Neutral Citation number: [2022] EWFC B1

CASE NO: ZZ 20 F 04122

IN THE FAMILY COURT SITTING AT
THE CENTRAL FAMILY COURT

Date: 10th January 2022

Before:

RECORDER ALLEN QC

Between:

CW

Applicant

-and-

CH

Respondent

(MFPA 1984 Part III: Interim Applications)

Hearing dates: 29th November 2021 and 15th December 2021

Mr. Justin Warshaw QC instructed by A Williams & Co for the applicant
Mr. Michael Glaser QC instructed by Harbottle & Lewis LLP for the respondent

JUDGMENT

1. I am concerned with an application brought by Mrs. CW against her former husband Mr. CH dated 6th October 2021 seeking (i) interim periodical payments; and (ii) a costs allowance in respect of legal fees.

2. Mrs. CW was represented by Mr. Justin Warshaw QC (instructed by A Williams & Co). Mr. CH was represented by Mr. Michael Glaser QC (instructed by Harbottle & Lewis LLP). I am grateful to both counsel for the quality and detail of their written Position Statements and their oral submissions.

3. In this judgment I shall refer to the parties as 'W' and 'H'. No discourtesy is intended.

Background

4. H was born on 6th July 1964. He is therefore aged 57. He is a Nigerian national. W was born on 17th February 1967. She is therefore aged 54. She is a Nigerian national but also holds US citizenship. The parties were engaged on 12th February 1994 and were married on 6th July 1994 in Nigeria.

5. There are two children of the marriage: X (aged 26)[1] who completed his tertiary education in Washington and now lives and works in the USA, and Y (aged 13) who attends a boarding school in England (having done so since September 2019).

6. The parties separated in 2014 (differing dates are given in that year but this is not material)[2] when W and the children moved out of the FMH in Lagos and into rental accommodation in the same city.

7. W issued a divorce petition in Nigeria on 31st October 2016 which she withdrew on 11th January 2017. On 6th September 2018 the parties signed a Deed of Separation. On 4th February 2019 W issued a second divorce petition in Nigeria. Decree Nisi was made on 30th September 2019. On the same date the terms of the parties' Deed of Separation were incorporated into a financial order.[3] Decree Absolute was made on 30th December 2019.

8. W moved to England on 20th October 2020 into a property in London ('the London property') which H had owned in his sole name since 2005.

9. On 18th December 2020 W issued an application under the MFPA 1984 Part III seeking leave to pursue an application for financial relief following a foreign divorce. It was supported by a statement from her solicitor dated the same date.

10. On 23rd December 2020 the application was heard by Deputy District Judge Hodson on an *ex parte* basis. He granted permission for W to bring her application.[4]

11. On 29th December 2020 a further order was made *ex parte* on paper by Mr. Justice Holman sitting as the Urgent Business Vacation Judge. It was supported by a statement by W's solicitor dated 23rd December 2020 and (I believe) a statement from W dated 24th December 2020 (although this is not specifically referred to on the face of the judge's order). He ordered that the permission granted (or purported to have been granted) by Deputy District Judge Hodson on 23rd December 2020 was confirmed.

12. I shall return to the specific wording of these two orders later in this judgment.

13. On 5th January 2021 Deputy District Judge Hodson made three further *ex parte* orders (i) a freezing order in the sum of £3 million; and (ii) non-molestation and occupation orders to last until 11.59 pm on 3rd July 2021 (Case No. ZC 20 F 0006). These applications were supported by a statement from W dated 4th January 2021.

14. The various orders were served on H in April 2021. The exact date is (I believe) disputed but nothing turns on this for the purposes of this judgment.

15. On 21st May 2021 Deputy District Judge Brooks made two *inter partes* orders (i) entering a restriction at the Land Registry against the London property (H having voluntarily offered the same) until the conclusion of W's Part III application, listing the issue of whether W's Part III

[1] There may be an issue as to whether or not X is H's biological child. If this is in issue it is not material for this application.
[2] The date of separation at clause 1.2 of the Deed of Separation is given as 2012 but, again, this is not material.
[3] The Decree Nisi states *inter alia "An Order is hereby made that [H] shall pay monthly allowance to [W] in line with the terms stated by the parties in clause 4 to 4.3 of Exhibit B. An Order is hereby made that [H] shall provide residence for [W] in line with the terms in clause 3 to 3.3 of Exhibit B. An order is hereby further made to [H] to provide cars to [W] in line with the terms agreed upon clause 5 of Exhibit B."*
[4] I should record that the order in the bundle was as set out in an email from the Deputy District Judge. I have not seen the order as drawn or sealed but neither party took any point in relation to this.

application had been validly issued prior to 31st December 2020 for a further hearing, discharging the freezing order of 5th January 2021, and ordering W to pay H's costs of the application to discharge the freezing order as incurred between 13th May 2021 and the hearing that day (inclusive) to be summarily assessed at the next hearing; and (ii) discharging the non-molestation and occupation orders on the basis of undertakings being given by H and adjourning the application generally with permission to restore and with it to stand dismissed if no application to restore was made prior to 4 pm on 4th January 2022.

16. On 12th August 2021 Her Honour Judge Hughes QC heard H's application as to whether W's Part III application had been validly issued prior to 31st December 2020. On 19th August 2021 she gave judgment determining that it had. On 24th September 2021 Mr. Justice Peel refused H's application for permission to appeal. On 7th October 2021 Her Honour Judge Hughes QC finalised her order in which *inter alia* she (i) permitted W's Part III application to proceed; (ii) listed a First Appointment on the first open date after 6th January 2022; (iii) directed Forms E to be exchanged by 30th November 2021; (iv) ordered H to pay W's costs of the hearing on 12th August 2021 summarily assessed at £30,000; and (v) summarily assessed the costs W was to pay in relation to the hearing on 21st May 2021 to be £10,000 which was set off against the costs order in her favour.

17. W issued her interim applications on 6th October 2021 supported by a statement of the same date. The time-estimate was given as two hours. H served a statement in reply on 25th November 2021 and W served a statement in response on 26th November 2021.

18. W's applications came before me on 29th November 2021 with a time-estimate of three hours (the time-estimate having been extended by a further hour on application to the List Office when H's solicitors had said on 9th November 2021 that a one-day time estimate was more realistic). I determined (in W's favour) the question of whether a report from Prima & Company accountants that was exhibited to W's statement of 24th December 2020 had been admitted into evidence but I said the question of what weight (if any) was to be given to the said report was a matter for the court to consider at any future hearing. I refused H's application for permission to appeal this decision.

19. There was insufficient time for me to deal with the application substantively. In this context I agree with the observations made by Recorder Chandler in *E v B (Interim Maintenance Inaccurate Time Estimate)* [2021] EWFC B90 on 04th November 2021 at 3 – 9 inclusive as to inadequate time-estimates. I therefore relisted the applications on 15th December 2021 with a time-estimate of one-day.

20. The hearing on 15th December 2021 concluded at 3.55 pm. There was insufficient time for me to consider and give judgment on that day. I therefore reserved judgment.

The nature of the two orders granting leave

21. The order made by Deputy District Judge Hodson on 23rd December 2020 recited that (i) W had sought urgent consideration of her leave application on or before 31st December 2020 *"in circumstances where the jurisdictional provisions thereafter change"*;[5] and (ii) the court was willing to make the order *"in the distinctive circumstances of the imminent change in the jurisdictional provisions of this discretionary power but with the specific opportunity for [H] to*

[5] This was because the only jurisdictional basis on which the application could be made was pursuant to s15(1A), relying on the Maintenance Regulation – i.e. that W was habitually resident at the time of the application and that she did not have to be resident for one year preceding that application. The application was therefore required to be made prior to the end of the transition period of the United Kingdom's departure from the European Union i.e. before the deadline of 23:00 on 31st December 2020 when this jurisdictional basis would cease to exist.

seek to set aside this leave upon service of this order …". The judge thereafter granted leave pursuant to MFPA 1984 Part III s13*"specifically on the basis of jurisdiction as prevails on or before 31 December 2020"* and ordered that H had leave *"in the particular circumstances of this case to apply to set aside leave"*.

22. The order made by Mr. Justice Holman on 29th December 2020 recited (i) the *"distinctive circumstances"* as referred to on the face of the order of 23rd December 2020 and the *"specific opportunity"* to apply to set aside granted to H; (ii) noted that W was concerned that, notwithstanding the valid grant of permission by the Deputy District Judge, *"the learned judge made* (sic) *have exceeded his powers in granting the urgent relief sought by [W] in the distinctive circumstances referred to in his order*" as the relevant rules state that only a Judge of High Court level may grant permission pursuant MFPA Part III absent the parties' consent;[6] and (iii) that W's solicitors' statement of 23rd December 2020 explained the urgency of W's application as changes to jurisdiction after 10.59 pm on 31st December 2020 *"render[ed] [W] potentially without an immediate remedy."* The order directed that the parties liaise with the Clerk of the Rules seeking an urgent hearing *"in the event that [H] seeks to challenge the jurisdiction"*.

23. Two questions arise – first was there anything 'conditional' in relation to the nature of the leave as granted, and second what is the relevance, if any, that H did not apply to set aside the leave.

