Neutral Citation Number: [2022] EWFC 29

Case No: **LV 16 D 01012**

IN THE FAMILY COURT SITTING AT THE HIGH COURT FAMILY DIVISION
IN THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/03/2022

Before :

MR NICHOLAS CUSWORTH QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

BETWEEN:

LAUREN BELINDA SIMON

Applicant

and

PAUL MARK SIMON

Respondent

And

INTEGRO FUNDING LIMITED ('LEVEL')

Intervenor

- -

The **Applicant** did not appear or participate and was not represented

Richard Todd QC and **Edward Benson** (instructed by Paradigm Family Law) for the **Respondent**

Jonathan Southgate QC and **Simon Calhaem** (instructed by BloomBudd LLP) for the **Intervenor**

Hearing dates: 17th, 18th & 21st March 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR NICHOLAS CUSWORTH (SITTING AS A DEPUTY HIGH COURT JUDGE)

This judgment was handed down REMOTELY in private on 21 MARCH 2022. It consists of 48 paragraphs and has been signed and dated by the judge.

The judge hereby gives leave for it to be reported.

MR CUSWORTH QC:

1. This is an application for the joinder by a third party to financial remedy proceedings, already granted without notice by Mr Justice Newton on 18 February 2021, but not dealt with on notice until now, in the very unusual circumstances which I will explain below. This hearing was originally listed, in addition to dealing with the issue of joinder, as the hearing of an application by the third party ('Level', who are litigation lenders) to set aside a final consent order in financial remedy proceedings. This was an order which I approved as the allocated judge on 2 March 2021, entirely without knowledge of Mr Justice Newton's order, and so Level's party status in the case at that time. As essential background, I will first set out how that has occurred.

2. On 2 December 2020, sitting remotely as a Deputy High Court Judge, I dealt with a directions hearing in what Mr Todd QC for the Respondent - the husband in those proceedings - describes in his skeleton as '*bitterly contested financial remedy proceedings*'. That was evidently an accurate description. By the time of that hearing the proceedings had been ongoing since 2016, and they had already been the subject of a fully contested final hearing before Mrs Justice Parker, alongside fully contested children's proceedings (again Mr Todd uses the word 'bitterly'), and a successful appeal to the Court of Appeal of the financial remedy order. A

rehearing was in prospect, and one of the provisions of the directions order which I made on that day was to provide for a listing for 5 days before me of that second final hearing. Both husband and applicant wife were represented by leading counsel.

3. In addition, the order provided a mechanism to raise by borrowing the funds to enable the wife to attend a planned private FDR appointment which was to take place on 12 February 2021, just over 2 months later. One of the principal issues then in dispute between the parties was whether the assets of a trust of which the husband was a beneficiary could properly be treated as a resource of his. Mrs Justice Parker had found that they could be so treated, but her order had been overturned on appeal.

4. The private FDR took place as planned before a retired High Court Judge. During that day, the wife parted company with her solicitors and leading counsel. She then entered into an agreement with the husband at that hearing, the effect of which was to compromise all of her financial claims.

5. One of the issues in the case up to that time was the fact that the wife had very little in her own name, and to fund the proceedings both in relation to the children and financial remedy applications, she had been the recipient of external legal funding. First, the solicitors whom she originally instructed entered into a Sears Tooth agreement with her. Later, that agreement was replaced by a series of loans from the Intervenors in this application ('Level'), which by February 2021 had a total value before additional interest of some £865,828, and with interest now nearer to £1m. By the order made by Mrs Justice Parker in July 2018, later (in December 2019) successfully appealed, the wife would have received some £3m. Now by reason of the agreement entered into at the private FDR the wife was to receive the right to reside in a property owned by the husband's trust for the rest of her life, but no additional liquid capital to meet her claim.

6. After the FDR, the wife's position was evidently communicated to Level, because just 3 days after that agreement, on 15 February 2021, they wrote to the Court, copying in the wife, the husband's solicitor and his leading counsel, to the following effect:

'The wife in the above numbered proceedings is a party to a loan agreement in relation to a substantial sum with this company ('Level' the trading name of Integro Funding Limited). We have been made aware that she might be attempting to enter into an agreement with the husband whereby she surrenders the entirety of her lump sum which would prevent her from being able to discharge her obligations under the loan agreement. We therefore urgently request that we are joined to the proceedings under case number LV16D01012 prior to the approval of any order. A formal application to join will follow but in the meantime, we urgently request that no order is sealed in relation to this case and that we are heard in relation to any order which is presented.'

