[2024] EWHC 2214 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No: PT-2021-000019**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
IN THE MATTER OF THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975
AND IN THE MATTER OF THE ESTATE OF FIAZ ALI SHAH ("THE DECEASED")
ON APPEAL FROM DEPUTY MASTER MARSH

B E T W E E N :

Date: 3 September 2024

Before :

James Pickering KC
(sitting as a Deputy High Court Judge)

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Between :

SRENDARJIT KAUR JASSAL **Respondent**

and

(1) SAJAD ALI SHAH

(As executor and beneficiary of the estate of Fiaz Ali Shah)

(2) SHABANA SHAH

(As executor of the estate of Fiaz Ali Shah) **Appellants**

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Oliver Ingham (instructed by way of direct access**)** for the **Appellants**
Andrew Morrell (instructed by **Dawn Solicitors)** for the **Respondent**

Hearing date: 7 June 2024

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APPROVED JUDGMENT

James Pickering KC (sitting as a Deputy High Court Judge):

PART I: INTRODUCTION

1. This appeal raises an important issue. In proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 ("**the 1975 Act**"), should litigation costs always be dealt with separately from and subsequently to the grant of substantive relief in accordance with the usual practice under the CPR; or is it ever permissible for the court to award a claimant their costs as part of the substantive relief?

PART II: THE BACKGROUND

2. The claim relates to Fiaz Ali Shah ("**Fiaz**"). He had 4 children including Sajad Ali Shah ("**Sajad**") and Shabana Shah ("**Shabana**").

3. In about 2000, Fiaz started a relationship with Srendarjit Kaur Jassal ("**Srendarjit**"). In due course, they began living together at a property known as 12 Sussex Close and, although they never married, their relationship became one equivalent to marriage.

4. In August 2006, Fiaz made a will under which he left everything to Srendarjit (whom he described as "my wife"). Somewhat curiously, however, just four months later in December 2006, Fiaz made a new will under which he left to Srendarjit (whom he now

described as "my close friend") just 50% of the proceeds of a certain property, with the residue of his estate passing to Sajad or, in default, Shabana.

5. In 2012, the relationship between Fiaz and Srendarjit came to an end and Srendarjit moved out of 12 Sussex Close. Subsequently, however, the relationship resumed although the extent of that resumption was controversial.

6. On 6 December 2018, Fiaz made what turned out to be his final will. Under its terms, he appointed Sajad and Shabana as his executors and made Sajad his sole beneficiary. Nothing at all was left to Srendarjit.

7. On 24 April 2020, Fiaz died at which time the 2018 will came into effect.

8. On 7 July 2020, Sajad and Shabana were granted probate of Fiaz's will, with the net value of his estate stated as being just under £1.4 million.

PART III: THE PROCEEDINGS

9. In January 2021, Srendarjit issued the present claim for relief under the 1975 Act. The principal basis was that in the period of two years before Fiaz's death, they had been living together in the same household as if they were a married couple for the purposes of section 1(1A). In particular, although she accepted that she and Fiaz had separated in 2012, it was her position that after their relationship had resumed they had once again begun living together at 12 Sussex Close in a marriage-like relationship.

10. The claim was resisted by Sajad (as executor and beneficiary) and Shabana (as executor). In short, while they accepted that post-2012 the relationship had resumed to a certain extent, it was their position that at no time had Srendarjit moved back into 12 Sussex Close; instead, so they said, she had lived in another property belonging to Fiaz, known as 19 Salt Hill Mansions, albeit as a tenant of his. In support of their case, Sajad and Shabana relied on various documents which suggested that over the relevant period Srendarjit had been living at 19 Salt Hill Mansions (as opposed to with Fiaz at 12 Sussex Close).

11. In response, Srendarjit said that she and Fiaz had been engaging in a benefits fraud in relation to 19 Salt Hill Mansions – in other words, that in reality she had been living with Fiaz at 12 Sussex Close and that the documents which suggested a connection to 19 Salt Hill were a false trail which they had created in order to fraudulently claim benefits from the local authority.

