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

Order made for payment both of historic and prospective costs through a Legal Service Payment Order in Schedule 1 and Section 8 Children Act 1989 proceedings.

The Mother had applied for financial provision under Schedule 1 to the Children Act 1989 which was due to come on for trial in February 2017. There were parallel proceedings under section 8 of the Children Act 1989. At this interim hearing the Mother sought a legal services payment order ('LSPO') that the Father pay (i) her outstanding costs of c.£140,000, and (ii) her prospective costs to the final hearing of c.£154,000. In the context of the sums involved in the Mother's claim these figures were not disproportionate. The Father opposed the application in principle.

The Father accepted that the court had jurisdiction to make a LSPO in respect of the costs of both the Schedule 1 claim and the section 8 claims, per CF v KM (Financial Provision for Child: Costs of Legal Proceedings) [2011] 1 FLR 208. The court noted that the origins of the common law LSPO jurisdiction are found in A v A (Maintenance Pending Suit: Provision for Legal Fees) [2001] 1 WLR 605, followed in G v G (Maintenance Pending Suit: Costs) [2003] 2 FLR 71 and Moses-Taiga v Taiga [2005] EWCA Civ 1013. In matrimonial and civil partnership causes, the common law LSPO jurisdiction has now been replaced by section 22ZA of the Matrimonial Causes Act 1973 (inserted by section 49 of the Legal Aid Sentencing and Punishment of Offenders Act 2012). The court stated that the principles at play in a case concerning the common law jurisdiction are the same, with some modifications, as those under section 22ZA Matrimonial Causes Act 1973 (citing Lord Wilson JSC in Wyatt v Vince (Nos. 1 & 2) [2015] 1 WLR 122 and following the analysis of Mostyn J in Rubin v Rubin [2014] EWHC 611 (Fam)).

The question in this case was whether the Mother could legitimately claim her historic costs in a LSPO application. The court noted that in Rubin, where Mostyn J had been concerned with an application under section 22ZA of the Matrimonial Causes Act 1973, the Judge had warned at paragraph 13(iv) that:

"It is important that 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. 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."

Mostyn J had rejected a legal costs funding application, seeing it as a vehicle to recoup the costs of either or both of these concluded claims. This court distinguished the instant case on the following grounds:

1. In Rubin, the court was asked to make an LSPO in relation to costs of two concluded applications (divorce

and child abduction). Here, the legal costs funding claim arose in relation to costs reasonably and legitimately incurred within ongoing proceedings.

2. There was authority for this analysis: In A v A Holman J permitted the wife to receive a legal costs funding payment which covered both prospective and outstanding costs; he made no distinction between prospective and outstanding costs; in G v G Charles J did not appear to distinguish between outstanding and prospective costs liability in making an award for legal costs funding.

3. In this case there was an argument that without being able to make payment towards her historic costs the Mother's solicitors were unlikely to provide their services in the future, and she would be unlikely to obtain the services of others whilst she had such significant debts. It was not necessary for an applicant to demonstrate that his or her solicitor had actually 'downed tools' or was about to do so before he or she could legitimately make an application for a legal costs funding order where 'historic' costs have been incurred.

4. In reaching this view the court was exercising a discretionary power. It considered that such an award was fair and reasonable in the circumstances of this case, and placed significant weight on the need for 'equality of arms'.

The court therefore granted the Mother's application. In assessing her claim the court made a deduction of 15% to reflect a notional standard basis of assessment, taking "a broad view about whether the costs are reasonably incurred, reasonable in amount and proportionate to the matters in issue, recognising that any costs which are disproportionate in amount may be disallowed or reduced, even if they were reasonably or necessarily incurred (CPR 44.3(2)(a) and PD 44.6.2), and on the basis that the court would resolve any doubt in favour of the paying party (CPR 44.3(2)(b))".

Summary by Marlene Cayoun barrister, 1 Garden Court Family Law Chambers

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Neutral Citation Number: [2016] EWHC 1806 (Fam)
Case No: ZC15P04051

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2016

Before :

THE HONOURABLE MR JUSTICE COBB
- -

Between :

BC Applicant
- and -
DE Respondent
- -
- -

James Turner QC (instructed by Dawson Cornwell) for the Applicant (mother)
Patrick Chamberlayne QC (instructed by Sears Tooth) for the Respondent (father)

Hearing dates: 12 July 2016
- -

Approved Judgment
I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
.....

