Neutral Citation Number: [2024] EWHC 464 (Ch)

Case No: PT-2023-000911

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUST AND PROBATE LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 07/03/2024

Before :

MASTER KAYE

- -

Between :

(1) KAMLESH PATEL **(2) PARUL PATEL** **(3) HABILIS CARE HOMES LIMITED** **(4) HABILIS OPERATIONS LIMITED**	**Claimants**
- and -	
(1) ISABELLE MICHELLE PAULE AWAN **(2) SARFARZ ALAM AWAN**	**Defendant**

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Joshua Griffin (instructed by **DLS Law**) for the Claimants
Alice Nash (pro bono through Advocate) for the Defendants

Hearing date: 7 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 7 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER KAYE

Master Kaye:

1. This is my determination of the claimants' Part 8 claim for an order sale in respect of 10 The Glebe, Clapham, Bedford, MK41 6GA ("the property"). Mrs Awan, the first defendant, is the registered proprietor of the property.

2. This claim was issued on 20 October 2023 ("the claim"). The charging order on which it relies was made on 5 February 2019. That charging order was obtained to secure an unpaid order for an interim payment included at paragraph 3 of an order dated 20 October 2017 ("the Order"). The Order and the charging order were made in what I will refer to as the underlying proceedings (HC-2014-000621). In those underlying proceedings the parties' positions were reversed. For ease of reference I shall therefore refer to the claimants (Mr and Mrs Patel and two related companies) as the Patels and the defendants (Mr and Mrs Awan and a related company) as either the defendants or Mr and Mrs Awan as applicable.

3. Mrs Awan was unsuccessful in the underlying proceedings and her claim was dismissed. The Order records that Mr and Mrs Awan had conceded the counterclaim and the additional claim.

4. The Order was made at the consequentials hearing in the underlying proceedings following a trial earlier in the year. Mrs Awan was represented by EMW solicitors and counsel, Mr Yell. Mr Awan was the third party and represented himself. The Patels were the defendants in that claim.

5. For these purposes, the parts of the Order which are relevant to this claim are those related to costs. The Order records the following:

   > "(2) [Mrs Awan and Mr Awan] be jointly and severally liable to pay the Defendants their costs of the Claim, Counterclaim and Additional Claim, on the standard basis to be assessed if not agreed.
   >
   > (3) [Mrs Awan and Mr Awan] do pay the Defendants the sum of £118,800 on account of the costs ordered to be paid under paragraph (2) above, by 4pm on 10 November 2017."

6. The Order therefore provides that Mr and Mrs Awan are jointly and severally liable for the Patels' costs of those underlying proceedings but in addition orders them to make a payment on account of those costs. The Order sets out an identified sum of money, £118,800 to be paid by a specified or due date of 4pm on 10 November 2017. The order therefore appears to identify both a sum to be paid and the date by which it should be paid.

7. Mr and Mrs Awan have not paid any part of the payment on account and say they are not able to. They accept they are in breach of the Order. They resist the order for sale on the basis that they argue that the payment on account is not yet due.

8. The defendants' primary position is that paragraph 3 of the Order cannot be enforced by way of a charging order and so the claim cannot succeed. If they are wrong about

that then they ask the court not to make an order for sale relying on various discretionary factors.

9. The claim is supported by witness statements from Mr Rupal and Mr Dass, solicitors for the Patels, dated respectively 19 October 2023 and 6 February 2024.

10. The evidence in response to the claim is provided, primarily, by Mr Awan with which Mrs Awan agrees. The defendants' evidence is contained in:

    i) two acknowledgments of service which are in identical form which were emailed to the court and the claimants on 5 November 2023

    ii) the first witness statement of Mr Awan dated 18 December 2023. This witness statement consists of very little evidence and is more akin to legal submissions. It runs to 11-pages of which only two paragraphs relate to the discretionary factors the defendants want the court to take into account in respect of the claim. The exhibit consists of documents relating to the underlying proceedings and subsequent claims against Mrs Awan's former solicitors and counsel which were struck out. These documents confirm that Mr Awan represented Mrs Awan in those subsequent claims as he has in this claim to date.

    iii) the first witness statement of Mrs Awan dated 18 December 2023. This witness statement runs to two pages and addresses a short point about her non-attendance at the hearing on 5 February 2019, when the final charging order was made, but otherwise adopts Mr Awan's witness statement as setting out the reasons why the court should not make an order for sale.

    iv) the second witness statement of Mr Awan dated 5 February 2024. The substantive part of the statement runs to 7 paragraphs addressing the discretionary matters the defendants rely on. The exhibit is a document relating to the defendants' son's universal credit position.

11. Ms Nash who represents the defendants at this hearing was acting on a pro bono basis having been allocated to the defendants' by Advocate a few days before the hearing. Mr Awan's very late second witness statement was as a consequence of her involvement. Mr Dass's witness statement was said to be responsive.

12. I have had the benefit of written and oral submissions from counsel which I have taken them into account when reaching this decision even if I do not set out each point or argument that they advanced during the hearing. I have read the evidence carefully and reflected on the matters raised by the defendants.

13. The defendants rely on their lack of representation earlier in this claim to justify the lack of evidential support for the assertions they make about the position of Mr Awan and two of their adult children and their inability to obtain evidence to support those assertions since Ms Nash was allocated to them.

14. However, the court expects litigants in person to comply with the court rules, orders, and practice directions. There is no different standard of compliance. There might at best be some flexibility at the margins. In this case although unrepresented more recently, Mrs Awan was represented by solicitors and counsel in the underlying

proceedings including when the Order was made. In addition although non-practising Mr Awan was by background a litigation solicitor and so should have a better understanding of what is expected of the defendants than some unrepresented parties. He represented himself in the underlying proceedings and has assisted Mrs Awan in relation to further claims as set out above.

15. In *Barton v Wright Hassall LLP* [2018] Lord Sumption said that where a party is unrepresented, "it will not usually justify applying to litigants in person a lower standard of compliance with the rules or orders of the court. The overriding objective requires the court so far as practicable to enforce compliance with the rules… The rules do not in any relevant respect distinguish between represented and unrepresented parties."

16. There was nothing inherently complicated, complex, unusual, or even onerous about the need to provide evidence in support of the discretionary factors on which the defendants wished to rely. Even less so given Mr Awan's background. I therefore consider any non-compliance by the defendants with that in mind.

