Neutral Citation Number: [2021] EWHC 195 (Fam)

Case No: ZZ20D49528

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2021

Before:

MR NICHOLAS CUSWORTH QC
SITTING AS A DEPUTY HIGH COURT JUDGE

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Between:

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Applicant

and

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Respondent

Michael Glaser QC and William Tyzack (instructed by **Charles Russell Speechlys**) for the Applicant
Rebecca Carew Pole QC (instructed by **Mishcon de Reya**) for the Respondent

Hearing date: 18 January 2021

Approved Judgment

MR NICHOLAS CUSWORTH QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

This judgment was delivered in private on 22 January 2021. It consists of 57 paragraphs and has been signed and dated by the judge. 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 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.

MR CUSWORTH QC:

1. A raft of applications came before me on 18 January 2021 in these proceedings, where the parties are at odds over almost every issue available to them, in relation to either their children or their marriage. In this matter, the parties' marriage came to an end only in September 2020. Already, in proceedings in these courts, whose jurisdiction is anyway challenged, they have run up costs of very nearly £1.3m. They are also currently litigating in State A.

2. Those formally listed matters were:

   a. The husband's application for interim maintenance, both in relation to rental provision and for general living expenses;
   b. His application for a Legal Services Provision Order;
   c. The wife's application to amend the terms of an existing *Hemain* injunction;
   d. The husband's requests for the wife to provide a range of further disclosure pursuant to the *Hemain* proceedings; and
   e. The assessment, including its basis, of a costs order made against the wife on 1 December 2020.

3. In addition, the husband sought certain directions in relation to the Children Act proceedings between the parties, concerning their children A (aged 14) and S (aged 4), in which the wife/mother is contesting jurisdiction on the basis of the children's habitual residence, and the husband/father is appealing the Child Arrangements order made by DJ Barrie on 21 December 2020.

4. In the event, after a full day of submissions from leading counsel for each party, but no oral evidence, I have been left in a position to determine the only first two issues on the above list – the others I will determine at a further hearing on 22 January 2021.

5. Just in this jurisdiction, the procession of hearings have taken place as follows. After a without notice freezing order was initially made on the papers on 2 October 2020 by DDJ Hodson, the matter then came before him on return dates on 8 and 15 October. A without notice non-molestation order was then made on 3 November 2020 but discharged on 4 November on procedural grounds – a discharge against which the

wife appealed. A further order staying the suit was then made by DDJ Hodson on paper on 9 November. On 17 November, Holman J listed the husband's *Hemain* application for hearing. On 23 November, the parties gave cross-undertakings in relation to further injunctive proceedings. On 1 December 2020, I made a consensual order comprising an *Hemain* injunction. On 7 December HHJ Roberts made a further order seeking to regulate the financial arrangements between the parties, and discharging the extant non-molestation applications on the grounds of cross-undertakings. The interim financial arrangements were not compromised and listed before Moor J on 16 December.

6. On 16 December 2020, Moor J made what was in effect a holding order, listing the matter before me on 18 January 2021, on the basis that the wife would until then (and backdated for 2 months) pay £11,166pcm to the husband – being the amount that she was then offering. Amongst other directions he determined that the husband was to provide a letter setting out the basis upon which the rental valuation evidence for the former matrimonial home which he had submitted was obtained, and the nature of the instruction given to the lettings manager who provided it. On the 21 December 2020, DJ Barrie dealt with the Children Act proceedings between the parties, but declined to make any order for contact between the children and their father.

7. **Interim Provision.** The principles in this area were distilled by Nicholas Mostyn QC as he then was in *TL v ML & Ors* [2005] EWHC 2860 (Fam). In that case he explained that:

> 123. The leading cases as to the principles to be applied on an application for maintenance pending suit are *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45, *G v G (Maintenance Pending Suit: Legal Costs)* [2002]3 FCR 339, and *M v M (Maintenance Pending Suit*) [2002] 2 FLR 123.
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> 124. From these cases I derive the following principles:
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> i) The sole criterion to be applied in determining the application is "reasonableness" (s22 Matrimonial Causes Act 1973), which, to my mind, is synonymous with "fairness".

ii) A very important factor in determining fairness is the marital standard of living (*F v F*). This is not to say that the exercise is merely to replicate that standard (M v M).

iii) 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 (*F v F*). That budget should be examined critically in every case to exclude forensic exaggeration (*F v F*).

