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Case No: 1652-1943-4230-6305
1653-9948-1184-8896

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

6 January 2025

Before :

Deputy High Court Judge Richard Todd KC

- -

Between :

HA — **Applicant**

- and –

EN — **Respondent**

- -
- -

Michael Glaser KC (instructed by **Messrs Harbottle & Lewis**) for the **Applicant**
Dominic Brazil (instructed on a Direct Access basis) for the **Respondent**

Hearing dates: 26 November 2024 with additional submissions on the 2, 4, 10 and 17 December 2024

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JUDGMENT

This judgment was handed down remotely at 10.30am on 15 January 2025 by circulation to the parties or their representatives by e-mail and by release to The National Archives.

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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 children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Deputy High Court Judge Todd KC :

1. This was listed as the post-FDR directions in the financial remedy claim of the Applicant-Wife against the Respondent-Husband. 14 days prior to the hearing, the Wife also applied for maintenance pending suit and a Legal Services Provision Order. This is the Judgment from those applications.

2. **Preliminary matters. (1) Anonymisation.** Both parties have invited me to anonymise this decision. The parties' consent is not enough to warrant such an order (see Lord Neuberger MR in *H v News Group Newspapers Ltd* [2011] EWCA Civ 42, §[21] condition (7)). I therefore start from the basis that although these proceedings are marked "private", that is purely for administrative convenience. There was nothing to prevent properly accredited media from attending. These proceedings should not be anonymised merely as a matter of course. These are not proceedings primarily concerned with the maintenance of children or generally under the Children Act 1989 (if it had been, then the proceedings would have been anonymised in accordance with §12 (1) of the Administration of Justice Act 1960). It is also not covered by the Judicial Proceedings (Regulation of Reports) Act 1926 which only relates to contested divorce proceedings and not the financial enquiry ancillary to it; formerly called an "ancillary relief (enquiry)" but now known as an application for a financial remedy order.

3. These are proceedings which are caught by the decision of *Scott v Scott* [2013] AC 417[1]. If anonymisation was ordered as a matter of course then, in the words

[1] I have also read other powerful authority. These magisterial judgments have provided a well-lit corridor for my travel. The sturdy walls include *BT v CU* [2021] EWFC 87, [2022] 1 WLR 1349, paras [100]–[114], *A v M* [2021] EWFC 89, [2022] 1 FCR 445, paras [101]–[106], *Xanthopoulos v Rakshina* [2022] EWFC 30, [2022] 2 FCR 712, paras [74]–[141], *Gallagher v*

of Lord Shaw, "*an easy way would be open for judges to remove their proceedings from the light and to silence for ever the voice of the critic, and hide the knowledge of the truth. Such an impairment of right would be intolerable in a free country, and I do not think it has any warrant in our law. Had this occurred in France, I suppose Frenchmen would have said that the age of Louis Quatorze and the practice of lettres de cachet had returned*."

4. I am not going to assume the powers of the late King of France. But I have, after considerable hesitation, decided to order that there should be anonymisation. My reason for so doing is that there is a strong prima facie case that, as in *FT v JT* [2023] EWFC 250, there is commercially sensitive material which should not be released into the public domain. By identifying the parties, I am seeking to prevent "jig saw" identification of that information.

5. In reaching this conclusion, I have asked myself, "*why is it in the public interest that the parties should be anonymous?*". I have decided that there is a public interest in the parties being able to keep commercially sensitive matters secret. This is a careful balance and it is significant that this is an interim hearing where a full review of the evidence and arguments has not yet been possible. In doing so I have balanced the competing rights to a private life under Article 8 of the ECHR annexed to the Human Rights Act 1998, with the ancient common law rights of the public and media to know about court proceedings; a right protected by Article 10 of the ECHR. I have been assisted by the speech of Lord Steyn in *In Re S (a child)* [2004] UKHL 47 at [17]:

Gallagher [2022] EWFC 52, [2022] 1 WLR 4370; *Aylward-Davies v Chesterman* [2022] EWFC 4, paras [26]–[31] and *Re EM* [2022] EWCOP 31, [2022] 4 WLR 101, paras [40]–[46].

"*First, neither article has as such precedence over the other. Second, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.*"

6. I have also had regard to the powerful observations of Dingemans LJ in *XXX v Camden LBC* [2020] EWCA 1468, "*It is also necessary to have particular regard to: the importance of freedom of expression protected by article 10 of the ECHR; the extent to which material has, or is about, to become public; the public interest in publishing the material; and any privacy code; pursuant to section 12 of the Human Rights Act 1998.*" (Similar principles were also, equally compellingly, set out by Haddon-Cave LJ in *Moss v Information Commissioner* [2020] EWCA Civ 580 at §§ [20] to [29]).

7. As indicated above I have concluded that in conducting that balancing exercise, especially as this is an interim matter with many of the issues still to be finally determined, that the public interest in preservation of commercial confidentiality does permit me to direct anonymisation. Such orders should never be in perpetuity and I am putting a time limit accordingly.

8. The order which shall be drafted by counsel shall therefore include the rubric, "*this judgment was delivered in private. The judge hereby gives permission for it to be published in this anonymised form. The anonymisation order shall be discharged on the first happening of a final financial remedy order or 1 January*

2035 whichever shall occur first unless the order for anonymisation is extended in the meantime."

9. To assist with anonymisation, I have adopted the usual convention in this judgment of referring to the parties as Husband and Wife; I intend no discourtesy to either of them by this shorthand.

10. **Preliminary Issue (2).** Mr Glaser KC objected to me reading the Husband's statement in reply to the Wife's statement in support of maintenance pending suit ("MPS") and legal services provision ("LSPO").

11. The 26 November 2024 hearing was listed for the post-FDR directions. Instead, the applicant asked for the hearing to be used to determine applications for a maintenance pending suit order (or an unless order) and for a legal services provision order. That application is dated 11 November 2024 and is supported by a 20-page, 70 paragraph statement in support attested to by the Wife. The statement was also dated 11 November 2024.

12. At 06.13 on the day of the hearing (26 November 2024), I received a witness statement in reply on behalf of the Husband . This was 14 pages long and was supported by a 103-page exhibit. Mr Glaser KC sent an email to me at 09.56 saying, "*We object in the strongest possible terms to the Court reading, let alone admitting, this document.*"

13. That was a surprising submission for three reasons:

    i) first, the Wife's own application had not been properly listed for the 26th November, but instead had been "piggy-backed" onto the post-FDR directions. Simply putting in a return date in a Form D11 does not

automatically mean that it is listed on that date; listing is a judicial function undertaken by the Court and not unilaterally by one party in their Form D11. As such, the Wife was seeking an indulgence that the hearing should be anything more than directions on her application. Yet despite seeking the Court's indulgence she was not prepared to accommodate the Husband. The Husband could properly have said that we should only deal with directions on the Wife's D11 application. He certainly could have said that he should have a right of reply by way of statement and accompanying rebuttal evidence.

ii) Second, if Mr Glaser KC is right in objecting, then Mr Brazil would not be prevented at a relatively informal maintenance pending suit / LSPO hearing from simply regurgitating many of the points which are made within that statement and rely on documents (such as previous answers to questionnaires) which are already before the Court. The statement is substantially reliant on matters which have already been evidenced. Such submissions would not impermissibly be counsel giving evidence from the Bar (as contended for by Mr Glaser KC) but would simply be submissions on evidence already before the Court. Moreover, the overriding objective is best achieved by me having the Husband's position in a written statement which counsel then speaks to, rather than have only to hear that position from the Bar.

iii) Third, Mr Glaser KC's email was not seeking an adjournment. He was not saying that he should have more time to consider the statement. The

sole motivation seemed to be that I should let the Wife be heard (despite not being properly listed) but not let the Husband reply.

14. I offered both parties the opportunity of an adjournment. This presented them with a difficult choice – accept an inevitable delay or press on with the Court admitting the evidence which each wished to adduce. Both parties invited me to deal with the MPS / LSPO application. In circumstances where the hearing was to proceed, I admitted the Husband's statement. As Lord Leggatt said in *Potanina v Potanin* [2024] EWCA Civ 702, at paragraph [1],

"[1] *Rule one for any judge dealing with a case is that, before you make an order requested by one party, you must give the other party a chance to object. …*

2. This fundamental principle of procedural fairness may seem so obvious and elementary that it goes without saying."

15. Elementary fairness demanded that the statement of the Husband be before the Court. If the Wife's legal team had insufficient time to master this, then their remedy was an adjournment and they did not want to pursue that. Due to the need for me to read-into the case, the oral submissions began at 2 PM. Needless to say, that and other directions (primarily agreeing a date for a Pre-Trial Review and setting down for a final hearing) left insufficient time to conclude the directions (which the case was listed for) and the MPS / LSPO application. Despite sitting beyond the usual time, I therefore had to receive final submissions by counsel in writing. I am grateful to counsel for those subsequent written submissions. I directed only one set of written submissions each; a position statement on behalf of the Husband and an answer from the Wife. But

Mr Brazil chose to ignore this and sent in a Reply. Fairness demanded that Mr Glaser KC be given the opportunity to put in a Rejoinder and he accepted that invitation. Since circulating the draft judgment, I have also now received a Surrejoinder from Mr Brazil and a Rebutter from Mr Glaser. I have therefore read written submissions in opening and three sets from each counsel in closing. I also had the benefit of counsel's helpful oral submissions.

16. In addition to the submissions from each counsel, I have had the benefit of reading a 362-page bundle and a bundle volunteered with the Husband's latest statement (103 pages) and latterly five pages of messages. Surprisingly, that lengthy Bundle did not contain an ES1 (albeit I have subsequently been shown a draft one). There was no ES2 with the bundle but Mr Glaser KC provided one with his skeleton submissions. Unfortunately it included a great deal of what were said to be unknowns (indicated by question marks).

17. I have also seen a reference to there having been an ES2 at the pFDR but this was not shown to me for fear of trespassing on the absolute privilege attaching to such meetings.

Background

18. The Wife was born in Russia in 1984 and is 40. She obtained British citizenship in 2011. She was a student when the parties met and has not been in paid employment since. The Husband was born in Kenya in 1958 and became domiciled in England in 2017. He is 66.

19. The parties met in the autumn of 2007. They began living together in 2008. They signed a Pre-Nuptial Agreement ("PNA") on the 16th December 2008. They married on the 8th January 2009.

20. At the time of the PNA, both parties were represented by specialist matrimonial solicitors: the applicant was represented by Messrs Manches LLP and the respondent was represented by Messrs Forsters, solicitors. The PNA provided that, on divorce, the Wife should receive:

    a. A housing fund of £5.6m (indexed for inflation)
    b. Capitalised maintenance of £21m (again indexed); and
    c. Child maintenance of £170,500 pa.

21. The agreement also contained what is commonly known as a "stop-loss" clause. This is found at Clause 18. This provided that the Wife's award would be capped at 50% of the total assets. There is now a dispute about whether that Stop-Loss clause is operative due to the decline in the Husband's fortunes and fortune. The Wife says that the Husband has manipulated his financial position so as to appear less wealthy than he really his. The Husband denies this and says that he has been victim of the vagaries of the market. At the time of the agreement, the Husband said that he had wealth of about £61 million including a Coutts portfolio worth over £50 million and five properties.

22. The parties have two children, aged 15 and 13.

23. Both children attend fee-paying schools. They spend their time equally at weekends and on holidays with each parent.

24. The parties separated in August 2020. The Wife applied as the sole applicant for a divorce on the 26 May 2022. The conditional order of divorce was made on the 10 November 2022. There has been no final order.