THE HONOURABLE MR JUSTICE COBB
This judgment was delivered in private. 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.

The Honourable Mr Justice Cobb :
1. By application dated 1 July 2015, BC (hereafter "the mother") seeks orders for financial provision from DE (hereafter "the father") under Schedule 1 of the Children Act 1989 ("the 1989 Act"), in respect of their child, F, who is soon to be 8 years old. By separate application (14 August 2015) she further sought a lump sum for

outstanding legal costs (by then £67,934.42) and a further sum (£42,372) in relation to prospective legal costs, all incurred (or to be incurred) in proceedings concerning F under Schedule 1 and section 8 of the 1989 Act. By cross-application (17 August 2015), the father issued a notice to show cause why an agreement as to financial provision for F, reached between the parties in June 2009, should not be made into an order of the court. The substantive issues are due for trial before me in February 2017.

2. The issue before the court at this stage of these proceedings is whether the father should be ordered to fund the mother's legal costs in the pursuit of her case. Specifically, I am asked to consider making an order in respect of:

i) Outstanding (i.e. already incurred) costs, which (following adjustments made during the hearing) amount to £141,269.18;

ii) Prospective costs between now and the final hearing; the sum claimed is £154,245.

The application in respect of outstanding costs (in [2(i)] above) is opposed by the father in principle. He has nonetheless made an open offer of a contribution in the global sum of £163,000 towards the mother's legal costs funding claim, for her to apportion between outstanding and prospective costs as she wishes.

Background

3. The relevant background can be stated shortly. The parties met in 2006, and for a period of time they lived together. F was born in 2008. The father is extraordinarily wealthy, with capital measured in £ hundreds of millions. His net annual income is measured in £ millions. The mother has no financial resources or income of her own. It is the mother's case that their relationship petered out at some point in 2013; the father's case is that their relationship had in fact ended before F's birth, although I am advised (and this is, I believe, undisputed) that the mother fell pregnant by the father in 2009, albeit that pregnancy ended in miscarriage. Between 2008 and 2009, the mother and father, each assisted by matrimonial solicitors of the highest calibre (not, as it happens, those currently instructed), entered into a comprehensive agreement for financial provision for F. The agreement was predicated on the basis that the mother would provide F's primary home, and that F would spend as much time with the father as the father's working schedules would allow, and would be in F's interests. F's housing needs were covered in the agreement, it being recorded that a property of a value of c.£2.5m would provide a reasonable home for him; it was further recorded that the mother was occupying a more expensive property (with a value three times that recorded as meeting F's reasonable needs) for which the father would grant leases to the mother which would be surrendered (at the latest) when F reached 25 years old. Provision was made in the agreement for F's income needs (at the annual rate of £30,000, index linked); the cost of education, and childcare support was also covered. Notwithstanding the agreement, the father provided significantly more generously for F; as mentioned above, the mother and F occupy a property, provided by the

father in early 2008 which is significantly more valuable. From the date of the agreement until 2014, the father made financial provision at a level many times more than he had formally agreed.

4. In 2014, relations between the father and mother soured; problems associated with a relationship which the father had formed with a friend of the mother contributed to this. Three children have been born to that relationship. There was a dispute about a holiday in the summer of 2014; the father reduced his financial support to the mother to the level set out in the agreement. The mother hoped that this was a temporary reduction in reaction to the dispute between them. It was not. The mother rapidly spent on living expenses a large proportion of a sum of £300,000 which she says that the father had previously given to her (he says it was a loan). In the circumstances, the mother made this Schedule 1 application. In parallel with these proceedings, the parties have been litigating over child arrangements (under section 8 of the 1989 Act).

Previous hearings
5. The Schedule 1 application (cross-application, and ancillary application) were transferred from the Central Family Court in August 2015; they were listed for determination of the legal costs funding issues on 20 October 2015 before Roberts J. Having heard argument, Roberts J gave an ex tempore judgment, explaining the following orders in the mother's favour:

i) An award reflecting 70% of the outstanding costs which had accrued at that time, both in relation to section 8 and Schedule 1 proceedings (a figure of £77,994); (the 30% reduction in the sum awarded was explained by the judge to reflect a rough computation of a standard basis of assessment);

ii) An award reflecting the mother's claim in relation to prospective Schedule 1 costs to the next hearing (fixed for February 2016) (a figure of £40,508);

iii) No order in relation to prospective costs in the section 8 proceedings; at that point it was believed that there would be no such proceedings or costs.

