




## Legal Services Payment Orders

*Aimee Fox*

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### Relevant Legislation

Sections 22ZA and 22ZB, Matrimonial Causes Act 1973

**What can the court do?**


- *Make an order or orders requiring one party to the marriage to pay to the other ("the applicant") an amount for the purpose of enabling the applicant to obtain legal services for the purposes of the proceedings (subsection 1)*

**What is the relevant test?**

- *The court must be satisfied that, without the amount the applicant would not reasonably be able to obtain appropriate legal services for the purposes of the proceedings or any part of them (subsection 3)*

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## What does an Applicant Need to Demonstrate?

### Section 22ZA(4)

- (a) the applicant is not reasonably able to secure a loan to pay for the services, and
- (b) the applicant is unlikely to be able to obtain the services by granting a charge over any assets recovered in the proceedings.

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## What does the Court consider?

### Section 22ZB(1-3)

- (1) When considering whether to make or vary an order under section 22ZA, the court must have regard to—
  - (a) the income, earning capacity, property and other financial resources which each of the applicant and the paying party has or is likely to have in the foreseeable future,
  - (b) the financial needs, obligations and responsibilities which each of the applicant and the paying party has or is likely to have in the foreseeable future,
  - (c) the subject matter of the proceedings, including the matters in issue in them,
  - (d) whether the paying party is legally represented in the proceedings,
  - (e) any steps taken by the applicant to avoid all or part of the proceedings, whether by proposing or considering mediation or otherwise,

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## What does the Court consider?

- (f) the applicant's conduct in relation to the proceedings,
  - (g) any amount owed by the applicant to the paying party in respect of costs in the proceedings or other proceedings to which both the applicant and the paying party are or were party, and
  - (h) the effect of the order or variation on the paying party.
- (2) In subsection (1)(a) "earning capacity", in relation to the applicant or the paying party, includes any increase in earning capacity which, in the opinion of the court, it would be reasonable to expect the applicant or the paying party to take steps to acquire.
- (3) For the purposes of subsection (1)(h), the court must have regard, in particular, to whether the making or variation of the order is likely to
- (a) cause undue hardship to the paying party, or
  - (b) prevent the paying party from obtaining legal services for the purposes of the proceedings.

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## Leading Authority

***Rubin v Rubin* [2014] EHC 611 (Fam)**, a summary of Mostyn J's guiding principles:

- (i) the court is to have regard to all the matters specified in s 22ZB(1)–(3)
- (ii) in order to assess the ability to pay, the court will look at the respondent's Form E and any other relevant material and apply the principles in ***TL v ML***. In particular, deficiencies in the Form E are likely to be visited by robust assumptions; the court should 'err in favour of the payee'. Equally, if a bounty has historically been extended by the family, the court may assume it is likely to continue, at least until trial.

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***TL V ML [2005] EWHC 2860 Fam*** at [124]:

- 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 (***G v G, M v M***). 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 (***M v M***).


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- (iii) where the claim for substantive relief is doubtful, the court should use caution.
- (iv) a LSPO should only be awarded to cover past unpaid costs where the court is satisfied that, without payment, the applicant will not reasonably be able to receive future legal services in connection with the proceedings.
- (v) Unlikely to be a requirement to deplete modest savings or sell or charge home but depends on the facts.
- (vi) evidence of two commercial lenders of repute.
- (vii) a statement of refusal from solicitors in respect of Sears Tooth arrangement.
- (viii) If litigation loan is offered at 'credit card' rates, the respondent may be expected to 'share some of the risk' e.g. an undertaking to underwrite interest payments.
- (ix) an undertaking from the applicant to repay the respondent such part of the LSPO as the court thinks fit at the conclusion of the proceedings.
- (x) the court should specify the type of legal services contemplated e.g. does it cover mediation?

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(xi) generally funding is up to FDR, 'but not beyond'.

(xii) monthly instalments are preferable to a lump sum, instalments can be Varied.


(xiii) care should be taken not to duplicate any inter partes costs order that may be made.

(xiv) A LSPO is subject to the Part 18 procedure, r 9.7(1) and (2)

- 14 days' notice FPR 2010, r 18.8(1)(b)(i), PD 9A, para 12.2
- Application must be supported by written evidence, r 18.8(2) and PD 9A para 12.2
- Time may be abridged if there is written evidence demonstrating why it is fair and just 18.8(4)
- Include a detailed assessment of costs already incurred and future costs

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## Costs

- The no order principle does not apply!
- Inter partes costs orders may be made

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## A Whistlestop Tour of Other Cases

What does the court expect of lawyers?