7. Two days later, on 17 February, the husband's solicitor wrote to my clerk, copying the wife but not the Court, attaching a consent order reflecting the parties' agreement at the FDR, and a Statement of Information and Schedule of Assets. The asset schedule included the loan to Level, but otherwise the communication made no reference to the letter received from them just 2 days earlier. Level were not notified that this had been done. It is now clear that no formal application was issued and no fee paid.

8. On the next day, 18th February 2021, Level's solicitor wrote to the Court attaching an application notice seeking to join them to the proceedings, accompanied by a witness statement in support from Mr Williamson, Level's Chief Executive Officer. The application was put before Mr Justice Newton, who indicated on a view of the papers that same day that he would make the order sought. The wife, the husband and his solicitor were notified.

9. This prompted a reply from the husband's solicitor to the Court on 19th February, copying Level's solicitor and the wife, asking why the order was made *ex p*arte, and seeking the inclusion into it of provision for liberty to apply and a return date. He indicated that the husband would be asking for Mr Justice Newton's order to be set aside, and that his order should be stayed pending the hearing of that application. He did not notify me or my clerk of these developments, nor did he inform the Court that the order had been sent to me seeking my approval.

10. He did write on the same day to Level's solicitor, taking issue with disclosure requests which they had made, and seeking their agreement that Mr Justice Newton's order should be stayed pending the return date. That letter finished by

threatening to seek costs against Level on the indemnity basis in respect of their application, but again made no mention of the fact that a consent order had been submitted to me for approval.

11. On 22 February, Level's solicitor replied, again copying the wife, making it clear that a stay of the joinder order was not agreed. She continued:

> *My client is deeply concerned that your client and Ms Simon entered into a collusive agreement (seeking to exclude our client's interests) against which you might seek court approval without further notification to them. You have now been prevented from taking that step...*

12. On the same day, the Court notified both solicitors and the wife that Mr Justice Newton had amended his order, making it clear that he had dealt with leave only, and providing liberty to apply and an on notice hearing on the first open date after 11 March 2021. When Level's leading counsel's clerk sought to fix the date for this hearing, the clerk to the husband's counsel was only able to offer some time in the week of 26 July.

13. On 26 February, Level's solicitor wrote to the husband's solicitor and to the wife as follows:

> *I am deeply concerned that notwithstanding the order made joining my client as party to proceedings you refuse to confirm the status of the proceedings, whether you have had any communications with the court since the private FDR or provide a draft order which I presume to be in existence. Please do so by return.*

14. There was no substantive reply from either husband or wife to this request, nor was I notified of it. However, on 2 March, 4 days later, my clerk notified me that he had received '*a very polite enquiry/chaser*' in respect of my approval of the draft order which had been sent to me a fortnight earlier, I understand from the husband's solicitor. Neither my clerk nor I had been notified of the correspondence which had passed between the solicitors and the Court, nor of the order that had been made by Mr Justice Newton, during the intervening period. Without that information, I approved the draft an hour or so later.

15. On 5 March 2021, 7 days since their letter of 26 February and still without a response, Level's solicitor issued a further application notice, seeking some disclosure from the husband and wife, and further, that '*the matter be listed for a case management hearing on a date to be fixed prior to 14 May 2021'*, and that '*no substantive orders in relation to the proceedings shall be made prior to the hearing listed above'*.

16. On the same day, the husband's solicitor finally responded to Level's, indicating that his client's draft application and statement in support was with leading counsel, and seeking to agree a July listing for the return date. He said that he would take his client's instructions in respect of the latest application. He provided no substantive response.

17. On 10 March, the application was put before Mr Justice Holman who identified that an urgent oral interim hearing was (correctly) being sought by Level's solicitor, and also indicated that it should be arranged with the clerk of the rules. He offered to deal with an urgent oral hearing. Level's solicitor invited the husband's solicitor and the wife to agree to such a hearing. The husband's solicitor responded (not this time copying in the wife) asking Level's solicitor to identify what relief Level were seeking, but still not notifying her that a draft order had been submitted for approval. He still sought to arrange a later remote hearing.