The order made on that day specifically recites (emphasis by italics added):

"This is an order made pursuant to Schedule 1 of the Children Act 1989 to enable the applicant mother to fund certain past and future legal services until the next hearing date in these proceedings. The court is satisfied that without such funds the applicant mother would not reasonably be able to obtain appropriate legal services for the purpose of these proceedings."

6. In her judgment, Roberts J considered the decision of Mostyn J in Rubin v Rubin [2014] EWHC 611 (Fam), and rehearsed in full the salient parts of the judgment in that case (i.e. paragraphs [13(i) to (xiv)] inclusive).

Rubin concerned an application under section 22ZA of the Matrimonial Causes Act 1973 ("MCA 1973") for a Legal Services Payment Order ('LSPO'). It is convenient for me to incorporate into my judgment at this point paragraph [13(iv)] of Rubin which reads as follows:

"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. It is important that 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. 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."

7. Roberts J reflected in her judgment (and in explaining her award in respect of outstanding and prospective costs) the "need for a level playing field" between the parties, concluding that: "equality of arms and the parties' Article 6 rights require that [the mother] has the ability to engage in that litigation on the basis of the professional expertise from which she has hitherto benefited."

8. On 15 February 2016, the proceedings were listed before Holman J for consideration of the mother's application for interim financial relief; he ordered (on the mother's subsidiary application) a further sum of £20,000 as a contribution to her future legal expenses in relation to proceedings between the parties which had resurfaced under section 8 of the 1989 Act. Holman J had insufficient court time to deal with the question of whether the father should fund, whether in full or in part, payment of the mother's outstanding legal costs and/or her future legal costs in relation to the Schedule 1 proceedings, and those issues were deferred to 15 April 2016.

9. Immediately prior to that next hearing, Mr. Harker, Managing Partner at Dawson Cornwell (the mother's solicitors) wrote to the court in these terms:

"... the level of outstanding costs has now gone far beyond what was anticipated or provided for by the order of 20 October 2015.... My firm has had no realistic choice but to continue acting for [the mother] while these substantial costs liabilities to my firm have remain (sic) outstanding, and increasing, but this places [the mother] in a prejudicial position in comparison with [the father]. That is both because she is beholden to her solicitors to continue acting in circumstances of very significant unpaid costs and because her level of debt and absence of provision impacts on the way in which we might wish to represent her. We are a small firm and cannot provide interest-free credit at this level, and without security, simply because our client is not able to borrow from any bank or litigation funding provider. It would have been prejudicial to our client for us to have ceased acting, as she would have been extremely unlikely to obtain alternative representation given her

outstanding costs. There is however a limit to the extent that we should be asked to continue to provide credit and we now ask for provision to be made to meet this debt and to allow our clients to be represented on an equal footing to [the father]."

10. The proceedings were listed before Roberts J again, by chance, on 15 April; she considered once again the mother's claim for prospective legal costs funding in respect of the Schedule 1 costs to cover the period from April to the FDR, which was listed to take place a few weeks hence (3 May 2016). She made an award of prospective costs in the amount (£38,000) which had (more or less) been requested by the mother, and she listed the hearing on 12 July for the court to deal with the questions of whether the father should fund in whole or in part (a) the mother's outstanding legal costs and/or (b) her future legal costs. In that judgment, Roberts J referred once again to Rubin and went on to say this:

"The mother, without any shadow of doubt, in a little over two weeks, is going to import into her Schedule 1 claims a six-figure liability for costs which she has incurred. In my judgement, and having scrutinised the figures, whilst of course I cannot bind another judge, I do not see those costs as being in any sense exceptional or unreasonable. But they are historic costs and, in my judgement, what Lord Wilson of Culworth said in Vince v Wyatt was dicta (sic.) and it does not override what I regard as the starting point of a principled approach as explained by Mostyn J in Rubin. .... I am not going to make any order in relation to the historic costs on the basis that I find it is probable that Dawson Cornwell are going to continue to represent her, and I hope that the remarks I have made in the context of this ruling will give those solicitors some comfort that certainly I would intend and expect those costs to be swept up in the context of an overall settlement.... I am not going to, as it were, seek to unravel the historic costs position at this stage... Confident in the expectation that those solicitors will recover those costs, one way or another."