17. The defendants' acknowledgments of service were served in time but by email. The claimant did not accept service by email. The defendants failed to serve their evidence at the same time and therefore needed permission of the court to rely on any evidence (CPR 8.5 and CPR 8.6). The defendants applied out of time on 10 November 2023 for a further 28 days to serve their evidence. The application resulted in the first disposal hearing in December 2023 being vacated and relisted. The witness evidence subsequently relied on was dated 18 December 2023 more than 28 days after 10 November. It was not filed on the court file at that time.

18. As set out above two further witness statements were filed by Mr Awan and Mr Dass shortly before the hearing.

19. At the outset of the hearing I determined that it was most consistent with the overriding objective and good case management, having regard to all the circumstances, to allow the parties to rely on all the evidence they had served whether late or not so that the hearing could be effective. All parties were in a position to progress the claim. In so far as the failures of compliance fell to be determined by reference to the Denton criteria it was appropriate to grant relief.

20. The defendants oppose the claim and seek in addition to have the charging order set aside on the basis that it was not properly made. There is no application to set aside the charging order although included in the Acknowledgment of Service is a request for an alternative remedy of setting aside the charging order. The charging order on which the claim is based was made 5 years ago in February 2019. No application, whether to set aside, vary or appeal the charging order, appears to have been made in the underlying proceedings.

21. Although Mr Awan sought permission to appeal in relation to some aspects of the Order, paragraph 3 of the Order which sets out the interim payment was not the subject of any application for permission to appeal by either Mrs Awan or Mr Awan at the time the Order was made over 6 years ago.

22. The defendants accept that paragraph 3 of the Order was an order to pay a sum of money which they have not paid. They accept they are in breach of the Order but say this is a case of "can't pay" not "won't pay" and should be viewed in that context.

23. They argue that paragraph 3 of the Order is not enforceable by any method that would require payment now because it is based on a contingent liability that has yet to be determined. It is not yet therefore due. This is based on the premise that until there has been a detailed assessment of the costs under paragraph 2 of the Order the sum that will be due cannot be properly ascertained. Consequently whether for the purposes of the Charging Orders Act or most other forms of enforcement there is not yet any sum due under paragraph 3 because it is an interim payment on account of the sum in paragraph 2. There is no sum which can be enforced.

24. Ms Nash argued that only limited forms of enforcement were available where an order was interim, and essentially on account, and that this applied to interim on account payments for costs and damages and interim costs certificates.

25. She submitted that although the non-payment of an order for an interim payment could not be enforced using for example charging orders or third-party debt orders which require the sum to be due, there were other suitable forms of enforcement that could be used. She argued that the solution was for the party with the benefit of the interim order to get on with getting to a final order. In the case of costs this would mean progressing a detailed assessment.

26. The types of enforcement she argued would be available included contempt and debtor questioning, as well as unless orders or debarring orders requiring payment with a sanction including those which might debar a party from participating fully in any subsequent detailed assessment (see for example *Days Healthcare UK Limited v Pihsiang Machinery Manufacturing Co Ltd* [2006] EWHC 1444). She also pointed to the possibility of applying back to court to seek an order that the costs be summarily assessed (see *Pipia v BEGo Group Limited* [2022] EWHC 846 (Comm)) which would then crystallise the sum due and enable the Patels to use all the methods of enforcement that she submitted were not otherwise available.

27. *Pipia* was a substantial claim involving overseas defendants where after a determination of an interim payment on account of costs the receiving party applied back to court to convert the interim payment on account into a summary assessment so that it was a final order for the purposes of enforcement overseas. This was no different in concept to seeking summary judgment rather than default judgment to obtain an order on the merits for enforcement overseas. It was an application to address a specific issue that arises in some overseas jurisdictions. Nonetheless in order to do this the applicant had to persuade the judge that the change was one that came within the well-known test in *Tibbles v SIG* [2012].

28. Ms Nash relies on this as evidence of the other steps that the Patels could take to ensure they had an enforceable final order and to reinforce her argument that an interim payment on account is not enforceable. But there was no suggestion in *Pipia* that the interim payment would not have been enforceable without more in this jurisdiction.

29. Each of Ms Nash's suggested alternative forms of enforcement on the basis that the sum was payable but not due would have required the receiving party to take additional

steps and incur additional costs and time and would not obviously result in payment, which of course was Ms Nash's point. It was not an attractive argument.

30. Ms Nash argued that there was no injustice to the Patels if the Order had this effect as the Patels were in a position to take steps to determine the sum due by progressing the detailed assessment. Their inability to enforce now was because they had not progressed the detailed assessment for 6 years.

31. These submissions which were set out at some length in Mr Awan's first witness statement seemed to me to be based on a fundamental misconception about the nature of an interim payment on account of costs. To suggest as Mr Awan and Ms Nash did, that an interim payment, was not a sum due for payment but only payable seemed to me to undermine the very purpose of the development of payments on account and the perceived unfairness and prejudice to a receiving party that they were intended to address. The submissions appeared to seek to undermine and circumvent the policy behind interim payments on account and ignore the cultural shift in the policy and approach to civil litigation arising from both the Woolf Reforms and the Jackson Reforms.

32. Since the introduction of the CPR in 1999 the court and the parties have been expected to further the overriding objective by managing cases justly, fairly, efficiently, and proportionately including as to costs. Part of the cultural shift and the aim of the overriding objective was to reduce the number of what Sir Rupert Jackson was later to describe as, "frivolous applications" by having a process of immediate costs consequences (for example summary assessment) rather than leaving the sanction or consequences of an unsuccessful or bad application resulting in an adverse costs order to be dealt with at the end of a claim. The introduction of this pay as you go approach was intended to benefit access to justice and be consistent with the overriding objective. It was also intended to embed the cultural change created by the overriding objective and the duty on the parties to help the court to further it.

33. Consistent with the overriding objective and the policy behind the introduction of the CPR it is not surprising that where the quantum of any costs order or sanction arising out an adverse costs order, whenever made, could not be determined immediately there was a process by which the court would award a payment on account in the interim pending a detailed assessment (see for example *Mars UK Ltd v Teknowledge Ltd* [1999]). The liability to pay the costs arose when an adverse costs order was made the only difficulty was the ability of the court to immediately determine the amount.

