

THOMAS · MORE · CHAMBERS

**MAINTENANCE
PENDING SUIT &
LEGAL COSTS**

**Wednesday 9th May
6pm to 7pm**

FAMILY LAW GROUP



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1. In recent years public funding for ancillary relief applications has declined. Large numbers of lawyers no longer undertake publicly funded work. A party might be able borrow money from a bank or credit card or friends to pay for her representation, but this is usually a very limited option, particularly where the litigation will be expensive, perhaps where experts are involved. The decline in public funding has thrown into sharp focus the question of whether the courts have the power to oblige a party (usually a husband) to fund the litigation against him, and the circumstances in which this will be ordered. In a short time, the Court of Appeal has twice visited this subject..
2. The answer to whether the power existed at all, was 'yes' according to Holman J. in 2000.

3. **A v A (Maintenance Pending Suit: Payment of legal Fees) [2001] 1 FLR 377**

Holman J

1 November 2000

The W's first MPS led to the discharge of her legal aid certificate.

Holman J then held that maintenance under s 22 MCA could include provision for legal costs. He allowed MPS of £7, 750 pm - £3, 750 pm for W's expenses and £4,000 pm for legal costs, to last until the determination of the suit.

“Maintenance payments were not restricted to matters of daily living in its most literal and restrictive sense, and legal fees incurred in the course of litigation were recurring expenses of an income nature. After provision of a roof over her head and food in her mouth, this wife's most pressing need was the resolution of her divorce claim. She would be unable to make any progress with the dominating issue of her life if she could not pay her lawyers, and it was reasonable to make provision for her legal fees.”
[Headnote]

4. The jurisdiction to allow legal costs as part of MPS was given its first airing in the Court of Appeal in 2005. Thorpe LJ surveyed the landscape of litigation set out three

conditions with the safeguard that the Judge must decide whether to exercise his discretion in an 'exceptional' case'.

5. **Moses-Taiga v Taiga [2006] 1 FLR 1074**

Court of Appeal

Thorpe and Dyson LJ

5th July 2005

This was the first consideration by the Court of Appeal of legal costs as a legitimate element of maintenance pending suit. The wife obtained a without notice freezing order against H's extensive assets in the UK and worldwide. She also obtained interim maintenance from District Judge Black of £300,000 pa or £25,000 pm - £10,000 pm for living expenses and £15,000 pm to her solicitors for legal costs. The H sought a preliminary issue as to jurisdiction. The Wife argued for all the issues (validity of marriage, jurisdiction of the Court, if it did whether it should defer to Nigerian courts; if it did not whether the wife's allegation of conduct had been made out) to be tried together. The trial was given a 10 day estimate and fixed for counsel's convenience on a date *1 year ahead*.

6. By the time IMO was before a High Court judge 6 months had passed. He increased it to £39,000 per month - £14,000 for living expenses and £25,000 for her solicitors. H had disclosed assets of at least US \$7million. H refused to pay the increase.
7. W applied and Court ordered arrears be paid in 14 days and lump of £350,000 into court for future payments. The H appealed and the Court of Appeal restored the order of DJ Black and altered the allocation so that the W's aliment should remain at £11,000 and the payment to her solicitors should reduce to £11,000 pm. The Court ordered a sum of be paid into court.
8. Charles J reserved his 'monumental' judgment after trial, which ran to 145 pages. That cleared the way for the H to appeal the MPS orders.

9. Held

(1) The Court had jurisdiction to grant MPS even if the H was challenging jurisdiction. The risk of irrecoverable payments had to be balanced against the risk of denial of access to justice for the W. *Ronalds* (1875) LR 3 P & D 259, PDA, was authority that the court had power to award MPS to sustain the W pending the Court's determination. (the absence of any authority, other than that of *Ronalds* only illustrates the tendency for propositions of universal acceptance to be difficult to support by reference to authority).

