

KSO v MJO: THE COSTS SCANDALS CONTINUE

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Introduction

“We simply cannot go on as we are. The expenditure of costs on the scale exemplified by this and by too many other such cases is a scandal which must somehow be brought under control.”

This quote from the recent case of KSO v MJO [2008] EWHC 3031 (Fam) has again sparked interest because of Munby J’s outspoken comments on the issue of disproportionate costs.

In this article, we review the case and the judgement against the backdrop of the costs rules in ancillary relief proceedings and the practice management obligations of judges and consider what lessons can be learned for the family law profession. The comments made by Munby J in this case clearly suggest that some clients and their lawyers are still incurring “*ruinous*” costs and that there is still a long way to go to eliminate the problem.

The New Costs Rules

The introduction of the New Costs Rules on 3rd April 2006 sought to keep the issue of costs at the forefront of the minds of practitioners and judiciary alike and place a greater emphasis on active case management.

“The general rule in ancillary relief proceedings is that the court will not make an order requiring one party to pay the costs of another party...” (R 2.71(4)(a)).

‘*No order as to costs*’ is therefore the norm and each party has to take responsibility for the level of their own fees in ancillary relief cases. The DCA Consultation Paper CP(L)29/04 ‘Costs in Ancillary Relief Proceedings and Appeals in Family Proceedings’ stated that: *“The purpose of applying a “no order for costs” principle in ancillary relief proceedings is to stress to the parties, and to their legal advisers, that running up costs in litigation will serve only to reduce the resources that the parties will have left to support them in their new lives apart...”*

However, the court may make a costs order: *“(b)... at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them)”* (R2.71(4)(b)). This is a low threshold. In deciding what costs order (if any) to make under R2.71 (4)(b), the court must have regard to a number of factors including, the reasonableness of pursuing or contesting particular issues, compliance with orders and rules and the conduct of a party in relation to the proceedings

The new rules replaced the Calderbank basis of costs following privileged offers, which sometimes put the whole basis of an order in jeopardy when the costs positions were opened up to the judge. Instead no order as to costs aimed to minimise prejudice to either party, as ultimately the costs are paid up to the final hearing. It was hoped that they would reduce the imbalance in cases where a spouse in a weaker financial position faced the prospect of litigating against a financially stronger spouse. Unfortunately the government refused to introduce at the same time the opportunity for interim lump sums for costs which jurisdictions such as Australia have found a crucial element alongside no costs orders as it means that the family pot can be fairly and evenly depleted to fund the costs as the case goes on.

Family Proceedings Rules 1991

These were also aimed to keep costs as a primary focus throughout ancillary relief proceedings including the introduction in 2006 of the new Form H and H1. They stated

2.51D—*(1) The ancillary relief rules are a procedural code with the overriding objective of enabling the court to deal with cases justly. (2) Dealing with a case justly includes, so far as is practicable—*

(b) saving expense;

(c) dealing with the case in ways which are proportionate—

- (i) to the amount of money involved;*
- (ii) to the importance of the case;*
- (iii) to the complexity of the issues; and*
- (iv) to the financial position of each party;.”*

(5) The court must further the overriding objective by actively managing cases. (6) Active case management includes—

(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;

(b) encouraging the parties to settle their disputes through mediation, where appropriate;

(c) identifying the issues at an early date;

(d) regulating the extent of disclosure of documents and expert evidence so that they are proportionate to the issues in question;

(e) helping the parties to settle the whole or part of the case;

(f) fixing timetables or otherwise controlling the progress of the case;

(h) giving directions to ensure that the trial of a case proceeds quickly and efficiently.”

The court is expected to actively manage cases from start to finish, and there is a clear emphasis on saving costs and dealing with matters expeditiously.

KSO v MJO [2008] illustrates that not enough is being done to prevent costs spiralling out of control.

KSO v MJO Case Summary

This ancillary relief case involved numerous applications, cross applications and an appeal. The husband's father and mother had also been joined. There was a total asset pool of £818,416, against which there were liabilities of £324,327, leaving a net pot of £494,519. By this stage the total costs incurred were £553,460, of which £276,471 had been paid and £276,989 remained to be paid, leaving the **□miserable sum□** of £217,530 for distribution. The wife believed that the husband was involved in various property transactions with her father in law and sought to investigate this further. The wife asserted that the husband had an interest in the assets held in his father's name and these assets should have therefore been available for the purposes of the ancillary relief application. The husband disputed this. The judge decided that there were 3 issues for him to consider:

1. Was the father-in-law entitled to his costs, or should there be no order as to those costs? Munby J' position was clear. He remarked that the wife had pursued and persisted with a claim which was **“always flawed and which never stood any very great prospect of success”**. He therefore ordered that the father in law was entitled to his costs.