34. By the time of the Jackson Reforms the policy considerations of pay as you go and the concept of an interim payment on account was embedded into civil procedure. Such awards had become common place if not the norm and were just one of the tools used to further the overriding objective, encourage, and embed good conduct and assist with good case management.

35. CPR 44.2 (8) introduced in 2013 brought in a presumption in favour of interim payments. From its introduction in 2013 the presumption in CPR 44.2 (8) was that where there was an adverse costs order that could not immediately be quantified whether after an application or at the end of a claim, the court would order payment of a reasonable sum by way of interim payment pending detailed assessment unless there

was a good reason not to do so. The effect of CPR 44.2(8) was to shift the burden to the paying party to persuade the court that there is a good reason not to do so.

36. Even though the defendants accepted that CPR 44.2 (8) created a presumption in favour of the making of an order for an interim payment they argued that an interim payment still did not give rise to an entitlement to enforce by way of payment because it was still contingent and the due date for payment would only arise when the detailed assessment to which it related had been completed.

37. The Patels therefore could not enforce their interim payment on account until they have undertaken a detailed assessment to determine the final sum payable and due in relation to costs. Only then would it be possible to enforce the sum then found due by use of say a charging order which requires a sum to be due and consequently an order for sale. The charging order should therefore be set aside and this claim should be dismissed.

38. To resolve these issues it is necessary to look at both CPR 47 and the rules relating to detailed assessment and the nature and effect of an interim payment made under CPR 44.2(8).

Detailed Assessment

39. CPR 47 sets out the rules and procedure for detailed assessment. As set out above an adverse costs order is an immediate liability to pay subject to the ability of the judge to determine quantum. Pursuant to paragraph 2 of the Order the Patels are entitled to their costs of the claim to be paid on a standard basis subject to detailed assessment against Mr and Mrs Awan. Pending that detailed assessment an interim payment on account was ordered to be paid by the defendants.

40. In simple terms, CPR 47.7 provides that a detailed assessment must be commenced by a date 3 months after the date of judgment or order which gives rise to the entitlement to costs. The Order was made at the conclusion of the trial in the underlying proceedings. The 3-month period for the commencement of the detailed assessment ran to a date in January 2018. No detailed assessment has yet been commenced 6 years later.

41. Although I was not taken to the authorities which consider both the effect of any delay in commencing a detailed assessment and the consequences if any, some are referred to in the White Book 2023.

42. There are many reasons why a detailed assessments may not be commenced within the 3-month time period allowed in CPR 47.7 or indeed at all. Some will relate to the complexity and size of the bill to be drawn but others will be for more nuanced case specific reasons. However, it is not necessary to obtain permission to commence a detailed assessment out of time because CPR 47 provides a series of checks and balances which address the consequences of not commencing a detailed assessment within that 3-month period set by CPR 47.7 (see below).

43. The Patels sought to argue that the interim payment should be paid first and before they had to proceed with any detailed assessment. There is no rule providing that the interim payment should be paid before the detailed assessment is commenced just as there is no rule that the interim payment cannot be enforced before the detailed assessment has

commenced. It is a matter of choice for the receiving party balancing the risks and benefits of not progressing the detailed assessment.

44. There are competing interests for both the paying and receiving party when considering what steps to take in relation to a detailed assessment.

45. For the receiving party, whether to incur the cost of drawing up a detailed bill of costs and pay the court fees to commence the process is a balanced decision involving value judgments about the costs and benefits to be achieved in any particular case. Weighing up the costs and benefits of pursuing the detailed assessment will be affected by whether the receiving party has an enforceable interim payment order for a substantial part of the costs they have incurred (for example in a costs budgeted case perhaps 90%) on which interest is accruing. That would be a particularly acute factor in a case where the paying party was not likely to be good for the money. And perhaps even more so if the only asset the paying party had was their family home. Against that the receiving party has to balance the potential consequences of delaying commencing the detailed assessment. Unless the paying party were to take some active step (see below) the issue is one of interest. If there is a delay beyond the 3 months in commencing the detailed assessment the receiving party's entitlement to interest could be reduced in whole or part (CPR 47.8 (3) (b). However balanced against that is the interest accruing on the interim payment and how much risk the receiving party is really taking in relation to the loss of interest on the balance of the sum eventually found due.

46. *Pipia* provides a good example of the types of issues which the receiving party might consider when deciding whether to incur the additional costs of pursuing a detailed assessment where there was a risk that not only the costs orders including the interim costs order might not be met but that any further costs would not be recovered see for example *Pipia* at [31] to [35]. Here the defendants say they cannot pay the interim payment and as set out in this judgment the position is deteriorating so the prospect of them being able to pay any further additional sum seems unlikely on the basis of the evidence they have provided on this claim.

47. For the paying party there is also a balance to be struck. For so long as the receiving party has not progressed the assessment although interest is accruing on the balance of the sum eventually found due the balance of the liability remains contingent and cannot be enforced. That is of course subject to any argument that interest should be disallowed in whole or in part under CPR 47.8(3)(b). Of course if there is an interim payment to be made then again there may be no interest on the part of the paying party in bringing forward a determination of the balance of contingent liability. It depends on the paying party's situation. There may be many reasons why a paying party is content to allow time to pass and take the risk on interest, for example an appeal, a lack of funds to make any payment and so on.

48. However, it is open to the paying party to force the receiving party to commence the detailed assessment to crystallise the liabilities. This can be done under CPR 47.8 (1) and (2). An application made under those provisions provides the court with the power not only to disallow interest but also to disallow costs which the receiving party would otherwise be entitled to. In a situation where the paying party cannot pay however, there may be some benefit to the paying party in not forcing the receiving party to take any further action.

49. It is of course also open to the paying party to pay not only the interim payment ordered but a further sum at an early stage to reduce their continuing liability for accruing interest which will also have an impact on the costs benefit assessment undertaken by the receiving party.

