Neutral Citation Number: [2024] EWFC 6

Case No: ZZ20D13505

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/01/2024

Before :

THE HONOURABLE MR JUSTICE COBB

- -

Between :

L	**Applicant**
- and -	
O	**Respondent**

- -

L v O (Stay of Order; Hadkinson Order; Security for Costs)

- -

Michael Glaser KC (instructed by **Charles Russell Speechlys**) for the Applicant
Nichola Gray KC and Joshua Viney (instructed by **Payne Hicks Beach**) for the Respondent

Hearing dates: 16 January 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 26 January 2024 by circulation to the parties or their representatives by e-mail, and subsequently in an amended form by release to the National Archives.

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THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment)

in any published version of the judgment the anonymity of the parties and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cobb :

Introduction

1. By application issued on 12 June 2023, Mr L (who I shall refer to hereafter as 'the husband', notwithstanding that he and the respondent are no longer married) seeks variation, discharge and/or set aside of a number of financial remedy final orders which were made by consent in October 2021. The respondent to the application is his former wife, Ms O, (who I shall refer to as 'the wife').

2. It is the husband's case that there has been a supervening and unforeseen event of the type contemplated by *Barder v Barder, Caluori intervening* [1988] AC 20 ('*Barder*') which has invalidated the basis on which the order was made ('the *Barder* event'); his claim is further or alternatively based on what Mr Glaser KC referred to as the *Thwaite* jurisdiction (deriving from *Thwaite v Thwaite* [1982] Fam 1), which provides that where the order is still executory and one of the parties applies to the court to enforce the order, the court may refuse if, in the circumstances prevailing at the time of the applications, it would be inequitable to do so. The *Thwaite* jurisdiction (which is less stringent than *Barder*) is not uncontroversial (see *BT v CU* [2022] 1 WLR 1349) and may in fact add little, if anything, to the overall claim; I say no more about that now. The husband's substantive application is listed for hearing before me in July 2024 with a time estimate of five days.

3. This version of the judgment has been anonymised in certain respects for the purposes of publication, with the agreement of both parties, so as to protect the identity of the parties.

4. Embedded within the husband's substantive application are to be found interlocutory applications: for (a) a stay of the order requiring two of the lump sum payments to be made, (b) a stay of the order requiring the sale of a property in a foreign city ('city Y') in the event of default on the lump sum payments, and/or (c) an application that the said orders shall not be enforced.

5. The wife has countered with interlocutory applications of her own. She applies for:

   i) A *Hadkinson* order, with the effect that the husband be barred from taking any further steps in these proceedings until he has paid at least the interest on the outstanding lump sums in the sum of £759,563;

   ii) An order that the husband provide security for her costs to the tune of £637,882 (this is made up of c.£272,200 incurred to date, plus an estimate of c. £365,600 from the date hereof to the conclusion of the final hearing in July 2024).

6. Both counsel have also asked me to consider case management directions at this hearing, including:

   i) whether the husband's application to vary the maintenance provision should be considered as part of the final hearing in July 2024;

   ii) what evidence should be made available to me from the Financial Dispute Resolution ('FDR') appointment in October 2021 to provide a baseline of information against which I can judge whether the alleged 'supervening event' was or was not reasonably foreseeable;

   iii) whether the wife should file evidence of her financial circumstances.

7. In October 2023, I determined the wife's application for leave to adduce expert evidence to address the husband's substantive case. I made an order granting her permission on the basis that the husband had permission to file evidence in reply. That evidence is now before the court.

Background

8. The husband is a national of a foreign country ('country X'); he has indefinite leave to remain in the United Kingdom. The wife has dual country X / British nationality. The parties are divorced. They have three adult children.

9. During the marriage, the parties lived between England and city Y; the wife was principally based in England with the children, whereas it appears that the husband was principally based in city Y. They own a large house in London where the wife still lives; they own a sizeable apartment in city Y which the wife occasionally still visits but otherwise it stands vacant. Since the breakdown of the marriage, the husband has travelled extensively for business; in 2020, he gave the address of the parties' city Y apartment as his "permanent residence in city Y", and maintained at that time that he was "based in a hotel in the UK for now". For the calendar year 2023, I was shown a spreadsheet which revealed that he spent approximately 90 days in England and a broadly equivalent number of days in another foreign country ('country Z'); he spent a little over 50 days in city Y and the rest of the year visiting about a dozen other countries. When in England he now stays in a rented part-furnished apartment in London (the second such apartment which he has rented in the last year); when in city Y he stays in a rented flat (not, contrary to his witness statement filed in support of this application, in the flat which the parties own), and when in country Z I am told that he principally stays in hotels. Among other investments, the husband also has an interest in a property in another foreign country ('country A'). This background narrative is relevant to my ruling on the husband's 'residence' (see §48 below).

