

The Costs of Keeping Litigation Funding In-House

In **Bronson [2013] Fam CA 11** the parties had spent nearly \$400K between them without having yet reached the stage of a Final Hearing to determine how to divide their \$4.7M plus pool of combined assets when the wife applied for an interim order that the husband pay her anticipated further litigation expenses of \$116K.

The argument which ensued did not seriously address the reasonableness of the quantum of such costs which seemed to be accepted, but rather focussed on whom or what would be the source of such funds.

Indeed the few limited comments made in the judgment in relation to the quantum of the parties' combined legal costs included the unattributed query as to whether in the circumstances an additional \$116K would in fact be enough to meet the Applicant's further costs liability.

The Court held that provided the Applicant seeking an order for litigation funding from:

- the other party; or
- their joint assets

has an arguable case for a settlement which deserves to be heard they don't have to establish extraordinary or exceptional circumstances.

The relevant factors in establishing the necessary circumstances are:

- a position of relative financial strength on the part of the Respondent;
- capacity on the part of the Respondent to meet his or her own litigation costs;
- an inability of the Applicant to meet his or own litigation costs from similar sources to those available to the Respondent; and
- an order is even more likely if the Respondent's financial affairs are complex and require expert examination.

In this instance the Respondent could meet his costs and presumably also those of the Wife if so ordered from various cash flow sources available solely to him, whereas the wife was in the position of having to sell assets in her name to continue the litigation. The wife argued that she alone should not have to sell her assets to pay her legal costs in circumstances where the husband did not have to do so.

Uncertainty as to whether the amount of the Applicant's eventual property settlement entitlement will actually necessitate a financial adjustment between the parties, while a relevant consideration is not necessarily fatal to a litigation funding Application.

The Court duly made the interim order sought by the wife despite the husband's strongly put contention that she already holds or has received or has the benefit of property of a value which exceeds her overall settlement entitlement and that accordingly she should not be entitled to any additional sum in any form.

In doing so the Court observed that while the terms of the final property division remained in reasonable dispute the uncertainty of that final decision would not influence the outcome of a litigation funding application.

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