10. (2) S 22 “ *On a petition for divorce, nullity of marriage or judicial separation, the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the presentation of the petition and ending with the date of the determination of the suit, as the court thinks reasonable.*”

11. Construing s 22 to include the need for cash to finance continuing litigation was pragmatic and sensible. While s 22 may not have been so construed when it came into force, the world had changed

12. “...In the 1970s, a petitioner who had no assets and whose only prospect of affluence lay in the outcome of her application for ancillary relief, could easily find specialist solicitors who would pursue her claim on legal aid. That world has long since gone. In those days, a number of the leading specialist ancillary relief firms could as a matter of public duty, take on an admittedly small number of legally-aided-cases. Leading firms that would not take legally-aided clients invariably had an arrangement to pass such cases to highly competent firms that would do legal aid. All those support systems have disappeared. The modern reality is that the highly specialist solicitors and counsel necessary for the conduct of big money cases will no longer do publicly-funded work.” [Para 25]

13. Thorpe LJ said an applicant without:-

- (a) **Assets,**
- (b) **security for borrowings** and
- (c) **potential for a *Sears Tooth* arrangement¹**

could not fund such litigation other than by an application for MPS including a substantial element for costs.

14. In language he may later have regretted, Thorpe LJ said “..Obviously, in all these cases the dominant safeguard against injustice is the discretion of the trial judge and it will only be in cases that are demonstrated to be **exceptional** that the court will consider exercising the jurisdiction. But I am in no doubt that in such **exceptional** cases s 22 of the Matrimonial Causes Act 1973 can in modern times be construed to extend that far”. (para [25] emphasis added).
15. The Court noted that where complicated matters arise such as *forum conveniens* or jurisdiction or MPS, the Court must strive to give the case the highest priority to keep the duration of the MPS order as short as possible, so the payer was not at risk of having to pay irrecoverable and unmerited monies.
16. Next, Mr. Mostyn QC lowered the bar for the ‘exceptional’ qualification. The Court of Appeal was later to raise it back up again.
17. **TL v ML and others (Ancillary Relief: Claim Against Assets of Extended Family) [2005] EWHC 2860 (Fam) [2006] 1 FLR 1263**
Family Division
Nicholas Mostyn QC sitting as a deputy High Court Judge
9th December 2005

¹ **Sears Tooth v Payne Hicks Beach** [1997] 2 FLR 116. The Wife entered into a deed of assignment to assign to her lawyers that part of her rights and interests in the ancillary relief proceedings that would settle their fees. Such a deed can be valid if the client is advised to seek independent legal advice and if the court is notified of its existence. They were not against public policy as it enabled a wife ineligible for public funding to obtain representation. They cannot attach to maintenance.

In satisfying the requirement of an exceptional case there was no need for an applicant to do more than demonstrate that she did not have assets and could not raise a litigation loan and could not persuade her solicitors to enter into a *Sears Tooth* agreement, which could be proved by a simple letter.

That would make the case exceptional. [para 128 p1290]

Mr. Mostyn QC's extremely simple test for legal costs within MPS was not accepted by the Court of Appeal in **Currey**.

18. Hedley J was also generous – all big money cases were 'exceptional'.

C v C (Maintenance Pending Suit legal Costs) [2006] 2 FLR 1207

Family Division

Hedley J

21 December 2005

13 year marriage before separation and 2 children 15, and 12. W aged 50 had been a full time mother, and had no earning capacity. The H, 45, owned the majority shareholding in one of the UK's fastest growing companies, worth £13m.

In **August** 2005 they negotiated a consent order giving MPS of £40,000 pa, plus £6,000 for the W's car, and all school fees and extras, which the H claimed to be £24,000 pa. That equated to £3,333 pm for the W's personal maintenance.

19. In **November** 2005 the W applied to vary the order, seeking £4,000 pm as opposed to £3,333, and a significant sum to maintain legal representation. In the hearing she proposed an upper limit of £120,000 and offered an undertaking to pay the money to her solicitors and credit that against any costs order that she might ultimately obtain against the H. The H denied any change of circumstances, that he could not afford it and that it was wrong in principle for him to underwrite her legal costs. The W should – he said – have raised money on her half share in the FMH or entered a *Sears Tooth* arrangement with her solicitors. The W's solicitors said they

were not prepared to agree a Sears Tooth agreement and the W said it was wrong to expect her to mortgage the FMH. The parties anticipated costs of £30,000 before the agreement but the FDR was unsuccessful and they anticipated a trial with forensic accountants.