24. My answer to the first question is 'no'. Although Deputy District Judge Hodson said that he had been willing to grant leave in the *"distinctive circumstances"* of the imminent change in the jurisdictional requirements and that he had granted leave *"specifically on the basis of jurisdiction as prevails on or before 31 December 2020"* I consider that the question of whether leave is granted is a binary one: it is either granted or it is not.

25. What the granting of leave means as to the merits of W application and whether given that leave was granted I can (and if so should) *"judge the application with caution"* 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 – i.e. have regard to the principle as set out in *Rubin v Rubin* [2014] 2 FLR 1018 per Mostyn J at 13 iii) – are separate questions that I shall consider in due course.

26. My answer to the second question is that it is of no relevance. In *Agbaje v Agbaje* [2010] 1 FLR 1813 (per Lord Collins of Mapesbury at [33]) it was made clear that once leave had been granted at the *ex parte* stage the approach to setting aside leave should be the same as the approach to setting aside permission to appeal under the CPR which may only be exercised where there is a compelling reason to do so (CPR r.52.9(2)) and in practice in the Court of Appeal is only exercised where some decisive authority has been overlooked so that the appeal is bound to fail or where the court has been misled. Therefore unless it is clear that the respondent *"can deliver a knock-out blow"* the court should use its case management powers to adjourn an application to set aside to be heard with the substantive application.

27. Similar comments were made in *Traversa v Freddi* [2011] 2 FLR 272 by Thorpe LJ at [42] that *"[i]t should be as difficult to set aside leave granted under s13 as it is to set aside permission to appeal granted in this court"* and by Munby LJ (as he then was) at [53] that *"[t]o repeat, unless it is clear*

[6] I assume that this was because The Family Court (Composition and Distribution of Business) Rules 2014 r.15(1) stated that proceedings under MFPA 1984 Part III, where one of the parties did not agree to the grant of permission, should be dealt with by a judge of High Court level until May 2021 when they were amended to reflect (i) *Barnett v Barnett* [2014] EWHC 2678 per Holman J; and (ii) amendments made to the FPR 2010 by the Family Procedure (Amendment No. 4) Rules 2014 SI 2014/3296. The President's Guidance: *Jurisdiction of the Family Court: Allocation of Cases Within the Family Court to High Court Judge Level and Transfer of Cases From the Family Court to the High Court* dated 28th February 2018 was also amended on 24th May 2021. See also *AA v AHM* [2020] EWFC 105 per Moor J at [42].

that the respondent can deliver "a knock-out blow" the court "should" adjourn an application to set aside to be heard with the substantive application" and at [54] that if an application to set aside the grant of leave is pursued it *"should be given an appropriately short listing to enable the respondent to demonstrate, if he can – and it will not take all that long, which is why the listing can be appropriately short – that he has some "knock-out" blow. Unless the respondent can demonstrate that, his application, if not dismissed then and there, should be adjourned to be heard with the substantive application."*[7] Likewise in *AA v AHM* [2020] EWFC 105 Moor J stated at [69] that *"I am clear that when Agbaje refers to the need for a "knock out blow" it was to discourage this type of application"* and at [70] that *"I am therefore clear that applications such as this to set aside are to be discouraged. They really are only to be successful where there is a "knock out blow" that means that an applicant will fall at one of the fences at the final hearing. That is what was intended by Agbaje and that should continue to be the position."*

28. In *Potanina v Potanin* [2021] 2 FLR 1457 having cited paragraph [33] of *Agbaje* King LJ stated as follows:

> [35] The principles are so well known that they scarcely need repetition:
>
> (i) The test is not high for the grant of leave but there must be a 'solid' case to be tried.
>
> (ii) The power to set aside may only be exercised where there is some compelling reason to do so. In practice it will only be exercised where a decisive authority is overlooked or the court has been misled.
>
> (iii) Unless the applicant can deliver a 'knock-out blow', an application to set aside should be adjourned to be heard with the substantive application.

29. It is clear that there was no such 'knock-out blow' in this case. It therefore follows that there is no inference that I can properly draw in W's favour from H's decision not to apply to set aside the leave.[8] I therefore reject the submission made at paragraph 6 of Mr. Warshaw's Position Statement that it is *"noteworthy"* that H has not applied to set aside the leave although he is right as to H's reason for not doing namely *"the grant of leave is made on solid ground"* as this is a prerequisite for leave being granted (see below).

The consequence of the grant of leave

30. MFPA 1984 s13 states that "*the court shall not grant leave unless it considers that there is substantial ground for the making of an application for such an order"*.

31. In *Agbaje* Lord Collins of Mapesbury said the following at [33]:[9]

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[7] I note that in *Potanin v Potanina* [2020] 1 FLR 616 Cohen J stated at [61] that *"The phrase 'knockout blow' is often used as the test of what a respondent needs to be able to land to revoke leave. It is agreed that 'knockout blow' is no different from 'compelling reason' and to my mind the latter is a more helpful phrase. I wonder if there is any real difference between 'compelling reason' and showing that there is 'no solid ground' for the bringing of an application. I find it difficult to see any distinction of significance."*

[8] I note for completeness that in his oral submissions Mr. Glaser was critical that (i) the witness statement of 18th December 2020 from W's solicitor that was before Deputy District Judge Hodson focussed almost exclusively on the urgency of the application given pending changes at the end of the Brexit transition period and made no reference to the Nigerian order. He also criticises W's solicitors' second statement of 23rd December 2020 for not referring to the Deed of Separation or the subsequent court order; and (ii) neither *M v W (Application after New Zealand Financial Agreement)* [2015] 1 FLR 465 nor *Zimina v Zimin* [2017] EWCA Civ 1429 were cited to either Deputy District Judge Hodson or Mr. Justice Holman. However, in my view these are submissions that would be made on an application to set aside leave or at a final hearing and are not relevant to an interim application once leave has been granted.

[9] Cited with approval in *Potanina v Potanin* [2021] 2 FLR 1457 by King LJ at [34]. I am of course aware that Mr. Potanin has sought permission to appeal from the Supreme Court and that the outcome of this application is awaited.

In the present context the principal object of the filter mechanism is to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse. The threshold is not high, but is higher than "serious issue to be tried" or "good arguable case" found in other contexts. It is perhaps best expressed by saying that in this context "substantial" means "solid" …

32. In *Traversa v Freddi* the Court of Appeal considered how the test set out in *Agbaje* should be applied. In respect of the leave filter in s13 Thorpe LJ said:[10]

[30] It is clear that the s13 filter is there to exclude plainly unmeritorious cases and, although, in the evaluation of substance, regard must be paid to overall merits, *it does not call for a rigorous evaluation of all the circumstances that would be considered once the application has passed through the filter.*

[31] At the hearing of the s13 application the judge will of course be conscious of the fact that, once through the filter, the applicant will have to clear a number of fences that the following sections erect. *Unless it is obvious that the applicant will fall at one or more of the fences, his performance at each is better left to the evaluation of the trial judge.*

33. In *Abuchian v Khojah* [2015] 2 FLR 153 Mostyn J stated at [7] that in *Traversa v Freddi "it was made abundantly clear by the Court of Appeal that the object of the filter is to weed out those applications that can truly be described as unmeritorious"* and at [8] that *"if there are issues of fact, or if the case is not obviously one where there would be a later exclusion, then the case should be allowed to go forward"*. Further at [12] he stated that *"[t]he case to set aside can only succeed if … the claim can be demonstrated to be plainly unmeritorious and where it is obvious that this applicant will fall at one or more of the fences that she has to surmount at trial"*.

34. In *Potanina v Potanin* [2021] 2 FLR 1457 per King LJ there is further reference at [85] to the *Agbaje* test being *"namely were there 'solid grounds or substantial grounds for the court to be able to say that an order might be made'"*.

35. In my judgment the granting of leave therefore establishes nothing more than Deputy District Judge Hodson and Mr. Justice Holman were satisfied that W's application (i) was not a *"wholly unmeritorious claim being pursued to oppress or blackmail"* [H]; and/or (ii) represented *"a 'solid' case to be tried"*; and/or (iii) was not *"plainly unmeritorious"*.

36. Therefore although I accept that as Mr. Warshaw states at paragraph 4 of his Position Statement (i) Part III proceedings unlike proceedings under MCA 1973 Part II can only be brought with the court's permission; and (ii) the filter mechanism *"involves appraisal of the case"*, such appraisal requires only a conclusion that there is solid ground that an order *"might"* be made. As Moor J recently observed in *HRH Haya Bint Al Hussein v HH Mohammed Bin Rashid Al Maktoum* [2021] EWFC 94 at [49] the grant of permission to an applicant *"does not, of course, mean that she will be successful"*.[11]

37. I therefore reject Mr. Warshaw's submissions that (i) there is a need for *Rubin* [13] iii) in MCA 1973 Part II claims as a party can apply as of right without any filter but there is not such a need in a Part III claim where there is such a filter; and (ii) once a court had determined that a case has passed through the leave filter it means that (in effect) the court is precluded on an interim application from having regard to the principle as set out at [13] iii).[12] Notwithstanding the difference between MCA 1973 Part II and MFPA 1984 Part III claims in this regard I agree with

[10] Italicised emphasis as applied in *Potanina v Potanin* [2021] 2 FLR 1457 at [36].
[11] Moor J used the same words in *Aldoukhi v Abdullah* [2021] EWHC 3086 (Fam) at [47].
[12] Mr. Warshaw accepted that there was no reported case as to whether paragraph [13] iii) of *Rubin* did not apply in a Part III case. He said, however, that this was *"not surprising"* because there was no doubt it did not apply when the *Agbaje* leave test applied and had been satisfied. However, this is somewhat circular logic.