The law

11. There is no dispute that I have the power to make a legal costs funding order in respect of the costs of both the Schedule 1 claim and the section 8 claim: see CF v KM (Financial Provision for Child: Costs of Legal Proceedings) [2011] 1 FLR 208: vis: "the 'equality of arms' point can apply in section 8 proceedings just as it has been found to warrant a provision for costs in Schedule 1 proceedings" at [36] ibid.

12. The common law jurisdiction for the making of an order for legal costs funding is now well-established. It finds voice first, for present purposes at least, in Holman J's judgment in A v A (Maintenance Pending Suit: Provision for Legal Fees) [2001] 1 WLR 605, followed soon thereafter by Charles J in G v G (Maintenance Pending Suit: Costs) [2003] 2 FLR 71; Moses-Taiga v Taiga [2005] EWCA Civ 1013, [2006] 1 FLR 1074 was then decided in the Court of Appeal in which Thorpe LJ said that "it will only be in cases that are demonstrated to be exceptional that the court will consider exercising the jurisdiction". In Currey v Currey No.2 [2007] 1 FLR 946 the Court of Appeal dismissed (at [19]) the suggestion that the word "exceptional" had been used in Moses-

Taiga otherwise than to illustrate the combination of circumstances whereby the applicant for funding has no assets, cannot raise a litigation loan, and cannot persuade her solicitors to enter into a Sears Tooth charge (a deed of assignment of her rights to financial provision). Wilson LJ observed that "whenever a court decides to make a costs allowance, it ought to proceed with a judicious mixture of realism and caution as to both its amount and its duration." ([28]).

13. In relation to matrimonial and civil partnership causes, the common law jurisdiction has now been replaced by section 22ZA of the MCA 1973 (inserted by section 49 of the Legal Aid Sentencing and Punishment of Offenders Act 2012), which provides:

"(1) In proceedings for divorce, nullity of marriage or judicial separation, the court may 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.

(2) The court may also make such an order or orders in proceedings under this Part for financial relief in connection with proceedings for divorce, nullity of marriage or judicial separation.

(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."

Section 22ZB sets out the matters to which the court is to have regard in deciding how to exercise power under section 22ZA.

14. Lord Wilson JSC in Wyatt v Vince (Nos. 1 & 2) [2015] 1 WLR 1228 described the "close parallel" between the criteria articulated in the common law jurisdiction (which had actually been exercised in that case, that part of the claim having been decided before the implementation of section 22ZA) and section 22ZA itself. Mostyn J took a similar view in Rubin at [14]/[15] where he indicated that in his view the principles will be the same – with some modifications – in the statutory and non-statutory schemes.

15. A compendium of fourteen principles relevant to the exercise of judicial discretion in this field, whether under statute or otherwise, is to be found in Rubin – the authority holding greatest sway in this jurisdiction at present. In the case of MG & JG v JF (Child Maintenance: Costs Allowance) [2016] 1 FLR 424 Mostyn J returned to the principles earlier laid out, distilling those which were relevant on the facts of the case, but not expanding their reach or applicability.

16. On the facts of the dispute before me, the controversial principle is that set out at paragraph [13(iv)] (which I

have reproduced at [6] above), as to which Mostyn J went on to say this (at [16]/[17] of Rubin) (emphasis by italics added):

"[16] In both applications the wife seeks to recover costs which have already been incurred in circumstances where there will be no further substantive litigation here whether about the children or about money. In my judgment, in both applications she falls foul of principle (iv). 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. Were her application to be granted it would represent a very dangerous subversion of the exclusivity of the inter partes costs powers and principles in CPR Part 44. A shadow or surrogate jurisdiction would emerge. Such a development must be stopped in its tracks.

[17] As I have shown there are full-blown financial remedy proceedings in California. It is there that the question of these debts owed by the wife to her lawyers should be raised and adjudicated. But even if there were not an alternative more convenient forum it would be wholly unprincipled to allow this claim to succeed where there are no further proceedings here in prospect".