25. The Wife lives in a very valuable property in SW3. I am told that it is worth approximately £21m. It is subject to a mortgage. One of the matters that the parties were able to agree today (with some encouragement from the Court) was that there should be a direction for a sale of that property. The parties now invite the Court to make a consent order directing the sale of the property. This is a very sensible move and I will make an order in those terms. (Curiously, in the order made on the 18 November 2022, there was provision for how the Husband should hold the proceeds of sale of the matrimonial home, but no direction or agreement for its sale. How the proceeds of sale should be held has now been subject to some further debate and I will deal with that later in this judgment.)

26. The Wife issued a 'notice to show cause' relying on the pre-nuptial agreement on the 18 July 2022. This was supported by a Form A dated 15 August 2022. At that time, the Wife was represented by Messrs. Vardags and the Husband by Messrs. Payne Hicks Beach. I note, in the context of the Wife's desire to have more time to consider the Husband's financial disclosure, this Form A was issued about 2 ½ years ago.

27. The first appointment was heard by Mr Recorder Amos KC on the 18 November 2022. The Wife was represented by Brent Molyneux KC and the Husband by Geoffrey Kingscote KC. The parties agreed that there would be a private FDR ("pFDR") before Simon Webster KC (albeit ultimately it took place with the assistance of Stewart Leech KC). The pFDR took place on the 8 March 2024;

some eight months before the post-FDR directions hearing on the 26 November 2024. I understand that at the pFDR the Wife retained Tim Bishop KC and Andrzej Bojarski KC; whilst the Husband was represented by Geoffrey Kingscote KC. Importantly the parties estimated their total costs up to and including the pFDR. The estimate was:

i) The Wife. £202,489

ii) The Husband £146,874.

In a case of this complexity, with this quality of representation, these figures were wholly unsurprising.

28. Conventional directions were given for questionnaires to be answered and for an SJE, the well-known and highly regarded Tom Rodwell of RDA, to report on the Husband's assets. Mr Rodwell's report is dated 19 June 2023.

29. The Husband provided answers to the Wife's first questionnaire on 18 April 2023. He answered a second Questionnaire on the 8 December 2023. I have seen an undated reply to another Questionnaire (that Questionnaire being dated 21st February 2024 and is the third). The Husband has produced what he called 'wealth progression' summaries showing the decline in his fortune. He has repeated that in his statement in reply.

30. The Wife's case is that the replies and disclosure give rise to further questions; she raised more questions and a schedule of deficiencies in two emails. The email-Questionnaires were sent on the 29 October 2024 (fourth Questionnaire) and then another on the 6 November 2024 (fifth). These were raised without the permission of the Court. But the Husband purported to answer them on the 12

November 2024. I have not seen the accompanying documents which he refers to in his answers.

31. The Wife says through her leading counsel that the Husband's disclosure is still very unsatisfactory but that she has not yet had sufficient time to provide a further (sixth) Questionnaire. There was no draft Questionnaire or Schedule of Deficiencies before me and no application that I should make any directions in respect of this.

32. The private FDR did not result in a settlement. An application was made on the 7 June 2024 to transfer the case to the High Court. That direction was made on the 13 September 2024. The case was allocated to be heard by a money-specialist Judge sitting at High Court level. (I was surprised to read a letter sent by Messrs PHB doubting whether this case was suitable to be heard by a High Court level judge; it is a case involving a dispute over the disposal of tens of millions of pounds. It plainly should be heard by a Judge of High Court level.)

33. For reasons which are unclear (and may be privileged) the Wife changed her solicitors in the Summer of 2023 from Messrs. Vardags to Messrs. Starck Uberoi. She has now moved solicitors, again. She has also changed her leading counsel, too. She is now represented by Messrs. Harbottle & Lewis who instruct Michael Glaser KC. Her statement in support of this application does not deal with why she left her last solicitors. Instead it says at paragraph 11 that a great deal of time has been spent chasing the Husband to fund her litigation costs.

34. This is the third full team which the Wife has had to assist her with the legal ramifications; it is noteworthy that she has changed both her solicitors *and* counsel thus depriving herself of continuity of representation. There must be an

additional cost involved in getting new solicitors and new counsel involved in a case. The new legal team will need to have read into the papers. If such a party wishes that cost to be borne by matrimonial funds or the other party, then it is incumbent on them to show a good reason for the change. Good reasons might include a conflict of interests arising, the costs of a particular firm being significantly higher than the new alternative, the solicitors being unable to act for some professional reason, diary pressures and / or the unlikely event of some impropriety by the previous solicitors and similar forced-choice reasons. None of those reasons are suggested here. Absent a good reason being given, it is unreasonable to expect the other party or the matrimonial funds to endure the costs of something which might be little more than a desire to get an alternative opinion.

35. The Husband was instructing Messrs. Payne Hicks Beach but parted company with them when he was unable to provide funds on account for the 26 November 2024 hearing. He now instructs Mr Dominic Brazil on a Direct Access basis.

Directions

36. It is critical that this long-running matter is now resolved either by agreement or in default of that by the Court timetabling this to a Court-driven solution. With counsel's assistance we have been able to agree dates for this matter. These dates are convenient to the counsel for both parties. Specifically:

    i) There will be a 1 day combined Pre-Trial Review and hearing for other directions on the 29 January 2025. Mr Glaser KC has subsequently been instructed to seek an adjournment of that date to give his team more time to prepare. I have rejected those informal applications; there have been

weeks to prepare for that hearing since the first draft of this Judgment was circulated. It is a milestone date and should not be put off unless there is a compelling reason.

ii) An 8-day final hearing in April. The first two days will be required for judicial reading and the last day for Judgment writing and delivery. The trial template will be discussed further at the January 2025 hearing.

37. As already stated, the parties have also agreed that there will now be a formal order made for the sale of the former matrimonial home. That will enable the parties to restore the issue of the sale at short notice if there are any difficulties with selling the property.

Maintenance pending suit and Legal Services Provision

38. The Wife has also applied for:

i) A Legal Services Payment Order in the following terms:

"*The applicant seeks an order: that the respondent shall pay, or cause to be paid, her incurred and ongoing legal costs to be incurred in the financial proceedings which have been issued under the case number under which this application is being made; and that the respondent shall pay the applicant's costs of and occasioned by this application.*"

ii) Maintenance Pending Suit Order. This is an unusual application in that it seeks "unless" provision. I therefore set out the terms of the application:

"*The respondent currently makes available to the applicant the sum of £20,500 per month via access to credit/ debit cards/ cash paid into the applicant's bank account (as well as meeting other costs directly on behalf of the applicant). The applicant is concerned that the respondent will reduce or restrict his interim financial support and/or her access to funds, in circumstances where (a) he has already unilaterally reduced the sums available to the applicant (via credit cards) and (b) the respondent has threatened to make further reductions.*

The applicant therefore seeks an "unless order", i.e. unless the respondent maintains the financial status quo (including the availability of funds to the applicant in the sum of £20,500 per month) he should pay maintenance pending suit to the applicant in the sum of £20,500 per month (plus an amount equivalent to any other reduction in the interim financial support currently paid by the respondent)."

39. The idea of an "unless" order for the payment of maintenance pending suit is a novel one. It is not a route that I have been tempted to go down. I am not aware of any advantage in this approach; indeed it suggests a certain hesitancy on the Wife's part. There should either be a Maintenance Pending Suit order or not one.

40. **The Wife's case.** A brief summary of the Wife's contentions in support of her application for Maintenance Pending Suit (including LSPO) are:

i) The Wife says that the parties tried to resolve their difficulties amicably but the Husband gave insufficient disclosure to the then jointly instructed accountants, Messrs. PwC (whose involvement pre-dates that of the SJE, Mr Rodwell). Because of this alleged non-disclosure, she says she felt

she had little option but to issue a Form A on the 15 August 2022. That was over two years ago.

ii) The Wife complains that answers to Questionnaire have been incomplete. She says the Husband, "*has continuously failed to produce both a cogent explanation and the necessary corroborative documentation for the alleged reduction in his wealth of c.£47m since the PNA.*" She complains that his disclosure is misleading, inconsistent and materially deficient.

iii) The Wife says that the parties' standard of living has remained at the same high level, despite the Husband's protestations of declining wealth.

iv) The Wife seeks her outstanding fees in respect of Starck Uberoi to be paid in order that her latest solicitors and counsel may see their old papers which they are currently exercising a lien over.

v) The Wife believes that the Husband has a true net worth of at least £23 million. The Husband asserted to litigation funders, Level, that he had an annual income of £200,000 per annum.

vi) The Wife says that the Husband is planning to re-instruct Messrs. PHB and leading counsel as soon as the LSPO hearing is completed. (I am then referred to an exhibit at page 97 of the bundle. That is an email from PHB. Contrary to what is said in the statement at §29, it does not support an assertion that the Husband is about to reinstruct Messrs. PHB; the fact that he has the same resources as he had in March 2024 does not mean that he can necessarily continue the same representation as before).

vii) The Wife says that there may have been liquidity events which would boost the Husband's finances or that he could borrow from business associates. She says that he has been lent money for business ventures in the past (§31). I hasten to observe that whilst a businessperson might lend money to a colleague for a commercial project, that is wholly different from lending money to him in order that those funds could be used by an ex-spouse to litigate against him.

viii) In §44 of her statement the Wife complains that she has had to adapt her expenses so as to manage on £16,000 per month instead of a previous allowance of £96,000 per month. The Wife has accepted her mother as a dependent in Russia at a cost of £1,500 to £2,000 pcm. In some jurisdictions, such as Hong Kong, it is common to see regular payments to parents and the Courts readily accept them as a necessary outgoing. Social norms are different in England and the ambit of maintenance is usually restricted to spouses and children treated as children of the family. That is not to say that such a claim can never be made, especially, as here, the Wife's mother is both poor and in ill health. But the Wife will have to budget for her Mother's needs from the maintenance pending suit provided for by this order. As is so often the case it is about her choosing what she is to prioritise.

ix) If this reduction in maintenance creates a difficulty, then the Wife might have to consider disposing of part of her £750,000 collection of jewellery and watches. (That figure is the Wife's, It is found in her Form E. In her ES2 she reduces the figure to £221,720 but as Mr Brazil complains, there

is no valuation supporting that new figure). There is also the Tamara loan facility of £300,000 which the Wife says is needed for her mother's second property. This too could potentially be used to provide the necessary support for her mother over the next four or five months. Ultimately, in English law, The Husband is not his mother-in-law's keeper.

x) The Wife explains her desire to have an unless order rather than a conventional maintenance pending suit as a conciliatory act. She says in her §46, "*However, in an attempt to be conciliatory I am not seeking that the court orders the Husband now to make payments to me in the sum of £20,500; rather, I am seeking an "unless order", i.e. he becomes obliged to make interim maintenance payments in the event he reduces my access to the funds he currently makes available (or that he pays on my behalf).*" As indicated above, what the Wife seeks is not a remedy known to the law. An "unless order" can only be made in support of a direction or order of the Court. It is usually made as a form of enforcement of an order which has been made; here the Wife seeks no order but provides for an "unless" enforcement of something which has not been ordered. It is legally incoherent and I must refuse it.

xi) The Wife accepts that the Husband had been paying her legal fees until July 2023 when she left Messrs. Vardags. The Wife says that she now has built up unpaid fees of £75,776.40 with Messrs. Starck Uberoi. This includes £4,500 of fees due for her half of the fees of the neutral evaluator, Stewart Leech KC. Like all disbursements, Messrs Starck

Uberoi should have had money on account for this. If Mr Leech KC was to bring a small claims action for his unpaid fees (plus statutory interest) as is his right, then it is hard to see what defence Messrs Starck Uberoi might have. Such a liability adds force to the request that Messrs Starck Uberoi should be put in funds by an order of this Court. Understandably, her unpaid solicitors are exercising a lien over their papers pending the payment of their outstanding fees.