50. Ms Nash also referred to the court's power in CPR 44.11 to disallow costs for misconduct arguing that even if the defendants had not made an application under CPR 47.8 (1) and (2) they could still rely on CPR 44.11 to persuade the court to disallow part of the costs as well as the interest. That of course assumes that the detailed assessment is commenced without an application by the paying party to force it to be progressed. However, assuming it is eventually progressed how the costs judge assesses the question of any misconduct will be a matter for any detailed assessment in due course but delay alone is not necessarily misconduct. It would depend on all the circumstances which would include considering the overriding objective and particularly the balance of any prejudice that could not be adequately addressed through interest and the costs of the costs assessment, including whether the delay had caused any prejudice to the paying party which if they are in a situation where they say they cannot pay may not be the case.

51. There is therefore as I say a system of checks and balances within CPR 47 which coupled with an assessment of the risks, costs and benefits overall will result in a bespoke decision for each paying or receiving party in each case. There is no need for the court to interfere in that process unless an application is made under CPR 47.8.

52. The defendants criticise the delay and say if nothing else it feeds into the discretion element of this decision even if it is not a complete bar to being able to enforce the interim payment. They seek to argue that the risk that the court will disallow all or some of the costs on assessment affects the position and goes to the question of whether the interim payment can be considered to be due before the detailed assessment has been carried out. However against that they appear to have been prepared to sit back and take the benefit of that delay for the last 6 years.

53. Of course if a detailed assessment were commenced in due course the Patels might be in a position to seek an interim costs certificate under CPR 47 but on Ms Nash's analysis such a certificate would not be enforceable as a money judgment either until after the detailed assessment. That did seem to me to rather beg the question as to what the defendants considered to be the purpose of any of these processes for obtaining interim orders. That was particularly so given that Ms Nash accepted that an interim payment on account was to ensure the flow of money between the parties but yet she maintained that if not paid could not be enforced as a sum that was due.

54. It certainly did not seem to me to be in keeping with policy or the underlying purpose of the changes in the civil procedure let alone to meet the balance between the parties consistent with the overriding objective.

Enforcement of a contingent liability

55. It seemed to be common ground that a contingent liability to pay costs where there was no ascertained sum was not yet due for payment. It also seemed to be common ground that in those circumstances there would be no sum due for the purposes of section 1 of the Charging Orders Act 1979 or other forms of enforcement.

56. I was referred to several authorities by the parties, *Pluczenick Diamond Co NV v W Nagel (A Firm)* [2019] EWHC 3126 (QB) Griffiths J, *Monte Developments Ltd v Court Management Consultants Ltd* [2010] EWHC 3071 (Ch) at [35]-[38], *Magiera v Mageria* [2016] EWCA Civ 1292 at [61].

57. I did not find any of these authorities particularly helpful. They simply confirmed the well-recognised position that unassessed costs are a contingent liability and not a liquidated sum. They did, however, provide some authority to support the proposition made by the Patels, with which I agree, that an interim costs order could be secured and enforced by way of a charging order.

58. In *Monte,* a charging order was discharged as it was based on unassessed costs which did not amount to a judgment for a sum of money which was due. The court concluded that save for the orders for summarily assessed costs and an order for an interim payment on account of damages there was no ascertained sum which was due for the purposes of section 1 of the Charging Orders Act 1979. I agree. Notably no issue was raised by the paying party about the enforceability of the interim damages order. In *Magiera*, applying the logic in *Monte* a charging order was discharged because it sought to secure unassessed costs.

59. *W Nagel* involved an order for debtor questioning based on an order for an unascertained sum. The only point sought to be drawn from that authority is that unassessed costs or an unascertained sum are not yet due. Again I do not disagree.

60. Mr Griffin relied on *Monte* as support for his submission that an interim award could be enforced by way of a charging order (in *Monte* the interim damages were secured) and also *Al-Khayat v Al Khayat* (unreported 10 August 2007) in which Master Moncaster discharged a charging order made in 2005 in support of an interim costs order because the interim costs order had been paid. He would not maintain it for the purposes of securing some future as yet unascertained sum pending a detailed assessment. Again entirely consistent with unassessed costs or unascertained sums not being securable or enforceable by use of a charging order or indeed by any other type of enforcement that required an ascertained sum that was due. Again, notably the interim costs order had been secured by way of a charging order.

61. *Erlam v Rahman* [2015] EWHC 2370 (QB) is of tangential interest since although the decision is about other issues it is clear that an order was made for an interim payment on account and detailed assessment and that the interim payment was secured by way of interim charging orders over three properties. Again not surprising. The unassessed costs were not secured but the interim payments were.

62. What is clear from the authorities to which I was referred is that there is a distinction to be drawn between unassessed costs which are a contingent liability and those which have been determined. Furthermore the authorities, understandably and consistently, distinguish between unassessed and contingent liabilities which could not be secured by way of a charging order because they were not ascertained and due and interim payments which could be secured.

63. For Ms Nash's analysis to be accepted she had to persuade me that this was wrong and an interim payment on account was a contingent liability dependent on the ultimate outcome of any detailed assessment.

What is an interim payment on account of costs?

64. As set out above CPR 44.2(8) provides that the court will order the paying party to pay a reasonable sum on account of costs, unless there is a good reason not to do so. Thus it is a mandatory requirement for the court to order a payment on account unless there is a good reason not to do so.

65. As set out in the notes in the White Book 2023 at 44.2.12 the object of the rule is to enable a receiving party to recover part of their expenditure on costs before the possibly protracted process of carrying out a detailed assessment (see for example *Days Healthcare*). Implicit in that understanding is that such interim payments are enforceable in a manner that requires payment of the reasonable sum determined by the court. However, Ms Nash argues that whilst the interim payment was payable because it was not yet due it could not be enforced using methods that require payment now and in advance of the completion of the detailed assessment.

66. In determining whether there is a good reason not to order a paying party to pay a reasonable sum on account of costs the court may take into account a number of factors including the stage in the proceedings and whether such an order will affect the ability of one party to continue to pursue the claim. But each case will be considered on its own particular circumstances at the time at which the order is made. It will be for the paying party seeking to persuade the court that there is some good reason not to make an order for an interim payment on account to evidence that good reason. Where, as here, the order for the payment on account was made after a trial there may be more limited scope to resist it particularly in a case where, as here, there has been costs management. Importantly the time to resist it and to make submissions about whether there should be an interim payment at all and if so in what amount is at the hearing when the order is made not 6 years later.

67. In cases where a costs management order has been made, and the future costs had been the subject of costs budgeting, the determination of a reasonable sum at least in relation to future costs has become simpler as it can be based on the costs budget as approved by the court. An approach more akin to that in non-costs budgeted cases may be appropriate in relation to incurred costs if they are very substantial even if the future costs have been the subject of costs management.

