Albion Chambers, Broad Street, Bristol BS1 1DR

Telephone 0117 927 2144
Fax 0117 926 2569
DX 7822 Bristol
clerks@albionchambers.co.uk
www.albionchambers.co.uk

Number 8 April 2021

Albion Chambers MATRIMONIAL FINANCE TEAM NEWSLETTER

The ups and downs and ins and outs of S22za

Most practitioners would agree that the provisions of MCA 1973 section 22ZA have, overall, been a helpful addition to the powers of the court.

In so far as I hear criticism of the section it is, in the case of Respondents, that the provision gives too little opportunity to control the Applicant's expenditure on costs. Provided the Applicant has presented a budget that is properly broken-down the court has little choice but to approve the charging rates of the practitioners involved if it is not to defeat the whole point of s22ZA(3) and deprive the Applicant of the necessary services. It can be galling, however, for a Respondent to feel they are funding solicitors and Counsel more expensive than their own. Notwithstanding the wording of s22ZB(3)(a) –which appears to contemplate such a conundrum– in the most perverse example, of a truly limited budget, the payor could be forced to seek cheaper representation than the payee.

But it isn't all about the problems of Respondents. Applicants have suggested they have an issue created by the combined effect of s22ZB1(f) (the conduct of the Applicant in relation to the proceedings) and s22ZA(5) (payment for a specific period) as amplified by Mostyn J in *Rubin v Rubin* ([2014] EWHC 611 (Fam) to emphasise that the court should not generally fund the Applicant beyond the FDR. It is suggested that this places an onus on the Applicant to make an open offer soon after the FDR as a demonstration of their good conduct. The (too often ignored) provisions of FPR 2010 r.9.27A(1) (open offers after the FDR) potentially have the unintended consequence of now mitigating the position somewhat but, arguably, the Applicant in an LSPO is still under a pressure to be seen to be reasonable that does not apply to the Respondent. The position would be eased in s22ZB(1)(f) expressly applied to both parties.

And there is the difficulty that *both* parties experience as a consequence of r.9.17(2) (future involvement of the FDR tribunal) and r.9.17(4) (the without prejudice nature of the hearing). If both the letter and spirit of r.9.17(6) –the duty to use best endeavours to reach agreement– is not complied with by a party, that forms no part of the consideration of a future s22ZA order. That is a hardship for a payor faced with an unreasonably incalcitrant payee. Likewise, that a payee who could show exemplary conduct of the hearing (and other without prejudice negotiations) and that the only reason to have to seek a (further) s22ZA order is the refusal of the payor to negotiate not to be able to do so is somewhat unfair.

One means of resolving that tension would be to exempt a future s22ZA application from the general prohibition under r.9.17(6). While that gives the FDR court additional power and could be seen as placing undue pressure on a party receiving an adverse indication it remains somewhat difficult to see how the full s22ZA/B exercise- including ability to retain representation, consideration of

Editorial

Since the last newsletter a return to 'normality' seems a real possibility although it is fair to say that current practices of working seem to be bedded in for some time to come yet. An imminent return to the courtroom arena is still a way off. I am grateful to Dan Leafe and Alex West for providing some useful and interesting commentary on interim relief, with Alex highlighting the recent case of *Rattan v Kuwad* [2021] EWCA Civ 1. Other highlights which are worth further scrutiny by practitioners are: *Finch v Baker* [2021] EWCA Civ 72 featuring our own Charles Hyde QC. The primary area of interest is the approach to pension valuation evidence. Moylan LJ also rejected the suggestion that there should have been greater consideration of the parties' needs saying at [42]: there was no basis for the Judge interfering with the District Judge's criticisms of the wife's asserted needs. A judge is well able to assess a party's income needs without, as Mr Evans suggested, them being subject to detailed cross-examination. The wife's needs had clearly been put in issue by the husband (as referred to during the hearing before the Judge) and a judge is well-placed to assess what is achievable and what is fair without any such, frankly often banal, cross-examination. *WX v HX (Treatment of matrimonial and non-matrimonial property)* [2021] EWHC 241 (Fam) (10 February 2021) continues yet further the debate with Roberts J setting out the state of the current law at [113-116] is useful on the ring-fencing of one party's wealth even where the other's is in the pot.

Caroline Middleton

what is actually in issue, steps taken by the applicant to avoid all or part of the proceedings, conduct.

A final issue relates to enforcement proceedings. While s22ZA(10)(d) expressly includes,*"…providing advice and assistance in relation to the enforcement of decisions in the proceedings…"*, it is self-evident that a Respondent to a s22ZA application who is already (wilfully or otherwise) in contempt is unlikely to comply with an order to fund enforcement.

It is here that it is important to remember the type of order made in *Al-Khatib v Masry* [2001] EWHC 108 (Fam), *Minwalla v Minwalla* [2004] EWHC 2823 (Fam), and reiterated in *Thiry v Thiry* ([2014] EWHC 404 (Fam) after the introduction of s22ZA. That is to say where the conduct of the substantive proceedings gives proper grounds for suggesting that enforcement proceedings and the attendant cost will be required– that is a "need" to be met by the Final Order in advance of any actual breach.

(Alex West is addressing Maintenance Pending Suit issues next in this bulletin and it is, of course, worth bearing in mind that Legal Services Payments Orders are but a species of MPS and that the strictures of the MPS authorities underpin the s22ZA regime.)

Daniel Leafe

Maintenance pending suit

A new orthodoxy?