Mr. Glaser that it would be odd to have *Rubin* apply in full to claims under MCA 1973 and CA 1989 Schedule 1 (as was suggested in *Rubin* and confirmed in (for example) *BC v DE (Proceedings under Children Act 1989: Legal Costs Funding* [2017] 1 FLR 1521 per Cobb J) but not claims under MFPA 1984 Part III.

38. I am fortified in this conclusion by what was said by Mostyn J in *Rubin* itself. At [14] the judge noted that *"curiously"* the new statutory provisions did not extend to proceedings under *inter alia* MFPA 1984 Part III and that the common law principles in *inter alia Currey v Currey (No. 2)* [2007] 1 FLR 946 continue to apply. Mostyn J stated at [15] that in his opinion *"the principles set out in para [13] ought to apply, with the necessary modifications, where an order is sought for costs funding in proceedings under … Part III of the 1984 Act …"* I do not consider that - absent this having been said expressly - the *"necessary modifications"* can be taken to exclude principle iii) and the fact that it was not excluded means that it applies.

39. I also reject for the same reasons Mr. Warshaw's submission that consideration of the merits means that in effect I am impermissibly going behind (or seeking to sit in an appellate capacity in relation to) the orders of Deputy District Judge Hodson and Mr. Justice Holman as these could only have been made upon satisfaction of the *Agbaje* test and by doing so I would be improperly making assumptions as to what each were doing. I agree with Mr. Glaser that the suggestion that a respondent in these circumstances should not be permitted to make submissions in relation to merits on the first occasion that the application is considered *inter partes* would be contrary to natural justice.

40. I further reject Mr. Warshaw's submission at paragraphs 7 and 8 of his Position Statement that when, as part of his reasons for refusing permission to appeal the order of Her Honour Judge Hughes QC, Mr. Justice Peel said on 24th September 2021 that *"[H's] complaints on the merits about forum shopping, the pre-marital agreement and the Nigerian order are a matter for the substantive application, and not relevant to this appeal"*, this means the final hearing of the substantive application rather than any interim hearing thereof.[13] An interim hearing such as the one before me is, as Mr. Glaser submitted, within the substantive application. I therefore disagree with Mr. Warshaw that such complaints *"have no relevance"* before me.

41. In my judgment taking account of these *"complaints"* at an interim stage when adjudicating on the interim applications is therefore not (as Mr. Warshaw submitted it would be at paragraph 8 of his Position Statement) *"morph[ing] into an application to set aside leave by the back door."*

The merits of W's wider application

42. It is H's case that no substantive relief should be granted on W's application as it is devoid of merit. It is, however, rightly common ground that the fact that H maintains that W has no substantive claim does not in and of itself preclude me from making an order for interim maintenance or a costs allowance. This would be the same even if (which is not the case here) the jurisdiction to bring the application was in issue (see *Moses-Taiga v Taiga* [2006] 1 FLR 1074 and *MET v HAT (Interim Maintenance)* [2014] 2 FLR 692 per Mostyn J).[14]

43. In *MET v HAT (Interim Maintenance)* Mostyn J further stated:

> [21] … where the jurisdiction to pronounce a decree is in dispute, the court should act very cautiously indeed. The court is entitled, in my view, to have regard to the strength or otherwise of the claim that the

[13] I reject the submission, however, made by Mr. Glaser that *"reading between the lines"* Peel J thought H's arguments in relation to these issues *"had legs"*. It would be wholly improper for me to speculate in this regard and I do not do so.
[14] In *MET v HAT (Interim Maintenance) (No. 2)* [2015] 1 FLR 576 Mostyn J stated that the foreign divorce in fact derived from proceedings as distinct from non-proceedings and hence a Part III application could be made.

court has jurisdiction, and the more uncertain the court is on a provisional basis that the court does have jurisdiction, the more cautious it should be.

[22] In my judgment, in circumstances where it is very uncertain that the wife here would be entitled, by reason either of *res judicata* or estoppel, to pursue a third petition and, even if she were able to demonstrate that this marriage had not been previously dissolved in the husband's home country, I believe that, for herself, I should only award maintenance pending suit to relieve a real predicament of need, should one exist; and, I am not satisfied at all that, from her position, there is a real predicament of need, particularly having regard to the sums which I intend to award by way of 'interim' child support. So I make no award in relation to maintenance pending suit for the wife; and for the same reason I make no award for a Legal Services payment order. In that latter regard I am specifically entitled, under s22ZB(1)(c) of the Matrimonial Causes Act 1973 to have regard to the subject matter of the proceedings, which does no more than reflect what Wilson LJ said in *Currey v Currey (No 2)* [2007] 1 FLR 946; and, given that I am extremely doubtful that the subject matter of the proceedings has any merit at all, I decline to award any sums by way of a costs allowance in respect of the wife's claims for herself.

44. In *CC v NC (Maintenance Pending Suit)* [2015] 1 FLR 404 Mostyn J referred back to *MET v HAT (Interim Maintenance)*. He observed as follows:

[18] On the unchallenged single-joint-expert evidence before the court in that case, the wife was heading towards a dismissal of her divorce proceedings and, in those circumstances, faced with evidence of such strength, I took the view that I should proceed very cautiously and, while I was prepared to award generous child maintenance, I was not prepared to make an award for maintenance pending suit or a Legal Service payment order.

45. Mostyn J then distinguished *MET v HAT (Interim Maintenance)* at [22] stating that in the current case W had *"an arguable case, possibly even a strongly arguable case"* as to jurisdiction and therefore *"it would [not] be proper for me to discount her maintenance pending suit claim or otherwise to act conservatively by reference to that factor"*.

46. In *Rubin* Mostyn J stated as follows:

[13] 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.

47. This is of course not a claim where jurisdiction is in issue but one where (*per* H) the claim for substantive relief appears doubtful having regard to its subject matter.

48. Most recently in *R v R* [2021] EWHC 195 (Fam) Nicholas Cusworth QC sitting as a Deputy High Court Judge stated:

[12] I also do take into account, as I am invited to by Mrs Carew Pole, the jurisdictional dispute which continues to rage between the parties, and the fact that there is also an issue in relation to Forum in this case. Furthermore, I am also aware and take account of the fact that that there is a Post-Nuptial Agreement executed in State A, under which if enforced in full the husband would be disentitled to any provision. I do not know how important that document will prove to be, if the case proceeds in this jurisdiction. But until the determination as to jurisdiction is made it is important that a fair and proportionate financial balance is maintained between the parties.

49. Mr. Glaser submitted that (i) the substantive application should fail because the Deed of Separation (which was made into an order of the court) was a binding separation agreement which satisfies the *Radmacher* and *Edgar* tests and was fair; (ii) in the event that W wished to challenge the order on *Edgar* grounds (for example undue influence, non-disclosure, bad legal advice etc) she must apply to set aside the order in Nigeria otherwise this court must work on the

basis that it is a valid and binding order and not one susceptible to challenge for such reasons; and (iii) if any increase in maintenance is to be applied for, W should apply for this in Nigeria where it can be properly considered in the context of the law there.

50. In support of these arguments Mr. Glaser relied on *Zimina v Zimin* [2017] EWCA Civ 1429 in which King LJ held:

> [91] Where the financial provision agreed and implemented between the parties following a foreign divorce, was (i) adequate at the time agreement was reached; and (ii) could be said to have satisfied the *Radmacher* fairness test and the *Edgar* principles, then a court will scrutinise an application for further provision with care and will hesitate before making an order under Part III in circumstances where there have been no change in the applicant's circumstances which, had the proceedings been conducted in England, would have satisfied the *Barder v Caluori* conditions. Naturally there may be exceptions …

51. Mr. Glaser also submitted that the present case bore similarities to *M v W (Application after New Zealand Financial Agreement)* [2015] 1 FLR 465 per Coleridge J. In particular he relies on the following paragraphs:

> [45] Given the grounds upon which the wife now seeks to challenge the agreement, the proper forum must surely be New Zealand. The New Zealand Act itself contemplates such set aside applications on precisely these grounds. However, the wife, having commenced such proceedings, has chosen not to proceed with them. It is not for this court to speculate as to the reasons for her withdrawal of those proceedings. Presumably she does not think she has much prospect of success in that jurisdiction.
>
> [50] Accordingly the wife is forced back on to the simple point that she is now in straitened financial circumstances. It is at this point that she has to confront head on the 'second bite of the cherry' argument. However much sympathy I have with the wife, to allow her to proceed in these circumstances would put her in a very much better position than an English wife in comparable circumstances. If a final order had been made in this jurisdiction along the lines of the order made in New Zealand, it would be incapable of being undermined, absent *Barder*-type factors, simply because a wife had spent her share and needed more.