18. After a further email from Level's solicitor indicating amongst other things that they could not identify the substantive order that they were seeking until the disclosure issue was resolved, the husband's solicitor replied again, now on 11 March, once more not copying in the wife, confirming that Level's intervention was opposed, that the case should be fixed for counsel's convenience, but stating, for the first time, that '*the matter has now concluded*'.

19. On 12 March, Level's solicitor pointed out that 7 days had now passed since they had been told that the husband's statement in reply was with his leading counsel. They also asked whether, in light of the previous letter, the husband had '*succeeded in attaining an approved consent order notwithstanding our join(d)er to the*

proceedings'. The husband was invited to undertake not to apply without at least 14 days' notice for the approval of any consent order.

20. A further 3 days later, on 15 March, the husband's solicitor finally responded that it was his understanding that the order had already been sealed. In the husband's statement signed on the same day he stated of the terms of his agreement with the wife that: '*Those have been reduced to a consent order which should have been sealed by the Court, by now*.'

21. On 16 March 2021, the draft order was in fact sealed by the court. On 17 March, the matter came before Mr Justice Holman, after I had provided to him the communications which I had had from the husband's solicitors; the Court and Level for the first time became aware of the full chain of events. Mr Justice Holman ordered a temporary stay of the consent order. He then gave substantive directions on 19 March.

22. After first seeking unsuccessfully to appeal against the order made, Level then made an application to have it set aside. That application was initially firmly opposed by the husband. The wife, despite being the person with whom Level have their agreement, is taking no active part in the proceedings, and although Mr Todd QC denies that she and the husband are 'in lockstep', it is very clear that since their agreement at the FDR on 12 February 2021, her interests in these financial remedy proceedings have not been promoted at all, other than as the mirror of his.

23. The only communications that I have from her are 2 emails sent 10 minutes apart on 14 March 2022 – 3 days before this hearing – and both apparently in reply to the same email from the husband's solicitors. In the first she simply says: '*I don't want any part in the proceedings thanks'*. In the second, she repeats very nearly verbatim the statements which she is invited by the husband's solicitor to confirm, namely that '*the consent order should still be made'*, and that '*if the order is set aside she doesn't intend taking any further steps other than asking the court to approve the consent order'*.

24. The wife does not in those emails expressly consent to the setting aside of the original order, but, by that date (14 March) that was no longer apparently an issue about that between Level and the husband. The set-aside has, eventually, been conceded before me by Mr Todd QC for the husband during the course of submissions at this hearing. In light of the chain of events which I have identified above, that was undoubtedly an appropriate concession. In the wife's absence, no one has sought to argue that the order which I approved should not now be unsealed.

25. This hearing had originally been listed for 4 days to deal with the set-aside application, but was then repurposed to deal with directions in advance of that hearing, after Level sought to appeal one part of the order of Mrs Justice Roberts dated 9 February 2022, following from a judgment handed down by her on 23 December 2021. In that judgment, she had refused them permission to access without prejudice material and material from the private FDR hearing in support of their case. At present a decision as to whether permission to appeal will be granted is still awaited.

26. On 22 February 2022, however, the husband's solicitor wrote openly proposing that I should proceed at this hearing on the basis that my original sealing of the order should be set aside. That, he explained, was to be to enable Level to make representations as to why it should not be sealed. On 10 March, Level's solicitor replied, requiring too a concession that her client should be able to '*participate in the proceedings as a party and to reference all the documents in the case which are not privileged including the financial disclosure it already has'*.

27. On the next day, the reply came back rejecting that proposal, but suggesting to Level that: '*you have your technical set aside, we can then see if you (a non-party to the marriage) can obtain any relief (especially as it is patent that Mrs Simon will not re-run her financial remedy application solely for your benefit) and then we can consider the costs of all of this'*. That appeared to be a concession both that the original order should be set aside, and that Level could remain joined at least to argue their case.

28. However, what should happen next in terms of their party status has in fact remained highly contentious. The husband continues to object to Level's joinder, notwithstanding the setting aside of the sealed order. The wife has expressed no view. At the outset of this hearing, there was even a suggestion that as the conditions which the husband sought to attach to the set-aside were not acceptable to Level, that the set-aside itself would remain contested. In the event, the parties present eventually agreed that the order should be set aside, but the joinder of Level to the proceedings remained contentious.

