was granted permission to appeal limited to whether the payments should have been ordered by HHJ Reardon in respect of the period in which the housing fund was not payable and whether orders for the payment of rent by way of lump sum(s) fall within the description of s5(1) of Schedule 1 of the Children Act 1989 or are otherwise prohibited by section 8(3) of the CSA 1991. The appellant's application for a stay of the order was, however, refused. The appeal was to be listed before me on 5 October 2022 as an attended hearing. The judgment accepts that it is an arguable point that the payment of rent, which is a recurring expense, falls foul of section 8(3) of the CSA but he adds that it is better that he does not say any more other than that he considers it is a point that can be properly argued.

20. The mother's skeleton argument in response is dated 5 October 2022. She makes the point that, if she had been paid promptly, she would not have incurred rental costs. The father was responsible for the delay in getting the order of O'Leary DDJ sealed such that the lump sum only became payable on 29 December 2020. The order of HHJ Harris is still not agreed. The mother has eroded her savings and incurred debt. The CMS assessment is now £263.45 and does not include housing expenses.

21. The Father's skeleton argument makes the point that a maximum maintenance assessment is only payable if an annual income of the payer is over £156,000 per annum. This is slightly ironic given that the judgment of O'Leary DDJ found that the father's gross income was between £150,000 and £200,000 per annum but I accept that this is not relevant to the decision I have to take, given that the father has not obtained permission to appeal on the basis of an inability to pay. It is then said that the CMS defines "child maintenance" as such that covers "how your child's living costs will be paid when one of the parents does not live with the child". It is argued that the meeting of everyday living costs includes housing costs and that, if a payer is contributing towards housing costs, a variation to the CMS figures is justified.

The law on appeals

22. Sir Jonathan Cohen has already given permission to appeal on the two grounds set out above. It follows that, pursuant to FPR 2010, Rule 30.3 he was satisfied that the appeal on those grounds had a real prospect of success. That does not, of course, mean that the appeal is bound to succeed. Pursuant to Rule 30.12, the appeal is limited to a review of the decision of the lower court, given that neither of the exceptions applies. Under Rule 30.12(3), the appeal court will allow an appeal where the decision of the lower court was either

wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

23. It is not suggested that there was any serious procedural or other irregularity in this case. It is therefore solely a question of whether the decision was wrong. It is said that the court did not have jurisdiction to make the order it did. If I find that the court did not have jurisdiction, the appeal will be allowed and that will be the end of the matter.

24. If I find the court did have jurisdiction, I will have to go on to consider whether the judge exercised her discretion in a way that was wrong. In other words, did she make an order that no reasonable judge properly directing herself could have made. If she did not, the appeal is likely to be dismissed.

The respective contentions as to the law

25. It is agreed that there is jurisdiction pursuant to section 1(2)(c) of Schedule 1 to the Children Act 1989 to make an order for such lump sum as may be specified to the applicant for the benefit of the child or to pay to the child direct. Section 1(3) provides that the powers conferred may be exercised at any time if the child has not reached the age of 18 and section 1(5) is to the effect that the court may at any time make a further order but it may not make more than one order for settlement of property or transfer of property.

26. Section 5(1) provides that, without prejudice to the generality of paragraph 1, an order under that paragraph for the payment of a lump sum may be made for the purpose of enabling any liabilities or expenses (a) incurred in connection with the birth of the child or in maintaining the child; and (b) reasonably incurred before the making of the order.

27. Section 8(1) of the Child Support Act 1991 applies in any case where a child support officer has jurisdiction to make a maintenance assessment. Section 8(3) states that, in any case where subsection (1) applies, no court shall exercise any power which it would otherwise have to make, vary or revive any maintenance order in relation to the child and absent parent concerned. There are, of course, exceptions, such as where a maximum assessment has been obtained; the child is undertaking education and the order is made solely for the purpose of meeting some or all of the expenses incurred; the child is disabled; or one party resides overseas. I accept that none of these exceptions apply in this case.