xii) The Husband indicated that he would assist with the Wife's costs but did not do so. She therefore applied for a litigation loan. This required the Husband's co-operation. She says that the co-operation was slow in coming but he did eventually supply it (the Wife says he "drip fed" information). Having received this information, Level refused to give a loan.

xiii) In the absence of a Level loan, the Wife asked the Husband by a letter dated the 18 October 2024 (referred to in the Wife's statement but not exhibited) to make payments to her solicitors in the same sum as Level had initially said they would be prepared to lend. This figure was £450,000. The Wife said that she would use £89,596.20 of this to pay outstanding billed (but not assessed) costs. Despite hundreds of pages of documents being provided to me (all in the context of an ambitious D11 time estimate of 3 hours), this letter was not provided to me. However the statement does say that the letter made clear that in the absence of the £450,000, an MPS application would be made. Put another way, they would *not* apply if they received £450,000. This suggested that they

would be prepared to continue to work for the sum of £360,403.80 being the £450,000 less outstanding billed costs.

xiv) The above figures do not sit easily with the Wife's claim in §59 of her statement that she has outstanding legal costs of (1) £75,776.40 to Starck Uberoi (2) £97,290 to Harbottle & Lewis LLP and (3) work-in-progress of £36,613 (plus VAT).

xv) The Wife exhibits a schedule of anticipated costs from now until the final hearing of £620,268 including VAT. In addition to the outstanding costs, the Wife is now seeking £837,270 or a little under twice what she was prepared to settle for (£450,000 plus some future provision) a month before the MPS.

xvi) The Wife says that a *Sears Tooth* arrangement is not available. I accept that. The Wife also says that she is unable to borrow litigation funds. It has been suggested that the Wife ought to have provided evidence of at least two borrowers but that seems unrealistic. Both the Husband (who has also tried to borrow from litigation lenders) and the Wife have had a similar experience of litigation lenders (and funders) being unwilling to fund this litigation. I accept that litigation lending and / or litigation funding is not available for these parties. (The Wife did apply to Level who refused litigation funding. She also made an application to the Rhea Group but that looked more like a mortgage application than an application for litigation funding).

xvii) No schedule of outgoings was attached to the MPS statement.

41. I have also read the Wife's Form E. It refers to a monthly income need of £140,763. The schedule setting this out was deep within the bundle and not referred to in oral submissions. That is unsurprising as it was of no real assistance. It included so many uncertainties that it was of no assistance in this interim application. For example, there were elements claimed which were already paid by the Husband (such as the service charge and buildings insurance); there were items that were not properly interim expenses (e.g. redecoration - £4,500 pcm). Other parts were obviously excessive on an interim basis (examples including £1,200 per month for house plants and cut flowers; dry cleaning £500 per month).

42. The Husband did not trouble to provide a Schedule of his income needs with his Form E; despite considerable Court of Appeal authority that such a schedule was mandatory. He will need to provide such a schedule; if need be this can be revisited on the 29 January 2025.

43. I have seen an email from Messrs. Harbottle Lewis dated 6 November 2024 in which they say that they will not continue to act for the Wife unless she is in a position to discharge her outstanding invoices and meet their fees going forward.

44. I have also had the benefit of a statement from Nicholas Westley who is a partner at Messrs. Harbottle & Lewis ("HL"). He confirms that HL will not enter into a Sears Tooth agreement. Further, that they had been prepared to await the payment of their legal fees from a Level loan but ultimately Level were not prepared to make that advance. If the loan had been made then they would have accepted the £450,000 and waited for any further fees until the determination of

the financial remedy application. On 17 October, Level said they would not provide the litigation loan. That offer was said to expire after 14 days. Absent that agreement or the Wife paying half the outstanding costs and agreeing to meet all invoices within 7 days, then Messrs. Harbottle Lewis would no longer be prepared to act.

45. **The Husband's case**. A brief summary of the Husband's position is:

i) He complains that he has already given an enormous quantity of disclosure. He says he has disclosed all his bank statements, investment documents, investment reports, contracts, emails from banks, internal memos, company letters, mortgage statements and his own personal analysis of his finances dating back to 2007.

ii) He says that the Wife's four sets of solicitors have "not indicated where they say the money is." (I assume that he is including her nuptial agreement solicitors, Messrs. Manches in order to reach the figure of four).

iii) He refutes any allegations of dishonesty or that he has lied.

iv) He provides a history of his business interests and how they have lost value.

v) He provides a high-level overview of what has happened to his funds. It provides:

Starting net worth	52,700,000

Loss Yen	(5,000,000)
Investments	(786,770)
Property in SW3	2,525,475
Portfolio return	(4,619,492)
In Play at cost	7,916,245
Costs Life & property in SW3	(17,629,817)
Costs Debt	(7,532,940)
Loans	(12,863,492)
Bills	(1,450,000)
S (company) possible payment	793,651
Pension	860,000
Net sum today	14,912,859

(vi) The above presentation is said to be subject to a surprising margin of error of "+-15%"; a potential margin of error of £7,905,000 up or down on the headline starting figure or a margin of error £2 ¼ million up or down on the net sum today.

(vii) The Husband complains that disclosure has extended to:

- 112 questions from Messrs Vardags which he says he answered in detail between February and May 2023.

- The Single Joint Expert, Mr Rodwell asked 38 initial and another 15-20 supplemental questions in 2023.
- A further 30 detailed Questions were asked in November 2023.
- There were five detailed meetings followed by documented exchanges of information with the Wife's legal advisers. These lasted over 20 hours. The last being in February 2024. These meetings included The Husband sitting down with an ex-banker friend of the Wife's and, at the Wife's request, working through the disclosure.
- He complains there was an unauthorized removal of over 10,000 pages of documents from his study at the property in SW3.
- He says he has provided all Coutts (London), Zurich and Jersey accounts documents and investment returns; some dating back as far as 2005.
- He has provided all S payment and return schedules.
- He says he has provided all documents related to his other investments.
- The Husband accepts that there are a few items of disclosure outstanding but that these are, "*not material and certainly not relevant to the period from 2018 – [20]24"*.
- The Husband accepts that he has been paying £20,500 per month but £4,500 of this is for staff and he pays other children's expenses directly. He says that this is unaffordable.
- He complains that the Wife has been slow to agree the inevitable sale of the property in SW3. Happily one of the directions agreed is a consensual order for the sale of the property; the net proceeds will then be subject to the earlier order of Recorder Amos KC (save for any other provision this Court makes). If the parties had not consented then I would have given serious consideration as to whether I should direct a sale under FPR Part 20 (such an order would not pre-judge the outcome of the proceedings). As the parties consented, I was spared the need to rule on the potential conflict between the decision of Mostyn J in *BR v VT* [2015] EWHC 2727 and that of Recorder Allen in *RA v KS* [2023] EWFC 102.

- The Husband says there is equity of redemption in the SW3 property of £7,767,804. With his various business interests, the total assets are £14,043,950. He has outgoings of:

  (i) Service charges £184,000

  (ii) School fees £103,200

  (iii) Voluntary interim maintenance £246,000

  (iv) Rent £45,000

  (v) His personal expenditure £60,000

  (vi) Medical insurance £24,000

  (vii) House insurance £38,000.

  (viii) Other £30,000

  Total £730,200

46. The Husband is uncertain as to his future finances but believes that he will be able to raise further funds (including from his pension fund – which he estimates at £418,050). He has budgeted £120,000 for his costs and £120,000 for the Wife's costs. He has had a quote from his last King's Counsel for a 5-day hearing of £99,000. He wishes to retain leading counsel and reduce his expenditure by instructing Mr Brazil on a Direct Access basis.

47. As there is no schedule of deficiencies or request for a supplemental questionnaire, it is not clear to me (or the Husband) as to what is said to be deficient by way of disclosure. I also note that there was sufficient disclosure

for a pFDR to take place. Of course, I have no knowledge of what took place then, but (a) nobody is requesting a new pFDR after one which was unsuccessful due to inadequate disclosure and (b) no formal questionnaires have been raised with the Court in the intervening nine months.

The parties' contentions

48. Mr Glaser KC in his spirited oral submissions repeatedly called the Husband a liar. When I asked Mr Glaser which asset he would enforce his claim to a lump sum of £837,270 against, he was unable to assist me. He was unable to point to where a paper trail of non-disclosed assets might lead. He was reluctant for enforcement to be against the former matrimonial home. Instead, it seemed to me that he was setting the case up for an interim lump sum order (described as a single LSPO payment) which the Husband would just have to find somehow. If he failed to do so, then the remedy might be a *Hadkinson* order[2] depriving the Husband of an appearance at the final hearing and allowing the Wife to obtain judgment effectively by default.

49. In Mr Glaser's written submissions (filed 4 December 2024), he said that the deficiencies can be summarised as (capital letters at the start of each following paragraph signify anonymised corporate or trust entities):

    a. SCJ:

        i. The Husband says that SCJ was wound up with $1 million due to him of which $800,000 has been paid to his accounts since pFDR. He has provided no clarity as to when the remaining

[2] From *Hadkinson v Hadkinson* [1952] P 285 the draconian order whereby a litigant's access to justice is severely curtailed by their non-compliance with an earlier direction of the Court where that non-compliance is in turn, sabotaging the other party's ability to have fair access to justice.

$200,000 is due, nor any documentation to support the $1m figure.

ii. There is also no clarity as to how this $1m surplus relates to the $540,000 owed by the Husband to S as disclosed on his ES2 (which I assume is the ES2 from the pFDR which has not been shown to me).

b. C: The Husband says that C is being sold, yet he provides no documentation supporting this, such as the "Pitch Documents" and the sale agreement he refers to.

c. SO: No documentation has been provided in relation to any potential unpaid or undistributed surpluses, carry, unpaid salaries or any other amounts that the Husband is or may potentially be entitled to from S entities or T.

d. I, E, HL: Although a narrative has been given by the Husband relating to these entities, he has failed (despite repeated requests) to produce any documents relating to the latest valuations that are in his possession.

e. No documents have been provided in relation to the Husband's newly disclosed role in Dubai and he has not said whether he has made or is committed to making any investment in that company.

f. The Wife invites me not to charge the former matrimonial home as this is, "*a soft target and fundamentally, is the only asset in this jurisdiction."*

g. There is free money in the Husband's pension. The Wife believes this is £930,000 gross or £450,000 after tax. She invites me to direct that the Husband should liquidate his pension and pay that as a lump sum to her. The written note does not explain what the jurisdictional basis for such an order; I am unaware of any authority permitting this Court to direct such a liquidation and lump sum payment on an interim basis.

h. Mr Glaser raises the idea of a freezing injunction against the Husband's pension (this had not been raised before).

i. He says no provision should be made for the Husband's legal costs.

j. Mr Glaser KC challenges Mr Brazil's assertion that the Wife's jewellery is worth £700,000. He extravagantly claims (a) this is without evidence and (b) "*This is far from the truth – it is worth significantly less –"* and (c) it would be "astonishing" if the Wife had

to use this resource to fund her own legal fees. I say it is extravagant because (a) it is the Wife who gives this evidence; I see at page 193 of the Bundle that it is her figure in her Form E; the Wife indicates a value of her jewellery at £640,000 and her watches at £111,000; a total of £751,000 and (b) whilst it might be wholly exceptional to realise jewellery to meet a pressing debt, it is equally exceptional for a pension to be cashed in with a 55% tax penalty – as advocated by the Wife. Both disposals of jewellery and / or of pension are wholly exceptional but not wholly forbidden.