29. I therefore required the attendant parties' respective leading counsel to prepare short written notes on the issue and have heard from them both orally in support. Mr Todd QC makes the following points for the husband:

    a. That the husband and wife cannot be compelled to litigate their financial remedy claim if they don't want to;

    b. That Level retain their civil rights and remedies against the wife, and that those are unaffected by the sealing of the order;

    c. That there is no valid reason given why the order should not now be resealed;

    d. That no public policy considerations demand Level's intervention; and

    e. The case does not fit within FPR Rule 9.26B.

30. FPR Rule 9.26B, under the heading 'Adding or Removing Parties' sets out at (1) that:

> *The court may direct that a person or body be added as a party to proceedings for a financial remedy if –*
>
> *(a) It is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or*

(b) There is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

31. Mr Todd QC argues that there is a lack of nexus between Level's debt action and this financial remedy. However, I remind myself that the debt which the wife owes them is one which was incurred by her to meet the costs of these proceedings, and the Children Act application which ran concurrently between the parties. So, this debt is not on any view entirely independent of these proceedings. The court in the financial remedy claim could legitimately have made provision for the wife which would have enabled her to meet those costs either out of any substantive award made against the husband, or (at least as to the financial remedy proceedings) by a costs order.

32. A number of questions present themselves, including:

    f. Mr Southgate QC for Level describes their position as having an 'assignment of the wife's recovery' in these proceedings. That was the intended route by which the debt would be recovered – is that a sufficient connection to permit Level to be joined to argue their case?

    g. The loan was made at a time when the quantum of the wife's award was very much a 'matter in dispute' between the then parties – does it matter that the husband and the wife have since purported to agree?

    h. Given Level's intervention and position, is it now 'desirable' to resolve the issue between them and the wife within these proceedings?

33. Mr Todd QC's principal focus in arguing that the conditions of Rule 9.26B(1)(b) are not met, is to criticise Level's case as to the remedy that they are seeking. He complains that they are trying to move from being an unsecured creditor of the wife to being a secured creditor of both wife and husband. He complains that they are seeking a remedy against a mortgagee who itself is not a party to these proceedings.

There may or may not be force in his arguments, but should these concerns be sufficient to prevent the joinder of Level *ab initio*? Do they go to the question of whether it is desirable to resolve the issue between Level and the wife, at the same time that the financial remedy proceedings are concluded, or rather as to how in those proceedings the disputes themselves should be appropriately resolved?

34. Mr Todd QC stresses that there are now no matters in dispute between the husband and the wife, which he says means that the intervention must fail. However, in the civil context, CPR Rule 19.2 (2) is in effectively the same terms at FPR Rule 9.26B (1). In *Price v Registrar of Companies* ('*In re Pablo Star Ltd'*) [2017] EWCA Civ 1768, a case cited by Mr Todd, Sir Terence Etherton MR made clear at [51] that:

> '*The provisions of CPR r 19.2(2) ought, however, to be given a wide interpretation. The words 'in dispute' ought to be read as 'in issue'. That is consistent with authority that the court's powers to add a party under CPR r19.2 can exist after judgment even though, on a literal approach, there is no longer a matter in dispute: Dunwoody Sports Marketing v Prescott (Practice Note) [2007] 1 WLR 2343*.

Giving a similar interpretation to FPR Rule 9.26B (1), the husband's case here would seem equally literal.

35. Mr Todd QC further argues that the husband and wife cannot be compelled to litigate, but in fact they have litigated against each other, rancorously, for over 5 years, and the debt in issue is in respect of the wife's costs of that litigation. He also relies on *Pawley v Whitecross Dental Care Ltd* [2021] EWCA Civ 1827, which decision did make clear that a decision to bring damages on a limited basis should normally be respected, and that a claimant should not normally be forced to pursue someone they had not chosen to pursue. But here, the arrangement between the wife and Level was predicated upon her choice to pursue her claim under the Matrimonial Causes Act 1973 against the husband, and indeed the costs of her having already done so form a significant part of the debt in issue. It must therefore be doubtful whether the wife, although conspicuously absent from this hearing, can properly place herself into the category of reluctant litigant in these proceedings.

36. Mr Southgate QC's case is that the husband and wife have in effect sought to resolve the disputes between them by so arranging their financial affairs, that the nearly £1m of debt to Level that the wife bears (and so should be able to seek to have met as a part of her needs by the husband in these proceedings) has been left with her but unenforceable against her; and the undetermined claim that she must have had against the husband has been deliberately dropped for an arrangement which houses her, but spares him from having to meet any part of her liability.