12. In late 2021, the trial took place over 4 days before Deputy Master Marsh. Srendarjit was cross-examined at which time it was put to her, amongst other things, that her assertion that she had been engaging in benefit fraud was itself a fabrication; given the size of Fiaz's estate, so it was said, she was better off admitting to a benefits fraud which she did not commit.

13. On 2 November 2021, the Deputy Master delivered his judgment. In short, he preferred the evidence of Srendarjit and held that over the relevant period of 2 years before death, she and Fiaz had indeed been living together in the same household as if they were a married couple such that she qualified for relief under section 2 of the 1975 Act. As for relief, the Deputy Master declared that Srendarjit should have a 50% beneficial interest in 19 Salt Hill Mansions, together with a lump sum of £385,000 for her maintenance needs - albeit that £200,000 of this was to be held back by Fiaz's estate pending any claim or prosecution by the local authority or other relevant body in relation to the admitted - and now found - benefits fraud.

14. Importantly, as to the above lump sum of £385,000, the Deputy Master calculated this as follows:

(1) The starting point was Srendarjit's property needs of £235,000, her income needs of £200,000, and her litigation costs of £140,000 - thereby making a sub-total of £575,000.

(2) A deduction was then made in respect of the awarded half share of 19 Salt Hill Mansions in the sum of £90,000 – thereby leaving a net figure of £485,000.

(3) A further deduction was then made for conduct in the sum of £100,000 – thereby leaving the above sum of £385,000.

15. No order was made in respect of costs, the order expressly stating that costs had already been dealt with as part of the lump sum award of the above £385,000[1].

16. On 24 November 2021, Sajad and Shabana issued an appellant's notice seeking permission to appeal on 7 grounds. Subsequently, Bacon J refused permission to appeal in relation to grounds 2 to 7 but granted permission in relation to ground 1, namely, that the Deputy Master had made an error of law by awarding Srendarjit her litigation costs (of £140,000 + VAT) as part of the substantive relief (i.e., as part of the calculation for her maintenance needs as set out above) as opposed to separately from and subsequently to the grant of substantive relief in accordance with the usual practice under the CPR. It is therefore the above ground alone which is before me now.

17. As to that ground, Srendarjit resists the appeal on two main bases:

(1) First, she says that the way that the Deputy Master dealt with the litigation costs, although unusual, was permitted as a matter of law and accordingly was within the wide discretion afforded to a trial judge ("**the Litigation Costs Issue**").

(2) Second, she says that the point now made by Sajad and Shabana (namely, that the Deputy Master should not have awarded her litigation costs as part of the substantive relief) is a new point which was not taken at the trial such that it is too late to take it now ("**the New Point Issue**").

PART IV: THE LITIGATION COSTS ISSUE

18. In a nutshell, the issue is this.

19. In general, in relation to proceedings under the CPR, the court will invariably first determine the substantive claim and, in the light of that determination, then go on to decide whether to make an order in relation the litigation costs and, if so, what order:

[1] The order in fact refers to a sum of £403,000 as the Deputy Master subsequently agreed to allow an additional £28,000 of VAT in respect of the above litigation costs.

CPR 44.2(1). A claim under the 1975 Act is of course governed by the CPR. On the face of it, therefore, a court hearing a claim under the 1975 Act should first determine the substantive claim and then, in the light of that determination, go on to consider the question of costs.

20. On the other hand, when considering how to determine the substantive claim under the 1975 Act, the court must (under section 3) have regard to certain matters including the "financial needs" which the claimant has or is likely to have. An obligation to pay litigation costs is of course a financial need. This being the case, it can be seen how a court may wish to consider the claimant's litigation costs as part of the substantive determination of the claim.

21. This being the case, in proceedings under the 1975 Act, should litigation costs always be dealt with separately from and subsequently to the grant of substantive relief in accordance with the usual practice under the CPR; or is it ever permissible for the court to award a claimant their costs as part of the substantive relief?

22. It would appear that there is no authority which directly deals with the point. A review of two related authorities, however, is instructive.

