

White Paper Conference  
June 2022

## **CAPITAL RESOURCES**

*To what extent will the court expect applicants to use their own capital resources for interim maintenance and legal services?*

ALEXIS CAMPBELL QC

# Interim periodical payments

MCA s.22

...the court may make an order for maintenance pending suit  
... as the court thinks reasonable.

*No definition of what is reasonable*

# ***What is reasonable?***

## ***TL v ML [2005] EWHC 2860***

... the following principles:

*i) The sole criterion to be applied in determining the application is "reasonableness" (s22 Matrimonial Causes Act 1973), which, to my mind, is synonymous with "**fairness**".*

*iv) Where the affidavit or Form E disclosure by the payer is obviously deficient the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the **payer** as to the extent of **his income or resources** (G v G, M v M). In such a situation the court should err in favour of the payee.*

## ***What is reasonable?***

Resources (ie not income – capital) of the **payer** are specifically listed

*TL v ML* approved by the Court of Appeal in

*Rattan v Kuwad [2021] EWCA Civ 1*

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# Legal Service Payment Order

MCA s.22ZA

...the court may make an order requiring one party to the marriage to pay to the other (“the applicant”) an amount for the purpose of enabling the applicant to obtain legal services for the purposes of the proceedings.

*Some statutory guidance...*

## ***Some statutory guidance s.22ZA***

- (3) The court must not make an order under this section unless it is satisfied that, without the amount, the applicant would not **reasonably** be able to obtain appropriate legal services for the purposes of the proceedings or any part of the proceedings.
  
- (4) For the purposes of subsection (3), the court must be satisfied, in particular, that—
  - (a) the **applicant** is not reasonably able to secure a **loan** to pay for the services, and
  - (b) the **applicant** is unlikely to be able to obtain the services by granting a **charge** over any assets recovered in the proceedings.

## ***Some statutory guidance s.22ZB***

... the court must have regard to—

- (a) *the income, earning capacity, property and other financial **resources** which each of the **applicant and the paying party** has or is likely to have in the foreseeable future*

ie- more than just income and specifically includes the applicant's resources

## ***Some statutory guidance s.22ZA(4)...***

So the payee is expected not just to use their own liquid resources but

(b) charge assets which are illiquid and

(a) borrow funds, possibly from family and friends

- to incur debt

## ***How far will an applicant have to tax their own resources?***

*Rubin v Rubin [2014] EWHC 611 [13]*

*v) In determining whether the applicant can reasonably obtain funding from another source the court would be unlikely to expect her to sell or charge her home or to deplete a modest fund of savings. This aspect is however highly fact specific. If the home is of such a value that it appears likely that it **will be sold** at the conclusion of the proceedings, then it may well be reasonable to expect the applicant to charge her interest in it.*

# ***How far will an applicant have to tax their own resources?***

## *BD v FD [2014] EWHC 4443*

- Parties married in 2002 and separated in 2014.
- Following separation, H purchased an alternative home for W costing £2.9m and gave her liquid capital of £1m (which he said she would not have to amortise to meet her expenses)
- H had non-trust assets of £49m and more in illiquid funds and approximately £130m of trust assets
- W had approximately £4.9m in assets (£3.9m given to her by H on separation) of which c£1.4m was liquid capital available to her.
- H had an income of c£1,700,000, the majority of which was retained in trusts and businesses.
- H has been paying c.£202,000 pa in expenses for family and offered similar sum (but reducing) going forward for MPS
- W sought MPS £392,000

## ***How far will an applicant have to tax their own resources?***

### *BD v FD [2014] EWHC 4443 (Moylan J)*

- W claimed she needed her £1.4m free capital for future housing needs
- J ordered MPS at £202,000 (reducing) as offered by H – if W needed more, including additional funds for legal fees, she could use her own free resources

*“[39] In my judgment, the court's intervention is neither required nor justified in this case. On any view, with maintenance being paid as proposed by the husband, the wife will have available to her resources which will enable her to meet her income needs. She will have available to her, from her own resources, such sum which she might choose additionally to spend on meeting her and the children's living expenses between now and the final hearing. To put it another way, the sum which the husband is paying is reasonable because it is sufficient to enable the wife to meet her reasonable income needs for herself and the children over the course of the next twelve months.”*