50. The Wife's position as to what the Husband had and should have, can be summarised as:

i) H had c £60.8m in the Pre-Nuptial Agreement in 2008.

ii) In 2017 he asserted this had reduced to £50.45m.

iii) In a statement of assets on 1 February 2018, he asserted he had £47.45 million.

iv) By 2022, he was saying he had £16.05m and now that he has "less than £14 m".

v) The decline above is not sufficiently evidenced by a funds flow description from the Husband (but it is accepted that he "has answered many of the Wife's questions"). Ultimately his case is summarised as, "Fundamentally, it is inconceivable – without cast iron and categorical evidence, that a man worth £60m in 2008 – or even £50.45m in 2017 *in a rising market*, would be worth just £14m now." (Original emphasis).

vi) In addition he says the Husband continues to enjoy the same high-level lifestyle. He points to what are said to be inconsistencies in income presentation.

51. Mr Brazil says that the Wife's earlier ES2 (which has not been shown to me) reveals that she believes that this is a case with assets of £23 million (as opposed to the Husband's stance that it is a case with £14 million of assets). He says on either presentation the assets have "plummeted" in value. He complains that the Wife has not set out her non-disclosure case with sufficient particularity.

52. Mr Brazil reminds me that the Form H provided by the Wife for the pFDR hearing showed costs incurred by her of £269,462.40 (per the Form H provided by Messrs Starck Uberoi of 7 August 2024) of which almost £217,000 had been paid and an estimated cost of £400,000 to the conclusion of the final hearing which included £150,000 for leading and junior counsel. The £400,000 figure included the cost of a potential *Daniels v Walker* application. He challenges whether the increase in costs from the estimate of £400,000 to almost £761,500 is justified. He says the costs sought are "wholly unjustified".

53. Mr Brazil complains – with considerable force – that the Maintenance Pending Suit application is not supported by any interim budget. He proposes that the £16,000 pcm which the Wife currently receives (plus £4,500 pcm for staff) is unsustainable. He notes that the Wife is not in paid employment and the children are often away as weekly boarders; when not at school, they share their time between their parents. He offers £9,000 pcm.

Discussion and decision

(a) Maintenance Pending Suit

54. Section 22 of the MCA 1973 gives the court power to make an order for maintenance during the course of the proceedings until an order for a divorce (and thereafter it may continue as interim maintenance). It provides:

> *"(1) On a petition for divorce, nullity of marriage or judicial separation, the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the presentation of the petition and ending with the date of the determination of the suit, as the court thinks reasonable."*

55. Does the Court need to have a budget before considering a claim for Maintenance Pending Suit? Mr Glaser said in his third written submission that it is sufficient for this Court to be told that the Wife simply wishes to maintain the *status quo*. It is not. The court has an inquisitorial duty. It will be a rare case where the Court is given no realistic budget; it is a mandatory requirement of the Form E. That budget will usually be the lodestar from which the interim budget is derived. Prudence dictates that often a pared down budget is provided in support of an MPS application. Mr Glaser KC reminded me of *Rattan v Kuwad* [2021] EWCA Civ 1. He said that authority supported the proposition that, "*it is not in every case that an interim budget is required."* I think that is an insufficiently substantial statement of the law; in *Rattan* Moylan LJ was concerned with a claim for income needs which, "*replicated the needs she has set out in her Form E and totalled just under £4,900 per month."* (Paragraph [13]).

Later, he held at paragraph [38]:

"In the present case, for example, it was not necessary for the wife to provide a specific maintenance pending suit budget. ***Her income needs as set out in her Form E matched her needs for the purposes of her application for maintenance pending suit.*** *Further, not all budgets require critical analysis. The extent to which a budget or other relevant factors require careful analysis will depend on the circumstances of the case. I return to this below but, in summary, the wife's budget in this case did not require any particular critical analysis; it was a straightforward list of income needs which were easily appraised.*" (My emphasis).

56. Thus, contrary to Mr Glaser KC's submission, the case of *Rattan* did not excuse his client from providing *a* budget. *Rattan* was authority for the proposition that the Form E budget might be used if capable of adaption. If so, an additional interim-award specific budget was not needed. Here I have been given no realistic Form E budget; certainly not one to assist with assessing interim maintenance. That it was incumbent on the Wife to provide such a budget is confirmed by the long-standing authority of Thorpe J (as he then was) in *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45. There he held, under his "fourth consideration"[3] that

"even in the case of a family of unusual riches **it would surely be wrong for the court not to look carefully and indeed critically at the suggested budget."** [my emphasis].

[3] The first consideration was that the s. 22 remedy under the MCA was designed to deal with every conceivable case. Second, he was concerned with a "Big Money" case and that reasonableness had to be seen by the standards of he ultra-rich. Third, that it was important to factor in the costs of the proceedings.

57. I am fortified in the view that an interim budget *is* necessary by the decision of *TL v ML and others (Ancillary Relief: Claim Against Assets of Extended Family)* [2006] 1 FLR 1263 at [124] (iii):

"(iii) *In **every** maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long-term expenditure, more aptly to be considered on a final hearing (F v F). That budget should be examined critically in **every** case to exclude forensic exaggeration (F v F).*" [My emphasis]

58. Despite Mostyn J using the imperative of this applying to "*every*" case, the jurisdiction must still include an element of discretion (as confirmed in *Rattan v Kuwad*). This case just falls into that very exceptional region where I can proceed with the maintenance pending suit despite the lack of budget. It is exceptional because of the huge disparity in contentions of the parties and the long-standing status quo whereby the Husband has been able to maintain a very high standard of living whilst being financially embarrassed. I concluded that he should and probably could continue something of that standard for the next four or five months.

59. The Court *and the Husband* have been deprived of the opportunity of an interim budget which could be the subject of critical examination. All maintenance pending suit applications require the application of a broad-brush. Mostyn J in *Collardieu-Fuchs v Fuchs* [2022] 2 FLR 957 aspired to paint with a brush of fine sable. In this case, the absence of a budget leaves me with a metaphorical paint-roller. I am unlikely to create a work worthy of Mark Rothko. I have been

deprived of much of the colour essential to this determination. I did consider simply refusing the Wife's application.

60. But on balance, this is a very broad jurisdiction (again, see *Rattan v Kuwad*) and my overarching aim is fairness. It would be unreasonable to deprive the Wife of an order entirely. Doing the best I can, I have concluded on the very sparse evidence that I have, that a fair order to tide the Wife over until the April hearing is £12,000 per calendar month. The Wife is not required to repay any excess sums paid over this amount prior to this order.

61. The reasoning behind this approach requires a necessarily rough and ready approach. The Wife has been spending approximately £21,000 per month on credit card (she has been spending up to the limit – when the limit was set at £23,600 she spent £23,201 (March 2024) when it was lifted to £25,700 in June 2024 she spent £25,699 and recently when reduced to £20,500, she brought her spending down to £20,284 (October 2024)). She describes her monthly need as £16,000 pcm.

62. Without seeing a proper budget, I cannot see whether some interim items are excessive. But both sides have referred to a decline in the parties' fortunes. I think that the Wife can tighten her belt for these next four or five months and reduce her outgoings by £4,000 pcm to £12,000 pcm. If there is a lack of granularity in these figures, then that is entirely due to the failure of the Wife to provide the necessary schedule. Whether it will have been fair to require the Wife to economise will become clearer in April when the Court will have had a more accurate view of the parties' finances. I appreciate that fairness is a two-way street and I must be fair to the Husband too, but I have decided that the

figure of £12,000 strikes a fair balance between his offer of £9,000 per month and her request for £16,000. The paucity of evidence has compelled me to exercise my discretion in a way which is, to labour the metaphor, part paint-roller and part meat-cleaver.

63. The Husband is also paying for staff at the rate of £4,500 per month. On his case, this would be a wholly unaffordable luxury. I was tempted not to require the Husband to pay this. But the disruption in the household (together with potential financial liability for redundancy) and that this order ought to run for only five months persuades me that I should leave this as a liability of the Husband's. This is not to say that it is a justified expense longer term; it will depend on the parties' evidence at the final hearing. I have concluded by the narrowest of margins that the staff need to be maintained as an interim expense pending the final hearing. As such, I am going to make an order requiring him to continue to pay the staff as part of his MPS obligations.

64. The Husband will continue to be responsible for the staff, education of the children and their reasonable extras. He will also continue to be responsible for insuring the matrimonial home (£42,000 per annum) until sale and paying the very expensive service charges (£184,000 per annum). I leave it to the Husband to continue to make arrangements with the mortgagee as to how that liability is covered; whether by way of reduced payment or mortgage holiday.

65. If the completion of the sale of the former matrimonial home takes place before a final decision of this Court, then the maintenance pending suit shall be automatically varied upwards so that the Wife shall be paid from the frozen net proceeds a sum of £16,000 per calendar month (with the Husband continuing to

be responsible for the staff and school fees) and £15,000 per calendar month for rent (with a deposit sum of £45,000 being provided from those proceeds) on the basis that she will take a short Assured Shorthold Tenancy until the Court is able to determine the financial remedy hearing. The balance of the funds realised will have been used in paying the ordinary costs of sale, the mortgage and the secured charges in favour of the parties' legal representatives. Any remaining funds shall be held by the conveyancing solicitors to this Court's order or the parties' agreement in the meantime.

(b) Legal Services Provision

66. I have regard to s. 22 ZA and ZB of the Matrimonial Causes Act 1973. I set out the most relevant parts below (with emphasis added):

*"**22ZAOrders for payment in respect of legal services***

(1)In proceedings for divorce, nullity of marriage or judicial separation, the court may make an order or orders requiring one party to the marriage to pay to the other ("the applicant") an amount for the purpose of enabling the applicant to obtain legal services for the purposes of the proceedings.

(2)The court may also make such an order or orders in proceedings under this Part for financial relief in connection with proceedings for divorce, nullity of marriage or judicial separation.

*(3)**The court must not make an order under this section unless it is satisfied that, without the amount, the applicant would not reasonably be able to obtain appropriate legal services for the purposes of the proceedings or any part of the proceedings.***

(4)For the purposes of subsection (3), the court must be satisfied, in particular, that—

(a)the applicant is not reasonably able to secure a loan to pay for the services, and

*(b)**the applicant is unlikely to be able to obtain the services by granting a charge over any assets** recovered in the proceedings.*

(5)An order under this section may be made for the purpose of enabling the applicant to obtain legal services of a specified description, including legal services provided in a specified period or for the purposes of a specified part of the proceedings.

(6)An order under this section may—

(a)provide for the payment of all or part of the amount by instalments of specified amounts, and

(b)require the instalments to be secured to the satisfaction of the court.

(7)An order under this section may direct that payment of all or part of the amount is to be deferred.

…….

22ZBMatters to which court is to have regard in deciding how to exercise power under section 22ZA

(1)When considering whether to make or vary an order under section 22ZA, the court must have regard to—

(a)the income, earning capacity, property and other financial resources which each of the applicant and the paying party has ***or is likely to have in the foreseeable future****,*

(b)the financial needs, obligations and responsibilities which each of the applicant and the paying party has or is likely to have in the foreseeable future,

(c)the subject matter of the proceedings, including the matters in issue in them,

(d)whether the paying party is legally represented in the proceedings,

(e)any steps taken by the applicant to avoid all or part of the proceedings, whether by proposing or considering mediation or otherwise,

(f)the applicant's conduct in relation to the proceedings,

(g)any amount owed by the applicant to the paying party in respect of costs in the proceedings or other proceedings to which both the applicant and the paying party are or were party, and

(h)the effect of the order or variation on the paying party.

(2)In subsection (1)(a) "earning capacity", in relation to the applicant or the paying party, includes any increase in earning capacity which, in the opinion of the court, it would be reasonable to expect the applicant or the paying party to take steps to acquire.