10. The financial issues consequent upon the parties' divorce were resolved in 2021; at that date, I am told that the parties' total assets amounted to c.US$76m. A detailed financial remedy order was made by Moor J on 4 October 2021, following an FDR conducted over two days.

11. The essence of the order was as follows:

i) The husband would retain the parties' property in city Y ('the city Y Property)

ii) The husband would transfer his beneficial interest in the London property to the wife who would be able to retain the exclusive use of the property for about four years; this would then be sold by 7 October 2025 unless the wife could secure the husband's release from the mortgage (i.e., potentially using the lump sums which she would by then have received in accordance with the order). If the property were to be sold, the wife would receive the entire net proceeds;

iii) The husband would pay the wife a number of non-variable lump sums amounting in total to US$16,000,000 (of which the husband had already paid US$5m to the wife by the time of the settlement). The balance of US$11,000,000 remained payable in the following lump sums:

a) US$1m by 1 November 2021; [this was paid];

b) US$4m by 1 April 2022; [this was not paid];

c) US$2m by 30 December 2022; [this was not paid];

d) US$4m by 30 June 2025; [this is not yet due];

e) 50% of the husband's interest in an asset (the 'B asset') run by the husband up to US$65m; [the husband paid the wife US$10m in respect of this order on 2 February 2023];

iv) If there was a default on the payment of any of the lump sums referred to in (iii) above, the city Y Property was to be sold and the net proceeds paid to the wife;

v) The parties agreed that they will purchase a property for each of the three children of the family after 31 December 2025;

vi) There would be a periodical payments award at the rate of US$650,000 per annum (and at a reducing rate in accordance with a formula set out in the order), payable monthly in advance by standing order. Payments were to start on 8 October 2021; the periodical payments order would expire on the payment of the lump sums provided for above;

vii) There would be financial provision for the two younger children until they had completed their tertiary education;

viii) Upon satisfaction of the terms outlined above, there would be a clean break.

12. Since the order was made, the husband has faithfully paid the periodical payments in the full sum. He has paid the wife US$6m by way of lump sums. As mentioned above, on 2 February 2023, the husband paid the wife a sum just in excess of US$10m (one half of the value of the interest in the B asset). However he has *not* paid the following sums due under the order:

i) US$4m due on 1 April 2022;

ii) US$2m due on 30 December 2022.

13. It is not relevant for the purposes of this judgment to identify the nature of the alleged *Barder* event; it is sufficient to note that it is the husband's case that the *Barder* event has had a devastating and irreversible impact on his financial situation. It is his case that the *Barder* event was not foreseeable at the time of the 2021 consent order, and that within a relatively brief period of time from the making of that order, the impact of the *Barder* event had invalidated the basis and/or fundamental assumption on which the order had been made. He relies on the principles set out by the House of Lords in *Barder*, discussed in more recent times by Mostyn J in *BT v CU* [2021] EWFC 87.

14. On 11 May 2023, with two orders for lump sum payments outstanding, the wife sought and obtained a freezing order in another foreign country ('country C') where the husband has a bank account; the sum of US$6m was frozen. This sum in fact represented the husband's one-half share of the B asset. An agreement is currently being negotiated between the parties under which that sum will be transferred to a special escrow account held in the wife's name to the joint order of both parties; the proposed country C agreement reflects that in the event of a dispute, the account shall be operated in accordance with any order made by the English Court until the English proceedings are concluded, or further order of the English Court. The detailed terms of that agreement have not yet been finalised, and the agreement not yet signed. Once the wording of the agreement is finalised, the parties will need to obtain the approval of the relevant authorities in country C before the monies can be transferred.

15. The orders which the husband seeks now to challenge include:

i) The orders for the payments of the final elements of various non-variable lump sum awards (amounting in all to US$10m) (para.20(b)-(d) of the original order). He seeks to have these orders discharged. Alternatively, he seeks an amendment of the final order "under the slip rule" (per Mr Glaser) so that the orders are described as a 'lump sum by instalments', and in this way a variation of the orders (as to quantum and/or timing) can be achieved under section 31(2)(d) Matrimonial Causes Act 1973;

ii) The order for the sale of the city Y Property (para. 27 of the original order) in default of the payment of the lump sum or sums, and

iii) The quantum of the order for periodical payments in favour of the wife (para.28 and 29 of the original order).

Husband's application for a stay

16. At this hearing, the husband seeks a stay of the order requiring him to pay the two outstanding lump sums, and of the order requiring him to sell the city Y Property in default of payment. This application has now to be seen in the context that as, I have mentioned at §14 above, US$6m is currently 'frozen' in the bank accounts in country C which would – if the order remains unvaried following the final hearing – in fact satisfy those payments.

