Neutral Citation Number: [2024] EWHC 1179 (Fam)

Case No: FA-2023-000199 & FA-2023-000201

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 March 2024

Before :

MR JUSTICE CUSWORTH

- -

Between :

AB **Appellant**

- and -

BA **Respondent**

- -
- -

Nichola Gray KC (instructed **on a direct access basis**) for the **Appellant**
Nasstassia Hylton (instructed **on a direct access basis**) for the **Respondent**

Hearing date: 5 March 2024

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JUDGMENT

This judgment was handed down remotely at 10.30am on 17 May 2024 by circulation to the parties or their representatives by e-mail and by release to The National Archives.

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This judgment was delivered in public. 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 OR the parties] must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Cusworth :

1. This is an appeal against 2 orders in relation to costs made by HHJ Oliver, on 9 June and 30 June 2023. Neither is an appeal as to principle, but rather against the judge's determination as to how those orders should be enforced: in one case (in the first appeal) as to the rate at which repayment by instalments should be made, and in the other (in relation to both appeals) as to whether an order should be left not to be enforced without the leave of the court, or should form part of the payment by instalment regime in place in relation to the other provision. These are of course usually discretionary decisions, which will be decided by a judge who has had carriage of the case, and who will determine what they consider a realistic outcome on fact specific grounds. In those circumstances it will rarely be the case that they become the subject of an appeal, and even rarer still for that appeal to succeed.

2. In this case the appellant is the husband, and the respondent is his former wife. They have 2 children, Child A (born in Spring 2013), and Child B (born in Summer 2014). They have been through fully contested financial remedy proceedings, which culminated in a final hearing before HHJ Everall QC where he made a final order, in Summer 2019. That order provided for the wife's housing to be provided out of the trusts which evidently dominate the financial landscape of the family, and also for ongoing joint lives index-linked periodical payments for her, alongside child maintenance orders, for both children. Those orders were both index linked. There have also been what I understand to have been extensive proceedings in relation to child arrangements since the parties' separation, culminating in a situation where the care of the children is effectively shared between them.

3. It is common ground that the wife has no substantial capital in her name, such that the satisfaction of any costs orders made against her can only come through deductions from the maintenance payments made to her by the husband under HHJ Everall's order. The current amount of maintenance which the wife is receiving under the order, I am told by Ms Gray KC for the husband, is £101,341pa, or £8,445pcm. I take this also to include child maintenance. This is slightly higher than the figure given to HHJ Oliver, because it includes indexation which came into effect soon after the hearings at which the orders were made, and which increase was communicated in writing to him by Ms Gray after the conclusion of the hearing. The judge later indicated by email on 12 June that he had taken such indexation into account. The figure for the wife's income needs which were put before the judge was £8,190.11pcm, deriving

from a schedule which although wrongly dated had in fact been prepared just before the hearing in June 2023.

4. The original costs liability which lay behind the judge's June 2023 orders went right back to 2019, not long after the original financial remedy order was made. On 16 October 2019, DDJ O'Leary made an order for costs against the wife after an issue arose about the division of chattels between the parties. Then on 26 January 2021, DJ Duddridge made a further costs order against her, after she made an unsuccessful LSO application in relation to the costs of the Children Act proceedings. After the application of interest, but also after a further setting off of a small costs order made against the husband, the amount which HHJ Oliver determined was then owed by the wife to the husband under these orders was £62,019.97. In addition there are 2 subsequent orders made against the wife, the first assessed in the sum of £15,000, the second not yet assessed but likely to be somewhere in the region of £23,000. There is thus currently up to £100,000 in outstanding costs orders made against the wife but not yet paid by her. Interest runs on these amounts at the judgment rate.