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*).

8. These authorities were considered again by Moylan J. as he then was in *BD v FD (Maintenance)* [2014] EWHC 4443 (Fam), where he considered the treatment of the marital standard of living and its importance in the context of interim claims. He said:

32. In *M v M* Charles J was referred to *F v F*. He said at paragraph 123:

"In my judgment, the wife is seeking to read too much into *F v F* when she relies on it to found an argument that the award in this or most cases concerning the super rich shall be designed to maintain the status quo or to establish a yardstick that more nearly reflects the marital standard of living and, thus, the status quo. In my judgment, such a restriction on the judicial discretion in the determination of what is reasonable in any given case is not something Thorpe J intended."

Then in paragraph 124:

"Having said that, I accept that the standard of living during the marriage is a very relevant factor but it seems to me that in determining what is reasonable in any given case the rival contentions of the parties, both as to the interim and final position, cannot be disregarded..."

…

> 40. …The purpose of an interim hearing is simply to ensure that one party has sufficient resources to meet their interim needs and to meet them in a way which does not prejudice their longer term position or place them at a significant disadvantage, for example if the wealthier party was seeking to erode the resources located in this jurisdiction when enforcement might be an issue…

9. I should add that this is clearly a case where the court's intervention is 'manifestly required' as identified as a necessary precondition of application by Moylan J in *G v G (Child Maintenance: Interim Costs Provision)* [2010] 2 FLR 1264.

10. The wife's means have not played a central part in determining these applications. A schedule of assets disclosed on her behalf in the proceedings discloses cash and property assets in her name worth over £29.2m, but of those it is her case that £12.7m in cash is held on trust for the children and a flat worth £7m is held for her brother. Both of those assertions are disputed, and I cannot determine them at this juncture. She also has a business interest to which she ascribes no real value, but the husband asserts has very substantial value. Mrs Carew Pole QC on her behalf asserts her resources to be worth £9.6m, and in relation to her income says only that her salary was £109,000 net in 2019 and £124,000 net in 2020.

11. By contrast, she acknowledges that spending from the family's joint account during the marriage topped £20,000pcm, and her offer of interim provision for the husband would provide for him at the rate of £170,000pa, to include his housing costs. Her case is that the parties have lived off capital during the marriage. If that has been so, it has evidently been to a very significant extent. However, she does not urge any pressing need of her own as a counter-balance to the husband's claims. She rather points out his own mathematical errors in assessing their marital spending, and seeks to limit him to the amounts which he has previously spent via his own card on the joint account.

12. I also do take into account, as I am invited to by Mrs Carew Pole, the jurisdictional dispute which continues to rage between the parties, and the fact that there is also an issue in relation to Forum in this case. Furthermore, I am also aware and take account of the fact that that there is a Post-Nuptial Agreement executed in State A, under which if enforced in full the husband would be disentitled to any provision. I do not know how important that document will prove to be, if the case proceeds in this

jurisdiction. But until the determination as to jurisdiction is made it is important that a fair and proportionate financial balance is maintained between the parties.

13. There are two specific elements to the issue between the parties as to the appropriate quantum of interim provision in this case. Both are infected by the significant disagreement which the parties have about the actual standard of living which they enjoyed in the marriage. These are firstly the appropriate amount to allow the husband in respect of his housing costs, and secondly the appropriate quantum of provision to meet other income needs. I shall deal with each in turn.