17. Mr Glaser has made clear that it is not the husband's wish or intention to interfere with the freezing order in country C, or country C's court's jurisdiction in relation to the same; nor does he not want to undermine the parties' current efforts to conclude the agreement to transfer funds to the escrow account. Ms Gray KC submits, on instructions from a lawyer qualified in country C, that if I were to impose a stay of the order for payment of the outstanding lump sums, this could thwart the arrangements in country C. The wife has filed a letter from lawyers qualified in country C which contains the following passage:

> "… any stay of enforcement of the order by the English Court would most likely result in the freezing order losing its effect, because the [country C] Court, which would typically have to follow up on the matter, can only act on the basis of an enforceable order."

Both parties submitted their own formulas for dealing with this situation.

18. As the dispute before me in this regard boiled down in the end to form rather than substance, I can take this shortly. I propose to accept the wife's proposal, to the effect that as soon as the monies are safely deposited in the escrow account in country C, she will undertake in this jurisdiction not to enforce the orders for payment of the lump sums. Ms Gray and Mr Viney have proposed the following wording which I approve:

> AND UPON the parties agreeing that once the funds frozen by the wife pursuant to the Order of the country C Court dated 4 May 2023 have been paid to an account in the wife's sole name to be held by the wife pursuant to a signed agreement between the parties that has been approved and ratified by the relevant authorities in country C and once the agreed costs have been paid by the husband pursuant to the same signed agreement, the wife will provide a written undertaking that she will take no steps to enforce the payment of the lump sums due pursuant to the Order of Mr Justice Moor dated 4 October 2021 prior to the conclusion of these proceedings.

***Wife's application for an order under Hadkinson v Hadkinson* [1952] P 285.**

19. The wife seeks a *Hadkinson* order. She invites the court to rule that the husband should be debarred from pursuing his application for substantive relief until/unless he pays into the account in country C into which the frozen monies are paid under the freezing order the interest due on the outstanding lump sums. This will be reflected by the sum of £759,563 as at July 2024.

20. As a preliminary point, Ms Gray argues (and I accept) that it is perfectly proper for the wife to continue this (and indeed any other) method of enforcement notwithstanding that there is an application for variation of the orders before the court; she relies on the judgment of Moylan LJ in *Tattersall v Tattersall* [2018] EWCA Civ 1978 at [32]:

> "… there is no principle which requires a judge to adjourn an enforcement application pending determination of a variation application. The objections to such a principle are obvious. It would enable the process to be too easily manipulated, if not subverted. It is a question for the judge to determine having regard to the circumstances of the individual case".

21. There is no need for me here to explain the *Hadkinson* jurisdiction itself. It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction, to obey it, unless and until that order is discharged. Where a party has not obeyed an order, then they may face a restriction on their access to the court, albeit that such restriction will only be imposed as a last resort; debarring a litigant from pursuing his/her claim except by complying with conditions is of course an extreme measure. It has rightly been described as a "draconian order", and one which should be made only "judicially, sparingly and proportionately" (per Eleanor King J (as she then was) in *C v C (Appeal: Hadkinson Order)* [2010] EWHC 1656 (Fam)). Sir Ernest Ryder echoed those comments in *Assoun v Assoun [No 1]* [2017] EWCA Civ 21 at [3]:

> "Such an order is draconian in its effect because it goes directly to a litigant's right of access to a court. It is not and should not be a commonplace. As developed in case law, it is a case management order <u>of last resort</u> in substantive proceedings (for example for a financial remedy order) where a litigant is in <u>wilful contempt</u> rather than a species of penalty or remedy in committal proceedings for contempt." (Emphasis by underlining added).

22. It seems reasonably clear that a *Hadkinson* order will only be made if the following conditions are satisfied:

i) The respondent is in contempt;

ii) The contempt is deliberate and continuing;

iii) As a result, there is an impediment to the course of justice;

iv) There is no other realistic and effective remedy;

v) The order is proportionate to the problem and goes no further than necessary to remedy it.

See Peter Jackson LJ in *De Gafforj v De Gafforj* [2018] EWCA Civ 2070, at [11].

23. Mr Glaser disputes that the contempt in this case is deliberate in the sense that it is 'defiant' or 'wilful'. He points to the fact that the husband sought to negotiate informally with the wife in 2022 and early 2023 in order to defer the payments given the stated downturn in his fortunes, before making the application for a stay and variation. He points to the fact that the wife has relative financial buoyancy at present; he argues vigorously that this is not a "last resort" case.

24. Ms Gray argues that there is no doubt but that the husband is in contempt, and there is no other realistic or effective remedy available to the wife. She emphasises that the wife is not seeking the payment to her of the interest at this stage. She seeks only the preservation of that sum pending the outcome of the husband's *Barder* application. The wife does not relish the prospect of having to seek to enforce payment of the interest in the event that the 2021 order remains intact.

