

# SB v MB (Costs) [2014]

**[2014] EWHC 3721 (Fam)**

13/11/2014

## **Barristers**

Henry Setright KC  
Charles Hale KC  
Michael Gration KC

## **Court**

High Court Family Division

## **Practice Areas**

International Children Law

## **Summary**

Application by a Mother to recover the costs from a Father following a hearing to determine a child's habitual residence.

## **Facts**

Hayden J made reference to his comment in the substantive judgment in this matter that this case had been 'litigated to saturation point.' The Father contended that the child's habitual residence was in Israel, the Mother contended that the child was habitually resident in the UK. The Judge found in favour of the Mother.

Hayden J's findings were met by an immediate application, on behalf of the Father, for permission to appeal. The Judge observed that there was a parallel 'jurisdictional' issue pursued by the Father in the Israeli courts. Following a resounding rejection of his application at first instance, a judgment that was highly critical of him personally, the points were pursued on to the Court of Appeal in Israel and eventually to the Supreme Court there. On Hayden J's reading of the respective judgments that litigation had been entirely futile. Hayden J commented that it was reassuring that there was conformity both of principle and approach in the two country's respective Hague Convention jurisprudence. Hayden J refused the Father's application for permission to appeal which was then pursued by lodging a written application before the Court of Appeal. However, ultimately the appeal was discontinued and the costs application was restored to Hayden J.

Hayden J reviewed the authorities and the relevant procedural rules in relation to costs orders in the Hague Convention Jurisdiction including the common ground as to the legal framework that was identified between the parties:

i) The High Court has jurisdiction to award costs in first instance cases brought pursuant to the 1980

Hague Convention. It is trite that it has such powers in applications made pursuant to the inherent jurisdiction though, for the reasons set out in my substantive judgment, that is of merely academic relevance here;

ii) Though there are few reported cases of cost orders having been made against applicants in this Hague Convention jurisdiction, the basis of the power to award costs was analysed and confirmed by Ryder J (as he then was) in *EC-L v DM (Child Abduction:costs)* [2005] EWHC 588 (Fam), There Section 11 of the Access to Justice Act 1999 was in focus and the Family Proceedings Rules 1991 that then applied. However, the principles identified in the case continue to hold, by parity of analysis, with the framework of the Family Procedure Rules 2010;

iii) In each case where a costs application is made, there should be an inquiry into the merits *EC-L v DM* (Supra)

‘it should be the expectation in child abduction cases that the usual order will be no order as to costs, but where a parties conduct has been unreasonable or there is a disparity of means then the Court can consider whether to exercise its jurisdiction in accordance with normal civil principles’;

iv) It is misconceived to talk of a ‘presumption’ of ‘no order’ for costs at first instance in either Hague Convention cases or children cases more generally. In *Re J (Children)* [2009] EWCA Civ 1350 Wilson LJ, as he then was, referred to the ‘general proposition’ of no order as to costs applied to a ‘paradigm’ situation. In *Re T (Costs: Care Proceedings: Serious Allegation Not Proved)* [2012] UKSC 36 ‘reprehensible behaviour’ or ‘an unreasonable stance’ were identified as markers for an adverse costs order;

v) FPR 2010, r 28.1 CPR 1998 r 44.3 do not circumscribe the Judge’s discretion on costs and invite the Court to consider ‘all the circumstances’. It should of course have regard to the matters set out at CPR rule 44.2 (4) and (5):

(4) ‘in deciding what order (if any) to make about costs, the Court will have regard to all the circumstances, including –

a) the conduct of all the parties;

b) whether the party has succeeded on part of its case, even if that party has not been wholly successful;

c) any admissible settlement by a party which is drawn to the Court’s attention, and which is not an offer to which costs consequences under para. 36 apply.

### **The conduct of the parties include-**

d) conduct before, as well as during, the proceedings and, in particular, the extent to which the parties followed the practice direction – pre action protocol or any relevant pre action protocol;

e) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

f) the manner in which a party has pursued or defended its case or a particular allegation or issue;

g) whether a claimant has succeeded in a claim, in whole or in part, exaggerated its claim.

vi) It is generally undesirable to award costs where the consequence of such order is likely to exacerbate hostile feelings between parents to the ultimate detriment to the child.

## Held

The Judge concluded that there is no magic formula in a case of this kind for determining how costs should be attributed in percentage terms. It is of note that the Judge was critical of opportunistic pleading in Hague Convention cases and held that this practice has become far too common, is antithetical to the summary philosophy of the proceedings themselves and causes both delay and unnecessary expense.

Hayden J held that the Father should be responsible for half of the Mother's costs and considered whether it was possible to undertake a Summary Assessment, focusing on a global view of proportionality of costs incurred rather than an itemised consideration. The Judge established that Summary Assessment in cases such as this was likely to fall foul of C.P.R 43 PD 13.2 which indicates the appropriateness of this type of approach is limited to a fast track trial or a hearing which lasts no more than a day. Accordingly, the Judge ordered that the Father should pay half of the costs incurred by the Mother's response to the application, subject to a detailed assessment on a standard basis.

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## Permission

Family Law Week 