14. Housing needs. In this regard, the parties do not agree the cost of the marital status quo in the first place, in that the husband has procured a letter from a local agent which purports to identify the rental value of the former family home which is in central London as £5,500pw, whereas the wife says that the actual rental value of flats in this area is not much more than £2,000pw. She rejects the document which, without permission of the court, or even purported compliance with Pt. 25, the husband seeks to adduce. It is clear that that letter has not been produced in a way that complies with any of the requirements of FPR 2010 Pt. 25, so the weight that I can attach to it must be very limited indeed. In those circumstances, I place far more reliance on the property particulars I have from each party and in relation to the former matrimonial home as comparators, as opposed to the contents of the letter, for the purposes of this interim adjudication. I would add that even if the letter from the estate agent were accurate, my determination would be no different.

15. Whilst I cannot determine the rental value of the family home today, that is not necessary to enable me to assess a reasonable figure for the wife to provide as a monthly rental amount for the husband's housing. I would have been helped to be told where the husband is currently staying, but Mr Glaser QC for him vouchsafed only that he was 'paying rent', 'somewhere in England'. This of itself was a change from his previous assertion that he was homeless, and it may be that he feared that any revelation that his current rental payments were lower than those which he was now claiming would prejudice his position for this hearing. That is a pity, but in the absence of any actual evidence from him I can make no assumptions, and simply seek to provide a sufficient amount to enable him to rent somewhere reasonable in the

same area as the family home whilst the various different strands of this litigation are gradually teased out.

16. Both sides have produced property particulars for available rental properties in smart West London, the wife's between £1,600pw and £2,000pw, the husband's between £4,500pw and £6,000pw. To his credit, the husband also produced, by way of example, some particulars of properties between £3,500 and £3,600pw, to try to show the range of the market, but Mr Glaser was clear that his client did not accept these properties were sufficient for his needs. He also rejected all of the properties put forward by the wife as being in varying ways less commodious that the former family home.

17. In relation to the family home, I was shown agents' particulars by the husband, and photographs taken personally by the wife which showed the property as a little more lived in. Whilst in size it is just over 2,000 sq. ft., and so no bigger than the properties produced by the wife, its position and general amenity can be discerned as clearly better. That does not however mean that the sort of properties contended for by the husband must be appropriate, even if it were the case that the rental value of the family flat were significantly higher than the amount for which the wife contends.

18. As the authorities make clear, I need not strive to replicate exactly the standard of living enjoyed in the marriage, but rather I should provide the husband with a reasonable amount, in all of the circumstances of this case, which will enable him to house close enough to the former family home to facilitate such direct contact with his children as the court in due course determines is in their best interests, and in a property of such condition that there will not be a significant perceivable gulf between the standard of his accommodation, and the home where the children live with their mother.

19. The properties put forward for the husband are in my judgment well in excess of what is reasonable in these circumstances. One is the same size as the cheaper properties produced by the husband, but those properties cost just over half the price (and are in locations such as Eaton Square); it is also 20% bigger than the family home. The second of the 2 properties he proposes, at £4,500pw, is half as big again as the family

home and those much cheaper flats that the wife proposes, and blessed with access to a communal gym and pool and 24 hour porterage. I do not consider that the husband's reasonable interim housing requirements extend to providing for those items. Even the husband's cheaper properties have the potential to represent an upgrade on the family home.

20. Ultimately, I am driven to the conclusion that reasonable provision in this regard will be somewhere between the less expensive properties provided for the husband and the range provided for the wife, which, whilst they all looked perfectly presentable when measured against the family home, could all be identified as having a specific reason why they were on the market at less than others around them might be. One, for example, was being actively marketed by its owner, and had been reduced in price on the basis that regular viewings would be accommodated. I am satisfied, however, that with a budget of £2,500pw, or £11,000pcm, the husband can find entirely appropriate accommodation in the area of London where all of the parties' particulars are to be found.