68. Where the court has undertaken a costs management exercise the paying party will have had the benefit of a detailed costs budget certified as representing a reasonable and proportionate sum for both incurred and future budgeted costs. The paying party will have had the opportunity to comment on and challenge the quantum of those costs (both incurred and future costs) at a CCMC. The court will have determined what it considers to be a reasonable and proportionate sum for the future costs on a standard basis and may, if persuaded by the paying party, have commented on the incurred costs. This provides a good base or starting point for the court to determine a reasonable sum.

69. However, even where there has been cost budgeting, as here, the court still has to determine a reasonable sum to allow for an interim payment. In doing so it must take into account all the circumstances particularly where the paying party is arguing that there is a good reason not to order any payment on account. There are numbers of authorities which look at what might be a good reason to make or not to make an order for a payment on account.

70. In *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm) ("*Excalibur"*) Christopher Clarke LJ explained that a reasonable sum on account will be an estimate of the likely level of recovery dependent on the circumstances and involves an element of uncertainty. He identified some factors that might be relevant to that consideration and made it clear that the assessment was not based on an irreducible minimum.

71. The amount sought, the quality of the information provided and all the circumstances including whether the future costs have been cost budgeted will determine whether and in what amount the court will order an interim payment on account.

72. It is for the receiving party to provide sufficient information to enable the court to be satisfied that it can safely make an order for an interim payment of a specific amount and for the paying party to identify any factors it considers relevant to that consideration at the time at which the order is made.

73. In costs budgeted cases an assessment has already been made about what is reasonable and proportionate in relation to future costs and authorities such as *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 3258 (Ch) have moved towards the simplicity of adopting a high percentage interim payment of say 90%. However, that is not set in stone and there may be proper reasons for reducing that percentage for example where a particular step that was included in the costs budget has not been undertaken or where additional costs have been incurred on some proper basis outside/beyond the budgeted costs. There may be other good reasons for adjusting any interim payment on account but that will depend on the information, evidence and circumstances relied on by the receiving and paying parties at the hearing at which the reasonable sum is determined.

74. Even in costs budgeted cases, there may be good reasons to take a more circumspect approach to incurred costs see for example *Bates v the Post Office Ltd (No5: Common Issues Costs)* [2019] EWHC 1373 (QB) which resulted in a lower percentage being applied to incurred costs than to the future budgeted costs.

75. Each case will ultimately turn on its particular circumstances and the quality and nature of the information provided by the parties to assist the court in determining a reasonable sum.

76. This process can be seen clearly in the authorities which Ms Nash relied on and in particular paragraphs [23] and [24] of *Excalibur*. There are many subsequent authorities which address how the court determines what is a reasonable sum and the factors it takes into account including authorities which expand on the factors identified by Christopher Clarke LJ such as the risks of an overpayment and repayment or the risks associated with a successful challenge in relation to a retainer issue. These fully address each of the concerns raised by Mr Awan about the possibility that the sum eventually found to be due on a detailed assessment might be less than the sum awarded to date.

77. The very process of determining a reasonable sum can take into account the risk of the sum being sought by the receiving party being too high and the risk of a paying party having difficulties in recovering any sum overpaid. Again this process can be seen clearly in a number of the authorities such as *Excalibur* at [24] and other authorities (see for example *Tulip Trading Ltd v Ver* [2022] EWHC 2970 Ch). However, it is for the paying party to raise any concerns they have on some proper basis at the time at

which the court is considering making the reasonable sum for an interim payment not 6 years later as a basis for undermining the enforceability of the interim payment which the court awarded.

78. I note additionally that the notes in the White Book 2023 at 44.2.12 also address a situation where the paying party says they are not in a position to pay any reasonable sum that might be ordered. Again it is a matter to be addressed at the hearing at which the court is considering whether and in what amount to make an order for an interim payment. It is no more than another factor to take into consideration if raised. It does not preclude the making of an order for the payment of a reasonable sum on account.

79. The determination of what sum is a reasonable sum to award under CPR 44.2(8) is not a guess, or even a best guess as Ms Nash sought to argue. It is a binding judicial determination of a reasonable sum based on all the circumstances of the case and the factors raised by the parties as to the likely level of recovery taking into account the nature and quality of the evidence available in relation to quantum. In undertaking that judicial determination the court determines whether to make any award at all and if so in what amount.

80. An interim payment on account of costs is therefore a final judicial determination or decision of a reasonable sum to be paid by the paying party to a receiving party.

81. Having made an order for a payment the reasonable sum, the sum so ordered is to be paid by either the date specified by the court and incorporated into an order or if no time period is specified by any rule, practice direction or statute. For judgments or orders the default position is 14 days. Again the time period will be the subject to a judicial determination based on the submissions made by the parties at the time the order is made.

82. As I have noted there are other examples of provisions in the CPR pursuant to which the court makes interim orders pending a final assessment. In costs terms where a detailed assessment has been commenced the court has the power to issue an interim costs certificate. Whilst the court does have the detailed bill of costs it still has a complete discretion as to the amount that can be awarded by way of an interim costs certificate and it would be payable in 14 days. Interim payments for damages (CPR 25) are made before damages are finally assessed and the rules and practice directions specifically cater for the possibility of an adjustment being required at the end.

83. Ms Nash's best guess argument would apply equally to any of these situations. In each case there has been no final determination but the court has determined a reasonable sum to award based on the evidence before it. There is no fundamental difference between interim payments on account of costs, interim costs certificates or interim damages payments. All three require the court to make a judicial determination of the appropriate sum to award having regard to all the circumstances raised by the parties at the time they make such a judicial determination. All three processes do so in advance of a final determination and all three recognise the possibility of the sum awarded on an interim basis may prove to be too high.

84. It would be nonsense to suggest, for example, that an award of interim damages to provide for ongoing care in a serious personal injury or medical negligence case was not due and enforceable if not paid. Ms Nash's argument that alternative means of

enforcement could be used such as contempt or debarring orders does not get to the heart of the policy reasons for interim payments which as she herself explained was about the flow of money from the paying party to the receiving party. Ms Nash's argument seemed to me to fundamentally undermine the concept of interim payments and the policy behind them.