25. In this case, on the facts I am satisfied that the husband is in contempt, in the sense that he has not honoured two of the lump sum orders; I further find that the contempt is continuing, albeit by the order which I shall make now, the wife will not be pursuing enforcement of the payment of the outstanding lump sums. I am not satisfied that there is a clear impediment to justice, as things currently stand, by this contempt, nor am I satisfied that it is proportionate to the 'problem' to make such an order given what I know of the relative financial positions of the parties. I accept that the husband sought to engage the wife directly and later her solicitors in the spring of 2022 and into 2023 in relation to the current difficulties; he has also continued to pay the wife's maintenance without missing a payment. His defaults on the lump sum payments have ostensibly been explained, and he has himself sought to bring his non-payment to the court. At the hearing in July 2024, I will need to undertake a proper investigation of the husband's *Barder* claim, and insofar as the supervening event was not foreseen, the apparent impact which the *Barder* event has had on his financial portfolio. I am not convinced that it is right to restrict the husband's access to court by requiring him as a condition of pursuit of his claim, to place c.£750,000 into the frozen account. There is a risk, it seems to me, that such an order may lead ultimately to injustice.

26. I conclude that the wife has failed to make good her case for a *Hadkinson* order.

Wife's application for an order granting her security for costs

Security for costs: the law

27. Applications for security for costs in family proceedings are relatively rare; the reason for this is that the court generally makes no order for costs in family proceedings unless litigation misconduct or other exceptional circumstances are demonstrated. In financial remedy cases, this rule is enshrined in the Family Procedure Rules 2010 ('FPR 2010') at rule 28.3(5): "the general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party".

28. However, in this case, a final substantive financial remedy order has been made and the husband seeks to vary or discharge it on the basis of a supervening (*Barder*) event. This application is specifically governed by rule 9.9A FPR 2010 and, given its inherent characteristics, should therefore be treated, in my judgment, as more akin to a civil action; if the husband succeeds in proving the *Barder* event, and persuades the court to vary or discharge the previous order, he may be entitled to recover some or all of his costs; more to the point, if he loses the claim he may well face an order that he pay some or all of the wife's costs. Indeed the general rule that the court will not make an order for costs in financial remedy proceedings is expressly disapplied in relation to a *Barder* application by rule 28.3(9) FPR 2010.

29. The purpose of an order for security for costs is to protect a party in whose favour it is made (in this case the wife) against the risk of being unable to enforce any costs order which she may later obtain. In this case, the wife seeks the sum of £637,882 as security for her costs of the husband's application to include the final hearing.

30. The jurisdiction for the order claimed by the wife is contained in rule 20.6 and 20.7 FPR 2010; this in turn mirrors in material respects (albeit not completely) rule 25.12 and 25.13 of the Civil Procedure Rules 1998. The type of order which the court may make is contemplated by rule 20.6(3), viz:

> "(3) Where the court makes an order for security for costs, it will—
>
> (a) determine the amount of security; and
>
> (b) direct—
>
> (i) the manner in which; and
>
> (ii) the time within which,
>
> the security must be given."

31. Rule 20.7 FPR 2010 is crucial and provides as follows:

> **"20.7.— Conditions to be satisfied**
>
> (1) The court may make an order for security for costs under rule 20.6 if—
>
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
>
> (b) either—
>
> (i) one or more of the conditions in paragraph (2) applies; or
>
> (ii) an enactment permits the court to require security for costs.
>
> (2) The conditions are—
>
> (a) the applicant is—
>
> (i) resident out of the jurisdiction; [...]
>
> (ii) [...];
>
> (b) the applicant has changed address since the application was started with a view to evading the consequences of the litigation;
>
> (c) the applicant failed to give an address in the application form, or gave an incorrect address in that form;

> (d) the applicant has taken steps in relation to the applicant's assets that would make it difficult to enforce an order for costs against the applicant."

32. Rule 20.7 contemplates a two-stage process:

i) Consideration of the jurisdictional 'gateway' provision (i.e., does the respondent to the application fall within one of the four grounds set out in rule 20.7(2)?),

and then:

ii) The exercise of a value judgment and discretion (i.e., consideration of whether it is 'just' to make the order having regard to all of the circumstances).

In relation to the jurisdictional 'gateway', Ms Gray pins her colours to rule 20.7(2)(a)(i), asserting that at the present time, the husband is 'resident out of the jurisdiction'.