21. Income provision. Here, the gulf between the parties is even starker than their respective positions in relation to housing. The husband seeks, in addition to his £23,500pcm claim in respect of rent discussed above, £21,703.50pcm to meet his living expenses, whilst the wife offers just £5,500pcm. One reason for this gulf may be found in the husband's initial presentation of spending from the family's joint account in the 2 years up to the parties' separation in September 2020. He said this analysis showed outgoings of £1,415,187 during the period. This would have been £60,000pcm, increasing to £73,000pcm if the period after the national lockdown from April 2020 is excluded. However, the wife's team identified that around half of the transactions on the account were in fact internal transfers, so that the true figure was £29,237 over the whole period, or £33,460 excluding the period of lockdown. Shorn of school and professional fees, tutoring and fixed property costs, these figures reduce further to around £21,000pcm (£500 more or less depending on whether the lockdown period is included).

22. Mr Glaser was constrained to acknowledge that there had been some double counting, but not the extent of it. In the circumstances I accept the wife's figures for spending

from this account for the exercise that I must perform. However, that is not the end of the parties' dispute. The husband says that there was other spending, not directed through this account, for example in cash, or through the wife's company, or on credit cards, for things such as holidays. He also says that school fees were paid from elsewhere, but the wife can point to payments to the school for A out of that account, as well as for S's school. I am satisfied that broadly, I have a sufficient picture of the level at which the parties lived during the marriage from the evidence before me fairly to assess the husband's interim budget in the way that the authorities require.

23. Of the figure which the husband claims, £2,500pcm - £30,000pa – is provision for a live in nanny. The husband does not work. At present, there is no order in place for any arrangements for him to see his children, although he is currently seeking to appeal the order of DJ Barrie in that regard. However, he is a long way from being able to justify a full time live in nanny in present circumstances. In the event that circumstances change such that that me become appropriate, he can seek to vary the existing order – but an arrangement that the children spend some nights with him each week will not necessarily justify such an upgrade. He also seeks £1,000pcm for domestic help, which equally may not be applicable now.

24. He has a further series of items in his budget which are of necessity extremely curtailed for the moment by the current national lock-down in face of the pandemic. He is seeking £5,000pcm for a combination of restaurant, theatre, cinema and concert visits, use of a gym and holidays and weekend breaks. He states that this is anyway reduced on account of the restrictions – which may have been a suggestion made initially during the tiered period before December 2020. None of this is currently required, and whilst some provision may become appropriate in due course, it is quite impossible to anticipate with precision when that might be. Any expenditure on take away meals in the interim can be more than provided for under groceries, where he seeks a further £3,000pcm. He seeks a further £4,000pcm for his own clothing and shoes, and £2,000pcm on the purchase of clothing for the children, as well as £700pcm of money for birthday parties and pocket money for them. His travel costs are said to come to just over £1,000pcm. None of these figures can currently be justified at this level, but are likely to become more important in coming months.

25. In addition, the husband seeks certain additional capital provision as part of his interim award. This is unusual, and only usually justified in circumstances where an urgent need can be demonstrated that cannot wait until final determination of capital issues between the parties. The court must be even more cautious when there remains a serious jurisdictional issue about its ability to make any final capital orders. In the event I propose to deal with the need for criminal legal costs as part of the husband's claimed LSO provision. I am not satisfied that the other interim capital provision sought is of sufficient urgency to merit any additional award, save for the sum of £1,000 in relation to dental treatment. I will factor that sum into my overall assessment, as I will the fact that the husband will have some set-up costs in any newly rented property.

26. How then to deal with this interim application at a time when due to an indefinite national lockdown, current expenditure is curtailed, but where costs will foreseeably be increasing by later in the Spring as measures will likely ease? The wife's calculation is that the husband's expenditure on the joint account before separation was in the region of £5,500pcm, and consequently that is the sum that she offers going forward. Given the significant arguments between the parties about the standard of living in the marriage, and the items of family spending which are not visible from the joint account, precision is difficult in this regard.