28. Much reliance is placed by Mr McGhee, who appears on a Direct Access basis on behalf of the father, on the decision of Holman J in Dickson v Rennie [2015] 2 FLR 978. In that case, the mother had sought provision by way of lump sums to meet expenditure shortfall on living costs and caring for the child. Holman J was clear that this was not permitted by the CSA 1991:-

> *"[36] I turn now, finally, to the current lump sum elements of the mother's claim. There is no doubt that the court does have a power under Schedule 1 to the Children Act 1989 to make orders "at any*

time", and from time to time, for payment of lump sums, and that power is in no way directly affected or impacted by any aspect of the Child Support Act 1991 and the statutory scheme. I must, however, be very careful that I do not circumvent the clear statutory intention, in particular of sections 8 and 10 of the Act, which I have quoted above, by making provision for what, in effect, is maintenance described as a lump sum.

[38] ... For the reasons that I have also already explained, there is absolutely no power in this court to make some form of "top up" order. If I were now to order a lump sum to reflect those amounts, I would be very obviously flouting the will of Parliament and, indeed, not acting as a court of law".

29. Mr McGhee also relies on Green v Adams [2017] EWFC 24 where Mostyn J said at paragraph [4]:-

> "*...the court does not have jurisdiction to make an award to meet the quotidian expenses of living; to meet, if you like, the cost of one's daily bread. It can only make an award for genuinely capital expenditure of a singular nature."*

30. He further submits that a "*series of lump sums*" is evidently on-going periodical payments that are simply re-flagged.

31. Mr McHugh, who also appears by way of Direct Access but on behalf of the mother, argues that the definition of child maintenance relied on by Mr McGhee comes from a Government website, not the Act. The Act simply says at s54(1) that "*child support maintenance has the meaning given in section 3(6)*" which in turn states that "*periodical payments which are required to be paid in accordance with a maintenance calculation are referred to in this Act as 'child support maintenance*'". The calculation is, of course, entirely based on a formula calculated primarily on the basis of income, rather than on the basis of need. He adds that there is no authority for the assertion that the meeting of everyday living costs includes housing costs.

32. He then relies on Morgan v Hill [2007] 1 FLR 1480, in which the father was ordered to pay £50,000 towards certain debts in the mother's name, which included historic mortgage costs. This was upheld on appeal by Thorpe LJ who held at [38] that "*indirect costs, such as the costs of the household and motoring expenses*" that had led to the debts, should be met by the father. Mr McHugh argues that this shows that the court had no difficulty in using the lump sum provisions to meet historic expenditure that was demonstrably for housing. The difficulty with this argument, as pointed out by Mr McGhee, is that this was a maximum assessment case, thus giving the court jurisdiction to make a top-up award, although it was done by lump sum not periodical payments. I do, however, accept that the court proceeded on the basis that historic housing costs can be a legitimate head of claim and be dealt with by a capital payment.

33. Mr McHugh also relies on a decision of Baron J in DE v AB [2012] 2 FLR 1396. The father appealed against an order that he pay a lump sum of £85,000 towards the mother's indebtedness which "*included mortgage interest, loans to cover arrears of mortgage and the huge credit/bank card debts which I have already outlined*". Baron J did reduce the lump sum to £40,000 but not on the basis of any jurisdictional arguments. She was clearly influenced by the fact that the mother was not able to afford housing from the modest amount of child maintenance paid by the father. Mr McGhee postulates that this decision would not survive Dixon v Rennie, but the law was the same both when Baron J came to her decision and Holman J came to his. Finally, Mr McHugh reminds me that housing benefit is not reduced by a CMS assessment which he contends supports the contention that housing is not a relevant feature of the CSA jurisdiction.

34. I asked the parties about a decision of Wilson J in R v R (Lump Sum Repayments)[2003] EWHC 3197 (Fam); [2004] 1 FLR 928 in which the judge ordered a husband to pay a lump sum of £30,000 immediately and then 240 monthly instalments in a sum equivalent to the wife's obligations under a 20-year repayment mortgage of £225,000 plus periodical payments. I entirely accept that this was a divorce case and there were no jurisdictional limitations on Wilson J but it is indicative of a decision to order what was, in reality, a whole series of lump sums over a very long period, even if it was dressed up as one lump sum payable by monthly instalments.