85. Each of the arguments about the risks associated with making the interim payment due in advance of completion of the detailed assessment were ones which the courts had already grappled with. As set out above they may be factors to take into account depending on the particular circumstances of a case but most importantly they are factors to be raised at the time at which the court is determining the reasonable sum. They do not preclude the court ordering an interim payment. Once the payment has been ordered it represents a final determination by the court and is an enforceable order for a payment of costs by the date specified.

86. Ms Nash and Mr Awan's arguments about the interim payment and the risks attendant on paying it in advance of the detailed assessment were made at the wrong time and in the wrong place and in any event were unsupported by any evidence at all and appeared to be based on speculation.

87. Such arguments should have been made at the hearing on 20 October 2017. Indeed it would have been too late to make them in February 2019 when the charging order was made. Any challenge to the interim payment once ordered whether as to principle or amount should have been made by way of an appeal against the Order in 2017.

88. Any outstanding arguments about the quantum of the costs overall or the Patels retainer can be made at the detailed assessment in due course should Mr and Mrs Awan wish to raise them on some proper basis. If they feel strongly about them then they can force the Patels to commence the detailed assessment using the process set out in CPR 47.8.

89. No issue has in fact been raised about the amount of the interim payment save for the vague unsupported argument that on detailed assessment the sums might be reduced as part of the justification for saying it is a contingent liability until the detailed assessment has been undertaken. I note that there is no suggestion that the interim payment if paid and later found to have been too much would not be repaid.

90. For completeness however, and without engaging in the detail, I have been provided with a copy of the Patels' skeleton argument before Mr John Baldwin QC from October 2017. It is clear that the starting point for the interim payment was based on 90% of the approved costs budget. From that the contingencies that had not been incurred and sums for summarily assessed costs were deducted to give the total of £118,000.

91. Mr and Mrs Awan had an opportunity to make representations in relation to the amount of the interim payment on account at paragraph 3 of the Order. Mr Baldwin QC determined the reasonable sum for the interim payment based on the representations and submissions made to him. That was a final judicial determination of an amount to be paid. He then made an order which set out the amount to be paid and provided a date for payment. The amount determined became payable and due on the date for payment.

92. Consistent with the purpose and policy behind CPR 44.2 (8) interim payments on account are not contingent liabilities. The determination of an interim payment is a final

judicial determination of a reasonable sum to be paid. On the plain reading of the Order the interim payment was both payable and due and enforceable.

93. For the reasons set out I find that paragraph 3 of the Order specifies a sum of money to be paid by the paying party by a date. It if final and binding on the parties. The Order specifies a date for payment being the due date for payment. The interim payment has therefore been due for payment and enforceable since 10 November 2017.

CPR 70 and PD 70A

94. Ms Nash's argument was based on the premise that the sum was not due but for completeness having found that the sum is due the Order is therefore an order for payment of a sum of money by a specified date. CPR 70.1 and 70.2 sets out the procedural rules in relation to the enforcement of orders for the payment of money.

95. 70.1(2) (d) provides that a " judgment or order for the payment of money' includes a judgment or order for the payment of costs..." CPR 70.2 then provides that:

> (1) Practice Direction 70 sets out methods of enforcing judgments or orders for the payment of money.
>
> (2) A judgment creditor may, except where an enactment, rule or practice direction provides otherwise –
>
> (a) use any method of enforcement which is available; and
>
> (b) use more than one method of enforcement, either at the same time or one after another.

96. The CPR therefore assumes that an order for payment of a sum of money by way of costs is enforceable by various methods including charging orders. CPR PD 70A 1.1 provides specifically that :

> A judgment creditor may enforce a judgment or order for the payment of money by any of the following methods:
>
> (1) a writ of control or warrant of control (see Parts 83 and 84);
>
> (2) a third party debt order (see Part 72);
>
> (3) **a charging order**, stop order or stop notice (see Part 73);
>
> (4) in the County Court, an attachment of earnings order (see Part 89);
>
> (5) the appointment of a receiver (see Part 69).

97. CPR 70 therefore provides that a money judgment or order is enforceable including one relating to costs by use of a charging order.

98. Ms Nash did not disagree with that in principle but sought to argue as I set out above that on the strict wording of the Charging Orders Act an interim payment on account cannot be enforced by use of a charging order because the sum is not due. For the

reasons set out above I do not agree and find that an order for a payment on account is due for payment by the date specified. Consequently I consider there is a due date.

Charging Orders Act 1979

99. For completeness, section 1 of the Charging Orders Act 1979 provides:

> "Where, under a judgment or order of the High Court, …a person (the "debtor") is **required to pay a sum of money** to another person (the "creditor") then, for the purpose of enforcing that judgment or order, the appropriate court may make an order in accordance with the provisions of this Act imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of **any money due or to become due** under the judgment or order." (**my emphasis**)

100. Having concluded that the order is a judgment or order which requires the defendants to pay a sum of money and that that sum of money became due on the date specified in paragraph 3 of the Order, nothing in section 1 of the Charging Order Act 1979 seems to me to provide any gloss to the meaning of due which would prevent a charging order being used to enforce an order for interim payment on account of costs.

101. I have no difficulty in concluding that there was an entitlement to apply for a charging order to impose a charge over the property to secure payment of the sums specified in paragraph 3 of the Order as "any money due".

102. Were the charging order securing the future contingent unassessed costs Ms Nash would be right to say that it was not yet due and indeed right to say that on application the charging order ought to be set aside at least to the extent that it was seeking to secure unassessed costs.

103. But that is not what it is doing. I am satisfied that the Order is an enforceable money judgment enforceable in the same way and manner as any other money judgment under CPR 70.2.

Conclusion

104. My conclusion on the question of whether paragraph 3 of the Order is enforceable by way of a charging order and subsequently an order for sale is therefore that:

    i) an interim payment on account is an enforceable money judgment/costs order which falls due on the date specified in the relevant order and if the order is silent then is payable and due for payment in accordance with any applicable rule, practice direction or statute setting the due date for payment and enforceable;

    ii) If such an order or judgment remains unpaid after the due date it is then enforceable as a judgment debt in the same way as any other order of the court for a sum of money;

iii) There is no magic to the words in section 1 of the Charging Orders Act for these purposes. An interim payment on account is a sum which is payable and which has become due if the time for payment has passed.

