

Checklist		√
1. Overall	Estelle will have to prove that she is not likely to be able to access fair provision from the court in the absence of an award but she will hold in mind that the court should be reluctant: in effect the court will find itself pre-judging the issue on costs and interfering fundamentally with the power dynamics in the litigation ... suddenly Joseph will find himself burning the fees candle at both ends and it is all likely to be lost money.	
2. Not restricted in terms of legal team	Joseph might object to Estelle's high cost lawyers; but where Joseph has specialist solicitors, it is likely to prove harder for him to deny that Estelle should too. This also follows in part from the equality of arms mandate of FPR 1.1(1)(c) (ensuring the parties are on an equal footing). Interesting development if Joseph acts in person with his legal support in the wings.	
3. Pay at end?	Where Estelle's lawyers are rolling up costs, the court is likely to expect this to continue – why should it prejudice the costs award? However, where the firm says (and this restriction will be recorded in the statement in support of the application) that it can roll up costs only as far as the first hearing or as far as the costs application hearing, this is likely to be accepted by the court.	
4. No available alternative funding	Estelle will need to show that she does not have access to capital to fund the case and show that family and friends will not lend to her. There is some discussion as regards whether she must have sold everything or whether that is not to be expected in some circumstances.	
5. No available loans	Estelle will need to prove that she can't access litigation funding. Often this will be an easy problem to hurdle: litigation loans will hard to find because there is no "pot of gold" at the end of this case as there might be for the married litigant ... however, for safety's sake, Estelle should secure letters from two lenders to meet limb vi) of the test provided by Mostyn J in (Rubin v Rubin [2014] EWHC 611 at 13 (ii) 1. We acknowledge that some funders are now looking into loans for schedule 1 cases.	
6. Reasonableness	Joseph's legal team may try to defeat Estelle's claim for funding on the basis that she has not been managing the case reasonably <sup>2</sup>  The original formulation of the law which prohibited these claims (W v J) was exactly on this basis. So Estelle will be keen to show	

1 Evidence of refusals by two commercial lenders of repute will normally dispose of any issue... whether a litigation loan is or is not available

2 "I am also satisfied that her stance in the proceedings, having regard to the merits of the claims, can be fairly described, at this stage, as sufficiently reasonable to justify my making an award in respect of costs. Or, to put it another way, her stance is not such that the proceedings cannot be said to be for the benefit of the children." G v G (Child Maintenance: Interim Costs Provision) [2009] EWHC 2080 (Fam).

For contrast, see Cobb J refusing funding largely on the basis of the mother's repeated failed litigation attempts in MG v FG [2016] EWHC 964

	<ul style="list-style-type: none"> <li>- Compliance with MIAM</li> <li>- Appropriate letter before action</li> <li>- Hitting litigation deadlines 'on time all the time'</li> <li>- Moderation of presentation</li> </ul>	
	<p>What this may raise for Joseph is whether he can make a protective and very generous offer which is <i>without prejudice save as to first costs but more particularly save as to a costs provision application</i>. Where done, Estelle is going to want to respond in kind to show that she is fully engaged or excuse why she can't make an offer (perhaps Joseph's disclosure is incomplete, in a way that impacts upon her ability to get advice).</p>	
7. A meritorious claim?	<p>Closely aligned with 6. is whether the claim has merit: the more doubtful the more cautious the court should be. In <i>MG v FG</i> [2016], the mother failed because of doubts that her sch1 claim could succeed.</p>	
8. Undischarged costs order & risk to future costs award	<p>Also specifically considered will be any undischarged order for costs against the applicant, which was the second crucial blow to the applicant in <i>MG v FG</i>, alongside the near certainty that if the mother pursued her claim with funding the father would be unable to recover the sums advanced (see para 31)</p>	
9. Budget & scope	<p>Usually what is on offer is funding up to FDR ...(Rubin para 13 xi)</p> <p>Again, this may be an opportunity to consider the reasonableness of Joseph's continuing to fund the case. However, in <i>Rubin</i> at 13xi), Mostyn J anticipated that the FDR judge could not deal with any extension to funding and a further hearing would be required.</p>	
10. Historic costs	<p>The question of accrued costs was considered in <i>Rubin</i>, where Mostyn J said that an award should only be made "<i>to cover historic unpaid costs where the court is satisfied that without such a payment the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings</i>".</p> <p>Cobb J took a more generous approach in <i>BC v DE</i> [2016] EWHC 1806 (Fam).</p>	
11. Assumed capacity to pay	<p>Where the respondent's disclosure is deficient, he will be assumed able to pay (<i>Rubin</i> at 13 (ii)).</p> <p>Conversely, where there has been external support for the applicant the continuation of that support will also be assumed</p>	
12. Interface with costs award	<p>(Per Mostyn J in <i>Rubin</i>): "The order should normally contain an undertaking by the applicant that she will repay to the respondent such part of the amount ordered if, and to the extent that, the court is of the opinion, when considering costs at the conclusion of the proceedings, that she ought to do so. If such an undertaking is refused the court will want to think twice before making the order."</p> <p>Estelle must be helped by her advisors to pause and consider what this means in the context of the case that she is pursuing and the range of outcomes that are reasonably foreseeable (in a highly unpredictable regime). On Joseph's side, however, he will recognise that Estelle is unlikely to have any money of her own at the end of the</p>	

	case and so it is going to be hard to convince a court to make a costs award in his favour (and hard for him to enforce it too).	
13. Jurisdiction	Where Joseph can create doubt that any award will be made the court should be slow to make an award. (Rubin para 13 iv). [This overlaps with item 7].	
14. Quantum	A 15% discount on the applicant's budget was imposed in the BC v DE case on the basis that a solicitor and own client assessment would usually generate that sort of reduction and Joseph will no doubt urge that sort of discount or greater in the negotiations.	
15. Costs cap	Joseph may also seek to take a leaf out of the M v F case [2016] EWHC 612 and ask that any provision he does make is on the basis that the applicant cannot seek more in an order for costs than her estimate of the costs of the case.  Is this the start of "costs budgeting" in the Family Division.	