It's Monday morning and a piece of correspondence comes across your desk regarding a contemplated MPS application in one of your cases. Scanning through the letter you see the other side have simply lifted the income needs schedule from their Form E and relied on it for their potential MPS application. It includes monthly amounts for the TV licence, car servicing and house insurance. Have they not read *TL v ML* [2005] EWHC 2860 (Fam)? You write back, reminding the other side of Nicholas Mostyn QC's words (as he then was) that in every MPS application there should be a specific MPS budget, which should be critically examined. This, you remind them, is no more than a simple statement of orthodoxy. The other side's reply is short: "read *Rattan v Kuwad* [2021] EWCA Civ 1".

The background to the Court of Appeal's decision in Rattan will be somewhat familiar to many practitioners. A DDJ heard the MPS application at first instance, decided the wife's income needs were reasonable, and made an award accordingly. The husband appealed, and in allowing the appeal the Circuit Judge decided the DDJ had failed to undertake a critical analysis of the wife's needs, in particular as to which items comprised her immediate needs. So far so good, and perhaps nothing more than we might expect. The case then came before the Court of Appeal, with Moylan LJ giving the leading judgment.

Moylan LJ looked closely at Mostyn's summary of the principles relating to MPS applications, and in particular the requirement that "in every maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long-term expenditure, more aptly to be considered on a final hearing. That budget should be examined critically in every case to exclude forensic exaggeration". That principle had been lifted from Thorpe J's decision in *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45, which was a case that concerned 'exceptional wealth'. In diluting the force of that decision, Moylan LJ stated that "the nature of the budget there being considered was very far removed from the list of income needs provided by the wife in the present case and as will be provided in the majority of cases". In short, the facts of *F v F* mean that it was a world away from the majority of cases being dealt with by District Judges up and down the country.

Commenting specifically on Nicholas Mostyn QC's checklist from *TL v ML*, Moylan LJ said:

"Whilst I accept the general effect of these principles, as with all guidance, they clearly have to be applied in the particular circumstances of the individual case. In the present case, for example, it was not necessary for the wife to provide a specific maintenance pending suit budget. Her income needs as set out in her Form E matched her needs for the purposes of her application for maintenance pending suit. Further, not all budgets require critical analysis. The extent to which a budget or other relevant factors require careful analysis will depend on the circumstances of the case. I return to this below but, in summary, the wife's budget in this case did not require any particular critical analysis; it was a straightforward list of income needs which were easily appraised."

The impact of this on the decision in *Rattan v Kuwad* was as follows:

- The wife's income needs schedule in her Form E was sufficient for the purposes of her MPS application;
- Whether or not that income needs schedule was reasonable was 'immediately apparent' and did not require a critical analysis;
- The fact that some of the items of expenditure on the schedule were not incurred every month did not mean they should be excluded for the purposes of determining what maintenance was reasonable;
- A maintenance pending suit analysis remains a broad analysis and the approach taken by the Circuit Judge in this case was 'unrealistic' and required 'far too detailed an analysis';
- School fees can properly be included within income needs and can form part of an application for MPS. There is no reason why they needed to be the subject of a separate application.

Of course this is not the first time Moylan LJ has had a slight difference of views to Mostyn J. In *Moher v Moher* [2019] EWCA Civ 1482 Moylan LJ queried what Mostyn J had said in *NG v SG* [2011] EWHC 3270 (Fam) about adverse inferences arising from non-disclosure. The previous year, in *Martin v Martin* [2018] EWCA Civ 2866, Moylan LJ had rejected Mostyn J's decision to equate cash at the bank with shares in private company (Mostyn J having stated the only difference between the asset and its cash proceeds was 'the sound of the auctioneer's hammer').

At various points in recent years, Mostyn J has been at pains to simplify the process of financial remedy applications and to give judgments which summarise the key principles in an easy to follow and easy to apply manner. The creation of template financial remedy orders is an apposite example of this drive towards greater harmonisation and consistency. However where MPS

Albion Chambers Matrimonial Finance Team

Team Clerks:
Michael Harding
Julie Hathway
Marcus Harding

Charles Hyde QC
Call 1988 QC 2006
Deputy High Court Judge
Recorder

Deborah Dinan-Hayward
Call 1988
Deputy District Judge

Nicholas Sproull
Call 1992
Team Leader

Jonathan Stanniland
Call 1993

Richard English
Call 1995

Daniel Leafe
Call 1996

Hannah Wiltshire
Call 1998

Stephen Roberts
Call 2002

Caroline Middleton
Call 2002

Gemma Borkowski
Call 2005
Deputy District Judge

Alexander West
Call 2011

Philip Smith
Call 2012

Simranjit Kamal
Call 2018

Ehsanul Oarith
Call 2019

is concerned, the judgment in *Rattan v Kuwad* reminds us that the MPS process is entirely discretionary, and that while case law can provide guidance, ultimately the only statutory requirement is for an order to be reasonable.

The result is likely to be a lack of clarity and a tendency on behalf of applicants to include items in their budget they would never previously have considered. Specific examples from the judgment include house insurance, TV licence, car tax, shoes and clothes, and entertainment. For cases that are not big money cases, *Rattan v Kuwad* appears to endorse an approach whereby MPS applications are made on the basis of income needs as stated in a client's Form E, and are subjected to the test of reasonableness rather than the sort of critical examination we have for so long viewed as orthodoxy.

Alexander West