5. That was the context in which HHJ Oliver determined that he would order the wife to repay the sum due of £62,019.97 at the rate of £50pcm, and directed that the other liabilities be not enforced without leave of the court.

    a. In relation to the instalment order on 9 June 2023, the judge said that '*looking at the mother's outgoings I am satisfied that she is able to afford some money. She does have this standing order to Moss Fallon for £500 a month, she can reduce that and pay… £50 a month*.'

    b. In relation to his other judgment on that day, having decided that she should have a further liability he then said: '*What about her ability to pay? Frankly, she has no ability to pay and therefore I am going to say that the costs order made will not be enforced except with the leave of the court… She has outgoings, she has costs orders that have got to be met. Another burden at this point is totally inappropriate and I am putting the children first if nobody else is.*'

    c. Finally, on making a further costs order on 30 June 2023 the judge indicated: '*I am still satisfied that the mother's income and expenditure is such that she does not have the means to pay the costs order and so, while I will make a*

costs order against her, I also make an order that it should not be enforced without leave of the court.'

6. Dissatisfied, the appellant husband sought to appeal, asking for an order for instalments at the rate of £1,000pcm, the rate that he had argued for before HHJ Oliver. The wife, just before this hearing – she says through her counsel Ms Hylton on 27 February 2024, although Ms Gray KC says it was later – accepted that there should be an increase in the level of payments ordered. She offered openly to pay at the rate of £500pcm, and offered £1,000 towards the costs incurred by the husband in prosecuting this appeal. It nevertheless remains her position that the decisions of HHJ Oliver were not sufficiently wrong that they should be set aside on this appeal.

7. The husband, meanwhile, had received permission to appeal from the President of the Family Division by his order dated 17 January 2024. I am satisfied that these were in time appeals and that permission to extent the time for appealing was not required. The reasons given in the order granting permissions were as follow:

The two proposed appeals have a reasonable prospect of success for the reasons advanced in the Appellant's skeleton argument and in circumstances where the judgments may be found to demonstrate an insufficient degree of judicial analysis in the context [9 June] of a formal application for enforcement under FPR 2010, r 33.3 and where [both judgments] the judge expressly failed to consider any detail concerning the Respondent's financial circumstances.

8. How then should I determine the issues raised by this appeal? I bear in mind of course that the judge has made a finding of fact that the wife's '*income and expenditure is such that she does not have the means to pay the costs order*', and an appellate court should be very slow to interfere with such a decision. As Lewison LJ in made clear in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ , at [114]:

Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them…The reasons for this approach are many. They include

i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii) The trial is not a dress rehearsal. It is the first and last night of the show.

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

9. I am also very aware in this case that I have not had nearly as much opportunity as had HHJ Oliver to assess the parties, or hear their evidence. He had clearly formed a strong view that, even though he still felt that it was appropriate to make costs orders against the wife in relation to what have evidently been a series of misconceived applications, he nevertheless felt that her financial position was such that she should be permitted to continue to prioritise her other obligations over the costs liabilities that he had determined that she should bear. I therefore agree with Ms Hylton that any appellate court should approach the task of reconsidering the judge's determination with considerable caution.

10. However, that position has now been somewhat compromised by the wife's acceptance before me that she can in fact manage to make some contributions at a higher level than those set by the judge. I was told that that was due in part to a change in circumstances, in that she no longer feels obliged to provide the monthly sum of £300 to her mother, because her mother no longer needs that money. I am also told that she acknowledges that other savings could be made, such that a total of £500pcm can in fact be made available.

11. I have to say that I am not satisfied that such a concession really reflects a 'change of circumstances' from those put before the judge, as the wife's decision to make the payments to her mother can only ever have been voluntary, and could not properly have been put in priority to her obligation to discharge a costs order made against her in proceedings in the family court. However, it is now clear that those funds are properly available, and therefore that a revisiting of the judge's discretionary determination does become both appropriate and necessary. Although these monthly

sums may seem small in the context of the overall debt, their annual impact will become significant over time.

12. Ms Gray KC for the husband says frankly that that concession still does not go far enough. She points out that, if the whole debt of c.£100,000 is taken into account, payments at the rate now offered by the wife will not even meet the monthly interest accruing on the principal, so that there will never be any reduction of the amount owed. Even if the debt is repaid at the rate of £1,000pcm, it will still take 13 years and 11 months before the full amount owing is discharged.