33. There is a dispute in this case as to the application of rule 20.7 FPR 2010, both as to the law and the facts.

34. As to the law, the parties disagreed about what is meant by 'resident' in rule 20.7 FPR 2010. Mr Glaser argued that 'residence out' of the jurisdiction contemplates that the respondent to the application will have no residence or home in England at all. He argues that a person may have more than one residence, and provided that one of them is in the jurisdiction of England and Wales then he/she cannot be said to be 'resident out of the jurisdiction'.

35. Ms Gray argued that 'resident' means 'habitually resident', and that temporary visits to, or periods staying in, this jurisdiction do not amount to 'residence' here under the rule, and/or do not negate the habitual residence of a respondent out of the jurisdiction. She argues that if Mr Glaser's construction were right, a respondent to a potential claim in this regard could seek to avoid it simply by acquiring (however temporarily) a small pied-a-terre in the jurisdiction.

36. I was taken to two authorities on this point:

i) *MG v AR (Security for Costs)* [2021] EWHC 3063 (Fam); [2022] 2 FLR 583 ('*MG v AR*'), a decision of Mostyn J, and

ii) *Lazarychev (and others) v Lyndou* [2024] EWHC 8 (Ch) ('*Lazarychev*'), a recent decision of HHJ Keyser KC sitting as a Deputy Judge of the High Court, Chancery Division in an appeal against the refusal of an order for security for costs under rule 25 CPR 1998.

The two authorities yield complementary perspectives on this issue from the family and the chancery jurisdictions.

37. In *MG v AR* at [13] Mostyn J asserted unambiguously, and without elaboration, that "[r]esidence for the purposes of this condition should be interpreted to mean habitual residence". In *Lazarychev*, HHJ Keyser KC considered the point in some detail, and referenced a number of significant authorities. I was taken to a number of passages of

his judgment. The key conclusions from the *Lazarychev* judgment, and from the authorities there cited, seem to me to be these:

i) The word "resident" is an ordinary English word and should be given its ordinary meaning, signifying 'to dwell permanently or for a considerable period of time, to have one's settled or usual abode, to live in or at a particular place' (*Lazarychev* at [4], [11], [13], [18], [19], and [23]);

ii) The question as to where the claimant is/was resident was a question of fact and degree (*Lazarychev* at [4], [11], [13], and [15]);

iii) Residence in a place connotes some degree of permanence, and/or some degree of continuity or some expectation of continuity (*Lazarychev* at [11]).

38. In support of the husband's contention that he is 'resident' in this jurisdiction (or more accurately not resident out of this jurisdiction), Mr Glaser took me to the further explanatory points referenced in the *Lazarychev* judgment at [14], drawn from the judgment of Lewison J (as he then was) in *The Commissioners for Her Majesty's Revenue & Customs v Grace* [2008] EWHC 2708 (Ch), [2009] STC 213 at [3]. Insofar as they *illustrate* (I emphasise) the key conclusions which I have summarised at §37 above in particular factual circumstances, I accept that they are useful:

> "(ii) Physical presence in a particular place does not necessarily amount to residence in that place where, for example, a person's physical presence there is no more than a stop gap measure: *Goodwin v Curtis* (1998) 70 TC 478, 510;
>
> (iii) In considering whether a person's presence in a particular place amounts to residence there, one must consider the amount of time that he spends in that place, the nature of his presence there and his connection with that place: *Commissioners of Inland Revenue v Zorab* (1926) 11 TC 289, 291;
>
> (iv) Residence in a place connotes some degree of permanence, some degree of continuity or some expectation of continuity: *Fox v Stirk* [1970] 2 QB 463, 477; *Goodwin v Curtis* (1998) 70 TC 478, 510;
>
> (v) However, short but regular periods of physical presence may amount to residence, especially if they stem from performance of a continuous obligation (such as business obligations) and the sequence of visits excludes the elements of chance and of occasion: *Lysaght v Commissioners of Inland Revenue* (1928) 13 TC 511, 529;
>
> (vi) Although a person can have only one domicile at a time, he may simultaneously reside in more than one place, or in more than one country: *Levene v Commissioners of Inland Revenue* (1928) 13 TC 486, 505;

> (vii) 'Ordinarily resident' refers to a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life, whether of short or long duration: *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 343;
>
> (viii) Just as a person may be resident in two countries at the same time, he may be ordinarily resident in two countries at the same time: *Re Norris* (1888) 4 TLR 452; *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 342;
>
> (ix) It is wrong to conduct a search for the place where a person has his permanent base or centre adopted for general purposes; or, in other words to look for his 'real home': *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 345 and 348;
>
> (x) There are only two respects in which a person's state of mind is relevant in determining ordinary residence. First, the residence must be voluntarily adopted; and second, there must be a degree of settled purpose: *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 344;
>
> (xi) Although residence must be voluntarily adopted, a residence dictated by the exigencies of business will count as voluntary residence: *Lysaght v Commissioners of Inland Revenue* (1928) 13 TC 511, 535;
>
> (xii) The purpose, while settled, may be for a limited period; and the relevant purposes may include education, business or profession as well as a love of a place: *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 344;
>
> (xiii) Where a person has had his sole residence in the United Kingdom he is unlikely to be held to have ceased to reside in the United Kingdom (or to have 'left' the United Kingdom) unless there has been a definite break in his pattern of life: *Re Combe* (1932) 17 TC 405, 411."