The arguments on principle; 'historic' costs
17. While Mr. Turner QC does not seek to challenge the principles set out in Rubin, he contends that insofar as Mostyn J was expressing a principle of general application of irrecoverability of all outstanding costs incurred at the point of determination (by reference to the term 'historic' in paragraph [13(iv)]) he was wrong to do so. Alternatively, the phrase "historic unpaid costs" in [13(iv)] has been widely misinterpreted or misapplied (including by Mr Chamberlayne QC here), and/or that Mostyn J's comments in paragraph [13(iv)] should not be regarded as even persuasive, given that Mostyn J was not dealing in Rubin with the situation which obtains here – namely where the costs are being and have been incurred in ongoing proceedings. Mr. Turner asks me to identify no logical distinction between allowing prospective costs under this jurisdiction (about which there is no challenge to the principle), and outstanding costs which may have been incurred (in an identical way to the way in which the prospective costs will be incurred) from the date of the application, including those arising immediately prior to the hearing. The applicant would face real prejudice on an application for a legal costs funding order if she or he has to wait weeks or even months between the date of application and a court date, racking up costs in the meantime, only to be entitled to those which arise after the court's determination.

18. Mr. Turner goes on to argue that the rule advanced in [13(iv)] of Rubin (when read with [16] ibid.) has the effect of prejudicing, indeed penalising, the solicitor (as here) who is, however reluctantly, prepared to continue to act for a client but is forced to offer ever-increasing unsecured credit rather than 'downing tools'. Mr. Turner suggests that Dawson Cornwell should not be put in a worse situation vis-à-vis their client because they are prepared to carry on acting and carrying their debt, than if they ended the retainer until they were paid. He cites paragraph 40 of Wyatt v Vince in support of his contention (emphasis by italics added):

"In circumstances in which the wife already owed the solicitors about £88,000 for their work done on her behalf on an application in which her ultimate recovery from the husband was likely to be comparatively modest and conceivably even non-existent, it was unreasonable to consider that they would, still less should, continue to act for her on that basis against an evidently litigious husband who was causing substantial escalation of the interlocutory costs in a manner which clearly caused him no difficulty"

19. He further points up the paradoxical benefit for the court and the putative payee of being able to review a schedule of outstanding incurred costs in the legal costs funding exercise in ongoing proceedings; the court and payee can see what actually has been incurred and whether it is reasonable. Finally, he adds that it is not 'reasonable' to expect solicitors' firms to shoulder the credit burden of their clients in litigation, 'reasonableness' being a component of the statutory and non-statutory scheme:

i) under statute in matrimonial causes ("the applicant would not reasonably be able to obtain appropriate legal services": section 22ZA);
and/or

ii) at common law "whether the applicant for a costs allowance can demonstrate that she cannot reasonably procure legal advice and representation by other means..." Currey v Currey No.2 (above at [20]) (emphasis by italics in the original).

20. Mr. Chamberlayne contends that Rubin is good law, and that paragraph [13(iv)] should be directly and strictly applied here. He describes the jurisdiction to award legal costs funding as a "narrow" one, which is merely concerned with ensuring that the parties are on an equal footing – i.e. with the benefit of lawyers, advice and representation – within the proceedings. He argues that solicitors take commercial risks with their clients all the time, and section 22ZA and/or its common law equivalent has never been intended to be a commercial 'safety valve' to mitigate that risk. He also cites paragraph 40 of Wyatt v Vince (quoted above) in support of his case, to the effect that what Lord Wilson had in mind was the "evidently litigious" who substantially escalates the litigation to put the solicitor into the position of 'downing tools'. Mr Chamberlayne submits that the liabilities for outstanding costs will generally be dealt with as debts to which the judge should have regard in making his or her substantive award – see paragraph 4 (1)(b) of Schedule 1, and see also [32] of Currey v Currey No.2.

21. Mr. Chamberlayne describes Roberts J's award of historic costs in this case in October 2015 as pragmatic, but (in view of Mostyn's comments in Rubin) unprincipled.

Discussion

22. My concern is to ensure that the mother and father have equality of arms, and equal access to justice in this case. I do not, as Mr. Turner sought to persuade me, treat equality of arms as "equality of payments" – a suggestion that, £ for £, the father should ensure that the mother is more or less equally provided for in relation to her costs as he is. However, for as long as any client has incurred significant outstanding legal costs with his or her solicitor, there is no doubt but that they become bound ("beholden" per Mr. Harker, see [9] above) to each other by the debt; this may well impact on the freedom of, and relative strengths within, their professional relationship. Further, the solicitor may feel constrained in taking what may be important steps in relation, for instance, to discovery, or in relation to exploring parallel non-court dispute resolution. The debt may materially influence the client's stance on possible settlement, and the solicitor's advice in relation to the same: a client – without independent resources – is in a vulnerable position, and may be more inclined to accept a settlement that is less than fair simply because of the concerns about litigation debt. This would not be in the interests of this, or any, child in Schedule 1 proceedings. 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. Though there is an increasingly familiar and commendable practice of lawyers acting pro bono in cases before the family courts, particularly where public funding provision previously available has been withdrawn, legal service providers, including solicitors and barristers, are not charities, nor are they credit-agents. It is neither fair nor reasonable to expect solicitors and the bar to offer unsecured interest-free credit in order to undertake their work; there is indeed a solid reason for lawyers not to have a financial interest in the outcome of family law litigation.