2. If the father in law was entitled to his costs, was it against the wife, or against the husband? And 3. If he was entitled to an order against the wife, was she entitled to a costs order against the husband? Munby J looked at these together and found that the father in law was entitled to look to the person who had brought the litigation against him, the wife. However he also found that the husband should bear some responsibility, given his inadequate responses to the wife's questionnaire. He ordered the husband to pay half the costs that she had to pay to the father in law.

The judge was highly critical of the approach of the wife in the case. *“In my judgment this is not the kind of case where, a good claim having become academic in the light of changed circumstances, it is appropriate to order that there be no order as to costs. Nor is it the kind of case where the practical difficulty of assessing the intrinsic merits or demerits of the claim similarly propels the court towards the default position of making no order for costs. I have more than adequate material upon which to base an informed view as to the wife’s prospects of success against the father-in-law. And that view, I am afraid, is stark and unhesitating: the wife embarked upon, and persisted for far too long in pursuing, a claim that in all probability was always flawed and which never stood any very great prospect of success. She chose to sue the father-in-law. She has failed. Costs should, in principle, follow the event. The father-in-law is in principle entitled to his costs.”* (para 65)

It is his judgement and especially comments on costs in respect of previous cases which is crucial

KSO v MJO Judgement on costs

Munby J went on to say: *“Not for the first time I have here been faced with ancillary relief litigation conducted at ruinous expense to the parties. I should like to think it will be the last time, but I doubt it.* (para 76). *In A v A (No 2) (Ancillary Relief: Costs) [2008] 1 FLR 1428, at para [269], I observed that in that case some 41.5% of matrimonial assets of £2,669,715 had gone in costs.”* (para 77)

In A v A (No 2), a vast amount of the costs were incurred as a result of the wife alleging that trusts belonging to the husband were a sham. Munby J said in his judgement in that case that *“the entire litigation was skewed from the outset by the wife’s determined pursuit of quite hopeless allegation that the trusts were shams.”* The matrimonial pot amounted to £2,669,715. Even had the wife succeeded in the sham argument, the pot would have increased to only £4,290,315. The total amount of costs incurred was £1,113,207, some 41.5% of the matrimonial assets. The wife was only left with 62%, of her award, even before claims against her by the husband and trustees. *“That is a heavy price for the wife to have to pay, but it is the consequence of the misplaced zeal with which she chose to conduct a case built on exiguous foundations. I only hope that others will pay heed and that similar cases will in future be pursued with more circumspection.”*

Munby J said in A v A (No 2) and quoted by him in KSO v MJO: *“It may be that the ‘mega’ rich can afford to squander grotesque sums in costs. The allusion is, of course, to Moore v Moore [2007] 2 FLR 339, at para [6]. Lesser mortals cannot. Costs in too many so-called ‘big money’ cases – in modern conditions many such cases do not in truth involve ‘big’ money at all – are, as here, grossly disproportionate to either the amounts or the issues at stake.*

Moore was a jurisdiction dispute case between England and Spain. Thorpe LJ remarked that there had been a *“lamentable and grotesque waste of family resources”*, in the sum of £1.5 million. This was despite the fact that it was accepted that even if matters were dealt in the Spanish courts, England law would be applied.

Munby continued in A v A (No 2) and quoted by him in KSO v MJO: *I have had occasion before to deplore the expenditure – one is tempted to say the waste – of money in such cases: see, for example, Re G (Maintenance Pending Suit) [2007] 1 FLR 1674, at para [46]. Other judges have also expressed their concerns. A very recent example is provided by Wood v Rost [2007] EWHC 1511 (Fam), where, speaking of a case which had been conducted at “vast expense,” the Deputy Judge lamented that the late Mr. Charles Dickens was no longer alive to write a 21st century sequel to Bleak House. The simile, if I may say so, is all too apt. The accusatory finger which in the 19th century was appropriately pointed at the High Court of Chancery is, in the modern world, more appropriately pointed at the Family Division.”*