(3)For the purposes of subsection (1)(h), the court must have regard, in particular, to whether the making or variation of the order is likely to—

(a)cause undue hardship to the paying party, or

(b)prevent the paying party from obtaining legal services for the purposes of the proceedings.

67. I have been guided in this decision by the decision of Mostyn J in *Rubin v Rubin* [2014] EWHC 611 and in particular paragraph 13. I have set out the relevant parts below (with my emphasis added):

"*Therefore it may be helpful and convenient if I were to set out my attempt to summarise the applicable principles both substantive and procedural.*

i) *When considering the overall merits of the application for a LSPO the court is required to have regard to all the matters mentioned in s22ZB(1) – (3).*

ii) *Without derogating from that requirement, the ability of the respondent to pay should be judged by reference to the principles summarised in TL v ML [2005] EWHC 2860 (Fam) [2006] 1 FCR 465 [2006] 1 FLR 1263 at para 124 (iv) and (v), where it was stated*

*"**iv) Where the affidavit or Form E disclosure by the payer is obviously deficient the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources. In such a situation the court should err in favour of the payee.***

*v) Where the paying party has historically been supported through the bounty of an outsider, and where the payer is asserting that the bounty had been curtailed but **where the position of the outsider is ambiguous or unclear,** then the court is justified in assuming that the third party will continue to supply the bounty, at least until final trial."*

iii) *Where the claim for substantive relief appears doubtful, whether by virtue of a challenge to the jurisdiction, or otherwise having regard to its subject matter, the court should judge the application with caution. The more doubtful it is, the more cautious it should be.*

iv) *The court cannot make an order unless it is satisfied that without the payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings. Therefore, the exercise essentially looks to the future. It is important that the jurisdiction is not used to outflank or supplant the powers and principles governing an*

award of costs in CPR Part 44. It is not a surrogate inter partes costs jurisdiction. ***Thus a LSPO should only be awarded to cover historic unpaid costs where the court is satisfied that without such a payment the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings.***

v) ***In determining whether the applicant can reasonably obtain funding from another source the court would be unlikely to expect her to sell or charge her home or to deplete a modest fund of savings. This aspect is however highly fact-specific.*** *If the home is of such a value that* ***it appears likely that it will be sold at the conclusion of the proceedings then it may well be reasonable to expect the applicant to charge her interest in it.***

vi) *Evidence of refusals by two commercial lenders of repute will normally dispose of any issue under s22ZA(4)(a) whether a litigation loan is or is not available.*

vii) *In determining under s22ZA(4)(b) whether a Sears Tooth arrangement can be entered into a statement of refusal by the applicant's solicitors should normally answer the question.*

viii) *If a litigation loan is offered at a very high rate of interest it would be unlikely to be reasonable to expect the applicant to take it unless the respondent offered an undertaking to meet that interest, if the court later considered it just so to order.*

ix) *The order should normally contain an undertaking by the applicant that she will repay to the respondent such part of the amount ordered if, and to the extent that, the court is of the opinion, when considering costs at the conclusion of the proceedings, that she ought to do so. If such an undertaking is refused the court will want to think twice before making the order.*

x) ***The court should make clear in its ruling or judgment which of the legal services mentioned in s22ZA(10) the payment is for; it is not however necessary to spell this out in the order.*** *A LSPO may be made for the purposes, in particular, of advice and assistance in the form of representation and any form of dispute resolution, including mediation. Thus the power may be exercised before any financial remedy proceedings have been commenced in order to finance any form of alternative dispute resolution, which plainly would include arbitration proceedings.*

xi) *Generally speaking, the court should not fund the applicant beyond the FDR, but the court should readily grant a hearing date for further funding to be fixed shortly after the FDR. This is a better course than ordering a sum for the whole proceedings of which part is deferred under s22ZA(7). The court will be better placed to assess accurately the true costs of taking the matter to trial after a failed FDR when the final*

hearing is relatively imminent, and the issues to be tried are more clearly defined.

xii) ***When ordering costs funding for a specified period, monthly instalments are to be preferred to a single lump sum payment.*** *It is true that a single payment avoids anxiety on the part of the applicant as to whether the monthly sums will actually be paid as well as the annoyance inflicted on the respondent in having to make monthly payments. However, monthly payments more accurately reflects what would happen if the applicant were paying her lawyers from her own resources, and very likely will mirror the position of the respondent. If both sets of lawyers are having their fees met monthly this puts them on an equal footing both in the conduct of the case and in any dialogue about settlement. Further, monthly payments are more readily susceptible to variation under s22ZA(8) should circumstances change.*

xiii) *If the application for a LSPO seeks an award including the costs of that very application the court should bear in mind s22ZA(9) whereby a party's bill of costs in assessment proceedings is treated as reduced by the amount of any LSPO made in his or her favour. Thus, if an LSPO is made in an amount which includes the anticipated costs of that very application for the LSPO, then an order for the costs of that application will not bite save to the extent that the actual costs of the application may exceed such part of the LSPO as is referable thereto.*

xiv) *A LSPO is designated as an interim order and is to be made under the Part 18 procedure (see FPR rule 9.7(1)(da) and (2)). 14 days' notice must be given (see FPR rule 18.8(b)(i) and PD9A para 12.1).* ***The application must be supported by written evidence*** *(see FPR rule 18.8(2) and PD9A para 12.2).* ***That evidence must not only address the matters in s22ZB(1)-(3) but must include a detailed estimate of the costs both incurred*** *and to be incurred****.*** *If the application seeks a hearing sooner than 14 days from the date of issue of the application pursuant to FPR rule 18.8(4) then the written evidence in support must explain why it is fair and just that the time should be abridged.*

Robust assumptions against the Husband

68. The Wife's case was put forcefully by Mr Glaser KC. He could not have said more. As summarised above, his case is that the Husband's collapse in his wealth was both inexplicable and remains unexplained. His case is that the Husband is a liar and I should reject any assertion by him or on his behalf that he cannot pay the funds demanded. The Husband denies that this.

69. Mr Glaser KC put strong emphasis on the paragraph 124 of *TL v ML & Ors* [2005] EWHC 2860 quoted above.

70. I am not satisfied that the Husband's statements or Form E disclosure is *obviously* deficient. I have not been drawn to an unanswered question which would reveal a destination where siphoned money could now expect to be found. I am not confined to the Husband's mere say-so, but it seems to me that he has provided a very considerable amount of disclosure as well as co-operating at least to an extent with both Messrs PwC and Mr Tom Rodwell. It may turn out that he has not been telling the truth (or not telling the whole truth). But I cannot, on the evidence before me, make that robust assumption now.

71. Mr Glaser KC was not able to point me to a convincing *exit* point of wealth which would suggest that a certain sum has been removed and that it is probably now either parked with another person (or entity) or is otherwise hidden. Similarly there is no *entry* points suggesting undisclosed wealth (a classic example would be of a spouse pleading destitution but maintaining a Champagne Charlie lifestyle. Here the Husband accepts that he has some considerable wealth but not as much as he used to; metaphorically, he can enjoy an NV Louis Roederer but rejects the insinuation that he can bathe in Dom Perignon Plenitude).

72. After over four years of investigation, the Wife's team are still needing to construct a new letter of instruction to new forensic accountants. They are still constructing a Further Questionnaire. HL believe they will spend 900 units (90 hours) just on the instruction of that shadow expert – that in itself suggests there is a good deal more research to be done. Put more prosaically, there is no

smoking gun. The factual case boils down to pointing to the figures set out in a number of Statements of Affairs required annually by RBC for mortgage compliance purposes [pages 282-304 of the Bundle]. Also reliance is placed on an old Lombard-type loan application with RBC.

73. H provides an explanation of the RBC "Statement of Affairs" documents at [307]: "*the Statement of Affairs were a view of what funds might to be available at some point in the future if 'normal' market conditions and company performance occurred, as opposed to the actual realised performance set out in the Wealth Progression Chart provided with my replies to questionnaire…. The RBC statements which the applicant took from my possession…are unsigned documents…. The signed and submitted annual review documents state net worth of £35.69m £48.7m and £36.7m*" (as opposed to £50.15m in 2015, £55.7m in 2016 and £47.45m in 2018). Included in these figures are cash holdings and estimates of ultimate future exit values of various investments. These are not professionally reviewed valuations as at the date of completion of the forms.

74. H indicates that: "*very limited data was requested by RBC to produce these documents and no formal valuations were requested…..further, between 2015 and 2018 the Revised Statements of Assets were prepared as quick routine updates as the loan was still current, funds were held in the bank to cover 5 years of interest and all the bank needed was updated statements indicating that my overall liquidity was acceptable for the loan.*"

"*It is not accepted that the Wealth Progression Table provided with my replies to questionnaire was unsupported. I provided Hay Hill reports, Coutts*

investment summaries and portfolio valuations and UBS valuations in support thereof, and it is far more accurate than the estimates in the RBC Statements of Affairs." [page 308 of the Bundle].

All evaluations of assets including S actual exit values and other assets referred to in these statements were provided and disclosed during the extensive disclosure and question and answer sessions with W's accountancy / banking adviser in February 2024.The Husband has provided a description of the movement of his main bank accounts.

The Credit Suisse Lombard Loan Extension Facility Document is at page 180. Credit Suisse were the custodian bank that held the Husband's investment portfolio from 2016-2023/4 - all offshore (Luxembourg). HayHill are the wealth managers who have managed H's investment portfolio since 2014/5. HayHill had a discretionary mandate on managing the portfolio that was kept at Credit Suisse. It was possible to borrow against this portfolio using a Lombard Loan Facility. This facility allowed H to borrow e.g. 60% LTV (loan to value) against the invested funds and 95% against cash. This way H could get funds into the UK for costs and still have offshore investments which H hoped would grow faster than the cost of the loans. I am told and accept for Maintenance Pending Suit purposes only, the reason for the document that H signed at page 180 was that the parties had reached a limit on the Lombard loans and to get funds released, Credit Suisse sent a document they had already populated and asked H to sign to unlock additional funds. W needed funds to be sent for her Greek villa so the parties "just signed it" to allow the loan to be extended. Whilst not

a particularly attractive explanation, it is an explanation. The emails corroborating this have been shown to me.

75. I emphasise that all of the above is very much an early view of the case. It is not an issue estoppel. But it does mean that I am of the view that the Husband's disclosure in Form E or his statements is not *obviously* deficient.

Resources generally

76. However the Wife does not have to prove that the Husband is a liar or a non-discloser for her to obtain a LSPO. It seems to me that:

i) She is unable to obtain alternative litigation funding.

ii) It was reasonable of the Wife's solicitors to refuse to offer a *Sears Tooth* agreement; that requires a difficult commercial decision and HL cannot be faulted for stepping away from it.

iii) Legal aid is not available for cases such as these.

iv) The parties have considerable unrealised resources. The Husband believes that he can raise up to £975,000 (gross) by cashing in the entirety of his pension and selling some small investments. However he has calls on his finances which will consume a good part of his resources. The parties also have a home which will probably realise in excess of £7 million once sold.

77. I am satisfied that the Wife will not be able to obtain legal representation unless some form of LSPO is made. I will turn to what form such provision should

take, after dealing with quantum of the costs. This will be in three parts: historical costs, the Wife's costs and the Husband's costs.

Historical costs

78. I have already set out paragraph 13 (iv) of the case of *Rubin v Rubin*. There are two elements to the historical costs – there are those incurred by Starck Uberoi for £75,776.40. They will play no further part in this case. HL's argument that they *must* be paid or HL will not be able to see their file is an unimpressive excuse for seeking that payment. If they wished to see what prior counsel had advised, then they need only have instructed either of them to advise. I have no doubt at all that leading counsel of the excellence of Tim Bishop KC or Brent Molyneux KC would retain detailed notes. The cost of instructing them would be a fraction of what is sought for the Starck Uberoi costs.