52. In reliance on *M v W (Application after New Zealand Financial Agreement)* Mr. Glaser submitted that (i) (based on [45]) if W wanted to go behind the Deed of Separation she needed to do so in Nigeria (and I must assume that it was validly made and *Radmacher* compliant); and (ii) (based on [24], [27] (xi), [47] and [48]) *Edgar* issues (duress and non-disclosure) were raised in that case on the applicant's behalf at an interim hearing and hence it is appropriate for him to do so in the context of this application and I must therefore engage with these issues now.

53. Mr. Warshaw disagreed. He stated that paragraph [91] of *Zimina* refers to what a court will (or will not) do if findings (i) and (ii) - i.e. the financial provision was adequate and that the agreement satisfies *Radmacher* and *Edgar* - are made at a final hearing. In other words, this paragraph relates to the final hearing and the conclusion of the case. *Edgar* issues are not matters for an interim hearing to be determined without evidence and therefore when considering interim maintenance and a costs allowance these are irrelevant and one should not *"bounce forward"* to [91]. In relation to *M v W (Application after New Zealand Financial Agreement)* he stated that the case (i) was an argument about a *'second bite of the cherry'* and not *Edgar*; and (ii) does not say W cannot proceed and must return to the foreign jurisdiction.

54. In my view it must be possible to raise *Radmacher* and *Edgar* on an interim application (and Mr. Warshaw is clearly wrong to submit that *Edgar* issues were not raised in *M v W (Application after New Zealand Financial Agreement)*) if these are the reasons why the respondent argues that the claim for substantive relief appears *"doubtful"*. I am fortified in this view by *S v S (Ancillary Relief)* [2009] 1 FLR 254 *per* Eleanor King J (as she then was) albeit it is a decision in a different context.

In that case the judge was considering what case management directions to make where the wife sought conventional (albeit slightly more limited) financial remedy directions and the husband sought a stay of the proceedings and the hearing of his notice to show cause application with a view to the court making an order in the terms he submitted had been agreed. Eleanor King J stated the following:

> [27] The issue as to whether or not there was an agreement will be decided by the judge hearing the case in whatever form it ultimately takes …
>
> [28] Whilst making no specific findings (and being conscious that the court has not had sight of all the complete files of documentation to which each party may wish to refer in due course), it is necessary for me to consider in broad terms the strength of the argument in favour of there having been an agreement by reference to the history of the agreement and the relevant law.

I therefore consider (adopting the words used in *S v S (Ancillary Relief)*) that it is permissible (and indeed appropriate) for me *"to consider in broad terms"* the strength of W's claim at this interim hearing.

55. In relation to the specific issues of Nigerian law, at paragraphs 47 – 48 of his Position Statement under the heading *"A red herring"* Mr. Warshaw submitted that (i) *"H wants to turn this hearing into a trial of the claim"*; and (ii) the competing expert opinion that I have from Nigerian lawyers dealing with the question of what relief W could obtain in Nigeria *"is an issue for the trial of the substantive claim not for this interim hearing"*.

56. I have competing Nigerian expert evidence. I have three reports on W's behalf by Elvis E. Asia of Law Future Partners dated 2nd August 2021, 24th November 2021, and 12th December 2021[15] and one report on H's behalf from Oluyele Delano of Akindelano Legal Practitioners dated 9th November 2021.

57. I accept, as Mr. Warshaw submitted, that I must be careful in determining an interim application not to go down a 'rabbit-hole' in relation to Nigerian law. As he stated this is not the trial of whether W has a cause of action in Nigeria. Further, as he rightly stated, I cannot adjudicate between two experts where their evidence is not agreed (H's Nigerian lawyers say W can apply in Nigeria and W's Nigerian lawyers say she cannot) and they have not been cross-examined before me. He therefore states that (in effect) I cannot take it any further.

58. Whilst I agree that this is not the trial of whether W has a cause of action in Nigeria I disagree that this prevents me from having some regard to the merits of the application for substantive relief for the reasons that I have set out above. Expressly – and solely – in this context I note the following:

    a) s73(j) of the relevant Nigerian statute under the heading "*General powers of the court"* states that the court may discharge, modify, revive or (at iv) *"vary the order so as to increase or decrease any amount ordered to be paid by the order"*;

[15] The report by Elvis E. Asia of Law Future Partners dated 12th December 2021 was filed pursuant to the direction at paragraph 8 of my order of 29th November 2021 for them to provide answers to the following questions as a matter of Nigerian law (i) could W apply to vary the terms of the order or apply for any further financial orders; and (ii) could W apply to set aside the order on *Edgar* principles namely any of the following: undue influence, fraud, material non-disclosure, abuse of a dominant position to secure an unreasonable advantage and/or bad legal advice. I further directed that, for the avoidance of doubt, no opinion shall be expressed as to the merits of succeeding on either of these applications.

b) the Nigerian Court of Appeal's decision in *Lamurde v. Adamawa State Judicial Service Commission* [1999] 12 NWLR, Pt. 629 (C.A) p. 99, paras. F-G (referenced at paragraph 4 of the Akindelano Legal Practitioners' letter dated 9th November 2021) suggests that an application can be made to set aside a consent judgment on *Edgar* principles. In stating this I do not consider that I am going down any impermissible rabbit-hole: as Mr. Glaser states it would be extremely unlikely that in a mature and common law based legal system such as Nigeria one could not apply to a competent court to set aside a judgment where it was obtained *inter alia* by fraud, material non-disclosure and/or duress; and

c) I agree with Mr. Glaser that there appears to be a contradiction between the Law Future Partners' letters of 24th November 2021 and 12th December 2021. In the former it is said that *"the issue really is not the general powers of the court but whether or not the powers can be exercised in the circumstances of this case"* and that an application to set aside can be made. I also note that it refers to the *"difficulty and almost impossibility of setting aside the order which was predicated on the agreement of the parties"* and that a fresh suit *"would take years to conclude"*. This suggests, as Mr. Glaser submitted, that there is jurisdiction for W to bring the application in Nigeria and then comments on the merits of so doing. However the letter of 12th December 2021 suggests that such an application cannot be made. I agree that it is not immediately easy to reconcile the two.

59. Balanced against this is that it appears that the merits of any application that W may be able to make to set aside the order may be materially impacted because she is in England and not Nigeria. Mr. Glaser's response to this is that she should therefore return to Nigeria and for W (as he put it) to *"put her fingers in her ear"* in this regard is a potential abuse of both process and the *lex fori* and if (for whatever reason) she cannot return to Nigeria then her remedy (if she has one) may be to sue her former lawyers in Nigeria.

60. Mr. Warshaw's response is that W cannot return to Nigeria because a criminal complaint had been filed against her by H which prevented her returning to Nigeria.

61. Shortly after the hearing on 15th December 2021 at 4.04 pm I received an email from Mr. Glaser about the alleged complaint in which he stated *"[t]here is no evidence about this (there is an unevidenced reference in [W's] Nigerian lawyer letter). [H] denies that he has made any such complaint and that even if he had, which he has not, that would not prevent her returning to Nigeria."* Mr. Warshaw replied at 4.14 pm stating that there is evidence of such a complaint. He attached a letter from Akindelano Legal Practitioners (H's Nigerian lawyers) to W's solicitors dated 15th April 2021 which said as follows:

> 6.2 … The sum of N150,000,000 (c £300,000) and other pecuniary benefits obtained by [W] under the Deed of Separation … were clearly received by a false representation which goes to the root of that Settlement. This is a financial crime which has been reported to the Economic & Financial Crimes Commission (EFCC) with the aim of recovering the money. A substantial part of the money has been laundered to the UK and it appears at least $20,000 is traceable to your account. We ask that you sequester the money or pay same to the court until these proceedings are concluded.

62. At this interim stage I do not have sufficient evidence to express even a provisional view that (deliberately adopting the wording used at paragraph [91] of *Zimina v Zimin*) the parties' agreement was *"adequate"* at the time it was reached or that it *"satisfied"* the *Radmacher* test and the *Edgar* principles. I agree (as Mr. Warshaw submitted) that this is what this entire case will be about. I therefore do not know at this stage whether findings in this regard will lead the final hearing judge *"to scrutinise an application for further provision with care"* and hesitate before making an order under Part III absent changes that satisfy the *Barder* conditions.

63. However I do consider that there is some basis to suggest that the court may – and I emphasise the word may – conclude that (i) this is the kind of application which Lord Collins in *Agbaje* at [72] stated was not the purpose for which Part III was enacted given the limited (*"some"*) English connections and where W had the right to apply for financial relief under foreign law and an award was made in the foreign country; (ii) in the event that W wishes to challenge the Nigerian order on *Edgar* grounds she should apply to set aside the order in Nigeria; and (iii) if any increase in maintenance is to be applied for, W should apply for this in Nigeria. I do not know, however, what conclusion the court will reach about the impact (if any) of this on the fact (as appears to be the case) that H has reported W to the Nigerian Economic & Financial Crimes Commission.