23. I agree with Mr. Turner that 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."

24. On the significant point of principle in issue in this case, my view is as follows. 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. The financial proceedings had been stayed (proceedings were now ongoing in California), and the mother and children had returned to California, pursuant to orders made by Hogg J under the Hague Convention 1980. There was, as Mostyn J observed, no further litigation in this country, and no litigation in prospect. I consider that Mostyn J was right to reject a legal costs funding application as a vehicle to recoup the costs of either or both of these concluded claims. 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. I draw support for this distinction by the following:

i) In A v A (specifically referred to as the 'seminal' decision at that point by Wilson LJ in Currey v Currey No.2 at [14]), Holman J permitted the wife to receive a legal costs funding payment which covered both prospective and outstanding costs; he made no distinction between prospective and outstanding costs. The outstanding costs liability was then c.£40,000, incurred since the discharge of the wife's legal aid certificate (which had only occurred when an order for maintenance pending suit had been made by the husband to the wife in that case); counsel for the husband in that case, as Mr. Chamberlayne in this, had argued that solicitors should be willing to wait for their costs and run the risk of not recovering them, as many other solicitors in their position have had to do. Holman J rejected that argument, observing that "we live in times of high overheads and a close eye on cash flow. There is a real risk that if wives (for it is usually wives) cannot obtain some funding as they go along, solicitors simply will not be willing to act for them at all"; that is the obvious risk here too;

ii) In G v G (above) Charles J did not appear to distinguish between outstanding and prospective costs liability (in that case, an aggregate of £120,000) in making his award for legal costs funding at £10,000 per month;

iii) That Roberts J, obviously aware of the decision in Rubin, made an order in relation to outstanding costs in this litigation and in the associated section 8 proceedings in October 2015 in the sum of £77,994.

25. I therefore do not consider that paragraph [13(iv)] of Rubin directly applies to these facts.

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.

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)). This is a case in which the applicant mother has a proper case to put before the court; it is a case in which her legal costs, I am satisfied, are broadly on a par with those of the father. He self-evidently, has the means to pay, though I recognise that he may well not be able to recoup the costs allowance awarded. I am satisfied that the mother cannot reasonably obtain legal costs funding elsewhere; it would not, in my judgment, be fair or reasonable for the mother and her solicitors to be labouring (literally) under the disadvantage of financial pressure in the preparation of this important case in the lead up to the final hearing.

The award in this case

28. The mother makes her claim under a number of heads. Mr. Turner sensibly abandoned his first head of claim (to recover the 30% balance of the costs award not previously allowed by Roberts J: October 2015) during the course of argument in the hearing before me. From the costs claimed (whether prospective or outstanding), I propose to make a deduction of 15% to reflect a notional standard basis of assessment; in doing this, I have taken a broad view about whether the costs are reasonably incurred, reasonable in amount and proportionate to the matters in issue, recognising that any costs which are disproportionate in amount may be disallowed or reduced, even if they were reasonably or necessarily incurred (CPR 44.3(2)(a) and PD 44.6.2), and on the basis that the court would resolve any doubt in favour of the paying party (CPR 44.3(2)(b)). Holman J in this case and Mostyn J in MG & JG v JF discounted their awards by 20% (in relation to prospective costs); Roberts J deducted 30% from her award of outstanding costs, but made no deduction from prospective costs. Having reviewed the schedules, which on the whole appear realistic, I consider that 15% is the right discount, and that it should be applied across the board.