## ***How far will an applicant have to tax their own resources?***

### **BD v FD [2014] EWHC 4443 (Moylan J) [40]**

*“The purpose of an interim hearing is simply to ensure that one party has sufficient resources to meet their interim needs and to meet them in a way which **does not prejudice their longer term position** or place them at a significant disadvantage, for example if the wealthier party was seeking to erode the resources located in this jurisdiction when enforcement might be an issue. The wife in the present case is neither prejudiced nor disadvantaged if she chooses to use part of her resources to meet her reasonable interim income needs.”*

## ***No need for interim protection of payee's assets***

*Rattan v Kuwad [2021] 2 FLR 817*

Moylan LJ endorsed his approach in *BD v FD*:

“It is also clear that the purpose of an order for maintenance pending suit is to meet 'immediate' needs.”

Likewise, available resources should be deployed to meet immediate needs, and the court can rectify any unfairness (assuming no prejudice) at the final hearing

## ***Charge over payer's assets – not outright LSPO lump sum***

*AM v SM [2013] EWHC 4380 (Moylan J)*

Parties argued over extent of H's assets.

W claimed H was very wealthy, and H argued all assets (bar one property) beneficially owned by family members

Judge ordered H to charge the one property not in dispute in favour of W's solicitors to meet their historic unpaid and future costs

Judge effectively imposed a Sears Tooth arrangement upon W's solicitors, albeit with security and judgment debt rate interest

## ***Sale of payer's assets – to meet LSPO***

### **MCA 1973 s.24A(1):**

Little used power of the court to order the sale of property in support of LSPO.

*“Where the court makes [an order under section 22ZA or makes] under section 23 or 24 of this Act a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order, then, on making that order or at any time thereafter, the court may make a further order for the sale of such property as may be specified in the order, being property in which or in the proceeds of sale of which **either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion.**”*

## ***Sale of payer's assets – to meet LSPO***

MCA 1973 s.24A(1):

The property in question must be owned beneficially (directly or indirectly) by **either or both** of the parties.

'Property' includes real and personal property, and therefore an order can be made to sell land, investments and valuable chattels in order to fund the applicant's legal fees.

## ***Sale of payer's assets – to meet LSPO***

MCA 1973 s.24A(1):

Need to consider whether can obtain vacant possession of the property

- *BR v VT [2015] EWHC 2727 (Fam) – Mostyn J*
- *WS v HS [2018] EWFC 11 – Cobb J*

Cases in respect of interim lump sums but not in support of s.22ZA application

## ***Sale of payer's assets – to meet LSPO***

### *Xanthopoulos v Rakshina [2022] EWFC 30*

W previously offered to transfer to H her unencumbered property (with a licence for her to remain in occupation) so that he could charge it in favour of a litigation lender or mortgage.

Never pursued, **but**:

Mostyn J said W should be able to access her funds which had been frozen to meet her own legal fees without the need to obtain permission of H or consent of the court – ie unfettered costs save for the solicitors' certificate that costs were reasonable

*HMRC v Begum [2010] EWHC 2186* and

*Anglo Trust Ltd and Kermanshahehi [2002] EWHC 3152*

## ***Sale of payee's assets – instead of LSPO?***

MCA 1973 s.24A(1):

If sale is available as an interim order to support a LSPO  
an applicant should be compelled to sell (if cannot charge)  
their own property before making an application

**But remember...**

Rubin v Rubin [2014] Mostyn J

*“[13] In determining whether the **applicant** can reasonably obtain funding from another source, the court would be unlikely to expect her to sell or charge her home or to deplete a modest fund of savings. This aspect is, however, highly fact-specific. If the home is of such a value that it appears likely that it will be sold at the conclusion of the proceedings then it may well be reasonable to expect the **applicant** to charge her interest in it”*

## ***Litigation lenders – LSPO and living costs provision***

- Some litigation lenders now offering LSPO and living expenses
- Arguably, if a respondent can get written confirmation from a lender that they would lend to an applicant – the LSPO/MPS threshold will not be crossed
  - Subject to arguments about immediacy and long term prejudice
    - No need for interim sale

***Test as to whether an applicant should utilise their own resources is “immediacy” and “reasonableness”***

- Are applicant’s resources needed on an interim basis?
- If applicant’s resources are utilised to meet MPS / LSPO will that prejudice a final award?
  - Is respondent litigating unreasonably?  
(Utilising limited assets within the jurisdiction to render final decision unenforceable?)
- Has the respondent made reasonable interim provision?

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