105. The Patels do therefore have an entitlement to seek an order for sale to enforce the charging order which is based on the sum payable and due under the Order.

Order for Sale

106. By this claim the Patels seek an order for sale in relation to the property. The Patels' papers are in order and service has been effected and/or notice given as necessary under CPR 73.10C. The only remaining question is whether the court should exercise its discretion to make an order for sale.

107. The Patels' evidence provides the following information:

i) a valuation of the property at £525,000 to £550,000

ii) The first charge holder's charge is currently £210,903.20, there do not appear to be any arrears.

iii) There is a second priority charge in the sum of £92,000 although there is an issue that does not need to be resolved on this application as to whether it is enforceable.

iv) The sum due to the Patels under the Order including accrued interest is currently £178,411.16.

108. Assuming that the second priority charge is subsisting then the charges over the property including the Patels' charge amount to in excess of £480,000 to which would be added the costs and expenses of sale.

109. Mr Awan says that property prices in his area have fallen considerably, his neighbour sold in July 2023 for about £400,000 and another neighbour has been trying to sell for a year without success. This did not seem a particularly strong point in Mr and Mrs Awan's favour. If the value is closer to Mr Awan's figure of £400,000 then Mrs Awan's interest in the property has already been completely expunged by the secured liabilities whether or not the second charge subsists. It means that the Patels' interest in obtaining possession and then sale is more acute since every day that goes by reduces the amount available to them to recoup any part of Mr and Mrs Awan's liability to them.

110. Assuming possession can be obtained both without further significant costs being incurred and reasonably quickly it is likely that even allowing for the costs and expenses of sale the Patels would recover at least the majority of the sum currently due to them. If the second charge is unenforceable the position is slightly better and Mrs Awan may retain some interest in the property. However, given the extent of the other unsecured liabilities Mrs Awan's position remains difficult.

111. As set out above Mr Awan's first witness statement focussed on legal submissions and argument based on the unenforceability of the Order. He devoted just two paragraphs to his family's circumstances. Mr Awan's second witness statement devoted seven

paragraphs to his family's position and the discretionary factors Mrs Awan relied on. Ms Nash made submissions on these issues.

112. The property is registered in the name of Mrs Awan and is the home to Mr and Mrs Awan. Mr Awan is 66 and retired. He says that he suffers from a number of health issues including diabetes, hypertension and angina but has provided no evidence of the nature and extent of the conditions he suffers from, how well managed they are, how they present and why they would preclude an order for sale being made. He says that Mr Patel would know that Mr Awan had various health conditions as he used to dispense his medication but that does not assist with the current claim. Mrs Awan is 60 and works one day a week as a teacher.

113. I was told that Mr and Mrs Awan have 4 adult children two of whom currently live at home. They are young adults aged 22 and 25. Kamran, the 22 year old, is said to be a vulnerable adult with mental and physical disabilities. Exhibited to Mr Awan's second witness statement was a universal credit print out for Kamran for an assessment period of 9 December to 8 January 2024. The printout included an allowance for "Limited capability for work and work related activity". This included the following wording "You said your health affects you at work or prevents you from working". This appeared to suggest it was a self-reporting provision although I was told there had been some assessment. It also covered only a one-month period.

114. There is no evidence of what condition(s) Kamran was affected by for example (i) what his mental of physical disabilities were; (ii) how long he had suffered from them; (iii) what the prognosis was; or (iv) why it was a relevant consideration in relation to the order for sale. For example if there had been adaptions to the home to cater for some specific disability that might be a relevant factor to take into account or if there was credible evidence that the impact on Kamran of any order for sale would be particularly detrimental for some reason. There was no evidence of the nature of Kamran's work if any and/or his ability to live independently. Mr Awan's evidence did not provide any explanation or information as to why Kamran's disabilities and/or his current inability to work precluded an order for sale being made. At best it provided some limited evidence that Kamran was living at home and had been unable to work from at least early December.

115. Mr Awan says that their son, Mikail, aged 25 has also been suffering from mental and physical health issues since early 2022. Mikail is a qualified chartered accountant who left a highly paid job in early 2022 but is now on track to return to work as soon as he finds a suitable job. There is no explanation or evidence about the nature or cause of Mikail's health issues, the prognosis. No explanation about his plans including whether he was or could live independently, what if any contribution he was or could make to the family's financial situation and so on. There was no explanation as to how it was said to affect the decision about whether to make an order for sale, particularly if he is now able to return to work as a chartered accountant.

116. There is no information at all about Mr and Mrs Awan's income or routine outgoings including the mortgage from whatever source, and/or whether the sons are contributing to the family financially. Instead Mr Awan explains that they have additional debts of some £65,000 in adverse costs orders arising out of the claims Mrs Awan made against her former solicitors and counsel after 2017 and £35,000 owed to DWP for mortgage assistance which in different circumstances might be considered an equivalent to

mortgage arrears. That additional £100,000 of debts is not currently secured against the property.

117. Mr Awan suggested that once the family's circumstances improved the children had agreed to remortgage the property to pay off all their debts (which I assumed to therefore include the £100,000) but it was unclear which of the four children this included and when it was hoped this might take place and indeed how since Kamran's income is benefits and Mikail is not currently employed.

118. Mr Awan's suggestion that his children would remortgage the property and pay off all the debts seemed to be unrealistic even if the property had a value of £525,000 to £550,000 since the total debts he had disclosed of some £580,000 including the unsecured debts already exceeded that amount.

119. Mr Awan says that when the current mortgage terms expire in three years the property will have to be sold in any event. He says that by arranging a sale themselves Mr and Mrs Awan will have time to make arrangements. It is not clear what if any steps have been taken since October 2023 and or how much time would be needed to make arrangements or what they would be and why they could not be made now. There is no evidence as to the timeline needed for the family to make arrangements to leave which they clearly anticipate having to do in about 3 years in any event. There was no attempt to explain why this was reasonable as between the parties for the Patels to be asked to wait another three years and to risk a diminishing return given the property value.

120. Mr Awan explains that if an order for sale is made there will be insufficient equity in the property to buy a replacement home. Ms Nash says there will be disruption to the life of the family and they may end up homeless. But that seems to be the position whatever happens.