64. If it is for the English court to determine *Edgar* issues of undue influence and the like I also consider that there is *prima facie* some force in Mr. Glaser's submissions that this may be difficult given that (i) the parties had separated four years before the Deed of Separation and five years before the consent order; (ii) W was separately represented in the negotiations that led up to the Deed of Separation; and (iii) it was W who issued the second divorce petition and sought conversion of the Deed of Separation into a financial order (H taking no part in the proceedings).[16] I fully accept that W's statements contain 'answers' to all of these points but in my view the bare chronology and facts allow for me at this interim stage to express my doubts as to the merits of an application to set aside on *Edgar* grounds.[17]

65. I do not consider that these interim views – and I emphasise that I am making no specific findings in expressing them - mean that (as Mr. Glaser stated at paragraph 17 of his second Position Statement) *"the Court should not / will not make any final order, **and therefore** the Court should not make any interim order – whether for legal fees or maintenance"* (my emphasis). However it does mean that I shall judge W's applications with a degree of caution.

66. For completeness I should record that I decline to express a view as to whether (as Mr. Glaser submitted) W's lawyers were *"partisan"* and/or whether in breach of paragraph 8 of my order of 29th November 2021 the letter of 12th December 2021 is *"replete with opinion"* and/or whether this contrasts with H's lawyers who wrote a letter *"in the usual terms"* focussing on statute and case law and that their letter *"made more sense"*. Not only do I not need to express a view on this issue to determine these applications but were I to do so I would be trespassing on the kind of conclusions that can only be expressed when such evidence has been tested at a final hearing.

Interim maintenance application – the law

67. Section 14 of Part III provides as follows:

> (1) Where leave is granted under section 13 above for the making of an application for an order for financial relief and it appears to the court that the applicant or any child of the family is in immediate need of financial assistance, the court may make an interim order for maintenance, that is to say, an order requiring the other party to the marriage to make to the applicant or to the child such periodical payments, and for such term, being a term beginning not earlier than the date of the grant of leave and ending with the date of the determination of the application for an order for financial relief, as the court thinks reasonable.

68. Mr. Glaser highlighted the words *"immediate need of financial assistance"*. He submitted that this imported a more restrictive test than that which applies under MCA 1973 s22. Mr. Warshaw disagreed. Neither counsel identified any authority on the point.

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[16] The Decree Nisi states there was *"no legal appearance for [H]"*.

[17] I also note that on 20th August 2020 H.B. Jimoh, Principal Registrar 1, signed certified copies of the Nigerian orders and within weeks W had moved to England and was claiming that the agreement was unfair and that she was (in effect) forced into agreeing it. The relevance (if any) of this may be a matter for the substantive application.

69. Assistance in this regard can, however, be found in *M v M (Financial Provision)* [2011] 1 FLR 1773 per Eleanor King J (as she then was) at [39] – [53] inclusive. The judge noted at [42] that the language adopted for Part III is *"somewhat different"* from that found in MCA 1973 s22 and she posed at [43] the question whether s14 imported a higher hurdle than that that found in s22 or, to put the question another way, did the word 'immediate' have connotations of urgency and was 'need' limited in its scope given that it, unlike s22, was not balanced by the various considerations found in MCA 1973 s25. At [45] the judge then stated that she had *"no doubt that the word 'immediate' should be construed to mean 'current' as opposed to 'urgent'"* and therefore at [46] *"the approach described in the authorities in relation to applications for interim maintenance under the MCA 1973 applies also to s14."* She therefore concluded as follows [original emphasis]:

> [50] In my judgment, the limitations imposed by s14 are as follows:
>
> (i) no order for interim maintenance will be made until leave to make a Part III order has been given; and
> (ii) under s14(2), the jurisdiction must be founded on domicile or habitual residence (as opposed to an interest in a former matrimonial home in this jurisdiction);
> (iii) the applicant must be in 'immediate need' and the provision is to be reasonable.
>
> There is not, in my judgment, a gloss on the words 'immediate need' or a further requirement which imports a requirement that a party should establish that he or she is in *urgent* need of funds.

70. The judge then referred at [51] to *"the philosophy of and contemporary interpretation of the Act"* as reviewed in *Agbaje* noting at [52] that as the Supreme Court had anticipated cases where a wife would receive the same provision as if the divorce proceedings were in England *"[s]uch an approach is not consistent with there being a higher hurdle under s14 of Part III for a wife (or husband) to clear before she (or he) is awarded interim maintenance than that under s22 of the MCA 1973 (or it would seem, illogically and inconsistently, under s17 of Part III)"*. She therefore framed the question at [53] as being whether the applicant *"has demonstrated 'immediate need', that is to say does she currently stand in need of financial assistance"*.

71. I therefore reject Mr. Glaser's submission that the words *"immediate need of financial assistance"* imports a higher hurdle or a more restrictive test than that which applies under MCA 1973 s22.

72. In *TL v ML And Others (Ancillary Relief: Claim Against Assets of Extended Family)* [2006] 1 FLR 1263 Nicholas Mostyn QC (sitting as a Deputy High Court Judge) summarised the applicable principles to be as follows:

> [123] The leading cases as to the principles to be applied on an application for maintenance pending suit are *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45, *G v G (Maintenance Pending Suit: Legal Costs*) [2002] 3 FCR 339, and *M v M (Maintenance Pending Suit)* [2002] 2 FLR 123.
>
> [124] From these cases I derive the following principles:
>
> i) The sole criterion to be applied in determining the application is *"reasonableness"* (s22 Matrimonial Causes Act 1973), which, to my mind, is synonymous with *"fairness"*.
>
> ii) A very important factor in determining fairness is the marital standard of living (*F v F*). This is not to say that the exercise is merely to replicate that standard (*M v M*).
>
> 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*).

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 (*G v G, M v M*). 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 (*M v M*).

73. Appellate guidance was given in *Rattan v Kuwad* [2021] 2 FLR 817 by Moylan LJ at [31] – [40]. At [38] the *"general effect"* of the *TL v ML* principles was accepted but, as with all guidance, it was said that have to be applied in the particular circumstances of the individual case. At [33] Moylan LJ stated *inter alia* that:

> **…** In every case the key factors are likely to be the parties' respective needs and resources and, as was also set out in *TL v ML*, at para [124](ii), the *'marital standard of living'* but beyond that, the court's approach will be tailored to the facts of the particular case. In the majority of cases, the family's financial resources are unlikely to be sufficient to enable the marital standard of living to be maintained for both spouses (and the children). However, as a generalisation, the parties' separation does not, of itself, provide a reason for that standard being reduced in the same way that it does not, of itself, provide a reason for that standard to be increased.

74. With reference to this paragraph Mr. Warshaw submitted (at paragraph 34 of his Position Statement) that unlike the *"majority"* of cases identified by Moylan LJ at [33], this family's resources *"are sufficient to maintain the marital standard of living after separation"*. However I consider that this is seeking to place on this phrase weight that it was not designed to bear. I do not read it as stating that if there are such resources then the marital standard of living should be maintained. Although I acknowledge the reference in *TL v ML* to the marital standard of living being *"a very important factor"* and a *"key factor"*, the role of the court is not to replicate exactly that standard.[18] It is settled law that the marital standard of living is not the *"lodestar"* in quantifying final financial awards (*SS v NS (Spousal Maintenance)* [2015] 2 FLR 1124 per Mostyn J at [35]) and therefore it should not be so on an interim basis.

75. I am fortified in this view by the fact that (i) at [36] of *Rattan* Moylan LJ expressly cited *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45 which is the origin of the need for the court to examine the applicant's budget *"critically"* as Thorpe J (as he then was) said at p50 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"*; and (ii) *M v M (Maintenance Pending Suit*) [2002] 2 FLR 123 also remains good law post *Rattan*. At [123] Charles J stated as follows [emphasis added]:

> In my judgment, the wife is seeking to read too much into *F v F* **when she relies on it to found an argument that the award in this or most cases concerning the super rich shall be designed to maintain the status quo or to establish a yardstick that more nearly reflects the marital standard of living and, thus, the status quo**. In my judgment, such a restriction on the judicial discretion in the determination of what is reasonable in any given case is not something Thorpe J intended.

76. The views expressed by the editors of *Rayden & Jackson* at [11.94] therefore still hold good:

[18] As confirmed in *R v R* [2021] EWHC 195 (Fam) *per* Nicholas Cusworth QC sitting as a Deputy High Court Judge at [18] – *"As the authorities make clear, I need not strive to replicate exactly the standard of living enjoyed in the marriage, but rather I should provide the husband with a reasonable amount, in all of the circumstances of this case …"*.

In cases of great wealth the court should still look carefully and critically at the suggested budget as the budget is part of the litigation and advocacy exercise and there is perhaps some temptation to gild the lily. The judge provided the following graphic illustration [in *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45 (at 51)]:

> As the wife's evidence makes plain, if you are very rich you can spend £40 on buying a candle. But a gallon of petrol or a litre of petrol costs the same whoever you are and I cannot see how the figure of £6,500 could be justified for petrol expenditure … and £4,000 to keep a labrador. After all, from the dog's point of view there is not a lot of difference in being owned by a very rich family or simply a comfortably off family and I find it hard to see how a dog can cost as much as £4,000 a year.

77. I therefore consider that although the marital standard of living is undoubtedly a very important factor in determining fairness it would be erroneous of me simply to seek to replicate that standard even if (as Mr. Warshaw stated) the assets are sufficient to maintain the marital standard of living after separation. My sole criterion is to be *"reasonable"* – a synonym of *"fair"* – and in doing so I must take into account needs, resources, and standard of living.