27. At paragraph 20 if his statement of 7 December 2020, the husband stated that: '*Until the breakdown of the marriage, we would use our… joint account … to meet our outgoings, although Alla also paid for other items of expenditure using other accounts and credit cards*'. I have no visibility as to the extent of that other expenditure, although I do have 2 years of joint account statements as a broad guide. It is clear that this is a family that could afford to live well, albeit not at the rate erroneously asserted by the husband in his evidence. Most of the items spent through the account are regular but small discretionary items. The school fees are paid, and the occasional larger item at a boutique or a jewellers. But holiday spending is entirely absent.

28. Doing the best I can, I propose to allow the sum of £9,000pcm by way of interim provision for the husband, which initially will allow him to spend any short-term surplus on other items, but should not require further adjustment pending final

determination of the various issues in this case. This is only slightly less than one half of the discretionary spend that I have seen for the family of four during the marriage, and less than one third of the total spend including school fees which the mother will be continuing to pay. This will allow the husband to have available sufficient to provide for leisure time with his children insofar as this becomes possible and is determined to be in their best interests, to include holidays as appropriate.

29. In this regard I remind myself of Moylan J's reference in *BD v FD (Maintenance)* [2014] EWHC 4443 (Fam) to the earlier dicta of Thorpe J where he said:

> 30. In *F v F* the parties were a long way apart in their submissions. The wife in that case was seeking approximately £540,000 and the husband was proposing £220,000 plus other expenses. In the course of his judgment Thorpe J, as he then was, commented that, in his experience, contested interim maintenance hearings were almost unknown. In his view this reflected what he called the practical considerations which he set out on page 49 C:
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> "I suspect that a disproportionate significance is attached by the parties and possibly by their advisers to the judgment that I give upon the issue. It does seem to me that the determination of the wife's reasonable needs for herself and the children, both present and prospective, depend crucially upon the investigation of a variety of issues raised not only in the interim provision affidavits but also in the substantive case affidavits which cannot be resolved without full discovery and oral evidence. Therefore, if I decide a figure within or approaching the high ground, the wife would be foolish to assume that the same conclusion would have emerged from a substantive hearing. Equally, if I decided a figure in the low ground, the husband would be rash to assume that that same result would flow at the substantive hearing.
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> It seems to me that in these cases involving very large sums of money it is, generally speaking, superfluous for there to be a full scale investigation of the interim provision. …any under provision or over provision can always be corrected when the account comes to be taken at the substantive hearing. During the course of the substantive hearing …there is no reason why account should not be taken of the …reckoning of her needs and the needs of the children over the interim period. If that account reveals that there has been over provision and if that over provision is the product of excessive demands and estimates on the part of the applicant, then there is every opportunity to do fairness by set-off."

30. This means that the total amount of interim provision will be in the amount of £20,000pcm, which should be payable with effect from 1 February 2021, with Moor J's order continuing to the end of this month. In addition, the wife should provide as required for the husband's rental deposit, which payment should be on account of his eventual entitlement in these proceedings. I have not backdated the order as the

payments for living expenses made to date will have been sufficient in a period of lockdown; and I have not been told what the actual rent payments which the husband has been making have been.

31. The amount ordered in total is less than the family's former discretionary monthly spend from their joint accounts, which of course did not include any provision for their holidays or holiday spending, and which I am satisfied is affordable for the wife. I have no evidence before me from her which might rebut any 'robust assumption about her ability to pay' (following *TL v ML*); and whilst what I have ordered is more than the amount offered, it only exceeds it by a factor of 30%.

32. **Legal Services Provision**. In these proceedings, there is agreement that an order for Legal Services Provision under s.22ZA MCA 1973 should be made. Apart from quantum, which must of course be fact specific in every case, there is however a separate issue about whether or not it is appropriate in the circumstances here to order some provision to meet some or all of the costs in these proceedings which the husband had already incurred.

