

Elena Golubovich v Ilya Golubovich (2011)

[2011] EWCA Civ 528

03/03/2011

Barristers

Justine Johnston

Court

Court of Appeal (Civil Division)

Practice Areas

Financial Remedies

Summary

Where a court had adjourned an application for permission to appeal two orders made in matrimonial proceedings to a rolled-up hearing, it was appropriate for the court to exercise its discretion under the CPR r.3.1 to order security of the respondent's costs of the proposed appeal where at least one condition under r.25.13(2) was satisfied and it was just to make an order pursuant to r.25.13(1)(a). However, it would be a breach of the proposed appellant's rights under the European Convention on Human Rights 1950 art.6 to require payment of £1,675,000, due under one of the orders the subject of the permission application, as a condition of the application proceeding.

Facts

The applicant wife (W) applied for security against the respondent (H) for past costs orders and estimated costs in pending proceedings, and for sums due under orders made in matrimonial proceedings.

The court had adjourned an application by H to seek permission to appeal orders granting W permission to apply for an order under the Matrimonial and Family Proceedings Act 1984 Pt III, and ordering H to pay a lump sum to W, periodical payments to her for their daughter's benefit and to pay W's costs. The court had directed that there be a rolled-up hearing of the permission application and the substantive appeals, which was to be heard some three weeks after the instant application. W's application for H to make payments as a condition of the continuation of the proceedings fell into three categories. First, security for her costs of the proceedings in the instant court, estimated at £30,000. Secondly, security for costs already ordered to be paid by H in prior proceedings, estimated at £264,200 when netted off against costs ordered to be paid by W to H. Thirdly, security of £1,675,000, being the balance outstanding of the lump sum and arrears of periodical payments.

Held

(1) It was appropriate to make an order in relation to the first category. Although, in the light of *Great Future International Ltd v Sealand Housing Corp (Security for Costs)* [2003] EWCA Civ 682, CPR r.25.15

and therefore r.25.13 were not directly in point, they were required to be considered in the exercise of the discretion under r.3.1, Great Future applied. At least one condition in r.25.13(2) had to be satisfied and it had to be just to make an order, pursuant to r.25.13(1)(a). H was resident out of the jurisdiction, he had not been in the jurisdiction for eight months and he claimed a current residence in Moscow. Thus, r.25.13(2)(a) was satisfied. It was also clearly just to make an order in light of the apparent absence of any remaining assets of H in the jurisdiction and of the incontrovertible evidence of H's determination to thwart W's assertion of financial claims in the jurisdiction. In the circumstances, the sum of £30,000 sought by W was entirely reasonable and would not infringe H's rights under the European Convention on Human Rights 1950 art.6. The present proceedings would be stayed until H paid that sum into court within 14 days (see paras 12-13 of judgment). (2) In relation to the second category, no order for security would be made, with one exception. W's first difficulty was that the total order for costs was estimated. More importantly, the overarching figure was for costs of £350,000, which had been ordered within one of the orders under proposed appeal. If a substantive order was set aside on appeal it usually followed that the collateral order for costs would fall, or at least be adjusted. Further, even though an order for costs was not in principle made by reference to an ability to pay, the prospective stifling of a proposed appeal could not be put aside by reference to any analogous suggestion that ability to pay was irrelevant (para 16). The exception related to the instant court's order whereby the pending proceedings were permitted to go forward to the rolled-up hearing. The court had directed that the costs then principally before it should be paid by H and that he should make an interim payment of £10,000 within three weeks of the order. That payment had not been made and that was not a situation which the court was prepared to countenance. H could not take the benefit of the order without its corresponding burden. Therefore, H was ordered to pay £10,000 to W's solicitors within 14 days (para 17). (3) In relation to the third category, to order H to bring the sum of £1,675,000 into court as a condition of his continuation of the proposed appeals would be prejudging those appeals in a highly objectionable way. Indeed, it would be infringing H's rights under art. 6. The appeal that H wished to put before the court was in part based on an assertion that the judge had been wrong to find by inference that H had the means to pay the sums ordered. There would be no order for payment in respect of the third category (para 15).

Application granted in part

Permission

Lawtel 