13. I am satisfied that it is appropriate to consider going further than the wife's open position, although I do so cautiously in circumstances where the experienced circuit judge, who has been able to assess, in much greater detail than have I, the evidently complicated dynamic between this couple which has led to the wife sitting in court before me behind a screen, has determined that no more than a nominal payment should be imposed on her. This, even though he and others have seen fit to make a string of costs orders in these proceedings. The judge's determination was that the wife could afford no more than he had ordered; but she now acknowledges that in truth she could. I will therefore consider in all of the circumstances what the right figure going forward should be.

14. Aside from the contribution to her mother, the wife also relies on a contractual obligation to her former solicitors, which is currently to repay a debt to them of c. £46,000 at the rate of £500pcm. The judge himself had found that the wife could reduce that payment by a small amount to enable the £50pcm that he determined to be paid. I should add that she owes other sums to other solicitors which are not currently being serviced. The wife also owes a reducing amount to Barlcayloan – being repaid last summer at the rate of £277.88pcm. She also included a number of compendious discretionary figures - £200pcm for maintenance, repair and replacement; £1,000pcm for food and general housekeeping; £619.66pcm for domestic help, when all added together; £866.40pcm for pet expenses, and then a number of smaller items which one might expect to see included within the general housekeeping category , such as light bulbs, printer cartridges and weed killer. There is an item for school uniform at £126.32pcm which should be the husband's responsibility under the 2019 order, so the wife should be able to be reimbursed for any amount which she finds herself needs to pay out under that head.

15. Generally, and looked at in the round, the budget for herself and the two children when they are with the wife has sufficient latitude for there to be sensible if modest savings made. The figure, shorn only of the sum then said to be provided for her mother, becomes £7,890.11. This represents a surplus already of £554.89pcm, before any other cuts are made at all.

16. I have also to remember, however, that under HHJ Everall's order, the wife is due soon to move to a new larger property, also to be provided through the trust, and that this will potentially increase the size of some of the utility bills which the wife will have to pay. Some of the expenses in her current budget particular to her current property might also be reduced of course, but I accept the general proposition that larger properties cost more to run. I also consider it reasonable in light of HHJ Oliver's expressed views as recited above to leave the wife in a manageable position whilst the children are still relatively young. I have therefore come to the view that for the time being the appropriate rate of deduction from the monthly maintenance figure towards the costs debts is in the sum of £700pcm.

17. I am aware that this will do little more for the time being than service the interest on the loans, but it will at least achieve that end. I also propose that after a further period of time, of 5 years, the monthly amount should increase to the figure put forward for the husband by Ms Gray, of £1,000pcm.

18. I have considered the decision of *Loson v Stack* [2018] EWCA Civ 803, cited to me by both sides, where Patten LJ made clear at [23] that:

> *'for the debtor to obtain the benefit of an instalment order, … the Court must be presented with a realistic repayment schedule backed up by evidence that the creditor can be expected to receive the amount of principal and any interest within a reasonable period of time. To that extent, the interests of the creditor will be paramount. Quite where the balance should be struck in terms of reasonable time will depend on the facts of each case'.*

19. In this case, I do bear in mind the judge's concern that the children should not be prejudiced by the rebalancing of debt between their parents post-divorce, and I am satisfied that to increase the monthly burden on the wife only once the children are older and therefore more robust will achieve that end. She is also in a position to plan for the increase well in advance. However, I am equally clear that it is appropriate that

foreseeably, the wife will begin to clear the debts that she has been found to owe, and that she can, without undue hardship, do so.

20. In relation to the decision which the judge made to defer a decision about enforcement of the further orders until a later date, I have formed the view that that course would not be in the interests of anyone in this family, and that a final determination of how the liability should be met is needed now. I will consequently direct that enforcement of those further orders will continue consecutively once the first liability is cleared, and at the same rate as under this order, thus precluding the need for further application in the absence of any unforeseen circumstances.

21. I have indicated to the parties that they should make any applications for costs to me in writing, to avoid the need for any further hearings in this case. That remains my position, however, I make it clear that, in the circumstances outlined above, I do not encourage any such further application, given the many years that will now have to pass before the extant costs orders that have already been made are discharged in full.