20. Held: granting the application only in respect of the legal expenses component but not the increase in MPS for the W

- (1) he found as a fact that the H could afford the increase – the H had recently redeemed £500,000 from his mortgage; to expect the W to raise the costs of her representation by mortgaging the FMH, risking her and her children’s occupation would be wholly unfair;
- (2) A change of circumstances is not necessary to justify a variation and the court should only have regard to it. The court should be jealous to uphold agreements freely arrived at in arms-length negotiations with the benefit of legal advice. If the W discovered that the MPS was too little and the only issue was the increase to £4,000 from £3, 333, the application would have been dismissed;
- (3) The court has jurisdiction to provide for legal expenses in an MPS order;
- (4) “[Thorpe LJ in *Taiga*] “...is doing no more than describing one exceptional scenario. In one sense all these ‘big money’ cases are exceptional. Certainly the facts of this case with a 15 year marriage, two minor children and the vast bulk of the assets under the control of one party and the need for investigation of them makes this case exceptional and permits this court to add a costs component to maintenance pending suit”. [p1211].
- (5) The figure of £120,000 proposed for the wife’s costs was not unreasonable having regard to the H’s costs. The judge regarded the increase in costs as a change of circumstances in this case. As she had raised £20,000 the H should pay £10,000 per month for 10 months until trial.

21. Munby J also followed the 'exceptional' test.

Re G (Maintenance Pending Suit) [2006] EWHC 1834 (Fam) March 2007 Fam Law 215

Munby J

13th July 2006

At first instance the judge ordered the W pay (a) MPS for the W of £10,000 pm for herself and the 4 children, backdated to the date of service of her application on the H; (b) MPS of a further £6,000 pm for ongoing legal costs and (c) costs to be reserved to trial. The trial judge dismissed the W's application for provision for a Bar Mitzvah for their eldest son.

Both parties cross appealed.

22. Munby J held

- (1) At the interlocutory stage the court was entitled to make robust assumptions about the H's finances, and an examination of the accounts of the family business in which he owned a 25% share could reject the H's submission that his income had declined. At this stage the court 'is not confined to the mere say-so of the payer as to the extent of his income or resources'. He could prefer the evidence at this stage of the Wife.
- (2) The parties did not disagree with dating the payments from the date of the W's application;
- (3) The Judge was entitled to find that this was an exceptional case to justify an order in respect of legal costs. It fell comfortably into the class of cases.
- (4) The judge was 'plainly wrong' in refusing the costs of a Bar Mitzvah, a matter of the most pressing cultural and social importance for the family, which could not be delayed. As a wealthy family, it should be done in a way appropriate for this family and having regard to the

social and business circles in which it moves. The W estimated the cost at £85,000 and the H £25,000. Munby J assessed the appropriate level at £46,000 would be ordered. (lump sum provision can, of course, be ordered for the benefit of the child under Sch I Children Act 1989.)

23. By October 2006 the Court of Appeal found it necessary to put an end to the 'exceptional' test and raise the bar lowered by Mr. Mostyn QC.

Currey v Currey [2006] EWCA Civ 1338

Chadwick, Wilson LJs, and Lindsay J

18th October 2006

Rich W (family had portfolio of valuable real property in central London) and poor H (substantial liabilities as Lloyds name, to his bankers and to his mother). In 2003 Charles J ordered W pay £48,000 pa pps, index linked.

24. In 2006 the W issued an application to vary the maintenance she paid her former husband by substituting a lump sum by way of clean break. Her income had risen from £190,000 pa to £340,000 pa. The Husband resisted a lump sum as he considered that it would be the subject of 'a vulturine sweep by his creditors' and that such a clearance of his debts by recourse to a fund intended for his maintenance would be gravely prejudicial to him.
25. In the W's application an interim order was made that the W should pay £10,000 pm for 4 months, allowing the H £40,000 to fund his legal costs in meeting her application to the conclusion of the FDR.
26. The H argued he could not secure continued legal advice without an increase in the periodical payments. The W accepted a Sears Tooth agreement was not possible but said that he could raise funds elsewhere. The judge rejected this suggestion at first instance.