33. At the commencement of the hearing, and by his counsel's written submissions, the husband's claim extended both to the costs incurred in these proceedings with his current solicitors CRS, but also with the previous firm which acted for him, Vardags. Mr Glaser QC for the husband went as far there as to assert that:

> *58. The question of provision for past costs has been an issue debated in these Courts. However the position now seems to be settled in that within ongoing proceedings, historic costs should be provided for (see eg. Cobb J in BC v DE [2017] 1 FLR 1521 at paragraphs 24 – 26 and paragraphs 25 – 31 in Re Z (A Child) (Schedule 1: Legal Costs Funding Order; Interim Financial Provision) [2020] EWFC 80).*

34. During the hearing, Mr Glaser rowed back from that position, and by the end was not pressing the position in relation to the formerly instructed firm's costs. However, it is evidently important that the position identified by the authorities is properly understood. I consider that it can be set out as follows.

35. By the statute (MCA 1973 s.22ZA) it is made clear that:

(3)The court must not make an order under this section unless it is 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 the proceedings.

36. The question for the court is therefore, and as with interim provision generally, one of reasonableness. As Cobb J explained in *BC v DE* [2016] EWHC 1806 (Fam) at [23]:

'…there is an ordinary expectation that the provision of funding ought to be 'reasonably' available – i.e. imposing no unreasonableness on the applicant nor on the provider of advice and/or representation – as Wilson LJ said in *Currey v Currey No.2* at [19] "Mrs C did have assets and could give security for borrowings; the point was, however, that it was unreasonable to expect her to do so."'

37. I do not understand that Mostyn J said anything different from this in *Rubin v Rubin* [2014] EWHC 611 (Fam) at [13], where he stated that:

'(iv) The court cannot make an order unless it is satisfied that without the payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings. Therefore, the exercise essentially looks to the future. …Thus a LSPO should only be awarded to cover historic unpaid costs where the court is satisfied that without such a payment the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings.'

38. In *BC v DE* Cobb J very clearly explained why the factual situation in that case was different from that facing Mostyn J in *Rubin*, when he said:

24. In *Rubin*, Mostyn J was not considering legal costs funding in ongoing proceedings; he was dealing with truly 'historic' costs which had arisen in two separate sets of proceedings (i.e. divorce and child abduction), which had, importantly, *concluded*. …But that type of application is distinguishable from the type of situation here, where the legal costs funding claim arises in relation to costs reasonably and legitimately incurred within ongoing proceedings prior to the determination of the legal costs funding application.

39. Further, in his more recent decision of *Re Z (a child) (Schedule 1: legal costs funding order; interim financial provision); X v Y* [2020] EWFC 80, Cobb J also dealt with a situation closer to that here, where historic costs were being sought, incurred by a firm no longer acting. There he said:

29. In my judgment, it is not necessary for the mother's debts to legal firms *other* than Hunters to be settled in order for her to maintain her current representation; as Hunters have made clear in recent correspondence, the mother "has no immediate need for onward funding to

cover the cost of instructing a [redacted] lawyer [in State A]".

30. The firm, Hunters, are in a different category from these other firms, given their position as the mother's *currently* instructed firm. I am satisfied that there is no other legitimate or accessible funding stream, and this firm should *not* carry a significant debt in working for the mother unpaid; the firm is not a charity, nor it is a credit agent, and, as in *Re F*[1], I am of the view that it is neither fair nor reasonable to expect the firm, and chosen counsel, to offer unsecured interest-free credit in order to undertake their work.

40. In *Rubin*, Mostyn J had said at [16] that:

'This is not a case where her lawyers are saying that they will down tools unless they are paid outstanding costs as well as being funded for the future.'

I do not understand that he was there necessarily intending to lay down the test for subsequent courts to follow. Rather he was giving an example of a situation where reasonableness might well suggest that an award would be appropriate.

41. As Wilson LJ said in *Currey v Currey* [2006] EWCA Civ 1338:

19. … There is a recognised syndrome in which, in order to illumine his exposition of the proper approach, a judge uses a word; and then, to his astonishment, finds that the word of intended illumination is mistaken for the proper approach itself.

