

Applications for security for costs

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In the family courts, applications for security for costs are rare and there is a strict procedure to follow, with no associated Practice Direction. Mostyn J's judgment in MG v AR [2021] EWHC 3063 (Fam) provides valuable guidance

This is the first reported judgment on an application for security for costs in a family case.

Mr Justice Mostyn noted that there is no Practice Direction dealing with the proper determination of these applications, which are governed by r20.6 and r20.7 FPR 2010, and himself set out the applicable principles.

The principled basis for the power to order security against an applicant remains applicable in the family jurisdiction: that a respondent has no choice but to engage in litigation, and applicants should not be able to litigate on a "free hit".

Canada. The father lived in Dubai. M had dual Canadian-British citizenship.

In 2015, when M lived in England, an order had been made in the English courts for M to live with her mother and have weekly contact with her father. In April 2018, M and the mother went to Dubai. The mother left Dubai for Canada with M in 2019. F issued proceedings in Canada seeking M's summary return to Dubai, which were unsuccessful on appeal. The appeal stayed the father's return application on the condition that he commence proceedings in the Central Family Court; if the English court declined jurisdiction, then the father could apply to lift the stay. After some delay, the father then applied to the English High Court under the inherent jurisdiction for M's return to Dubai. The hearing of the mother's application for security for costs took place a month before the final hearing in those proceedings.

At the time of the hearing on security, the father owed £127,000 to the mother, made up of unpaid Schedule 1 periodical payments, lump sum and costs orders, and costs ordered in the Canadian proceedings.

The court's decision

Mostyn J awarded the mother security for costs in the sum of £50,000, covering all of her claimed future costs and

However, the power will need to be exercised in light of the "fundamental differences between civil and family litigation when it comes to awarding costs", including the greatly reduced expectation that successful respondents will be able to recover (any) costs, and the relevance of the welfare of the child in case management decisions.

Background

The proceedings concerned an 8-year-old child, M, who at the time of the application lived with her mother in

- c) The applicant failed to give an address in the application form, or gave an incorrect address in that form: this, like gateway condition (a), is a simple matter of fact.
- d) The applicant has taken steps in relation to the applicant's assets that would make it difficult to enforce an order for costs against the applicant: this requires a finding of fact, regarding any steps taken in relation to the assets, with an "evaluative component" about the impact of these steps on enforcement of any costs order.

No order for security for costs can be made in proceedings under the 1980 Hague Convention.

Next phase

If one of the gateway conditions is satisfied, the court can move on to considering whether, in all the circumstances of the case, it is satisfied that it is just to make the order for security (r20.7(1)(a) FPR); this is more properly considered "as the formation of a value judgment" rather than an exercise of discretion.

The following factors will be relevant:

giving an allowance for historic costs. The court considered the father's application to be "dubious" with very limited prospects of success, given that the only possible basis on which the father could ask the court to exercise jurisdiction was the *parens patriae* citizenship-based doctrine, which did not at all fit the facts (as the child "does not need protecting at all"). The mother would have a "solid claim to an order for costs" should the father's application be dismissed. If the father did not transfer this sum to be held by the mother's solicitors within 14 days, then the court would consider as a preliminary issue at the final hearing whether his application should be dismissed.

Gateway conditions

One of the "gateway conditions" in r20.7(2) FPR must be satisfied. These are very similar (though not identical) to the CPR gateway conditions and are as follows:

- a) The applicant is resident out of the jurisdiction: this is a "matter of concrete fact"; "residence" means habitual residence; residence in the Channel Islands or the Isle of Man will suffice but residence in Scotland or Northern Ireland may not – as Mostyn J said, "an authoritative decision must be awaited" [at para 13].
- b) The applicant has changed address since the application was started with a view to evading the consequences of the litigation: this requires the court to make a finding about the applicant's state of mind; any such finding will also be relevant to the exercise of the court's discretion when deciding whether to make an order for security.

Quantum

In general, the guidelines in *Rubin v Rubin* [2014] EWHC 611 (Fam) for the award of a costs allowance will apply. Assertions that the financial support provided by a third party to the paying party will be curtailed will be assessed in line with the approach of *TL v ML* [2005] EWHC 2860 (Fam) and the court may continue to assume the third party will supply the bounty; obviously deficient disclosure can give rise to robust assumptions about ability to pay. Security should only be provided up to the FDR or pre-trial review. The *Rubin* guidelines are not applicable in full in that in an order for security, historic costs are fully claimable; the undertaking to repay if required to do so by the court is also not relevant.

Procedural requirements

The application should be made on Form D11 in a financial remedy case and Form C2 in a children's case, using the Part 18 procedure. The application form should state which gateway condition is relied on and must be accompanied by written evidence with a statement of truth, setting out the facts relied on in establishing the gateway condition, details of the quantum of security sought, and a detail breakdown of historic costs and estimated future costs.

If security is ordered, then the court has discretion to direct the manner in which and the time within which security must be given. The standard wording in the Civil Procedure Rules Form PF44, which provides for the sum to be lodged by the Court Funds Office or in a banker's draft with the defendant's solicitors, with a stay until the funds are paid, will not be appropriate in every case, particularly when monthly instalments are ordered.

How to deal with default

i) The merits of the application and the defence, and the means of the parties: merits are far more important to consider in an application for security in a family case than in a civil case; only by considering merits can it be ascertained whether an order for costs would be a likely outcome at the end of proceedings; means are also relevant to consider, as this affects the likelihood of an order for costs being made, and whether it is just to make an order for security; overall, the court should only order security for costs if it is satisfied "there is a good chance (but not necessarily a probability of more than 50%) of the respondent obtaining an order for costs at the final hearing" [34];

- ii) The likelihood of non-payment of an award of costs: the applicant for security for costs must show that there is a "real risk" that they will not be able to enforce any costs order, adducing evidence showing "objectively justified grounds" relating to enforcement difficulties; if there is a real risk, security for costs is claimable in full, not on a percentage scale according to the degree of risk [37].
- iii) Whether the application for security has been promptly made: delay may lead to only partial security being ordered, or no security at all; the principled reason for this is that the later an application is made, the more limited an opportunity the applicant in the main proceedings has to change course [39].
- iv) Other discretionary factors: including whether the claimant has a *bona fide* claim which they should not be forced to abandon through lack of means.

Practical implications

There is unlikely to be a flurry of successful applications by respondents for security for costs in family proceedings, given the need to demonstrate a good chance of obtaining an order for costs at the end of the proceedings, and the challenges in surmounting the general rule of no order

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as to costs. Nevertheless, practitioners should be ready to make applications in appropriate cases. Mostyn J's 12-point summary of the applicable principles at [53] of the judgment is a useful point of reference.

The issue of whether a respondent should make an application for security for costs should be considered at an early stage. Prompt advice is crucial to ensure that the quantum of any award is not reduced due to delay. The applicant for security for costs will need to show a strong case on merits to demonstrate that they do indeed have a "good chance" of a costs order being made at the end of proceedings.

The gateway condition should be identified very clearly in the application. Hague Convention proceedings are excluded from the security for costs provisions and this narrows the pool of applicants who fall under the first gateway (living abroad).

If the required security is not provided, the respondent (in the main application) should return the matter to court for consideration of next steps. The court may decide to exercise its general case management power to summarily dismiss a claim but this is not inevitable; in children proceedings, the court "would need to be satisfied that such a sanction was in the best interests of the children, or at least not contrary to their interests".

Clear evidence will need to be provided of the quantum of the costs claimed (both historic and future). Proper evidence is also required of means. Providing sufficient detail at an early stage will avoid delay in determining the application and reductions in quantum.

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