Wood v Rost concerned the interpretation and enforcement of an agreement including a clause whereby

the husband would pay the wife three lump sum payments. The parties had litigated for four and a half years, and the wife alone had incurred costs of £150,000. Mr Peter Hughes QC commented that “*Such delay and expense is appalling*”. He added: “*If Charles Dickens were alive today, the twists and turns of this litigation, conducted at vast expense, would provide him with ample copy for a 21st century sequel to Bleak House.*”

Munby continued in KSO v MJO: “*Only a few weeks later, in Whig v Whig (2008) 1 FLR 453, I had occasion again to lament what I described (at para [88]) as “ruinously expensive” ancillary relief proceedings. In that case the ancillary relief proceedings had been overtaken by the husband’s bankruptcy – on his own petition – and the aggregate costs of both sets of proceedings amounted, as I explained, to more, on the husband’s view, than the net aggregate value of the identified family assets and not far short of what the wife said they were worth. I commented:*

“One wonders with astonishment at what has been going on. One can only speculate as to what anyone thinks they could possibly hope to salvage from this expensive and utterly futile fiasco.” (para 78)

In Whig the matrimonial assets were £211,551. Net of liabilities, the total was £144,176 (and on the wife’s case £177,843). The wife’s total costs for the ancillary relief and bankruptcy proceedings were £51,730 (excluding children proceedings). The husband’s ancillary relief costs were £32,551. The trustee in bankruptcy had expenses (including legal fees) of £73,711. The total was a “*staggering £157,993 more, on the husband’s view, than the net aggregate value of the identified family assets and not far short of what the wife says they are worth*”. Consequently, “*the result of these ruinously expensive proceedings has been to diminish very drastically indeed the part of the ‘matrimonial pot’ which remains available for distribution to the parties*”. Munby J added in the judgement in that case that the costs incurred were “*grotesquely disproportionate to the amounts at stake*”.

Munby J continued in KSO v MJO: “*A year earlier, in C v C (Costs: Leave to Appeal) [2008] 1 FLR 136, at para [19], I had commented on how costs amounting to no less than £394,275 had been spent in the course of ancillary relief proceedings which had been commenced scarcely three months earlier and which had, as to the substance of the matter, not yet progressed very far despite the intensity of the interlocutory skirmishing.*” (para 79)

Many practitioners would have had sympathy with the wife in C v C (Costs: Leave to Appeal) as after a medium length marriage she discovered that the husband was about to make an improper disposition of two expensive London properties, one of which was the FMH which she was still occupying, in order to defeat her claims for ancillary relief. The wife then discovered that the properties were owned by a Liechtenstein Anstalt (an establishment often used as a holding company for estate assets) who had obtained a possession order in respect of both properties. Shocked and dismayed she perhaps understandably disputed the matter and obtained a worldwide freezing injunction and applied for an order that the Anstalt’s solicitors and that purchaser’s solicitors attend an inspection appointment. The wife was ordered to pay the costs of the Anstalt and the husband. By the time this came before Munby J, the parties had incurred no less than £394,275 in 3 months.

Munby J concluded in KSO v MJO: “*The picture is deeply dispiriting. And it is not as if it is only the adults who suffer from the consequences of such folly. The luckless children do as well. The present case is a sobering, and for me deeply saddening, example. If, instead of spending – squandering – over £430,000 in costs, the wife and the husband had been able to resolve their differences at a more modest and, dare I say it, more seemly level of costs, there might very well have been enough left in the matrimonial ‘pot’ to house the wife and children and to enable the children to remain at their school, whilst still leaving something more than a mere consolation prize over for the husband. As it is, it is hard to see much being left from the wreck, not least after the trustee in bankruptcy has had his costs, expenses and remuneration. It is difficult not to be reminded at this point of Jarndyce*

v Jarndyce [the fictional case in Bleak House]. And the wife and the husband – and for this purpose I refer to them as the mother and the father, for that is what they are – are faced now with the wretched and thankless task of trying to explain to their daughters how it has all come to this. (para 80)

Something must be done about the problems highlighted by this and by too many similar cases. We simply cannot go on as we are. The expenditure of costs on the scale exemplified by this and by too many other such cases is a scandal which must somehow be brought under control.” (para 81)

Conclusion

KSO v MJO is not, unfortunately, a ‘one off’. Too often, parties are incurring quite astonishing costs which means that at the end of the ancillary relief proceedings, there is quite simply nothing or very little left for a fair distribution.

So who is responsible for these wasted costs – the parties, the solicitors, the barristers, the judiciary or even perhaps the law and procedure? Whilst it would be easy - and very comforting - to point the finger at the parties, who undoubtedly have a significant say in how, and how much, a case is pursued, perhaps practitioners and judiciary should take a more proactive stance to prevent such costs being incurred.