78. I also bear in mind that at [34] of *Rattan* Moylan LJ noted that *"[i]n a number of cases, the court's approach has been described as 'rough and ready'"* which reflects the words of Coleridge J, sitting in the Court of Appeal in *Moore v Moore* [2010] 1 FLR 1413 at para [22] namely *"[i]ts calculation is sometimes somewhat rough and ready, as financial information is frequently in short supply at the early stage of the proceedings."* However I do not consider that this means (as Mr. Warshaw submitted) I should therefore be less concerned about making robust assumptions of ability to pay. Notwithstanding how interim applications are dealt with I can only make the assumptions if the disclosure is evidently deficient.

Costs allowance application – the law

79. As Mostyn J noted in *Rubin* at [14] this application is one to be determined under the common law jurisdiction for the making of an order for legal costs (with its origins in *A v A (Maintenance Pending Suit: Provision for Legal Fees)* per Holman J [2001] 1 FLR 377, *G v G (Maintenance Pending Suit: Costs)* [2003] 2 FLR 71 per Charles J, *Moses-Taiga v Taiga* [2006] 1 FLR 1074 and *Currey v Currey (No. 2)* [2007] 1 FLR 946).

80. It was therefore technically incorrect for counsel to have referred me to the statutory provisions in MCA 1973 s22ZA. However, as Mostyn J stated in *BN v MA* [2013] EWHC 4250 (Fam) at [34] *"[t]he statutory provision … does no more than to codify the principles to be collected in this regard in the authorities"*. Similarly Lord Wilson observed in *Wyatt v Vince* [2015] 1 FLR 972 at [39] there is a *"close parallel"* between the criteria articulated in the common law jurisdiction and s22ZA. Mostyn J restated his view in *Rubin* at [14] and [15] where he indicated that in his view the principles he set out at [13] ought to apply – with the necessary modifications – to both the statutory and non-statutory schemes.

81. It therefore the case both under statute and common law that (albeit using the words of the statute) a court must not make an order 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 thereof) and that, in particular, the court must be satisfied that (i) the applicant is not reasonably able to obtain a loan to pay for the services; and (ii) the applicant is unlikely to be able to obtain the services by granting a charge over any assets recovered in the proceedings.

82. W has filed emails from potential lenders (Novitas (15th February 2021), Level (7th May 2021), and Ampla Finance (29th September 2021)) stating that they will not loan and her current

solicitors confirmed on 22nd November 2021 that they would not enter a *Sears Tooth* agreement. This obligation is therefore satisfied.

83. The guiding principles to any costs allowance award (whether under statute or at common law) are as set out by Mostyn J in *Rubin* at [13].[19] I shall not unnecessarily lengthen this judgment by setting out the principles in full. I do, however, bear them all in mind.

84. Mostyn J's guidance (and in particular [13] iv) and observations made in [16]) was expanded upon in *BC v DE (Proceedings under Children Act 1989: Legal Costs Funding)* [2017] 1 FLR 1521 where Cobb J (i) expressed the view that the statement that *"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"* was a comment made in relation to concluded rather than ongoing proceedings; and (ii) concluded that it was not necessary for an applicant to show that their solicitor has 'downed tools' or will do so before he or she could legitimately make an application for a legal costs funding order where 'historic' costs have been incurred as if this principle were applied too strictly it would work to the disadvantage of the solicitor who is prepared to soldier on for the good of the client or the case.

85. I have already said that I disagree with Mr. Warshaw's submission that the fact that in *Rubin* Mostyn J was dealing with a MCA 1973 Part II claim rather than a claim under MFPA Part III means that [13] iii) is of no application. As I have said I disagree that a consideration of the merits of the substantive relief means (as Mr. Warshaw stated at paragraph 48 of his Position Statement) that *"this court [is] re-assessing solidity"*.

Interim maintenance and costs allowance application – the parties' respective cases

86. W seeks interim provision of (i) £82,942 pa/£6,911.80 pm for herself (excl. property costs as paid via the service charge); and (ii) £34,166 pa/£2,843 pm for Y (excl. school fees). She therefore seeks a total of £117,058 pa/£9,755 pm. In her Application Notice this is sought from 1st October 2020.

87. Mr. Warshaw, at paragraph 37 of his Position Statement, states that the marital standard of living was very high, the budget in fact understates the marital standard of living, and that W and Y will be on *"short commons"* at the level of provision which she seeks.

88. H states that W's claim should be dismissed in its entirety.

89. By her application notice dated 6th October 2021 W sought:

    a) £41,513.34 to discharge her outstanding legal fees to be paid forthwith;[20]
    b) £32,760 for the First Appointment to be paid forthwith;
    c) £51,600 for FDR Appointment to be paid within seven days of the First Appointment; and
    d) £159,600 for the final hearing to be paid within seven days of the FDR Appointment.

90. In relation to legal costs W's historic costs calculated to the end of hearing on 29th November 2021 amounted to £344,600. This was broken down as follows:

    a) £177,756 financial remedies;

[19] In *MT v VA (Second Application: Legal Services Provision Order)* [2020] EWHC 3087 (Fam) Roberts J described these principles at [41] as *"definitive guidance."*

[20] Outstanding legal fees of £36,996 and WIP of £4,517 in relation to her statement. As Mr. Warshaw noted at paragraph 56 of his Position Statement this appears to have been calculated as the outstanding financial remedies costs assuming that all payments W had made were treated as payments towards that liability.

b) £43,997 interim relief (in addition to financial remedies); and
c) £122,846 other matters (e.g. freezing injunction, registration/removal of the caveat from South Africa, investigations, etc).[21]

91. As at 29th November 2021, W had paid c. £170,000 (including the £20,000 paid by H). Her total outstanding costs were therefore c. £174,000.[22] Since those figures were calculated W has incurred a further £26,400 and paid a further £2,000. W's unpaid costs are therefore c. £198,400.[23]

92. W does not, however, seek the entirety of her unpaid costs. Before me she sought £111,910 (being £85,510, the adjusted figure notified to H in Ann Hussey QC's Position Statement for the hearing on 29th November 2021, plus £26,400 incurred since the last hearing). She also seeks (i) costs to conclusion of the First Appointment of £32,760; and (ii) further costs to conclusion of the FDR Appointment of £51,600. She therefore seeks a total of £196,270.

93. Mr. Warshaw did not seek before me W's anticipated costs to the conclusion of a final hearing of £159,600 (with a time-estimate of five days). He accepted that such costs should be stood over to be dealt with after the FDR Appointment. This was clearly appropriate given the guidance in *Rubin v Rubin* at [13] xi).

94. Again H states that W's claim should be dismissed in its entirety.

Interim maintenance and costs allowance application – the merits

95. The parties put before me radically contrasting positions in relation to H's wealth.

96. In his oral submissions Mr. Warshaw identified a number of what he called evidential 'markers' as to the scale of H's resources such that I could be satisfied that he had the resources to meet W's interim claims in the sums sought. These were (i) the parties' extremely high standard of living; (ii) W's knowledge given that the parties were together for 27 + years; (iii) corroborating evidence; (iv) H's delay in providing disclosure; and (v) the poor quality of H's disclosure (as evidenced by the contrast between the Prima & Co report dated 24th December 2020 and H's Form E dated 25th November 2021). He placed particular reliance on paragraph [124] iv) of *TL v ML And Others (Ancillary Relief: Claim Against Assets of Extended Family)* and submitted that as H's disclosure was *"obviously deficient"* – both in terms of the delay in providing it and its inadequate nature when provided – I *"should not hesitate to make robust assumptions about his ability to pay"*.

97. W's position is underpinned by the Prima & Co report dated 24th December 2020 which W had exhibited to her statement of the same date. This report concludes that the net value of H's resources to be c. £27.5 million. H's Form E dated 23rd November 2021 suggests a net worth of (£1,018,773).

98. Both Mr. Warshaw and Mr. Glaser spent much of their oral submissions focussed on the Prima & Co report. I shall not lengthen this judgment unnecessarily by going through each of their points and counter-points.