He was speaking there of Thorpe LJ's use of the word 'exceptional' in *Moses-Taiga*[2]. Another famous example is the reference to 'a predicament of real need' at paragraph 81 of the judgment of the Supreme Court in *Radmacher*[3]. This may be what has also happened here.

42. It is important that, as Mostyn J made clear in *Rubin* at [13](iv):

'…the jurisdiction is not used to outflank or supplant the powers and principles governing an award of costs in CPR Part 44. It is not a surrogate *inter partes* costs jurisdiction.'

But equally, per Cobb J. in *BC v DE* at [22]:

[1] A reference to *BC v DE* [2016] EWHC 1806 (Fam)
[2] *Moses-Taiga v. Taiga* [2005] EWCA Civ 1013
[3] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42

‘A level playing field may not be achieved where, on the one side, the solicitor and client are 'beholden' to each other by significant debt, whereas on the other there is an abundance of litigation funding.’

43. There is thus a balance of reasonableness to be struck in each case, on its own facts. I have carefully considered Holman J’s decision of *LKH v TQA AL Z (Interim maintenance and costs funding)* [2018] EWHC 1214 (Fam), where he rightly observed at [23] that the statutory provision ‘is looking forward to the obtaining of legal services, not backwards to legal services which have already been obtained’, and I agree that that must always be borne in mind – but as Cobb J has made clear, the reasonable availability of future provision may well be affected by the degree to which existing outstanding bills to the firm then instructed have been cleared or reduced. It appears from his judgment that whilst Holman J was made aware of Cobb J’s decision, there was no opportunity for him to consider its detail. Plainly, each case must be determined on its own facts, applying the criterion of reasonableness to what is a question of funding, and not any determination of ultimate costs liability.

44. Another factor to consider must be that significant costs may be run up between the issuing of the application for an order and the hearing when the appropriate provision is determined. There is clearly less room to argue that those costs are costs in relation to which solicitors have made ‘a decision to extend…credit’, per Holman J. in *LKH v TQA AL Z* at [29], as opposed to costs incurred before any such application is made. In this case, those costs are in the order of £103,000, or around 25% of the outstanding bill owed to the husband’s solicitors, CRS.

45. Finally, as Cobb J also made clear in *BC v DE* at [27]:

‘I recognise that I must exercise my discretionary power with a view to promoting fairness between the parties; I must do so exercising a judicious mix of "caution and realism" (*Currey v Currey (No.2)*).

In those circumstances I come to consider the husband’s claim, albeit that I do so only on the basis of information provided at my request during or after the hearing from each side.

46. A different consideration is that set out at MCA 1973 s.22ZB (1) (c), namely:

'(c) the subject matter of the proceedings, including the matters in issue in them…'

This was picked up by Mostyn J in *Rubin*, where he said at [13] (iii):

'Where the claim for substantive relief appears doubtful, whether by virtue of a challenge to the jurisdiction, or otherwise having regard to its subject matter, the court should judge the application with caution. The more doubtful it is, the more cautious it should be'.

47. This relates both to historic and prospective costs and is a factor which I must bear in mind here, just as I do in relation to the question of interim provision, as there are currently in issue substantive jurisdictional arguments between the parties both in relation to the suit, and in relation to jurisdiction under the Children Act 1989. Indeed, it is to fund the husband to engage in those arguments, as well as interim issues in relation to the children, that this application is substantively focussed; it being agreed that the costs of any subsequent financial proceedings cannot fairly be awarded now, before questions of jurisdiction have been determined.

48. I also remind myself again that one of the issues within those financial proceedings, if they take place in this jurisdiction, is that the wife asserts the existence and validity of a post-nuptial agreement effected in State A, by which she says that the husband disavowed the making of any claims against her in the event of divorce. I cannot judge the force of those arguments now, but do keep in mind that if the husband in the event receives only an attenuated award, full recovery of the amount of any LSO provision may not be practicable if the basis of the award is predicated only upon need, however assessed.