Munby J commented that the parents in this case who had ‘*frittered*’ away their money would one day have to explain to their children where all the money had gone; an unenviable and sobering task indeed.

So what lessons can be learned and what new directions should perhaps be taken? This requires a debate across the whole profession. These are not just isolated cases anymore. Something is going seriously wrong. This is our contribution to the debate.

1. First and fundamentally, it is paramount to recognise that across the country masses of ancillary relief cases are being conducted by specialist family lawyers bringing about sensible and fair resolutions and in which costs are not disproportionate and where clients are very satisfied with the service received. These reported cases and others are still fortunately the exception. Nevertheless their high profile is affecting the reputation of all family lawyers.
2. The new costs rules have been in force for almost 3 years. It is still early days. However there is an increasing belief by many specialists that in fact more cases, rather than less, are going to final hearing and that the new costs rules have been no disincentive whatsoever, and perhaps sometimes act as an incentive to go onwards. Receipt of a Calderbank preciously close to what might be the final settlement acted as a dramatic deterrent to going onwards. That has been removed. Whilst there may be more costs orders on discrete issues, it is now much rarer to have costs orders on the whole case. Moreover the failure to introduce interim lump sums for costs has made the new costs rules an inadequate measure.
3. Whilst naturally practice across the country varies dramatically, many specialists do not perceive the judiciary giving strong and vigorous case management guidance, for instance at first appointments, nor adamantly insisting that particular areas of enquiry or investigation are not undertaken nor actively exploring then limiting the issues at an early stage. Better judicial case management should reduce costs.
4. Specifically there is a perception that the judiciary rarely condemn disproportionate costs between the parties lawyers at first appointments and FDR’s. Some lawyers with modest charging rates attend a FA or a FDR and are amazed to find that the costs of the lawyer on the other side may be five times their own, or even more, for no greater work save very much greater charging rates or different styles of work. Yet there is no judicial approbation or

condemnation or even comment on many occasions. It is wrong in principle if there is massive condemnation at a final hearing yet high and unbalanced costs building up at interim stages have gone unremarked.

5. England is an incredibly thorough and highly sophisticated family law jurisdiction including in its investigation of all possible issues. Have we gone too far?
6. The high level of costs of lawyers have not simply happened but they have built up over years. In this regard, some of the higher judiciary were themselves responsible for significant increases in legal fees when at the Bar and able to command higher and higher charges. Those charges are sometimes today's disproportionate legal costs.
7. Ancillary relief law is uncertain and unclear. The postscript in Charman v Charman (No 4) [2007] 1 FLR 1246 made very clear the need for some reform. Practitioners have said for years that it would be easier and quicker to settle cases if outcomes according to case law were more certain and clear. Instead, practitioners are given the vast myriad of confusions from Miller v Miller; McFarlane v McFarlane [2006] 1 FLR 1186. Then when the Court of Appeal gave excellent and practical guidance in Charman, subsequent High Court decisions have muddied the waters and created distinctions, exceptions and confusions. Hence the cycle of uncertainty and lack of clarity continues. One primary way to reduce costs is to have a more certain and clear ancillary relief law
8. Issues need to be narrowed and defined earlier in cases than the final hearing. Munby J indicated that in some cases there might be real benefit if arguments had been committed to a system of pleadings at an earlier stage so everyone had a clear idea of what was and was not being asserted. See paragraph 54 of the judgement. This should be considered at first appointment stage.
9. Ultimately, if the amounts in dispute are substantial then incurring relatively substantial costs can be justified, at least in the eyes of the party doing so. This is the problem bedevilling the really big money cases.
10. In practice, it is only sometimes as the case approaches final hearing that the costs show themselves as disproportionate. In hindsight, the costs would not of course had been incurred. Having the ability, experience and courage to abandon a course of action once embarked upon is very hard. Yet often initially embarking on a course of action might have been reasonable to ascertain the response of the other side, the available evidence and test a perceived reasonable position. The challenge for the practitioner is knowing when, along a course of action, dramatic steps should be taken to stop the juggernaut

The profession will not want to make any excuses for these disproportionate costs cases. To the contrary, the specialist family law profession will be concerned about the impact on its reputation. Nevertheless in their extremity they highlight crucial issues for reform and change for the benefit of all cases, and not just the extreme big money costs scandals

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