23. The first is ***Lilleyman v Lilleyman*** in which Briggs J (as he then was) first gave a judgment relating to his substantive determination under the 1975 Act (at [2012] EWHC 821 (Ch)) and then, a few weeks later, gave a separate judgment in relation to costs (at [2012] EWHC 1056 (Ch)).

24. In the substantive judgment, when summarising the size and nature of the net estate (as another of the matters to which the court is to have regard under section 3), Briggs J stated at [71]:

> "The above summary of the net estate…also ignores the contingent liability for the costs of these proceedings, which I am unable either to quantify or to guess as to their likely incidence, as between the estate and Mrs Lilleyman. Counsel were united in submitting that I have no alternative but to leave the contingent costs liabilities entirely out of account, however unrealistic in the real world that might prove to be."

25. Briggs J went on to determine the matter in the claimant's favour and awarded her certain relief. Subsequently, however, certain without prejudice negotiations were (in the usual way) revealed to him including a Part 36 offer made by the defendants which the claimant had failed to beat. In his costs judgment, Briggs J started by summarising the position as follows:

> "1. This is my judgment in relation to the costs of and occasioned by Mrs Lilleyman's claim for reasonable financial provision from the net estate of her late husband. I handed down my judgment on the main claim on 4 April 2012, and then heard extended submissions as to costs for most of the remainder of that morning. I make no criticism of the length, indeed thoroughness, of counsel's submissions, bearing in mind the very substantial consequences of any order for costs against Mrs Lilleyman upon her financial needs and resources. In para 71 of my main judgment I recorded counsel's agreement that I could not at that stage make any assumptions as to the incidence or amount of any contingent costs liabilities arising from these proceedings, either for the estate or for Mrs Lilleyman, and would therefore have to leave them entirely out of account "however unrealistic in the real world that might prove to be". As will appear, my apprehensions about the unreality of doing so have proved to be fully justified."

26. In the light of the unbeaten Part 36 offer together with certain conduct issues, Briggs J went on to order that the claimant should pay 80% of the defendants' post-Part 36 offer costs – an order which inevitably had a significant impact on the financial award made in favour of the otherwise successful claimant. He then concluded by contrasting the position in proceedings under the 1975 Act (which as noted above are governed by the CPR) with the position in financial remedy proceedings on a divorce under the Matrimonial Causes Act 1973 (which are expressly excluded from the CPR and instead are governed by the FPR) by commenting:

> "26. I must in concluding express a real sense of unease at the remarkable disparity between the costs regimes enforced, on the one hand for Inheritance Act cases (whether in the Chancery or Family Divisions) and, on the other hand, in financial relief proceedings arising from divorce. In the latter, my understanding is that the emphasis is all on the making of open offers, and that there is limited scope for costs shifting, so that the court is enabled to make financial provision which properly takes into account

> the parties' costs liabilities. In sharp contrast, the modern emphasis in Inheritance Act claims, like other ordinary civil litigation, is to encourage without prejudice negotiation and to provide for very substantial costs shifting in favour of the successful party. Yet at their root, both types of proceedings (at least where the claimant is a surviving spouse under the Inheritance Act) are directed towards the same fundamental goal, albeit that the relevant considerations are different, and that there is the important difference that one of the spouses has died, so that his estate stands in his (or her) shoes.
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> 27. I express no view on which of those fundamentally divergent approaches to costs is better calculated to serve the ends of justice, and in particular to promote compromise. I merely observe that the potential for undisclosed negotiations to undermine a judge's attempt under the Inheritance Act to make appropriate provision for a surviving spouse is a possible disadvantage of the civil litigation costs regime currently applied to such claims, by comparison with the regime applicable to financial provision on divorce. I consider that those fundamental differences in approach to proceedings having the same underlying objective deserve careful and anxious thought."