99. Having heard their respective submissions I have come to the conclusion that for the purposes of adjudicating on these applications I cannot agree, as Mr. Warshaw stated at paragraph 5 d of his Position Statement, that the Prima & Co report *"demonstrates the likely truth of the value of [H's]*

[21] It is not easy to reconcile these figures with W's Form H which stated total costs of £261,354 (of which £70,800 had been paid). By way of comparison H's Form H stated total costs of £164,749 (of which £94,388 had been paid).
[22] This corrects an error made at paragraph 55 of Mr. Warshaw's Position Statement.
[23] This corrects an error made at paragraph 58 of Mr. Warshaw's Position Statement.

resources." This is material as what W says in her statements is a 'copy and paste' from this report. It seems to be a materially flawed report as demonstrated *inter alia* by the following:

a) the *'Notes and Assumptions'* to the report uprate the 2020 "Net Book Value" of KHL (100% owned by H) of £6,081,920 (being the sterling equivalent of the $8 million purchase cost in 2018) by 16% for time value over two years to £8,210,592 without providing a basis for this figure;

b) the *'Notes and Assumptions'* to the report provide a gross annual revenue for the three elements of KHL (M, L, and E) of £2,643,636;

c) at paragraph 113 of her statement of 6th October 2021 W duly states that the *"book value"* of KHL is £8.2 million and its income stream is £2.64 million;

d) however the Financial Statements for KHL[24] as at 31st December 2020 state that the company had non-current and current liabilities of NGN 1,076,920,059 (or £1,953,738 (assuming an exchange rate of NGN551.21 to GBP1)). It did not appear that the liabilities had been deducted in the report;

e) likewise it did not appear that overhead expenses had been deducted from the 'income stream' figure as the Financial Statements to 31st December 2020 suggested a loss of NIR161,160,767 (or £292,376) for the year;

f) H has an interest in SET. This company was originally called NSL. H owned 33.3% of the shares and the value of NSL in 2007 per the report was £1,575,758. The report uprates that figure at the rate of 16% over 13 years to reach £10,856,970. However (i) there is no evidence that SET is in all material respects the same company; and (ii) the SET accounts for 31st December 2020 suggest that H only has a 0.17% interest in this company which equates to £18,457;

g) LP 1 is ascribed a capital value of £454,545 at 2020 (which is the figure H gives for its value at paragraph 2.2 of his Form E dated 25th November 2021). However it is ascribed annual rental income of £819,182 as at 2020. This appears somewhat unlikely; and

h) in respect of BH, the parties' holiday home in Florida, the report (at 9.4) referred to H having sold this property in the past without W's knowledge but there was still reference (at 6.1) to the parties owning a property in the USA from which (along with their other properties) it was said (at 6.7) the net rental income *"reasonably expected to be derived"* was £2,409,781. Not only does this seemingly include a property that the parties (even on W's case) no longer own it is assessment of the rent that could be derived rather than that which is actually received.

100. Overall Mr. Glaser took me through adjustments to the figures in the report which would lead to the £27.5 million figure being reduced by c. £18-£19m in respect of (business) investments and by c. £8m - £9m in respect of properties. This now negative figure broadly equated with the presentation in H's Form E. Mr. Glaser also disputed that H's property rental income was £2.4 million per annum referring me not only to the LP1 and BH issues (above) but also that at paragraph 41 b of his statement of 25th November 2021 H states that he did not receive £1,363,636 or indeed any income from a warehouse at Surulere.

[24] There was a slight discrepancy between the name of the company in the Prima & Co report and in the Financial Statements but it was not suggested to me that they are different companies.

101. I do not consider that the Prima & Co. report is saved by Mr. Warshaw's observation that *"some parts may be less compelling than others"*, that there may be *"one or two problems"* in the report or that *"the fine art of valuation is not the meat of an interim hearing".*

102. However there is still evidence before me that H is a wealthy individual. It appears to be common ground that his background is in property and various entrepreneurial ventures. The family have enjoyed high-end residential property in Lagos, Florida, South Africa and London. They employed nannies, security guards, and other staff. W underwent IVF treatment in three countries (UK, USA and Canada). Both children have been (and Y continues to be) privately educated in very expensive secondary and tertiary institutions. At least one of their cars was bullet-proof. The Deed of Separation dated 6th September 2018 provided *inter alia* for the purchase of a three-bed luxury apartment, 'joint lives' spousal maintenance, two cars (to be replaced every four years) and the provision of a nanny and a driver.

103. It does not appear to be disputed that the parties enjoyed a high standard of living for many years of their marriage (if not the entirety of the 27 + years they were together) including expensive holidays and the use of private jets (as summarised at paragraphs 94 and 95 of W's first statement dated 24th December 2020, paragraph 20 of her statement dated 6th October 2021, and paragraph 7 k) – m) inclusive of her statement dated 26th November 2021). Paragraph 19 of H's statement of 25th November 2021 accepted that the parties *"lived quite a comfortable lifestyle by any standard"* although he disputed that it was a life of affluence and provides a response – albeit not a very detailed one – to W's assertions.

104. I also agree with Mr. Warshaw that given that H pays school fees and extras for Y of c. £45,000 pa (paragraph 57 of his statement of 25th November 2021) and funded X's education at both expensive schools and at university/college in the US it is inherently unlikely that H's income for the next 12 months is £106,580 net as stated in his Form E (i.e. earned income of £62,280, self-employed/partnership income of £30,600 and investment income of £13,700). I therefore do not accept Mr. Glaser's submission that from an income of c. £100,000 pa I can conclude that H has only c. £20,000 (after meeting (i) school fees (of £45,000 pa); (ii) incidentals for Y and maintenance for W (of c. £15,000/£20,000 pa); and (iii) the c. £20,000 mortgage on the London property (given that this is no longer covered by rental income as W now lives there)) and therefore has insufficient income to meet W's interim claims.

105. In addition to this evidence is the fact that (i) H was awarded '*Entrepreneur of the Year*' at the H Awards in 2019; (ii) in the WhatsApp message between H and X exhibited to W's 24th December 2020 statement (sent I believe on 24th August 2020) – and which is also at paragraph 28 of Mr. Warshaw's Position Statement – H states that in relation to the KM the *"[a]sking price for the whole premises an businesses is $8 mil"*; and (iii) the BH news article dated 26th November 2019 which contains an interview with H which described him as:

    [Redacted for purposes of publication].

106. Against this background I consider that I can, as Mr. Warshaw submits, ask myself "w*hich is more likely – is [H] worth negative millions or several millions?"*. Although I consider that the Prima & Co report dated 24th December 2020 is extremely flawed I consider it inherently unlikely given what I say at 102 – 105 inclusive above that H has a net worth of (£1,018,773). In that context (and only that context) I conclude that H's disclosure to date is *"obviously deficient"* meaning that I can make robust assumptions about his ability to pay.

107. I should record for completeness that Mr. Warshaw was critical of the delay in H giving his disclosure. He relies upon the obligations at paragraphs 19 and 21 respectively in the order of

Deputy District Judge Hodson dated 5th January 2021 that within (i) seven days of service of the order and to the best of his ability H was to inform W's solicitors of all his assets giving the value, location and details of all such assets; and (ii) 14 days of being served H was to make and serve on W's solicitors an affidavit setting out the above information. On 15th April 2021 H's solicitors requested a 21 day extension with respect to the disclosure of assets and 28 days with respect to the affidavit (and paragraph 5 c. of Mr. Warshaw's Position Statement suggests that he applied on 19th April 2021 for an extension to 17th May 2021). Although the order of 5th January 2021 was subsequently discharged by Deputy District Judge Brooks on 21st May 2021 Mr. Warshaw remained critical stating that (i) the extension date sought had passed by then in any event; and (ii) H ought to have provided disclosure voluntarily. He is also critical of the fact that H provided 365 pages of disclosure with his statement at 4.57 pm on 25th November 2021 - i.e. all but on the eve of the last hearing.

108. I do not consider that this chronology justifies (as Mr. Warshaw seeks) an inference being drawn against H given that (i) it would have been all but impossible given the complexities of H's finances for him to have complied with the seven and 14 day deadlines in the order of 5th January 2021 (and quite possibly likewise the extended deadlines his solicitors sought on 15th April 2021 given that H had only been served with the proceedings a relatively few days prior); (ii) the order of 5th January 2021 was discharged in any event; and (iii) H in fact provided his Form E earlier than the date of 30th November 2021 directed by Her Honour Judge Hughes QC on 7th October 2021 as he exhibited it to his statement of 25th November 2021.

109. Mr. Glaser, however, makes a further submission. In summary, he states that in every respect this is a Nigerian family. The 'need' (if there is one) is solely a consequence of the decision W made to come to England seven years after the parties' separation, a country where (in reality) she had never previously lived. She had a significant earning capacity in Nigeria as demonstrated by her very successful history in business – and for many years thereafter she had as a result been able to meet her outgoings from her own income and H's payments – but that this had now been jettisoned by her move to England on a student visa (which runs to August 2022) at age of 54 leading to her now saying that she can no longer earn and H should therefore meet her needs. It is a 'need' that would be removed if she returned to Nigeria.

110. Mr. Glaser also submitted that there were numerous unexplained credits into W's bank accounts which (he suggested) may be undeclared income. I was sent an email during the course of the hearing that suggested unexplained credits into W's Barclays /xxxx account between 2nd November 2020 and 8th November 2021 inclusive of £223,500 with further (albeit far smaller) credits into W's other bank accounts.

111. W's Form E dated 30th November 2021 suggested that she has a net worth of (£257,427). Her evidence is that her financial position since entering into the Separation Deed has grown even more desperate with her financial impecuniosity resulting in her defaulting on her rental payments, her car being secured by her former landlord against the debt, and that she has even sold jewellery to part fund these proceedings.

112. Mr. Glaser's response to this is that the *"absurd"* position that W now finds herself in (if indeed she does) is one of her own making.