**BC v DE [2016] EWHC 1806 (Fam)**

- LSPO application in Schedule 1 and private law children proceedings (**CF v KM (Financial Provision for Child: Costs of Legal Proceedings) [2011] 1 FLR 208** allows this, see also **A v A (Maintenance Pending Suit: Provision for Legal Fees) [2001] 1 WLR 605**)
- Could M claim historic costs? Yes! How far do solicitors need to go?

*"[26] I would just make this further point. I would not regard it as necessary for an applicant to demonstrate that his or her solicitor has actually 'downed tools' or will do so before he or she could legitimately make an application for a legal costs funding order where 'historic' costs have been incurred. Such an approach could be problematic. I agree with the essence of Mostyn J's approach – namely that a clear case would need to be shown that the solicitors are reaching the end of their tolerance – but the approach described in [16] of Rubin ought not to be applied too strictly, otherwise it would work materially to the disadvantage of the honourable solicitor who is prepared to soldier on (perhaps somewhat against their better commercial judgment) for the good of the client or the case."*

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## A Whistlestop Tour of Other Cases

Pound for Pound Orders

**LKH v TQA al Z (interim maintenance and pound for pound costs funding) [2018] EWHC 2436 (Fam)** Holman J


- Invited the court to award W £100 for every £1 H spend, rejected in favour of a pound for pound order
- What if H doesn't spend anything? Protection? Baseline?

*"[17] The rationale of such an order must be that of an equal or level playing field, and it does not seem to me that the Mubarak jurisdiction can properly be applied to require a payer (usually the husband) to pay substantially more to the other party than to his own solicitors."*

- A debarring order was refused as "too extreme" [19]

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## A Whistlestop Tour of Other Cases

### Undertakings

***BN v MA [2013] EWHC 4250 (Fam)* at [35 – 40]**


- W had received offers of litigation loans although the interest rates were high, H conceded he would have to discharge the interest if the substantive application was successful
- W's financial claims in general were 'extremely speculative'
- A detailed schedule of costs was absent
- Costs order against W for 75% of the costs

***SJ v RA [2014] EWHC 4054 (Fam)***

- If one party has to take an expensive litigation loan then it is arguably a debt of both parties which ought to be discharged from matrimonial assets.

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## A Whistlestop Tour of Other Cases

### Backing it Up! Hadkinson?

***De Gafforj v De Gafforj [2018] EWCA Civ 2070***


- W applied for a Hadkinson order seeking a dismissal of H's appeal because of his failure to pay sums due under the legal services order
- W was successful – she couldn't participate with appeal without LSPO
- Conditions?
 

*"[11] For present purposes, it is enough to note the exceptional nature of the order and to record the conditions that are necessary before it can be made. I would summarise these as follows:*

  - 1. The respondent is in contempt.*
  - 2. The contempt is deliberate and continuing.*
  - 3. As a result, there is an impediment to the course of justice.*
  - 4. There is no other realistic and effective remedy.*
  - 5. The order is proportionate to the problem and goes no further than necessary to remedy it"*

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Property?

***AM v SS* [2013] EWHC 4380 (Fam)**

- H argued there were no assets against which an order could be made and there was no merit in W's claim.
- W argued H had assets and in any event H's father had been generous to him in the past and H had been able to pay to date.
- H's income was insufficient to allow him to contribute to W's costs but court ordered a charge over H's property in Maida Vale for £150,000 to reflect costs already incurred and those which would be incurred in future.

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## A Whistlestop Tour of Other Cases

Looking to the future? A war chest?

***Thiry v Thiry* [2014] EWHC 4046 [Fam]**

- W was awarded £500,000 to fund future litigation in Belgium.
- Manipulative and sadistic role to his personality.
- Costs order made against H.

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*"[44] In Al-Khatib v Masry [2002] EWHC 108 (Fam), [2002] 1FLR 1053 Munby J awarded the wife and mother a war chest or fighting fund, applying the reasoning set out in these paragraphs from his judgment:*

*[133] There is, as it seems to me, a simpler route to Mr Mostyn's desired destination. Two of the factors which s 25 of the 1973 Act requires me to take into account are, as he points out, the welfare of the children (s 25(1)) and the wife's financial needs, obligations and responsibilities in the foreseeable future (s 25(2)(b)). Section 25 itself, says Mr Mostyn, putting his case in the alternative, accordingly justifies a coercive order of the particular form he seeks here. I agree. The wife has both a 'need' to take, and indeed the 'responsibility' of taking, all appropriate steps, for their own benefit as much as for hers, to recover the children from the husband who has abducted them. That exercise will, I have no doubt, expose her to heavy financial expenditure.*

*[134] In my judgment there should be made available to the wife, in addition to the other relief I have already mentioned, a fund, the interest and capital of which can be used by her but only for the purpose of funding future litigation, whether in this country or elsewhere, directed to her recovery of the children. Whatever is left of the fund will be returned to the husband so soon as the children are returned by him either to the wife or to the jurisdiction of this court."*

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