27. The other authority to which reference should be made is ***Hirachand v Hirachand*** [2021] EWCA Civ 1498[2]. This too was a claim under the 1975 Act although this time by an adult daughter who had longstanding mental health problems. At first instance, the trial judge awarded the daughter a lump sum calculated by reference to her financial needs which included an amount referable to the daughter's liability to pay a CFA success fee (which under the relevant legislation for CFAs was not recoverable from the opposing party by way of a costs order). On appeal, the Court of Appeal upheld the trial judge's award, concluding that the daughter's liability for the CFA success fee was a debt, the satisfaction of which was a "financial need" within the meaning of section 3 for which the court might in its discretion make provision under the 1975 Act.

28. The leading judgment was given by King LJ with whom the other two members of the court agreed. In her judgment, she too made comparison between proceedings under

[2] ***Hirachand*** is currently subject to an appeal to the Supreme Court. As at the time of the hearing of the present appeal (and indeed as at the time of the hand-down of this judgment), while argument had been heard, no hand-down date had been set.

the 1975 Act (as governed by the CPR) and financial remedy proceedings under the MCA 1973 (as governed by the FPR) as follows:

> "50. Having determined that no reasonable provision for maintenance has been made by the Deceased, the judge, in deciding whether to and in what manner to exercise his powers to make orders under section 2 of the Inheritance Act , is required inter alia by section 3(1)(a) of the Inheritance Act to "have regard to … the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future". The term "financial needs" is unqualified and unlimited, and given the Supreme Court's endorsement in ***Ilott*** that the payment of debts can form part of a maintenance award, it must undoubtedly be the case that a claimant's financial need can include the payment of a debt or debts.
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> 51. In a financial remedy case, the rule as to costs is found in FPR r 28.3(5) which provides that save in certain specified exceptions, the general rule is that "the court will not make an order requiring one party to pay the costs of another party".
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> 52. As a consequence, when a court is determining quantum in a "needs case" under the Matrimonial Causes Act 1973 , the court knows with precision the amount of costs incurred by both sides. That is not the case in a claim made under the Inheritance Act where costs follow the event and where CPR Pt 36 provides in broad terms (see CPR r 36.17) for the claimant to pay the costs of the defendant where he/she fails to obtain a judgment more advantageous than the defendant's Part 36 offer. The court does not know what (if any) Part 36 offers have been made until after judgment."

29. After reference to the above-mentioned passages in ***Lilleyman v Lilleyman***, King LJ continued:

> 55. A similar provision to that in section 3(1)(a) is to be found at section 25(2)(b) of the Matrimonial Causes Act 1973 which requires the court to have regard to "the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the future".
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> 56. Recently in ***Azarmi-Movafagh v Barriri-Dezfouli*** [2021] EWCA Civ 1184 the Court of Appeal had to consider (para 3) the appropriate treatment of outstanding costs

incurred by the recipient of a needs award in circumstances where the "no order" principle which applies in financial remedy cases would otherwise have meant that the recipient would have to satisfy their outstanding bill for costs from their needs award.

57. The Court of Appeal considered the proper approach to costs in needs cases at para 46 onwards. This included an analysis of those cases where first instance judges had to determine the financial needs of a party and thereafter to decide whether to include in an award a sum referable to those debts which related exclusively to the costs of the litigation. At para 50 the Court of Appeal held that it was in the discretion of the judge to include such provision and noted that even where parties had behaved unreasonably, the courts had in a number of cases nevertheless ordered an additional sum referable to costs in order to ameliorate the impact on the assessed needs of the recipient."

30. Applying the above to the facts of the case before the Court of Appeal, King LJ then concluded:

"58. In a financial remedy case, outstanding costs which could not otherwise be recovered as a consequence of the "no order principle" are capable of being a debt, the repayment of which is a "financial need" pursuant to section 25(2)(b) of the Matrimonial Causes Act 1973. In my judgment a success fee, which cannot be recovered by way of a costs order by virtue of section 58A(6) CLSA 1990, is equally capable of being a debt, the satisfaction of which is in whole or part a "financial need" for which the court may in its discretion make provision in its needs based calculation…

62. It follows that, in my judgment, the judge was right in concluding that an order for maintenance could contain an element referable to a success fee. As already noted, on the facts of this case, the judge concluded that without such a contribution "one or more of the claimant's primary needs would not be met".