39. Ms Gray pointed out that although the word ‘ordinary’ (immediately before the word ‘residence’) has been removed from the text of rule 25.13 CPR 1998, the editors of the White Book had expressed the view that “[i]t appears unlikely that this change was intended to change the scope of ground (a)”.

40. That summarises the arguments on ‘residence’. Both counsel went on to address me on the basis that if the ‘gateway’ criteria is satisfied, the court must (they agree) go on to decide what would be the ‘just’ order for security for costs having regard to all of the circumstances of the case. The discretion involves consideration of the amount of security sought/ordered, and the manner and time in which it is to be provided. I was taken to a number of authorities.

41. I start with *Bestfort Developments LLP v Ras al Khaimah Investment Authority* [2017] CP Rep 9 wherein Gloster LJ said at [77]:

> "… it is sufficient for an applicant for security for costs simply to adduce evidence to show that 'on objectively justified grounds relating to obstacles to or the burden of enforcement', there is a real risk that it will not be in a position to enforce an order for costs against the claimant/appellant and that, in all the circumstances, it is just to make an order for security. Obviously there must be 'a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden' but whether the evidence is sufficient in any particular case to satisfy the judge that there is a real risk of serious obstacles to enforcement, will depend on the circumstances of the case." (Emphasis by underlining added).

42. In the instant case, I am encouraged by Ms Gray to take into account the difficulties which may well exist in enforcing an order for costs against the husband in country X and/or country Z. Ms Gray further submits (rightly in my judgment) that the fact that the wife already has several million dollars to her name is not relevant; she should still not be out of pocket if she were to benefit from a costs order which she cannot enforce.

43. Mostyn J considered that at the second discretionary phase it would be incumbent on a court to consider carefully the merits of the case (see *MG v AR* at [30]). That may be right in conventional matrimonial litigation where no order for costs is the usual regime (see §27 above); but in the context of this case, I do not consider it as either necessary or appropriate to consider in any detail the merits of the substantive claim itself. The wife is being brought into the litigation, by which the husband seeks to disturb a concluded agreement, against her will; if she succeeds then it seems to me that she is likely recover her costs. In civil and commercial cases, it is usually only in those cases where it can be shown without detailed investigation of evidence or law that the claim is certain or almost certain to succeed or fail that the merits are taken into consideration (see *Mountain Ash Portfolio Ltd v Vasilyev* [2022] EWHC 1867 (Comm) at [20], [23] and [24]).

44. In *MG v AR*, Mostyn J provided (at [53]) a useful distillation of the approach of the court to the second discretionary stage of an application for security for costs in what may be regarded as a conventional family case. Nothing I say here is intended to cast doubt upon that section of his judgment. Adopting Mostyn J's helpful list, I have approached the question in this case as follows:

i) I must have regard to all the circumstances of the case, and endeavour to make an order which is 'just';

ii) If the imposition of the order for security for costs would have the effect of stifling the substantive application, then it would not be likely to be 'just' and I would not make it;

iii) In considering the ability of the husband to pay, I need to take a reasonably high level approach to the evidence about his means, and am entitled to make robust assumptions about them;

iv) I need to consider whether there is a real risk (*Bestfort* above) that the wife would not be in a position to enforce an order for costs against the husband;

v) I must consider whether the application was made promptly;

vi) I will fix the amount in a robust, broad-brush manner, deploying a wide discretion. Historic costs are fully claimable. The evidence of the respondent seeking security must provide full detail of claimed historic costs and a detailed estimate of future costs;

vii) When fixing the amount of the security it is open to me to reflect litigation uncertainties and potential reductions on detailed assessment.

As I have earlier explained, the substantive application before the court in this application (under rule 9.9A FPR 2010) is more akin to a civil claim; therefore I have put on one side for now Mostyn J's focus in [53] on the evaluation of the merits of the substantive claim, and I have not reproduced those sub-paragraphs from his judgment which deal with that here.

45. On the issue of 'stifling' (see §44(ii) above), I was addressed by both parties; this concept derives from the judgment of Peter Gibson LJ in *Keary Developments Limited v Tarmac Construction Ltd* [1995] 3 All ER 534:

> "The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression such as by <u>stifling a genuine claim</u> by an indigent company against a more prosperous company". (Emphasis by underlining added).