49. During the hearing I was handed a letter from Miranda Fisher, who has conduct of the matter for the husband at CRS, in which she set out that:

'There is undoubtedly a significant conflict caused by the condition I am under from the financial management team and Managing Partner at my own firm to recover historic costs in order to continue to act, and the resources which my firm is willing to devote to Mr R's case until those costs are paid, coupled with my capacity to represent Mr R to the best of my ability and to continue to act for him in these proceedings.'

50. After the hearing, I received from the wife's solicitors, Mishcon de Reya, notification that her invoiced and paid costs are £465,944, and that their WIP / unpaid costs for her

to date are a further c.£240,000. So that produces a total of £705,944, run up since their involvement in these proceedings from mid-October 2020. This may be compared to the overall figure of £589,672 claimed by the husband as the full amount of historic costs owing to his solicitors. Whilst I do not have sufficient information to make an exact comparison, it is clear that the husband's costs expenditure has not been by any measure disproportionate when compared to that by the wife, and I will approach CRS's costs schedule on that basis.

51. I have considered the wife's proposal in relation to her appropriate contribution to these costs. She proposes payment of £560,000 plus VAT – so £672,000, plus further payments of £10,000 per mediation session. This is to be on the basis that a loan will be taken against the security of the family home in the total amount of £1.5m – which Mrs Carew Pole acknowledged could be extended, and from which each party would take their costs on a pound for pound basis.

52. Whilst I am satisfied that it is reasonable to raise the amount of the costs to be provided for the husband in this way, charging the former matrimonial home, I do not have sufficient information about the wife's financial circumstances to accept that it is appropriate for her to be able to reduce the available liquidity in this jurisdiction to meet her own costs by the same amount at the same time. I do not know from where she has already paid £465,944 to her solicitors. I am aware that there is a second property next door to the family, in her name, which the wife says she holds for her brother. If she has no interest in that property, then security in this jurisdiction for the court's eventual award, if jurisdiction is established, may be limited. This would risk the same prejudice that was identified by Moylan J in *BD v FD (Maintenance)* at paragraph 40 (set out at [8] above). I therefore do not accept the pound for pound element of the charge which the wife proposes, on the basis of the information before me.

53. Outcome. Firstly, in relation to the historic costs, I do not consider it reasonable that the wife make no contribution whatsoever to the outstanding amount, currently a little over £394,000, to CRS, although I will make no award in relation to the costs outstanding to the husband's former solicitors. I am not satisfied that the discharge of those latter costs is reasonably required to enable him to obtain appropriate legal

services. I also bear in mind that by the time this interim application was made in mid-December 2020, the costs bill with CRS had already reached a significant £291,781, and I am not persuaded that all or even the majority of that amount need now be discharged to achieve a fair balance between the parties.

54. A different consideration applies to the £103,000 incurred after the application was made but before the date of this hearing, which costs can be seen as incurred in light of the application, and therefore more fully within its potential ambit.

55. Overall, I consider that a fair amount of the outstanding costs to be met now under the auspices of a legal services order will be £200,000, or just over half of the current bill owed to CRS. I am satisfied that that amount, coupled with adequate provision going forward, will be sufficient to enable their continued representation of their client without undue tension in the relationship, and would therefore be reasonable, and appropriate to procure legal services for the husband.

56. In addition, in relation to the costs to be incurred, I propose to provide for ongoing payments at the rate of £150,000pcm, paid over the next 5 months from 1 February 2021 until 1 June 2021, on the basis of the current estimate that the jurisdiction hearings will take place in June 2021, so a further £750,000, inclusive of VAT. This is made up as to £300,000 in relation to the divorce jurisdiction proceedings, £400,000 in relation to the children proceedings, to include any collateral criminal hearings, and £50,000 in respect of the proposed mediation. The provision for the historic costs should be made with the first monthly payment.

57. I am satisfied that this is a reasonable amount having regard to the rate at which both parties have been spending in the litigation to date, and the issues between them and their complexity, which of themselves justify the top level representation currently being employed by both husband and wife.

20 January 2021