79. As regards papers generally, I have not been told what documents Starck Uberoi have that are so pressing; still less those which would justify a payment of over £70,000. The Husband says that a file was sent by his previous solicitors, PHB to HL. The thousands of pages of the Husband's documents belong to him and ought to have been returned to him by now; they should not be with SU. The need for the SU files is put in the most general terms. It is said that HL (who will soon have incurred more costs than their predecessors and so presumably will have done more work) simply need to review them.

80. The statutory test is whether the files are needed. They are not. I am reinforced in my view that allowance should not be made for these costs by the decision of MacDonald J in *DH v RH* [2023] EWFC 111 where he said that specific evidence of an intention not to continue work would be required. The only

evidence that SU could give is that they certainly are not going to continue to work. They fail the statutory test of necessary for future representation (§22 ZA (3)) – the payment of those historical costs makes no difference to future representation.

81. If there was any doubt about this approach it was resolved by Mostyn J in *Xanthopoulos v Rakshina* [2022] EWFC 30 at paragraph [39] where he confirmed the general rule that former solicitors should not expect to recover their costs through the mechanism of an LSPO.

The Historical Costs of Harbottle & Lewis

82. I accept HL's partner's evidence that his firm will "down tools" if not paid.

83. I note that per *Xanthopoulos v Rakshina* [2022] EWFC 30, HL's outstanding costs might be treated as if assessed on a standard basis. This would result in the application of a 30% discount. The claimed sum is £89,596.20. That figure derives from §52 (a) in the Wife's statement in support of her maintenance pending suit. It relates to a claimed figure as of the 18 October 2024. It was also the figure requested in the letters to PHB of 25 October 2024. Yet at paragraphs 58 and 59 of the same statement, the Wife increases her claim for costs to £97,290 plus £36,613 in Work in Progress – that is only 17 days later than the previous statement. I can only assume (as I have been offered no alternative explanation) that the additional costs were incurred in respect of the MPS / LSPO application. The same must be true of the additional costs which have now taken the Wife's costs in her Form H to £193,417.20. Some of those costs must have been prospectively considered in the pre-25 October calculations. In any event, Messrs H & L were prepared to accept £89,596.20 (plus the top-up

to £450,000) very recently and that £89,596.20 will be my baseline figure for unpaid costs without which HL will not act.

84. This is subject to challenge by the Husband. On balance I have decided that the correct figure to allow for historical costs is **£62,717.34** (applying a 70% assessment as if this was – very broadly – a standard basis assessment). But this is only permissible on the basis that it is necessary for the Wife's future representation. If HL are unable or unwilling, having considered the matter commercially, to continue to act on the basis I set out later, then they will not receive that sum via this LSPO application and will just have to pursue their civil remedies for any debts. It would not be consistent with the statute for them to achieve this payment otherwise.

85. I emphasise that this applies where HL is unable or unwilling to act. The position is different if the Wife chooses to dispense with their services – in that event, HL should have both the benefit of the historical costs referred to above and any outstanding costs due under the charge (referred to below).

86. The approach which I have adopted in respect of the historical costs conforms with the approach adopted by Cobb J in *Re Z (A Child)* [2020] EWFC 80. That approach represents a sound compromise between the competing imperatives of:

(a) historical costs which will not be necessary for future representation and

previous costs which will need to be paid if those lawyers continue to act but to whom the costs should not simply be allowed without question.

87. Ultimately it is a matter of reasonableness (as DHCJ Cusworth QC (as he then was) confirmed in *R v R* [2021] EWHC 195).

The quantum of HL's costs going forwards to the final hearing

88. I have read the very detailed and helpful schedule of future costs of Messrs HL. I have adopted a broad-brush approach in dealing with this. Specifically:

i) No *Walker v Daniels* application has been made. I am unaware of any questions which have been raised of the Single Joint Expert, Mr Tom Rodwell. At this stage, I am not prepared to permit the cost of instructing a second expert. However I accept that some costs will be incurred in raising matters with Mr Rodwell and asking him to update his report. I anticipate this might be raised at the 29 January 2025 hearing. I deduct £30,000 from the anticipated costs.

ii) I disallow (certainly at this time) the second expert's fees estimated at £48,000 including VAT. It is too early (if that time will ever come) to displace the role of Mr Tom Rodwell.

iii) Leading counsel's fees. Leading counsel's fees were entirely reasonable in the estimate. But there will not be the additional 1-day directions' hearings and consultation in addition to the LSPO and the PTR. (Saving £21,500). The PTR hearing is therefore "light" at £10,000 and I increase it to £15,000. Net position is therefore £16,500 less.

The final hearing is now listed for 8 days. The original estimate was £50,000 plus £6,000 refreshers. However that was for a 5-day hearing. The hearing will now be 8 days. I therefore add in three additional refreshers. This adds an additional £18,000.

It might be helpful here to address one matter which has caused a surprising level of confusion in the profession at large. It is long settled law that counsel is entitled to be paid a full refresher for a day where the Court is listed and counsel still retained. If the matter is not listed, then counsel do not get paid. The authority for this is the long-established case of *Lawson v Tiger* [1953] 1 WLR 503. Thus, Mr Glaser KC (and any other instructed counsel) are entitled to charge a refresher for days which are listed even though the Court might be reading or considering judgment on those days. The logic is compelling; counsel is not available for any other work. Counsel might be called upon even if the Court is provisionally detained in reading or judgment writing. Counsel has contracted to provide that time exclusively (this is the usual position where the agreement is between solicitor and counsel (a "B2B" agreement[4])). The position of counsel is directly akin to a barrister in a criminal court waiting for a jury to return with a verdict; nobody could sensibly say that such a barrister should go unpaid whilst having to wait for the Court to re-assemble.

89. The total costs to be incurred by HL are therefore:

[4] The position is less clear where there is a direct access agreement between a "consumer" and a barrister – see the decision involving a direct access agreement in *Glaser and Miller v Atay* [2024] EWCA 1111. But that is not the position here where counsel is retained by a solicitor.

i) For HL's professional fees:

a) Historical costs. £62,717.34

b) Solicitor's future costs (£388,668 - £30,000) = £358,668.

c) Counsel's costs (50 hours at £650 + VAT; LSPO / MPS / Directions £15,000; 1 day PTR £15,000; Final Hearing £50,000 + 7 refreshers at £6,500 per day) + VAT = £189,600 (£158,000 net of VAT)

The total to be found is £610,985.34

This is considerably more than the £450,000 that HL would have been content with in October. That is unsurprising – the £450,000 was a compromise "needs must" figure which included avoiding litigation risk; now that litigation has happened and a more certain figure has been calculated. Not all of this needs to be found immediately. Moreover, these are necessarily broadly painted figures. The above suggests a degree of arithmetic precision which is illusory. I will adopt a rounded figure of £610,000

The Husband's costs

90. There needs to be equality of arms. Mr Brazil has impressively said that he can shoulder the responsibility of representing the Husband whilst the Wife has a full team. She has the very highly regarded firm of HL including a highly respected partner, Nicholas Westley and Eleanor Haidon (employed barrister) in addition to expert leading counsel. Mr Brazil says that representation by him

as lone representative is possible for £120,000. I fear that Mr Brazil might be overreaching himself by taking on the roles of both solicitor and counsel. It seems to me that in order to obtain equality of arms, Mr Brazil should have the opportunity of being led by leading counsel. Leading counsel have always been retained in the past. A quotation was received for leading counsel of £99,000 (which I assume included VAT). Adding the further three days (at £6,000 per day plus VAT) takes this figure to £120,600.

The Husband's reasonable need for representation will therefore require a fund of £240,600 of this he can find £150,000. He therefore needs a charge to cover the remaining £90,600.

How will these necessary costs be funded?

91. The Husband says that over time he will be able to raise a total of £240,000. I think that he is being too pessimistic. I believe that he could raise with his impressive commercial contacts, his other resources (including pension) and his ability to borrow (whilst being assisted by a small drop in the interim maintenance) a total of at least £300,000. This should be divided equally. I will direct that he should pay this to HL as to:

(a) £30,000 to Messrs HL by 10th January 2025.

(b) £60,000 to Messrs HL by 28th January 2025

(c) £60,000 to Messrs HL by 28th February 2025.

92. This leaves the Husband with £90,600 to find (i.e. after £150,000 of the £300,000 is made available to him). It leaves the Wife's legal team with

£460,000 to find (after the provision of the £150,000). I will make an order that these are the sums which are to be paid provided the recipients agree to continue their representation of each respective party until the conclusion of the final hearing (or earlier settlement). If their lay client dispenses with their services (either expressly or constructively) then they will not be treated as having voluntarily given up representation. The order will be secured against the former matrimonial order by a charging order. The reasonable costs of realising the charge and interest will be payable on the sale of the property. The interest will be simple interest calculated on a daily rate basis.

93. In a different context in *BC v DE* [2016] EWHC 1806, Cobb J held that it is not reasonable to expect solicitors or counsel to extend (i) unsecured and (ii) interest free credit. I agree.

94. The only obvious way that the shortfall between the need for the reasonable costs and the resources available can be made is from the net proceeds of sale. I note Mr Glaser KC's concern that this will depreciate the assets which can be enforced again – but that concern reveals the exact difficulty. If there are no other assets which are easy to enforce against, then similarly there are no other assets that can be utilised to pay the costs. (The pension funds will soon be expended on the living costs).

95. It seems to me that I should make an order that the shortfall of funds should be directed and that these should (a) be secured and (b) carry interest. Do I have jurisdiction to make such an order? If I do, what conditions should be attached.

Charging Order

96. Charging Orders in family proceedings are regulated by FPR Part 40. This prescribes a mandatory Form N379 which is to be used. If Messrs Harbottle & Lewis decide to adopt the course suggested by this Judgment then they should file such an application in time for the next hearing. I formally abridge the 21-day notice period for such an application to 2 days for this purpose. The interim charging orders are found at 4.11 of the revised version of the compendium of Standard Orders. The interim charging order can be made now (on the basis that the N379 form will be filed). The final charging order will be listed to be heard with the final hearing of the financial remedy hearing.

97. Section 22ZA (6) (b) provides that any instalments payable as Legal Services Payment orders may be "*secured to the satisfaction of the court.*" Such security must include secured against a property; this may be achieved by a charging order.

98. In addition to the power referred to under Part 40, these costs are caught by the Solicitors Act 1974, §73. Section 73 provides:

> "**73.— Charging orders.**
>
> (1) Subject to subsection (2), any court in which a solicitor has been employed to prosecute or defend any suit, matter or proceedings may at any time—
>
> (a) declare the solicitor entitled to a charge on any property recovered or preserved through his instrumentality for his [assessed]1 costs in relation to that suit, matter or proceeding; and
>
> (b) make such orders for the assessment of those costs and for raising money to pay or for paying them out of the property recovered or preserved as the court thinks fit;
>
> and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the solicitor.

(2) No order shall be made under subsection (1) if the right to recover the costs is barred by any statute of limitations."

99. I do declare that the solicitors (which I assume will include Mr Brazil acting on a direct access basis albeit I have heard no argument on this despite having invited submissions generally on this section) are entitled to a charge on the former matrimonial home . The difficult question is then whether my determination of a specific sum to be paid amounts to assessed costs. I have decided to adopt the ordinary meaning of those words. The purpose behind the statute was that once a sum for costs was fixed and payable then it could be enforced by a charge. By making an order for a specific sum under §§22ZA and 22ZB, I have fixed a set sum of costs to be paid. I will require a solicitor's undertaking that they should pay back any surplus which is not properly incurred in the provision of legal services. But this does not affect the certainty of a specific payment now. The Court is not bound to order that the costs be assessed as between solicitor and client (see *Fairfold Properties Ltd v Exmouth Docks Company Ltd (No 2)* [1993] 2 WLR 241). The monies are sums which are due by an order of court.

