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Young v Young

[1998] 2 FLR 1131

14/07/1998

Barristers
Mark Johnstone

Court
Court of Appeal

Facts
In ancillary relief proceedings in 1994 the court ordered the wife to pay the husband a lump sum of £20,000 on the sale of the matrimonial home, which was in her sole name. She was to retain the balance. The lump sum awarded to the husband was stated to be less than it otherwise might have been on account of what the judge described as the husband's selfish annexation of funds during the marriage. No order as to costs was made, but the parties were given liberty to apply in view of the fact that no submissions on costs had been made before judgment was handed down. The basis on which the order was made was that the husband required £45,000 to rehouse himself and was able to obtain a mortgage of £25,000. The wife subsequently made an application for costs, but that application was not heard until mid-1995. By then, it had become clear that the husband was not able to obtain a mortgage and that the Legal Aid Board's statutory charge would apply to the lump sum he had recovered, but it also emerged that the husband's daughter was willing to lend her father sufficient moneys to enable him to rehouse himself. The judge ordered the husband to pay some £10,000 in respect of the costs of the substantive ancillary relief application, the effect of which was to reduce the amount available to the husband to rehouse himself. In making this order she took account of the husband's dishonest conduct. The husband appealed.

Held
Held – allowing the appeal –

(1) The dwelling-house of a legally aided litigant could not be taken into account in an assessment of his means on an application for costs against him. None the less, when a house was sold the proceeds formed part of that party's disposable capital and could be taken into account. The court could in those circumstances investigate the intended use of that capital and exercise a sensible discretion. In the present case, the judge had concluded that with the aid of his daughter the husband would be able to purchase a house for himself even if the contemplated costs order was made against him. Whilst therefore it would have been wrong to order costs to be paid out of funds earmarked to rehouse a litigant, that was not the situation which had confronted the judge. Her decision could not therefore be impeached on this basis.

Chaggar v Chaggar and Another followed.

(2) In cases where conduct was a relevant issue, it was important to distinguish between marital misconduct and litigation misconduct. Whilst the former was one of the factors to be taken into account in the determination of the substantive award, the latter would normally sound in costs and would affect the substantive award only in the most exceptional of cases: Tavoulareas v Tavoulareas applied. Here the misconduct was only marital and was properly reflected in the quantification of the husband's lump sum. It should not have been brought into account a second time to increase his liability for costs.

(3) The judge had also taken into account aCalderbank letter delivered by the wife only 5 days before the final hearing. In the Family Division, the clear practice was that the recipient of aCalderbank letter had to be given a reasonable opportunity to consider the proposed compromise. There was no such reasonable opportunity here. In the circumstances, the judge had been wrong to place reliance on theCalderbank letter in making a costs order against the husband.

(4) In the circumstances it was for the court to exercise its discretion afresh. The wife's costs attributable to the trial were £4500. In the circumstances, the appropriate order would be for the husband to pay £4000 towards the wife's costs.

Per curiam: where what was made was in effect an order nisi, it was important that a party who wished to disturb the proposed order sought to do so promptly whilst the matters were fresh in the judge's mind. No formality was required, it simply being a matter of arranging a date convenient to the judge and to counsel in the case.