

# Mickovski v Liddell (2017)

**[2017] EWCA Civ 251**

05/04/2017

## **Barristers**

Stephen Lyon

## **Court**

Court of Appeal

## **Practice Areas**

Financial Remedies

Application by husband for permission to appeal against an order refusing his application to vary an order for periodical payments by revoking the same and, instead, capitalising those payments at £34,000. Permission refused and husband ordered to pay the wife £3,453 in costs.

## Introduction

The Court of Appeal (Macur and King LJ) heard the appellant husband's application for permission to appeal against an order refusing his application to vary an order for periodical payments by revoking the same and, instead, capitalising those payments at £34,000. The Court refused permission and ordered the appellant to pay £3,453 in costs.

## Background

The parties had been married for 11 years and had two children, aged 7 and 5 at the date of the permission hearing. The wife ("W") was the primary carer. A financial order was made by consent in March 2013, providing W with a lump sum of £555,000 (her interest in the former matrimonial home), a half share of the balance of all joint bank accounts and periodical payments at the rate of £8,4000 p.a. payable monthly in advance for seven years.

In 2015, the husband ("H") applied to vary the periodical payments order, by revoking the same. He argued that there had been a significant drop in his earnings, that he was financially dependent on his second wife, that both his and his second wife's jobs were precarious and that W's income had significantly increased. H retained an interest in the former matrimonial home. W, who was cohabiting, and had purchased a new property, said that she did not receive assistance from her cohabitee, and that her earnings had plateaued.

In February 2016, at the end of a day long hearing, during which both H and W gave oral evidence, and after reading written submissions from both parties, Recorder Cubdy refused H's application, and instead, capitalised the periodical payments at £34,000. She found H to be "belligerent, unhelpful and dictatorial", and found that his evidence was "unclear ... confusing ... wholly unbelievable" [8]. The judge

said that it did not appear that H's lifestyle had been in any way affected by the claimed substantial decrease in his earnings. She found that he had built up substantial credit, clearly had access to funds, and was not reliant upon his new partner to the extent that he argued. By contrast, Recorder Cubdy found that W received no real financial support from her cohabitee, worked hard to provide for the children (one of whom had special needs) and had reached a plateau in her earnings.

Before the Court of Appeal, H was represented and W appeared in person. H's representative acknowledged that Recorder Cubdy had identified the correct statutory provisions to be applied and that H bore the burden of proof for establishing the basis for the downward variation in payments. He accepted that the Court was unable to go behind the Recorder's findings of credibility, or findings of fact about W's cohabitee's negligible contribution towards household expenses. His overarching submission on H's behalf was that, absent any articulation of the correct legal framework in her judgment, Recorder Cubdy must be taken not to have applied the same.

### Judgment

Macur LJ, with whom King LJ agreed, refused permission to appeal. Her Ladyship was satisfied that H had identified the correct legal framework, and said that the judgment read in isolation tended to substantiate H's submission that the judge distracted herself from conducting a proper analysis of whether W needed ongoing support and/or the merits of capitalising the periodic payments, or H's ability to pay the same [12].

Macur LJ went on to say, however, that the judgment should not be read in isolation. Citing the "timely reminder" of Sir James Munby P in *Re F* [2016] EWCA Civ 546 §§22-24, her Ladyship said that it was necessary to read the judgment in the context of the whole. She observed that this was a one-day case, that there was a wealth of written submissions, that each side had given evidence, and that Recorder Cubdy had delivered an *ex tempore* judgment at the end of the day.

Considering the judgment in this context, Macur LJ found that the Recorder was plainly entitled to reach the conclusions that she had reached, and that it would have been surprising if she had not done so [14-15]. Macur LJ found that the Recorder had, on the facts, been entitled to assume that W would continue to require ongoing support at the current level, and had not been constrained by W's open offer of capitalisation of periodical payments at £30,000 [16]. The decision to capitalise periodical payments at £34,000 "...was well within a reasonable band of discretion" [16].

The Court found that the prospective appeal had no real prospects of success and refused permission. It allowed W costs of £3,453, noting that H had not objected to the principle of an award of costs, W had attempted to compromise, and that the amount claimed was modest, and well within the relevant rate payable to litigants in person [18].

### Permission

 Family Law Week