100. As a further security, I will declare that the solicitors shall be entitled to an equitable charge over the ultimate award made by this Court in favour of their respective clients. This is often referred to as a *Palmer v Carey*[5] charge as explained by DHCJ Nugee QC (as he then was) in *Clifford Harris & Co v Solland International Ltd* [2005] EWHC 141. All that is needed is an agreement or understanding that the legal costs debt should be paid out of a specific fund

[5] From *Palmer v Carey* [1926] AC 703 per Lord Wrenbury.

coming to the debtor (here the Husband or Wife). The specific fund is the net proceeds of sale of the former matrimonial home (after discharge of costs of sale and the mortgage in favour of the Royal Bank of Canada). This is not the repayment of a loan but the satisfaction of a debt which this Court has determined.

101. Mr Brazil contends that the first mortgagee is entitled to be heard on the question of an imposition of a §73 charge. I have some reservations about whether that is correct; the fixed sum charge does not affect their security; the RBC mortgage will have priority over the solicitors' charge. *Civil Procedure 2024* (at **7C-135.1 et seq**) does not say there is any such requirement. (Similarly FPR Part 40 which provides for detailed service requirements does not require service on a mortgagee or chargee). However, they may have a right to be consulted in respect of any additional security under their mortgage covenants. I therefore give permission to both parties to serve the mortgagees with the operative parts of the order. It should be emphasised to the mortgagees that I am imposing a specific sum charge and not an all monies or unrestricted charge.

Interest

102. As previously indicated it would be wrong for the solicitors and counsel to be deprived of interest on their unpaid fees. §35A of the Senior Courts Act 1981 provides:

"(1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and—

(a) in the case of any sum paid before judgment, the date of the payment; and

(b) in the case of the sum for which judgment is given, the date of the judgment.

103. By this Judgment I have directed that the Husband should pay from the net proceeds of sale of the property in SW3the specified sums for the Wife's legal costs. I am also concerned that his own legal team should be paid. Ordinarily, the Courts powers under the Matrimonial Causes Act 1973 are limited to orders between the parties to the marriage. Rather than have an arid dispute about whether third parties may be paid as part of that dispute, I simply rely on the Wife's assertion that she has a beneficial interest in the SW3 property and direct her to pay to the Husband for the purpose of discharging his legal costs the sum of £90,600 plus interest.

104. Although these are prospective costs, that does not prevent the Court making such an order; the incurring of brief fees is commonly on a prospective basis and the words of §§22ZA and 22ZB clearly contemplate payments to cover the future incidence of legal costs. As a judgment debt, these sums would usually attract interest at the rate of 8%[6].

105. Parliament has specifically endorsed the concept of interest automatically running on late payments; see The Late Payment of Commercial Debts (Interest) Act 1998 provides that in respect of the commercial relationship between counsel and solicitors interest would run automatically. As such, barristers are entitled to claim 8% over the current Bank of England basis after 30 days after the rendering of an invoice for fees (or such other rate as their terms and

[6] §17 Judgments Act 1838 and the Judgments Debts (Rate of Interest) Order 1993.

conditions may have specified). This does not apply between solicitor and own client although the particular terms of a retainer might allow for this. I have not seen the retainer letters but will be making an award of interest on the Judgment Debt basis. In so doing, it is a condition of the barristers accepting instructions and payment pursuant to this judgment that they will accept that lower rate of interest and not rely on the LPCD(I) Act 1998.

106. Interest will run on the required sums at the Judgment Rate of interest of 8%. This is a simple interest rate. It is considerably more than the rate of inflation but very much less than litigation lenders usually quote (in this case they were seeking 22%) and less than would be available for an unpaid commercial invoice. Bearing in mind the cash flow difficulties and inherent risks in all litigation, it seems that an 8% rate is reasonable in all the circumstances.

Concerns by the parties' legal teams about being paid

107. Two cases ((1) *Simon* and (2) *Wyatt v Vince*) have caused considerable disquiet about legal teams becoming effectively litigation costs' lenders by them accepting some delay in payment. I hope to address both sets of fears in this Judgment.

(1) Simon v Simon (Level Intervening).

108. Mr Brazil refers me to the *Simon v Simon* series of cases - especially *Simon v Simon (Level Intervening)* [2023] EWCA Civ 1048. This series have now culminated in the decision of Peel J in *Simon v Simon (Level Intervening)* [2024] EWFC 160.

109. It is helpful to set out a relatively short summary of some of that case's very long history in order to illustrate the perils which the Husband and Wife's legal representatives in *this* case could properly be concerned about.

110. There, the litigation lenders had advanced £630,000 which with interest of 19% or 20%, had become £1.2 million by June 2024. The long history to that case had begun with an ancillary relief application (as it was then called) on 12 February 2016. Parker J assessed the assets (including funds held in a trust) as amounting to at least £9 million. She made a needs' based award in favour of the Wife of £3.1 million.

111. The order was subsequently set aside by consent following an appeal to the Court of Appeal. Mr Nicholas Cusworth QC (as he then was) became the allocated Deputy High Court judge in respect of the retrial and on 2 December 2020, dealt with the application made by the wife for legal services provision. There was a pFDR on 12 February 2021. During the course of negotiations, the wife's QC and legal team became conflicted and withdrew. The wife continued unrepresented. The Husband and Wife privately reached an agreement at the FDR whereby the wife was to receive a life interest in a residential property to be purchased for a figure of £1m by the husband's trust; which trust would thereafter own the property absolutely. The wife was to receive no free capital or income in settlement of her claim. Given that the wife had no capital of her own, it followed that a consequence of the agreement was that she would have no funds with which to repay any part of the Level loan.

112. A draft consent order reflecting the agreement was signed by the husband and the wife and sent to the designated Judge on the 17 February 2021. Shortly after

the pFDR, the wife contacted Level and told them that she would not be repaying the loan. Level, on learning of the proposed settlement, wrote to the court on 15 February 2021 copying in the husband's and wife's legal teams. Level said that they urgently requested being joined to the proceedings prior to the approval of any order. They did not say on what basis they were able to intervene; i.e. how they – not a party to the marriage – could obtain a different order for a financial remedy.

113. On 18 February 2021, Level obtained an *ex parte* order from Newton J joining them. The wife, the husband and his solicitors were each notified of the terms of the order. Newton J subsequently amended his order to add a liberty to apply provision and to provide for there to be an "on notice" hearing on the first open date after 11 March 2021.

114. On 10 March, the application was put before Holman J who offered to deal with an urgent oral hearing. Also, on 10 March 2021, the husband's solicitors asked what substantive order Level sought and emphasised that Level had no standing as a non-party to the marriage to achieve any financial remedy award. Level responded by telling the husband's solicitors that they were unable to identify the order they sought until there had been disclosure. The next day, the husband's solicitors replied stating that so far as the Husband was concerned the "matter has now concluded".

115. The order was sealed – unknown to Level – on 16 March 2021. The Husband accepted that the sealing of the order did not affect the civil law rights of Level. Nevertheless, Level asked for the order to be set aside. The Husband resisted on the basis that Level had no standing to pursue their own financial remedy claim

in someone else's marriage and that their civil law claims (which had still not been articulated) would exist irrespective of the making (or the non-making) of the order. On 17 March 2021, Holman J ordered a stay of the consent order.

116. At a further hearing on 19 March 2021, Holman J amongst other orders, ordered Level to plead their civil claim against the husband by 16 April 2021. On 6 April 2021, three weeks after the sealing of the consent order, Level issued their civil claim which alleged repudiatory breach on the part of the wife, procuring a breach of contract by the husband, procuring a court order by fraud and unlawful means conspiracy. They relied on §§423 to 425 of the Insolvency Act 1986.

117. On 29 November 2021, Roberts J heard an application by Level for permission to disclose material and information in their possession but which was subject to "without prejudice" privilege. Roberts J held that on the facts of the case, Level had been entitled to 'seek and secure' party status as an intervener in the financial remedy proceedings. Roberts J refused the application for disclosure. Level appealed the Roberts J order and the appeal was refused permission.

118. On 22 February 2022, the husband agreed that the consent order should be set aside "to permit Level to make representations as to whether the order should be approved" and that thereafter either the order would be made as between the parties or they would simply withdraw the application. Again, it needs to be emphasised that whatever civil remedies Level had, they would retain; they would retain them irrespective of any sealing or an order or even the non-sealing of an order and not making a subsequent one.

119. Mrs Simon then twice in emails to the husband's solicitors on 14 March 2022, said that she wanted no part in the proceedings and in the event of the consent

order being set aside, she did not intend to take any further steps. On 21 March 2022, the first day of the trial, the husband agreed to the consent order being set aside on the basis previously indicated. DHCJ Cusworth QC consensually set aside the sealed order but instead of either (a) making a consent order or (b) make no order and allowing W to withdraw her application, he gave detailed directions for the matter to proceed to a fully contested financial remedy case and gave directions for the filing of updating evidence and further disclosure. The Husband appealed.

120. At the appeal it was pointed out to Level by the Court of Appeal, that their s. 423 to 425 claim was fatally flawed by their not actually being any transaction (especially if the Wife simply withdrew her claim); the Husband was not seeking any transfer or any order and neither was the Wife. The Court of Appeal did direct that Level should be allowed to make representations in order that the Court should have that as part of the consideration of whether to make a consent order. The directions order for filing of evidence and so on of DHCJ Cusworth QC was set aside. As Moylan LJ held at §[114],

"*Further, however, apart from the very limited intervention which has been accepted as being appropriate in the unusual circumstances of this case, namely for the purposes of making submissions as to the proposed consent order, no circumstances were identified during the course of the hearing which, in my view, would justify any more extensive participation either in this case or more generally.*"

121. By then, the Husband and the Wife were no longer proceeding with the consent order. So *prima facie* there was no consent order application for Level to make

representations in. Level did not accept the Wife's position. They were not entitled to seek their own financial remedies orders as between Mr and Mrs Simon, but wished to be heard but to what avail remains unclear. Undaunted Level pressed on and had the matter set down for a hearing on the 5 June 2024. At that hearing, before Peel J, the Husband's counsel contended that as neither Mr Simon nor Mrs Simon was seeking an order, the court could not force them to seek relief and there was no purpose in continuing the proceedings. Level argued that W must attend. Peel J ordered W's attendance. She wrote on 10 June 2024 saying that she did not wish to proceed or attend. On 13 June 2024 Level asked for a bench warrant to secure the Wife's attendance. This was refused. On 20 June 2024 the Wife did appear and said yet again that she did not wish to continue with her claim. Level accepted that they could not seek any substantive relief and the proceedings should be ended (as by then all parties agreed) by the Wife withdrawing her application; i.e. as the Husband had proposed in February 2022.

122. The whole litigation makes for a sorry and expensive tale. But the critical point of distinction from that case to this one, is that here (a) I do propose to make a charge in favour of the legal teams (as opposed to Level who went wholly unsecured and (b) the effect of this order will also mean that there will be a *Palmer v Carey* type charge as explained below. The *Simon v Simon (Level Intervening)* case is very much unique to its own facts. It ought to be rare that a funder should go wholly unsecured but if it does – as *Simon* demonstrates – its civil claims will survive any pact reached in a financial remedy claim.

(2) *Wyatt v Vince* and whether any payment to the lawyers for LSPO can be clawed back.