27. The W also argued that a costs allowance was wholly unsuitable where the H had behaved badly in the case. He had -
- (a) impoverished himself by engaging in ill-directed litigation;
 - (b) indeed was the subject of a civil restraint order;
 - (c) owed the wife at least £46,000 in respect of costs and
 - (d) had made unsatisfactory disclosure of his financial arrangements.
28. On appeal, Wilson LJ considered **Moses-Taiga** “In my view, despite the occasional murmur to the contrary among family lawyers, the existence of the jurisdiction to include such an allowance [for costs] thereby became res judicata at the level of this court.”
29. Wilson LJ noted ‘the repeated use by Thorpe LJ of the word ‘exceptional’ has become controversial...’The word ‘exceptional’ was obstructing the proper exercise of the jurisdiction to include a costs allowance and Thorpe LJ was convinced that Thorpe LJ never intended it should do so.
30. “There is a recognised syndrome in which, in order to illuminate 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 from the proper approach itself” [para 19]
31. “It is clear that the reference by Thorpe LJ to an applicant’s need to demonstrate that she ‘has no assets [and] can give no security for borrowings’ should not be taken literally. 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. “ [para 19]
32. “...the initial, overarching enquiry is into whether the applicant for a costs allowance can demonstrate that she cannot reasonably procure legal advice and representation by any other means. Thus to the extent that she has assets the applicant has to demonstrate that they cannot reasonably be deployed, whether directly or as a means of raising a loan, in funding legal services....she has also to demonstrate that

she cannot reasonably procure legal services by the offer of a charge upon ultimate capital recovery....Fourthly, that the court needs also to be satisfied that there is no such public funding available to the applicant as would furnish her with legal advice and representation at a level of expertise apt to the proceedings...”

33. Once the applicant has demonstrated that she cannot reasonably procure legal advice and representation by any other means, that is not a sufficient condition in itself. Other factors may well come into play, which on occasion will lead the court to decline to make an order, notwithstanding the demonstration. The subject matter of the proceedings will always be relevant; insofar as it can safely be assessed at so early a juncture the reasonableness of the applicant’s stance in the proceedings will also be relevant. So will a variety of other factors including (as here) the fact that the H already owes £46,000 to the W in respect of costs. However in this case the judge at first instance reached a correct conclusion in considering these matters.
34. Wilson LJ said that there was ‘a lot of sense’ in the Judge crafting the order to carry the husband’s representation only up to the end of the FDR appointment.

“The FDR appointment is a watershed and all reasonable inducements to both parties there to negotiate positively in the light of informal judicial indications should be in place. The knowledge of a spouse in receipt of a costs allowance that, absent settlement at or in the immediate aftermath of the FDR, she will have to apply for a further allowance, which may or may not be granted, seems to me to amount only to a reasonable inducement, as opposed to improper pressure, to reach settlement’ [28].”

Any such application for a further costs allowance should not be heard by the FDR judge. [29]

To forestall further argument Wilson LJ stated that a costs allowance within a maintenance order is not an order for costs and so does not fall foul of the new rule 2.71(4)(a) post 3 April 2006.

35. LJ Wilson gave this cheerful overview of the state of the legal profession:

“In the majority of applications for ancillary relief which proceed in the courts of England and Wales the problem does not arise. For in relation to applications of normal size and complexity a cohort of admirably dedicated solicitors and barristers still remain upon a publicly funded basis to represent such litigants as cannot afford to pay them out of their own resources and as are entitled to public funding...”

36. The Court agreed with Thorpe LJ’s account of the reality of highly specialist solicitors undertaking big money cases.

“It is thus to the ‘big money’ cases that this developing area of the law is relevant. Were our judgments to be reported they would, I fear, contribute to the growing unease, which I share, that the current development in this court – and in the House of Lords – of the law in relation to ancillary relief betrays an unbalanced concentration upon forensic conflict within only a few rich families.”

He might also have added, ‘ and cases involving obsessed litigants in person’, but did not.

37. To summarise the criteria for interim orders for legal costs:

Firstly, the Court will ask

‘Can the applicant for a costs allowance demonstrate that she cannot **reasonably** procure legal advice and representation by any other means?’

- (a) Does she have **assets?** Can she demonstrate that they cannot be reasonably be deployed directly;
- (b) or as a means of raising a **loan?**
- (c) Can she demonstrate that she cannot reasonably procure legal services by the **offer of a charge upon ultimate capital recovery?**
- (d) Is the Court satisfied that there is **no such public funding available** to the applicant as would furnish her with legal advice and representation at a level of expertise apt to the proceedings.

38. If the applicant can demonstrate that she cannot reasonably procure legal advice and representation by any other means the Court may well go on to consider other factors. Thus,

- (a) the **subject matter** of the proceedings will always be relevant;
- (b) so far as it can be safely assessed at the early stage, what stance does the applicant take in the proceedings?
- (c) how has the applicant conducted the litigation so far, including responding to **orders for costs?**

39. It is sensible for orders to be calculated to provide for funding to last until the FDR. The applicant should know that she will have to reapply for to the Court – not the FDR judge - for further funding after the FDR.