31. Importantly, King LJ then concluded her judgment as follows:

63. I am conscious, as was the judge, of the difficulty identified by Briggs J in Lilleyman, namely of the potential for undisclosed negotiations to undermine a judge's efforts to make appropriate provision under the Inheritance Act. The civil litigation costs regime, unlike the approach in financial remedy cases, means that there is the

> potential for a situation where a claimant is awarded a contribution to her CFA uplift but is subsequently ordered to pay the defendant's costs of the claim where, for example, the claimant won overall but failed to beat a Part 36 offer. I note however that this is likely to be less of a risk than might be thought at first blush to be the case given that under many CFAs the claimant is obliged to accept any reasonable settlement offer or an offer above a specified threshold or risk the solicitors withdrawing from the CFA. Conversely a success fee is frequently not payable in the event that the claimant, on advice, rejects a Part 36 offer or other relevant settlement offer but subsequently fails to beat that offer at trial.
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> 64. The judge was alive to this tension and commented that he could not avoid some potential injustice to one side or the other. The judge therefore mitigated that potential injustice by taking a cautious approach towards the success fee liability and made an order which resulted in only a modest contribution of 25% towards payment of the success fee. In my view the judge's cautious approach to this difficult aspect of maintenance cases where the claim is made on the back of a CFA contract cannot be faulted and only serves to highlight the imperative of the full engagement in the Part 36 process and the importance of the parties making realistic offers in order to settle these difficult and distressing cases."

32. So how do the above authorities assist with the issue in the present appeal?

33. In ***Lilleyman***, Briggs J had noted with some "unease" the disparity between the CPR and FPR regimes but nevertheless proceeded to deal with matters in the "conventional" way for CPR claims, i.e., by first determining the substantive issue and then, subsequently and separately, determining costs. In his submissions to me, counsel for Srendarjit sought to distinguish ***Lilleyman*** from the present case by reference to the passage in paragraph 71 of the main judgment where Briggs J had stated that "*Counsel were united in submitting that I have no alternative but to leave the contingent costs liabilities entirely out of account, however unrealistic in the real world that might prove to be*". In short, so it was submitted, Briggs J's hands had been effectively tied. I have to say, however, that that is not how I read paragraph 71 (or indeed paragraph 1 of the subsequent costs judgment). Both counsel in that case had submitted that there was no alternative but for contingent costs to be left entirely out of account at the substantive determination stage – a submission which Briggs J did not have to, but did, accept

(albeit with some concern). Indeed, so it seems to me, it was his concern that he had little choice but to follow the conventional CPR approach that prompted his comments in the final paragraphs of the costs judgment that the differences in approach between the CPR and FPR regimes deserved "careful and anxious thought."

34. As for ***Hirachand***, as counsel for Srendarjit rightly points out, this case was primarily concerned with a different point, namely, the recoverability or otherwise of a CFA uplift. I do not accept, however, that - as was submitted to me - it is irrelevant to the present appeal. Indeed, in her careful judgment King LJ noted the differences in approach between the CPR and FPR regimes - and while she too noted the difficulties to which the CPR regime could give rise, at no time did she suggest that the FPR regime approach - of considering costs as part of the substantive award - was possible, let alone appropriate or desirable.

35. Taking the above into account, I summarise the position as I see it as follows:

(1) Despite there being similarities between the objectives of, on the one hand, inheritance proceedings under the 1975 Act and, on the other hand, matrimonial proceedings under the MCA 1973, they are expressly subject to different procedural regimes – the former being governed by the CPR, the latter by the FPR.

(2) In proceedings under the CPR, costs are considered separately and subsequently. The regime accordingly has the advantage of allowing for costs-shifting (based on, amongst other things, Part 36 offers) and therefore encourages without prejudice negotiations with a view to settling litigation as opposed to going to trial. In the context of a 1975 Act claim, however, it has the disadvantage that the effect of the substantive order (which will have been designed to give a certain financial outcome) can be impacted upon by the subsequent costs order.