37. The husband's response is that that is no matter – Level can still pursue a civil remedy against the wife; although I note that such a claim, if the agreement is converted into an order, would be almost inevitably worthless. Mr Todd QC argues that Level's rights will be completely unaffected by the resealing of the order which reflects the agreement of his client and the wife. If they had wanted more security, he says, they should have obtained it before lending the money. Yet in this situation, it must have been the natural consequence of their agreement that if Level were to seek to enforce any part of the debt owed by the wife, it would only ever have been possible through the medium of the Court's enquiry in the financial remedy proceedings. That enquiry is discretionary, so any recovery is by no means guaranteed, but just as the loans enabled the wife to participate in the earlier stages of the proceedings, so their recovery was always going to dependent upon the outcome of the proceedings. If those proceedings have been brought to an end collusively, as Mr Southgate QC asserts, and the court has now to re-exercise its function to approve any proposed outcome, then a proper understanding of those circumstances will very likely be crucial in determining whether to give such approval.

38. Mr Todd QC suggests that, if Level are denied party status, he will then resubmit the draft consent order for approval and resealing. And that absent Level's intervention, there would be no reason for the draft not to be approved. He dismisses any public policy arguments on the basis that Level are lenders, rather than funders. He relies on the Court of Appeal's remarks about Champerty and Maintenance in *Farrar v Candey* [2022] EWCA Civ 295. Here however, I remind myself of the judgement of Mrs Justice Roberts in these proceedings, handed down on 23 December 2021, and reported as *LS v PS* [2021] EWFC 108, where she said:

70. In the present case, I accept Mr Southgate QC's submission that Q does not stand in the same position as a third-party unsecured creditor, albeit one connected tangentially with the litigation giving rise to the privilege which is under attack. During the course of legal argument, Mr Todd QC invited me to consider Q's position as analogous to that of any external commercial lender or provider of credit. What, he asked, would be the position if the wife in this case had used a Barclaycard to discharge her legal costs? Surely it would not be open to that creditor to intervene in financial remedy proceedings to secure some form of priority in relation to its debt?

71. It seems to me that different policy considerations are engaged in the case, as here, of a professional corporate lender which offers bespoke services designed for the specific purposes of enabling a litigant to participate fully and effectively in litigation flowing from matrimonial breakdown. The role of such lenders has been considered by the courts in several authorities to date.

72. Outside the field of matrimonial law, the principle of access to litigation funding has been recognised for many years. In Gulf Azov Shipping Co Ltd v Idisi [2004] EWCA Civ 292, Lord Phillips MR said this:-

"54. .... Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation."

73. In the field of matrimonial law and family proceedings arising out of divorce and family breakdown, the courts are frequently confronted with situations where one party has direct access to funds, including cash and other liquid resources which will be required to meet often very significant legal costs, in circumstances where the other party's access to such funds may be limited, if they exist at all. In these circumstances the disadvantaged party, usually the wife, cannot seek assistance from conventional commercial lenders because there are usually restrictions on the extent to which she can provide sufficient security for the lending. In its quest to ensure equality of arms and a level playing field, the court has always been astute to ensure that both parties should have access to resources from which they can meet legal fees. Sometimes there will be agreement that one party should provide the other with a litigation fund at the outset. This avoids the additional costs of applications to court and/or the often significantly higher rates of interest charged by specialist litigation funders. Once the litigation is progressing, the court can control future expenditure on costs in a number of different ways but the principle is enshrined that fairness and justice require that both parties have access to litigation funding.

74. In the field of financial remedy litigation, judges in the Family Division have often recognised and endorsed the valuable function which litigation funders such as Q can provide in appropriate circumstances: see, for example, Moor J in Young v Young [2014] 2 FLR 789, Francis J in Weisz v Weisz [2020] 2 FLR 95, and Gwynneth Knowles J in Akhmedova v Akhmedov (above). Mr Southgate QC reminds me that a similar view was expressed by Holman J when this matter came before him on 19 March this year. The availability of this form of finance is now recognised specifically by the court in the context of the provisions of s.22ZA of the 1973 Act. For the purposes of any application made to a court for a legal services provision order against the other party, a litigant generally has to show that he or she has been refused lending by "two commercial lenders of repute": see Rubin v Rubin [2014] 2 FLR 1018 at para 13(vi) per Mostyn J. In this context Mr Southgate QC makes the obvious point that litigation lending and its interrelationship with s.22ZA would break down if applicants and lenders perceived a real risk that a court could,

or would, sanction an outcome which left an applicant without any resources to repay the loan at the end of the litigation.