My conclusions

35. I have not found this an easy case to decide. I entirely accept that the decision in Dixon v Rennie is correct. The court cannot "*top-up*" a CMS assessment unless there is a maximum assessment. Mr McHugh described Dixon v Rennie as an "*unapologetic attempt*" to get round the CSA regime. I agree with him. I have to decide, however, whether the situation here is different.

36. I have been struck by the admitted fact that this court does, despite the existence of the CSA, retain jurisdiction to provide for the housing costs of the child and the parent with care by way of a capital sum. It has never been suggested that this falls foul of the provisions of the CSA. Capital awards are regularly made in large sums to enable a property to be purchased, even though the property is, almost always, held on trust for the payer. The courts have therefore clearly accepted that such provision does not fall within the maintenance provisions where the CSA has exclusive jurisdiction.

37. If the court has jurisdiction to provide a capital fund for housing, it is difficult to see why it does not have jurisdiction to provide for the costs of such housing prior to the property being acquired. It would be completely illogical if one was not maintenance provision but the other was.

38. I do not accept that the only way to deal with this is by directing interest on the lump sum. First, interest is unlikely to cover the period up to the making of the order. Second, although interest is, in general, designed to compensate the payee for late payment, I am of the view that any interest on a Schedule 1

lump sum accrues to the capital fund and thus reverts to the payer in due course. In other words, it covers the position if the property market increases between the date when payment is due and the date on which payment is actually made, but it does not assist in paying rent in the meantime.

39. I have therefore come to the conclusion that there is jurisdiction in the court to make an award to cover rent before the capital sum is paid.

40. I accept entirely that this has to be done by way of lump sums. There is no question that there is jurisdiction to make more than one lump sum. The provision of past payments of rent can easily be covered, as here, by a crystallised figure. I was slightly more troubled about the ongoing monthly lump sums. I take some comfort from the decision of Wilson J in R v R, where the overall lump sum was not quantified but there were monthly lump sums payable for a further twenty years.

41. In any event, I have come to the conclusion that the provision was justified. There was jurisdiction and a series of lump sums was the only way to do justice. The father cannot complain on the merits, in that the delay in payment is entirely of his making. He accepted the overall quantum of the provision when the appeal was compromised. He could have paid long ago and simply argued about the terms of payment. This would have obviated the need for the mother to rent to provide accommodation for Z. The father cannot benefit by his own default. Indeed, he has still not paid any capital even now, some two years after the original order of O'Leary DDJ and nine months after the order of HHJ Harris.

42. In summary, O'Leary DDJ concluded that the father should be responsible for providing housing for the mother and Z during Z's dependency. I simply cannot see why this only applies after the father pays the capital lump sum. The obligation applies both before and after he pays the lump sum. The CSA legislation does not mean it can only be his responsibility after he pays the lump sum. To so determine would be illogical and would encourage delay in payment to the huge detriment of Z or any other child in a similar situation.

43. The appeal is therefore dismissed on the basis that there was jurisdiction and the judge's exercise of her discretion cannot be criticised.

44. I now turn briefly to the question of whether HHJ Reardon was right to backdate the award to a date before the order of O'Leary DDJ became payable. The amount in dispute is relatively modest at some £15,000. I do not know if the father was the one who was responsible for the delay in obtaining an order from the court. I do not base my decision on that. Equally, I accept that the matter could have been raised with O'Leary DDJ but, again, I do not believe that this assists the father as it was not raised by him either. The provision of interest on the lump sum does not help given my conclusion that any interest payable would merely accrue to the trust provision. Nobody knew that there would be huge delays in payment in this case when O'Leary DDJ gave her judgment on 1 July 2020. The rent was payable from then to November 2020. I have therefore come to the conclusion that the decision of

HHJ Reardon was within the appropriate exercise of her discretion. The appeal is therefore dismissed on that ground as well.

45. I am very grateful to both counsel for the immense help they have given me with this difficult case. Nothing more could have been said or done on behalf of either party.

Mr Justice Moor
26 October 2022