(3) By contrast, in proceedings under the FPR, there is no provision (except in limited circumstances) for adverse costs orders. Accordingly, it has the advantage that when making its substantive determination, the court is already aware of each parties' costs obligations. It has the disadvantage, however, of there not being in place the

mechanisms available under the CPR which encourage without prejudice negotiations and settlement.

(4) There are no doubt good reasons for the two different regimes – there are clearly very different considerations which apply to financial remedy proceedings following divorce than those which apply to regular civil litigation.

(5) As things stand, proceedings under the 1975 Act are squarely governed by the CPR. This being the case, so it seems to me, the approach taken by Briggs J in ***Lilleyman*** was (with respect) the correct and indeed the only approach which was properly open to him. Indeed, the subsequent decision in ***Hirachand***, albeit not directly on point, only seems to confirm this.

(6) While, as stated above, there are some clear concerns from applying the conventional CPR approach to 1975 Act proceedings (including the impact that a subsequent costs order can have on the financial outcome designed by the substantive order), there are also some advantages (in that it encourages without prejudice negotiations and therefore settlement). In any event, it seems to me that if there is to be a change, the same ought to be effected by the legislature or policy makers. Unless and until then, in my judgment, the conventional CPR approach of first determining the substantive matter (ignoring any contingent liability for costs) and then, subsequently and separately, considering costs ought to be applied.

36. I am further reinforced in the above view by a concern that if in 1975 Act cases the FPR approach (of dealing with litigation costs as part of the substantive award) were to be followed, it would significantly undermine the Part 36 regime. Indeed, one can imagine a situation where a defendant makes a Part 36 offer. Subsequently, the court (in ignorance of the Part 36 offer) then proceeds to make an FPR-style substantive order in favour of a claimant which takes into account the claimant's litigation costs - but which overall fails to beat the previously made Part 36 offer. Following the making of that substantive order, it would then be revealed to the court that the claimant had failed to beat the offer. Rhetorically, what then should the court do? Should it apply the usual Part 36 consequences (and then effectively undo the substantive order it has just made) - or simply disapply the usual Part 36 consequences? In short, the application of the

FPR approach to 1975 Act claims would at the very least disincentivise a defendant from making a Part 36 offer – and at worst make the Part 36 regime unworkable.

37. In summary, therefore, in my judgment (and with the greatest respect to the Deputy Master in respect of his otherwise impeccable decision), it was simply not permissible for Srendarjit's litigation costs to be considered as part of the substantive award. Instead, so it seems to me, he should have considered the appropriate substantive relief ignoring those litigation costs (however unrealistic that may have been) and should then, subsequently and separately, have gone on to consider the matter of costs.

PART V: THE NEW POINT ISSUE

38. Srendarjit's second point is that the argument now advanced on behalf of Sajad and Shabana on appeal (as summarised above) was not advanced before the Deputy Master such that it is too late to raise it now. As was submitted to me, the trial is not the dress rehearsal – it is the first and last night of the show.

39. I was referred to the leading authorities on the point. In ***Singh v Dass*** [2019] EWCA Civ 360, Haddon-Cave LJ (giving the only judgment of the Court) said:

> "16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (***Mullarkey v Broad*** [2009] EWCA Civ 2 at [30] and [49]).
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> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (***R (on the application of Humphreys) v Parking and Traffic Appeals Service*** [2017] EWCA Civ 24; [2017] R.T.R. 22 at [29])."

40. Further, in ***Notting Hill Finance Ltd v Sheikh*** [2019] EWCA Civ 1337 (which considered ***Singh***), Snowden LJ stated:

> "26. These authorities show that there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.
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> 27. At one end of the spectrum are cases such as the ***Jones*** case in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ said in the Jones case (at para 38), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as May LJ also observed (at para 52), there might none the less be exceptional cases in which the appeal court could properly exercise its discretion to do so.
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> 28. At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court: see eg ***Preedy v Dunne*** [2016] EWCA Civ 805 at [43]–[46]. In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime."