Mr Glaser argued that any order for security for costs would indeed have the effect of 'stifling' the husband's ability to pursue the claim given the limited 'liquid' resources now available to him. Mr Glaser sought to emphasise the husband's diminishing funds.

46. Ms Gray emphasised that the burden falls on the husband to demonstrate on the balance of probabilities, and on the evidence, that his claim would be 'stifled', and referenced the judgment of Eady J in *Al-Koronky v Time Life Entertainment Group Ltd* [2005] EWHC 1688 (QB) at [31]). She highlighted the need for

> "… full, frank, clear and unequivocal evidence before [the court] should draw any conclusion that a particular order will have the effect of stifling." (*Al Koronky* at [31]).

In this case, she asserts that the husband has not provided the court with that quality of evidence. Moreover, she submitted, if the husband cannot provide the security from his own resources, it is perfectly proper for the court to consider whether he can provide it from third parties.

47. There are two supplementary points which I have taken into account. First is that *Article 6* of the *European Convention on Human Rights* is plainly engaged here. But this is not just engaged on the husband's side. *Both* parties have the right of access to the court and a process which is inherently fair. Secondly, that if the risk is that of non-enforcement of any of a costs order, then the starting point should be that the defendant is entitled to security for the *entirety* of his costs: see Hamblen LJ as he then was in *Danilina v Chernukhin and others* [2018] EWCA Civ 1802:

> "The purpose of ordering security in such circumstances is to secure the defendant against the risk of non-recovery of those costs." [57]

Mostyn J in *MG v AR* at [42] considered that there was some scope for a reduction to take account of litigation uncertainty and for the probability that the costs budget may well include some items which the claimant could later successfully challenge on a detailed costs assessment.

Security for costs: decision on these facts

48. As I mentioned above (see §9), during the marriage and since the breakdown of the marriage, the husband has travelled extensively for work. During the marriage he was largely based in city Y; at no time in the earlier proceedings did he assert that he was habitually resident in England. I am led to understand that he does not pay tax here. In the last calendar year, he spent about one-quarter of the year in this country, and for the remainder of the year he was abroad. There is very little evidence which supports the contention that the husband is 'resident' here 'permanently', nor that he treats London as his 'settled' or 'usual' place of abode; he has specific reasons to be here (seeing his children and doing business) and the impermanent nature of his accommodation (part-furnished short let) suggests a somewhat transient presence. In his written evidence in support of his applications and in response to those of his wife he has not asserted, either strongly or at all, that London is his usual or permanent home. While in 2023 he spent a marginally greater number of nights in this country than in any other single country, this does not of itself translate into a finding that he was 'resident' here. All of the husband's assets are held off-shore. For the purposes of considering this application, it is not necessary for me to declare where precisely the husband *is* resident; it is sufficient for me to conclude, as I do, that it is not in this country, and that he is therefore 'resident out of the jurisdiction'. In the circumstances, the 'gateway' in my judgment is crossed.

49. The husband's assets are held globally, including in country X and country Z (bank accounts with US$2m); it is agreed that he does not have material assets in this jurisdiction against which the wife could enforce any order for costs. The wife has already taken the initiative by pursuing enforcement action against the husband in country C. It seems to me that there is a 'real risk' that the wife will not be in a position to enforce any order for costs against the husband should she be successful in claiming the same, and/or that the route to enforcement would be crowded with obstacles.

50. Would such an order 'stifle' the husband's legitimate access to court, having regard to his assets? Mr Glaser emphasised the lack of liquidity of the husband's assets. I was presented with some very crude descriptions and calculations of the husband's assets,

his personal expenditure, and other outgoings. The figures were in many instances rounded off to a significant extent; there was some challenge to the items in the asset schedules, and the valuations, but I am not in a position to resolve the disputes. There are enormous mortgages on the city Y and London properties which need to be serviced over the next five months (at least); these properties need to be maintained for the benefit of both parties. The husband must of course fund his own legal expenses. Mr Glaser urges me not to condemn him to a point where he "only has US$500,000 to his name" between now and the final hearing.

51. The husband nonetheless claims not insignificant sums on his own personal expenditure (US$600,000 per annum); he rents an expensive apartment in city Y for his own use, notwithstanding that he owns (and services a sizeable mortgage on) a property there which stands vacant for extensive periods in the year, which suggests a somewhat bounteous approach to his personal expenditure. He rents at not inconsiderable expense an apartment in London, while choosing to stay in hotels in country Z. On his own case he currently has access to approximately US$2.2m in liquid capital.

52. Working on the figures which have been presented to me, I am satisfied that the husband could find a relevant sum as security for costs from his own resources; insofar as this may be challenging, it is obvious that he has been successful in achieving extensive borrowing in the past, and I am entitled to conclude that he retains this facility at least to some degree.