123. Solicitors are often dissuaded from adopting deferred payment schemes due to the difficulty of securing the funds. It is settled law that a solicitor can usually take the funds on account once they have rendered a detailed bill but this is a retrospective remedy only. It is not usually possible for the solicitor's own future costs to be taken from funds on account (but it may be permissible for future disbursements such as an expert's prospective fees). That a lien can only be levied over money paid to the client in respect of *already* billed costs is authoritatively established by *In Re the Estate of Fuld (deceased) (No 4)* [1968] P 727 (per Scarman J, as he then was). (Of course, once the bill is rendered the solicitor can exercise his lien; he does not need to wait for assessment).

124. But the statute provides in §22ZA (1) that this Court might specify that the purpose of the litigation funding is expressly to enable the provision of future legal services. Having done so, it would seem that the solicitors once in receipt of such funds hold those funds for that purpose; in effect what has sometimes (but not always) been referred to as a *Quistclose* trust for the benefit of the solicitors' incurred but unbilled costs and costs to be incurred in the future. The nature of such an arrangement was examined by the House of Lords in *Twinsectra Ltd v Yardley and Others* [2002] UKHL 12.

125. The apparent difficulty which has arisen with this approach is a perception that following *Wyatt v Vince* [2015] UKSC 14 any such funds might subsequently be clawed back. It seems that that view is a misunderstanding of the speech of Lord Wilson. There he was concerned with counsel arguing that once payment

of the legal costs had been ordered and funds received, then the funds could not ever be retrieved; not even if the original LSPO order was appealed. Lord Wilson understandably strongly doubted that proposition. It is necessary to set out his reasoning in full. It is found at [42] of *Wyatt* (*with my emphasis):*

"It may be helpful briefly to notice **the wife's argument** that, even had the Court of Appeal been correct to have concluded that the costs allowance order should not have been made, **it was not open to it to direct repayment** of any part of the £125,000 other than £2,539. **The argument is that the wife could not be ordered to make repayment because she had never received any part of the sum paid; that, while it remained in their client account, the wife's solicitors held it for the benefit not of her but of the husband** (hence his entitlement to repayment of £2,539); and that, when the balance of the fund was released in stages into their office account, **it became the property of the solicitors.** In support of this argument the wife cites *Twinsectra Ltd v Yardley and Others* [2002] UKHL 12, [2002] 2 AC 164, [2002] 2 WLR 802, in which the House of Lords held that a solicitor for a borrower might hold borrowed money in trust not for the borrower but for the lender subject to the solicitor's power to apply it by way of loan to the borrower for such purposes as had, to his knowledge, been agreed with the lender. I cannot accept this analysis of the costs allowance order. **It provided for the husband to make interim periodical payments to the wife and indeed to make them directly to her solicitors or, in other words, via them. Had he not duly paid under the order, it would have been for her to enforce it. When the instalments were paid into their client account, the solicitors therefore held them for her benefit, albeit subject to the terms of the order. If an order for payment made in respect of legal services under s 22ZA of the 1973 Act or made under the preceding jurisdiction recognised in the *Currey* case has been wrongly made, the appellate court must at least have jurisdiction to order that sums paid under it should be repaid;** otherwise such orders would, to the extent implemented, in practice be unappealable. But, as by its order for only partial repayment the Court of Appeal recognised, an appellate court has a discretion whether to exercise its jurisdiction to order repayment in the wake of a successful appeal. Where the payments have been applied to the purchase of legal services in accordance with the order, the court should in that regard carefully consider all the circumstances, including whether the payer, say a husband, should have applied for a stay of the order and whether, in the light of his circumstances and the wife's ability to make repayment to him, it is reasonable to exercise the discretion to order repayment whether unconditionally or subject to a prohibition against enforcement against her without further leave. The exercise should certainly not be equated with that of determining the incidence of costs at the conclusion of an appeal.

126. Lord Wilson's speech is binding on this Court. So is that of Lord Millett in *Twinsectra.* Lord Wilson's focus is on the ability to review and reimburse

overpayments or where payments have been wrongly made. The argument that the effect of Lord Wilson's dicta could be that a solicitor who has incurred costs in reliance of a § 22 ZA order may then be ordered to reimburse the paying party is mistaken; it is the recipient-spouse who has to make good wrongly paid interim maintenance (which LSPO is a species of).

127. Lord Millet's analysis in *Twinsectra* might be summarised as (1) a resulting trust arises immediately money is paid from the paying-husband to the wife (2) she then pays those funds to her solicitor who is only to deploy them for the LSPO purpose (3) the solicitor is then authorised, i.e. given the power to use that money for the purpose of payment of legal services (4) If the money is not used for that purpose (say that solicitor is disinstructed) then the resulting trust is no longer subject to a power (5) As such the money must return or "result" to the wife who in turn must return it to the husband. But that only applies to money not used for the purpose of legal fees – past and future.

128. Seen in this way, there is no unnecessary exposure to a solicitor receiving LSPO payments. Any funds not used for legal costs must ultimately be returned to the payer (via the recipient-spouse) (the *Twinsectra* position). Where funds have been used for legal services and the LSPO order is subsequently disturbed then it is for the recipient spouse to reimburse (not the lawyers) the paying-spouse; that is the *Wyatt* position. (I do not take Lord Wilson to have gone further than saying if the s.22ZA was wrongly made, there should be power to direct repayment; similarly a repayment would occur on the failure of power identified by Lord Millet).

129. It seems that the fear that lawyers might have to repay funds received under an LSPO represents a mis-reading of *Wyatt v Vince*; it is the recipient-spouse that would have to repay if the original LSPO order is successfully challenged. The lawyers stand in the same position as any other third-party recipient of payments from that spouse. The lawyers need only repay where the funds have not been applied to the specified purpose; i.e. legal costs. If not deployed on legal costs, that repayment is to the Wife who then holds it on resulting trust for the Husband.

130. As already advertised and in order that there be no doubt about this, the solicitors receiving any such s. 22ZA funds shall be required to undertake to apply the funds for the sole purpose of provision of legal services. If there is a surplus of funds this must be returned to the wife for her to repay to the husband.

Adjournment

131. Mr Glaser KC has sought an adjournment of the 29 January 2025 hearing in an unsolicited email sent directly to me. He has then repeated it again in his Rejoinder submissions and again in another email. The 29 January date was arrived at on the 26th November after consultation with counsel's and the Court's diary. I reject this application for a number of reasons:

i) In the bundle (at pages 150 to 167) are the very detailed monthly invoices, that Messrs Harbottle Lewis have billed for to date. These include considerable amounts of time spent on reading into these papers. The reading-in exercise is already well under way. I am told that they received the Husband's papers from Messrs PHB shortly after the FDR. The costs incurred to date (apart from the MPS) are £97,290 (including

counsel's fees). This must represent a considerable amount of work. (It is in addition to the £75,776 have outstanding for the Wife's previous solicitors). In total the Wife has spent (per her Form H of the 22 November 2024) £465,125 . It is reasonable to assume that for nearly £½ million, she has made some progress with the prosecution of her case.

ii) There is about a month in which to read into these papers. The papers ought to be already largely in the Wife's solicitor's hands – either the Wife will have kept her own copies or copies can be requested from the Husband's representatives. The Wife's principal solicitor, Mr Westley believes that he needs 100 units to read the Starck Uberoi file. (See page 168 of the Bundle). That is 600 minutes or 10 hours. He then needs another 100 units to consider a schedule of deficiencies; another 10 hours. There is plenty of time for this to be undertaken before mid-January which will be when the Husband's team will need to see the new Schedule of Deficiencies.

iii) The Form A is dated 15 August 2022. That is over two years' ago. It was preceded by time spent in the pursuit of financial discovery with PwC. In total the Wife has spent nearly four years pursuing discovery. Enough now; the case needs to be got on.

iv) The overriding objective is best served in this case by pressing on with the matter. It will soon be five years since the parties separated. The matter needs to end sooner rather than later.

v) A relatively minor matter is the extent to which the Wife's time difficulties are of her own making: she has changed solicitors in the summer of 2023 and again in early 2024; I have not been told of a good reason for this change. It is her choice who represents but if this causes delay whilst her new solicitors read-in, then it would be unfair to pass on that delay to her ex-spouse. She has also not sought any other directions in the nine months since the unsuccessful pFDR.

Order

132. The order will recite that the Husband will make £150,000 available to Mr Brazil to cover his own representation. Mr Brazil will refund £30,000 of that fund if he does not subsequently retain leading counsel (and the charge in Mr Brazil's favour shall, in that event, be discharged).

Mr Brazil and Messrs Harbottle & Lewis (and their retained counsel) will then have to take a commercial view as to whether they are prepared to continue to act on the bases set out below. If not, then this opportunity should be granted to a successor legal representative. If either Mr Brazil or Messrs Harbottle & Lewis do decline to act, then they must not benefit from this order and will be required to return any funds which they might have received under it.

I therefore require the solicitors for the Wife and for Mr Brazil for the Husband to undertake that they will:

(1) respectively apply the funds received by each of them by this order, for the sole purpose of provision of legal services

(2) if there is a surplus of funds this must be returned to the paying party

(3) they will continue to act for their respective party until the conclusion of the financial remedy proceedings. If they will not give this undertaking or subsequently wish to be released from it then it will be on the basis that they shall repay any funds received under this order to the paying party. Those funds may then be applied to a successor legal representative but on the basis that the new legal representative provides undertakings in like terms as set out in this order

On this basis the order will be:

1. [Consensual directions for the sale of the former matrimonial home in SW3]

2. The Husband shall pay or cause to be paid maintenance pending suit at the rate of £12,000 per calendar month from the 1st January 2025 until the final order for a divorce and thereafter for the parties' joint lives or the Wife's remarriage or further order in the meantime.

3. The Husband shall continue to pay the household bills including service charge, staff costs and household insurance.

4. He shall continue to pay the school fees and reasonable extras appearing on the bill.

5. The Husband shall pay the following sums of Legal Services Provision pursuant to §22ZA of the Matrimonial Causes Act 1973:

a. £30,000 for the purpose of paying the Wife's legal services which shall be paid to Messrs Harbottle & Lewis by 10th January 2025.

b. £60,000 by 28th January 2025

c. £60,000 by 28th February 2025.

6. The Husband shall pay a further £476,585.34 to the legal representatives of the Wife on or before 14 February 2025. The Husband shall be held to have discharged this obligation if by then there is a charge over the former matrimonial home in the same sum plus interest at the Judgment Rate of 8% per annum

7. The Wife shall pay £90,600 to the legal representative of the Husband on or before 14 February 2025. The Wife shall be held to have discharged this obligation if by then there is a charge over the former matrimonial home in the same sum plus interest at the Judgment Rate of 8% per annum.

8. The former matrimonial home shall be forthwith charged with an interim charging order for the sums provided for in paragraphs 6 and 7 above. The formal order will follow that described in the judgment.

9. It is declared that the net proceeds of sale of the former matrimonial home are subject to a *Palmer v Carey* equitable charge in favour of the respective legal representatives in the sums set out in this order.

133. Whether this order should have been made is highly dependent on the factual matrix which will be determined at the final hearing. I am therefore minded to reserve the costs to that final hearing. I therefore make an order nisi reserving the costs. Either party may apply by 21 January 2025 to challenge this order nisi in which event I will hear submissions on the 29 January 2025. Absent such an application the order will be made absolute and the costs reserved to the final hearing.

134. I hope that the respective legal teams will feel able to continue to act in this matter. Unpaid invoices are a bitter harvest after the very hard work that a case such as this requires. Even the contemplated delay in receipt represents an unwelcome uncertainty for both solicitors and counsel. But I hope that the charging mechanisms coupled with the provision for interest contemplated by this judgment will represent something of a haven against the vicissitudes of not being paid immediately on presentation of the bills.

135. It just remains for me to thank both counsel and their legal teams for all their considerable assistance in what is a far from straightforward case.