41. In the present case, at the PTR, a direction was made for the parties to lodge an updated schedule of needs and resources setting out, amongst other things, any "present and future liabilities". Pursuant to that direction, Srendarjit subsequently provided an estimated schedule which stated [sic]:

> "I also have my legal cost and disbursements related to this claim be paid out. The costs which were previously estimate at £129,869.00 excluding VAT as per my solicitor's cost inform of Precedent H. I have been updated and my costs is likely to increase to £140,000.00".

42. At trial, there was no cross-examination on the above costs. More importantly, nor was there any argument as to whether or not such costs could or should be taken into account as part of the substantive award – it was simply not discussed.

43. As stated above, however, in his judgment the Deputy Master did take the above costs into account as part of his substantive judgment. At paragraph 62(5) he said:

> "As to her other resources and needs, there is little challenge to her evidence and I accept the figures that are provided. She has legal costs of £140,000 which need to be taken into account."

44. In short, so it is now said on behalf of Srendarjit, at trial it had been open for Sajad and Shabana to make submissions on whether or not the costs could or should be taken into account as part of the substantive award, but they did not so; and having not done so, it is now too late for them to seek to argue the point on appeal. As was stated in her counsel's skeleton argument:

> "No submissions were made by the Appellants' counsel about the principle of whether costs may be sought as part of the overall sum awarded for maintenance under the 1975 Act. There were numerous opportunities for this to be raised; the point was not taken."

45. In my judgment, however, the above argument has a level of artificiality about it. As discussed above, there appears to be no case law under the 1975 Act where a court has taken the approach (of including litigation costs as part of the substantive award) adopted by the Deputy Master. Indeed, as set out in the previous section, in my judgment such an approach is impermissible. Even on Srendarjit's own case, the order made by the Deputy Master was "somewhat unusual". This being the case, I do not think Sajad and Shabana (or their legal team) can be criticised for not expressly raising the point. On the contrary, given the (on any basis) unusual nature of what was being

sought, if Srendarjit was indeed seeking the inclusion of her legal costs as part of the substantive award, this should have been expressly flagged up in a clear and unambiguous manner (certainly clearer than the simple reference to her outstanding legal costs in her schedule of needs) such that this (on any basis) less than straightforward legal issue could have been the subject of submissions.

46. In my judgment, therefore, it does not seem to me that it can be properly said that we are in "new point" territory. If I am wrong about that, it is in any event clear to me that this is a case at the end of the spectrum where, in accordance with the guidance set out in the above case law, the court should exercise its discretion to allow the point to be considered – it is a point of law and, further, it seems to me that little or no material prejudice has been suffered by Srendarjit as a result of the court's consideration of it.

PART VI: CONCLUSION

47. In conclusion, therefore, I will allow the appeal on the single ground before me.

48. In particular:

(1) Paragraph 3 of the Deputy Master's order will be varied such that the lump sum will be reduced to a sum which excludes the litigation costs (and VAT).

(2) Paragraph 10 of the Deputy Master's order (which currently states that there shall be no order as to costs as they have already been dealt with) will also need to be varied. While it would in theory be open for me to remit the matter to the Deputy Master to determine costs, given that overall (and irrespective of this appeal) Srendarjit was the clear winner, it is more expedient for me to simply myself make what, so it seems to me, is the inevitable order, namely, that Sajad and Shabana shall pay Srendarjit's costs of the proceedings (excluding this appeal), such costs to be subject to detailed assessment on the standard basis, if not agreed.

49. As for the costs of this appeal, while I will if necessary hear argument on the point, given that (1) Sajad and Shabana have been successful on the appeal, and (2) the appeal was actively opposed by Srendarjit, my provisional view is that Srendarjit should pay

Sajad and Shabana's costs of the appeal, such costs to be subject to detailed assessment on the standard basis, if not agreed.

50. I conclude by expressing my gratitude to both counsel and their legal teams for their assistance in this matter.

JPKC