39. I agree entirely with all that Mrs Justice Roberts set out in those paragraphs. Her judgement also contains a careful consideration of the detail of Level's substantive case, and of the husband's reply, and further of the wider issues and chronology of this litigation, which consequently I need not repeat here.

40. As I have indicated, at the time of its joinder, Level was owed £865,828 under its loan agreements with the wife. To secure the borrowing, she had legally assigned to Level the benefit of the financial provision to be awarded to her by the court.

41. I have also explained that CPR Rule 19.2(2) is in materially the same terms as FPR Rule 9.26B(1). In *Price v Registrar of Companies* [above], Sir Terence Etherton MR also made clear at [60] that:

'*In considering whether or not it is desirable to add a new party pursuant to CPR r 19.2(2) two lodestars are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case and the overriding objective in CPR Pt 1'.*

42. Level's rights are unquestionably capable of being affected by the further decisions now to be made in this case. Further, CPR Rule 40.9 permits a person who is not a party to proceedings but who is "directly affected" by a judgment or order made in those proceedings to have it set aside or varied.

43. It does not matter that it cannot yet be clear that an order will in fact be made which enables Level to enforce the debt owed by the wife, or any part of it. As Edward Murray, sitting as a Deputy Judge of the Chancery Division, said in *Abdelmamoud v The Egyptian Association* [2015] EWHC 1013:

[59] *Since the "directly affected" test is for the purpose of establishing locus standi, it is sufficient that the relevant judgment or order would prima facie be capable of materially and adversely affecting a legal interest. It is not necessary to show that it would, in fact, do so, for that would be the subject of the application itself.'*

44. Clearly, Level would be directly affected by the prospective final order within the meaning of CPR 40.9 in the sense that that order is 'capable of materially and adversely affecting its legal interest'.

45. Mr Todd QC also relies on the case of *DR v GR & ors.* [2013] EWHC 1196 (Fam), where at [35] Mostyn J restated the tests in Rule 9.26B as follow:

> *'iv) The applicant for joinder must show either:*
> *a) that there is an existing matter in dispute which requires for its resolution the joinder of the new party, or*
> *b) that there is a matter in dispute between a party and the proposed new party which is connected to the main matters in dispute between the parties and that it is desirable to resolve all the issues together.*
> *v) Under the first limb it must be clearly shown that an existing matter in dispute between the parties cannot be effectually and validly resolved without the joinder of the proposed new party.*
> *vi) Under the second limb it must be shown that there is a separate dispute between a party and the proposed new party and that it is desirable to hear the matters together. The question of whether it is desirable to hear the matters together extends to the commonality of evidence as well as the saving of costs.'*

46. I am not in this judgment dealing with the question of the proposed transfer of the current civil actions brought by Level, at the husband's urging, to be heard together with the proceedings in the Family Division. Whatever decision is made about that, and I will hear submissions from counsel after handing down this judgment, it is clear to me that (i) the evidence required by the court to determine whether the unsealed consent order should be resealed once the background to the making of the parties' agreement has been properly considered, and (ii) the evidence required to enable the court to determine those civil proceedings, will significantly overlap.

47. Finally, Mr Todd QC says of Level in his written argument that: '*They have not successfully intervened for the purposes of setting aside the order. We have consented to this in order to avoid this arid dispute*.' I cannot currently accept this assertion. But for Level's intervention, the extraordinary series of selective communications set out at the outset of this judgement would never have been revealed to the Court. No explanation for what happened has yet been offered, and the husband's consent to the set-aside has deferred the occasion when such an

explanation will be required. I should therefore express no view today about why the husband has consented, but I am very clear that that explanation will be required before any consideration can be given to re-sealing the consent order.

48. I am however satisfied that Level's joinder to these proceedings by Mr Justice Newton on 18 February 2021 was entirely appropriate, in accordance with the provisions of FPR Rule 9.26B (1) (b), and that it is desirable that they should remain a party so that the clearly connected issues between Level and the wife, and between the wife and the husband, can be fairly and expeditiously resolved.

Nicholas Cusworth QC
21 March 2022