29. I consider the global award of legal costs funding under the following six heads of claim:

(a) Costs for section 8 proceedings October 2015 – February 2016

30. When the mother's legal costs funding application was considered by Roberts J in October 2015, there was no prospect of any immediate section 8 litigation, and the judge did not therefore consider any costs award in this regard. In the event, within a few weeks of that hearing the father made an application under section 8 for a child arrangements order in relation to his time with F over Christmas. The mother engaged solicitors; there was a hearing. Costs were inevitably incurred. The section 8 application was, so far as I can tell, determined, and concluded. A further hearing took place in the section 8 proceedings in early 2016 (resulting from the failure to agree the consequential orders following a July 2015 hearing), which brought matters to an end at least for the time being.

31. While it could be argued that these section 8 applications have been concluded and are therefore historic costs (and prima facie irrecoverable as 'historic' per Mostyn J in Rubin), the reality in this case is that the dispute between these parties in relation to F has been proceeding in parallel on these two related fronts over the last nine months. The repeated (and recent) skirmishing in the section 8 proceedings distinguishes this situation from the child abduction costs in Rubin; the section 8 files of the firms instructed by both of these parties remain open, I suspect. I therefore see no reason why the mother should not be entitled to have these considered in this context, which I assess in the sum of £28,844.85 (the sum claimed by the mother, discounted by 15%).

(b) Underestimate of costs for work on the Schedule 1 claim: October 2015-February 2016

32. Roberts J made an award in October 2015 in the sum of £40,508 to reflect the mother's prospective Schedule

1 costs at that time. It transpired that the mother's solicitors and counsel underestimated the time and cost involved by more than 50%; they undertook significantly more work on the case than they had expected in this period, and the actual cost incurred was £83,673.60. I understand the father's lawyers' surprise and frustration at this miscalculation on the part of the mother's lawyers, but I see no reason why the mother should not be entitled to recover the balance for the work done, which seems to me, as it seemed to Roberts J, to be reasonable. As Mr. Turner observes, and I accept, where a legal costs funding claim is made in relation to outstanding incurred costs, at least the court and the paying party can see the reasonableness of the costs incurred. The additional sum claimed is £43,255.60, which I discount as discussed above, and award the sum of £36,767.26.

(c) Schedule 1 costs: February to April 2016
33. No provision has thus far been made for the mother's Schedule 1 legal costs for the period from February 2016 to April 2016. The mother has already made a contribution of £10,000 to these costs (from the backdated interim maintenance award); the shortfall is £19,303. The costs appear to have been reasonably incurred, and the award I make in this regard is £16,407.55.

(d) Shortfall on the section 8 costs March 2016
34. Holman J had made an award of £20,000 by way of legal costs funding to the mother for the section 8 proceedings in March, against a claim of £28,887. The actual costs incurred were £34,842. Deducting the £8,887 from the shortfall (not allowed by Holman J), and subject to the 15% deduction, the amount awarded is £5,061.87.

(e) Costs from FDR (3 May 2016) to 12 July 2016
35. The sum claimed for this period is £29,234. The case plainly did not settle at that hearing; inevitably further work has been undertaken on the case. The sums claimed appear reasonable, and the award will therefore be £24,849.

(f) Prospective Schedule 1 costs July 2016-February 2017:
36. The mother seeks £154,245 in respect of her future costs to final hearing. The father contests this sum only in respect of the cost of two counsel, Mr. Chamberlayne arguing that this is essentially a 'leader only' case. For present purposes only, I propose to allow the cost of a leader only given that (a) the significant 'heavy-lifting' in the case has, according to Mr. Turner, been done in the preparation of the mother's lengthy witness statement dealing with the 2009 agreement; this explains the significant underestimate of costs referred to in [32] above, (b) the 'Statement of the Case' in relation to the purported agreement between the parties was ostensibly prepared by Mr. Turner alone without the assistance of a junior (it is signed off by him alone), and (c) in the schedule of prospective legal costs, the solicitor with conduct is expecting to bill some 14 hours for reviewing the 20 lever arch files between now and the final hearing, and 60 hours for two solicitors to attend the final

hearing. It may be that instruction of two counsel for the final hearing is entirely justified on other grounds, and if so, this may well be considered in the final evaluation of the costs at the conclusion of the case. The sum allowed is £100,508.25.

Conclusion

37. It follows from the above that I propose that the mother is entitled to the sum of £212,438.78 in respect of her legal costs funding (as against an original claim, before concessions were made, of £328,470). This sum is to be utilised only for the purpose of meeting past and future legal bills. I propose that it be paid in instalments, the precise quantum and timing of which is to be discussed between counsel, and on which I will adjudicate only if required.

38. That is my judgment.