121. Mr Awan sought to rely on the evidence of the family's difficulties in support of their rights under Human Rights Act and their Article 8 rights under ECHR. Of course those are aspects of the balancing exercise the court has to undertake when considering whether to make an order for sale.

122. Mr Awan said that there had been insufficient time to obtain better evidence, but the explanation provided in the seven paragraphs of his second witness statement was light on any detail or proper explanation of the matters he sought to rely on. There was no obvious reason why he could not have been more forthcoming even if the documentary evidence in support remained lacking, although I note that none of the health issues relied on were new so one would anticipate some documentary evidence being readily available.

123. The claim was issued in October 2023 there has been ample time to obtain evidence in support of any points that Mr and Mrs Awan wanted to rely on which go to the exercise of the court's discretion between October and February. Mr Awan was an experienced litigation solicitor by background. He will have known that the court would need some evidence on which to base its decision and indeed made reference to the discretionary nature of the exercise referring to *Close Invoice Finance Limited v Pile* [2008] EWHC 1580 in his first witness statement.

124. An important factor is the need to balance the rights of the Patels to be paid this long outstanding debt with the rights of Mr and Mrs Awan. Mrs Awan has provided no proposal for repayment other than on a sale of the property in three years which will be 10 years after the Order. I do not consider the possibility of repayment in about 3 years to be reasonable and the vague suggestion of some unevidenced future family arrangement which appears to be based on a remortgage for more than the value of the property does not assist either.

125. Finally Mr and Mrs Awan rely on the delay in commencing the detailed assessment process as an additional factor the court should take into account. Given my determination that the Order is enforceable by way of a charging order the delay in commencing the detailed assessment process has very limited weight in considering the order for sale.

126. I have already identified that there are checks and balances in CPR 47 to enable Mr and Mrs Awan to address any concerns about the delay in progressing the detailed assessment. If Mr Awan believes that on a detailed assessment no sum will be due to the Patels then he and Mrs Awan have had 6 years in which to cause the Patels to commence detailed assessment but have not done so. This also addresses Mr Awan's argument that prejudice was caused to Mrs Awan in her negligence claims against her former legal advisers because the detailed assessment had not been concluded.

127. Against that there was no explanation for the Patels' delay in seeking an order for sale following the making of the charging order in 2019 or why it is sought now. Although I note that when the Patels issued the claim they believed that Mr and Mrs Awan were by then the only occupants of the property.

128. There is no suggestion or any evidence of any particular need or urgency on the part of the Patels now. There was no obligation on the Patels to pursue an order for sale in a particular period of time, they could simply have waited for the property to be sold at some point in the future. Their risk was that there would be insufficient equity left after paying any prior charges to meet the sums due to them under the Order a risk that seems to be increasing. The time taken to commence the claim is ultimately a matter for the Patels who had been prepared to wait 6 years to commence the claim, but it is a factor that I take into account when considering what order to make. The delay in issuing the claim has provided Mr and Mrs Awan with a period of 6 years during which they have been able to continue to live in the property despite not having met the liability under the Order. In that time they have not made any payments towards the outstanding liability. The claim against Mrs Awan's former legal advisers which appears to have included a claim for the costs of the underlying proceedings was struck out some time ago.

129. I have taken into account the limited evidence from Mr and Mrs Awan including Mr Awan's late second witness statement when considering the exercise of my discretion in relation to the order for sale. Mr and Mrs Awan had ample opportunity to file evidence. The proposal for repayment in about 3 years when the property is sold does not appear to me to come close to meeting the balance between the parties.

130. Mr and Mrs Awan should be given credit for being candid about their inability to pay but that does not mean that the Patels' interests should not be taken into account. They

have been entitled to be paid the interim payment since the Order was made and it became due for payment by 4pm on 10 November 2017.

131. The position in relation to the property and the prospects of a full recovery by the Patels is deteriorating daily, Mrs Awan's interest appears to be all but expunged. Mr Dass's second witness statement provides some sale prices for properties in the area more recently obtained from publicly available information. This appears to me to suggest that the figures of £525,000 to £550,000 may be slightly on the high side but that Mr Awan's figure of £400,000 is too low. That suggests that the risk of in effect "negative equity" in relation to the Patels' interest is increasing and the prospect of Mrs Awan having any interest at all is diminishing.

132. Against that I balance the fact that the Patels have been prepared to wait for 6 years to take this action and have relied on no evidence of immediate prejudice or urgency. Although not a necessary requirement for the reasons I have given they have not progressed the detailed assessment either which is also a factor to consider.

133. It seems to me that this is a case in which an order for sale should be made. I am not persuaded that the unsupported discretionary factors relied on by Mr and Mrs Awan shift the balance in their favour. However, in taking into account the respective interests of the parties and exercising my discretion the order for sale should provide a period of three months from the date of the hearing on 7 February 2024 for Mrs Awan to pay the sums due or give up possession enabling the Patels to sell. This seems to me to meet the balance between the parties. It provides time for Mr and Mrs Awan and their adult children to focus on the seriousness of their position and if they are able to, to raise funds to enable them to pay off the liability to the Patels and retain their home or to make alternative arrangements.

134. If the property is sold there will little or no equity after the prior charges and the Order have been satisfied on the basis of the figures provided so the possibility of Mr and Mrs Awan being able to pursue the sale of the property themselves and to buy an alternative property from any net proceeds is not a heavy factor to weigh in the balance. Waiting three years until the mortgage term expires seems to me to be the worst of all worlds in that the liabilities will continue to increase in the meantime. Unless there were to be a significant increase in property values in the next two to three years the position will be worse not better. The Patels position in having to wait another three years and the risk that their ability to recover the sums due under the Order will be adversely affected is a significant factor to take into account. I am satisfied that providing the three-month period gives due respect to the rights of Mr and Mrs Awan, Kamran and Mikail whilst balancing against their rights the rights of the Patels to enforce their security and be paid.

135. I therefore consider that balance falls in favour of an order for sale and exercise my discretion to make such an order but allowing a period of three months for payment and/or possession from the date of the hearing on 7 February 2024.

136. This judgment will be handed down remotely. I invite the parties to agree a form of order to reflect this judgment without the need for a consequentials hearing which is substantially in the form of Appendix A to CPR PD 73/ Chancery Forms CH36/37. The parties are referred to the Chancery Guide at Chapter12.87 to 12.95.