53. The wife's claim is for £637,882 (broken down as to costs incurred and forecast – see §5(ii) above). I note that the husband's costs to date are c.£330,000. Making an adjustment for litigation uncertainties, and potential reduction on detailed assessment, I find that the husband should provide the sum in this regard of £480,000, reflecting overall a deduction of approximately 25%. I shall require the sum of £300,000 to be added to the frozen account into which the US$6m is shortly to be paid within 14 days of the date of this order (or within 7 days of the creation of the account if later); the balance of £180,000 shall be paid by 28 March 2024.

54. I make clear that in the event that the husband defaults on the payment of security for costs, the wife should apply back to the court for consideration of appropriate measures. At that hearing I will need to decide whether the substantive application should be summarily dismissed. This, I believe, corresponds with the practice in the Commercial Court (*Radu v Houston and Another* [2006] EWCA Civ 1575, [2007] 5 Costs LR 671, [2006] All ER (D) 295 (Nov)) and was endorsed by Mostyn J in *MG v AR* at [52].

Case Management

55. I have been asked to consider a number of case management directions.

56. Should the husband's application for variation of the periodical payments be dealt with at the same hearing as the determination of the *Barder* application? Currently, five court days are set aside for the hearing of the husband's application; the parties will almost certainly need to give (at least short) oral evidence, as will – in all probability – some or all of the four experts whose reports are already before the court. Given the need for judicial reading time, and judgment writing time, I do not

believe that there will be sufficient time within the five days also to consider in appropriate detail the husband's application for variation of the periodical payments. Furthermore, and in any event, it seems to me that there would be a value for the parties and the court in knowing the capital position (post the *Barder* hearing) *before* moving to the question of possible variation of the periodical payments; the husband's ability to pay maintenance, and the wife's ability to meet her own outgoings, will inevitably depend upon the capital resources available to them.

57. The expert reports are all supported by extremely lengthy appendices containing highly technical documents (there is an account of one exhibit simply being unexplained spreadsheets of figures: 'Comparative World Overview Tables'). One exhibit runs to over twenty-two lever arch files. The size (and indeed, from counsel's descriptions, the content) of these appendices will be indigestible to the court in such a short hearing. I have made clear to the parties that the information on which the experts wish to rely will need to be condensed and translated into a form and size which is manageable and proportionate for the enquiry on which I will be engaged.

58. There has been some discussion about whether I should see any part of the transcript of the FDR appointment on 4 October 2021, or (at the very least) a note of the indication given by Moor J at that appointment. Some of the transcript of the appointment (and/or the indication) has regrettably already found its way into an experts' report, and indeed into the husband's witness statement. The wife, too, makes reference (albeit only in general terms) to what the husband and Moor J said at the FDR. I recognise that the FDR is a confidential process, and there is bound to be some sensitivity around what was said by and/or on behalf of the parties; it may well be that admissions were made in the FDR in a genuine attempt to reach a settlement. This is all the more delicate as the husband was unrepresented throughout the earlier process. I am conscious of the terms of para.6.2 of PD9A FPR 2010:

> "As a consequence of *Re D (Minors) (Conciliation: Disclosure of Information)* [1993] Fam 231,evidence of anything said or of any admission made in the course of an FDR appointment will not be admissible in evidence, except at the trial of a person for an offence committed at the appointment or in the very exceptional circumstances indicated in *Re D*."

59. I note that in the husband's Form E filed in 2020, he made a number of references to matters which may in fact be relevant to the *Barder* event, and their impact on assets. It seems to me that the parties and/or the Judge may well have picked up these points and developed discussions in this vein at the FDR. If comments were made in this regard at the FDR, then this may well be relevant to the *Barder* application. In short, I feel I should have some understanding of the factual basis on which the final order was agreed, and whether risks to assets were then in contemplation and if so to what extent. I have asked the parties to consider this more fully, and in default of agreement, have proposed that they refer the issue back to Moor J. In forming all of these views, I have borne very much in mind the judgment of Thorpe LJ in *Myerson v Myerson* [2008] EWCA Civ 1376; [2009] 1 FLR 826.

60. I consider it appropriate to direct that the experts in the same disciplines should meet, and draw up a schedule of agreement and disagreement. If after those meetings either

party wishes to put further questions to the experts (or any of them), then this can be considered at the pre-trial review hearing which is fixed for 10 April 2024.

61. In my view it would be appropriate for both parties to file up to date statements of financial disclosure on Forms E2 prior to 10 April 2024. The information contained therein may be relevant to the issues of relief if the husband is successful in persuading me that the 2021 consent order ought to be varied or in part discharged on *Barder* grounds.

62. I shall ask counsel now to draw the order to give effect to these rulings.

[END]