113. In support of this submission Mr. Glaser:

    a) relied on aspects of the Prima & Co report dated 24th December 2020 and in particular (i) paragraph 11.15 which states in 2014 (i.e. the year of separation) W had an income of £289,116 and such income lasted until at least 2018; and (ii) paragraph 12.1 which states that

in 2020 she received income of £96,681 *"from friends and family"* which was not referred to in her Form E;

b) referred to H's witness statement dated 25th November 2021 where he described W as *"an educated, sophisticated and very forceful woman"* (paragraph [46]), as coming from *"a very influential and wealthy Nigerian family"* (paragraph [46]), that she had worked until 2000 for FBNBL and had a successful career earning in the region of $100,000 (paragraph [47]), after Y's birth, she set up an international fashion business (SCL) which was very successful and which she ran successfully until 2018 (paragraph [48]), and that W also owned/ran five other businesses (paragraph [49]);

c) stated that W received from H NGN150 million (c. £235,000) on 2nd November 2020 and the payments due under the Deed of Separation/financial order but now seemingly had nothing; and

d) submitted that not every 'need' is required to be satisfied by court order but only relationship generated needs (a principle drawn from I assume from *SS v NS (Spousal Maintenance)* [2015] 2 FLR 1124 per Mostyn J at [31] and [46] (i) and (ii) and *Wyatt v Vince* [2015] 1 FLR 972 per Lord Wilson at [33]).

114. I do not consider that I can give weight to this submission at this hearing for the following reasons:

a) it is W's evidence that (i) her business was wound up several years ago; and (ii) she can no longer return to Nigeria for the reasons I set out at paragraphs 59 - 61 above. I cannot decide these issues at an interim hearing;

b) it is W's evidence that the credits into her bank account relate to (i) the method by which she transferred the monies she received from H in 2nd November 2020 to the UK; and (ii) the sale of personal property. I cannot decide these issues at an interim hearing; and

c) Peel J considered the issue of relationship-generated disadvantage in *ND (by her litigation friend KW) v GD* [2021] EWFC 53 observing that (i) at [50] that the statute (s25(2)(e)) does not limit consideration of needs in this way referring to *Miller/McFarlane* [2006] 1 FLR 1186 at [11] where Lord Nicholls said *"[m]ost of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter"*; and (ii) at [51] although at paragraph [137] of *Miller/McFarlane* Baroness Hale refers to factors which are linked to the parties' relationship, either causally or temporally, and not to extrinsic, unrelated factors such as disability arising after the marriage has ended he did not read her as saying that in such circumstances needs cannot or should not be provided for by the paying party, particularly as she signals no dissent with the observations of Lord Nicholls. I therefore do not consider that this issue is necessarily as clear-cut as Mr. Glaser submits.

In saying this I accept of course that in *North v North* [2008] 1 FLR 158 Thorpe LJ stated at [32] that:

> … it does not follow that the respondent is inevitably responsible financially for any established needs. He is not an insurer against all hazards nor, when fairness is the measure, is he necessarily liable for needs created by the applicant's financial mismanagement, extravagance or irresponsibility. The prodigal former wife cannot hope to turn to a former husband in pursuit of a legal remedy, whatever may be her hope that he might, out of charity, come to her rescue.

However I read this comment in the context it was made (a variation application under MCA 1973 s31) and reject any suggestion that the fact that H *"is not an insurer against all hazards"* means that if W has genuine needs now that it may not be reasonable for H to meet them.

115. I therefore find (for the purposes solely of the application before me) that (i) H could afford to meet the interim claim sought; and (ii) W has a 'need' that she cannot (at present) either meet from her own resources or take steps to obviate the same.

116. The question is therefore whether H should meet W's interim claim in whole or in part in light of my observations as to the merits of W's application.

Interim maintenance

117. In my judgment the appropriate answer to question is that H should pay W interim maintenance of £5,300 pm rather than the £9,755 pm sought.

118. In reaching this figure I bear in mind that when considering W's interim budget of £6,911.80 pm for herself Mr. Glaser said the following figures should either be removed in their entirety or substantially reduced (making it clear that this was not necessarily an exhaustive list):

Car, petrol and servicing	£280
Birthday and Christmas presents	£125
Clothes	£917
Shoes and jewelleries	£1,400
Toiletries	£600 [should be *"nominal"*]
Transport/travel	£800
Flowers for the house	£50
Disinfection/sanitation	£25
Magazines and newspapers	£110
Telephone (land line) and mobile phone	£192 [should be £50 pm – i.e. £142 reduction]
Salon (hair and nails)	£600
Gym membership	£125
Private health insurance	£223.80
Car rental	£600
Dry cleaning	£84
Total	**£6,081.80**

119. Mr. Glaser therefore reduced W's interim budget from £6,911.80 to £830 pm. In respect of Y's interim needs (said to be £2,843 pm) he stated that her needs were fully catered for under the Nigerian order.

120. Mr. Warshaw described this as an *"absurd savaging"* of W's budget.

121. I agree that to seek to reduce all these categories of expenditure to zero was unreasonable. Balancing the various and sometimes competing factors (my conclusion that H has the ability to meet the figures sought, the very high standard of living enjoyed during the marriage, the fact that these are (almost) all discretionary items of expenditure, and my concerns about the overall merits of W's application) I consider that I should reduce all the figures that were disputed by H (i.e. £6,223.80 after adjusting for the telephone figure above) by 50%. This reduces W's interim budget to £3,941.90 (i.e. £3,111.90 + £830) and Y's interim budget to £1,421.50 – i.e. a total of £5,363.40. I round this figure down to £5,300.

122. In reaching this figure I remind both parties of the observations made in *F v F (Substantial Assets)* [1995] 2 FLR 45 *per* Thorpe J (as he then was) at p49:

I suspect that a disproportionate significance is attached by the parties and possibly by their advisers to the judgment that I give upon the issue. It does seem to me that the determination of the wife's reasonable needs for herself and the children both present and prospective depend crucially upon the investigation of a variety of issues raised not only in the interim provision affidavits, but also in the substantive case affidavits which cannot be resolved without full discovery and oral evidence. Therefore, if I decide a figure within or approaching the high ground, the wife would be foolish to assume that the same conclusion would emerge from a substantive hearing. Equally, if I decided a figure in the low ground the husband would be rash to assume that that same result would flow at the substantive hearing. It seems to me that in these cases involving very large sums of money, it is generally speaking superfluous for there to be a full-scale investigation of interim provision. The discipline imposed by the parties in the preparation of the case should ensure that the duration of the interim period is a matter of months rather than years and any underprovision or overprovision can always be corrected when the account comes to be taken at the substantive hearing. During the course of the substantive hearing, the account that the judge takes is principally an account of the applicant's prospective future needs. But there is no reason why accounts should not be taken of the much less significant reckoning of her needs and the needs of the children over the interim period. If that account reveals that there has been overprovision and if that overprovision is the product of excessive demands and estimates on the part of the applicant, then there is every opportunity to do fairness by set-off.

123. In the draft order attached her Application Notice dated 6th October 2021 W sought interim maintenance from 1st October 2020. Her request that the figure be backdated to this date was repeated at paragraph 40 of her statement of the same date. The issue of backdating was not addressed by either counsel in their respective Position Statements or oral submissions.

124. In the draft version of this judgment I therefore adopted the date sought on W's behalf. In his response to the draft judgment (email of 7th January 2022 at 9.04 am) Mr. Warshaw accepted that s14 only permits an interim order for maintenance for a term *"beginning not earlier than the date of the grant of leave*". He therefore stated that the order should provide for backdating to 1st January 2021 (as leave was granted on either 23rd or 29th December 2020).

125. In Mr. Glaser's response to Mr. Warshaw (email of 7th January 2022 at 4.04 pm) he submitted that the order should be made from the date of the application (6th October 2021) for the following reasons:

    a) W clearly had resources, either by way of gifts from friends and family or from the sale proceeds of the property in Nigeria, to supplement her living costs since coming to the UK;
    b) whilst the jurisdiction to backdate the order to the date of leave exists it is unusual to order it to be backdated to a date many months prior to the application. W's witness statement was silent about it and any need for it to be backdated and I heard no argument on this;
    c) any backdated maintenance should be offset against all payments made to W in this period, otherwise there will be double recovery and/or there should be a *pro tanto* reduction in any maintenance payable of any maintenance paid pursuant to the Nigerian order; and
    d) I found that W is *"at present"* unable to meet her needs from her own resources (paragraph 115 above), not that she has been unable to do so since coming to this country. Many of her claimed expenses are prospective rather than retrospective.

126. I agree with Mr. Glaser's submissions in relation to this issue. In particular I take into account that (i) W has had the monies provided to her by H of NGN 150,000 million (c. £235,000) on 2nd November 2020 (albeit some of course have been used by her to meet her legal costs). W does not consider that this sum ought to be utilised to meet her housing need – the purpose for which the money was given to her by H - which she puts as being £2.765 million; and (ii) W's witness statement was silent about any *need* (my emphasis) for the interim maintenance to be

backdated. It is also of relevance (albeit less so) that I heard no argument on the issue (whether this was because it was not referred to in W's statement I know not).

127. I therefore order that the interim maintenance be paid from 6th October 2021 (and monthly thereafter). I decline H's request (made in Mr. Glaser's email) for H to have eight weeks to pay any backdated maintenance given (i) my interim findings as to affordability; and (ii) I am only backdating by a matter of a few months.

Costs allowance – past costs

128. In my judgment H should not be required to discharge the £111,910 sought of W's c. £198,000 in unpaid costs. She has, no doubt on advice, already incurred £371,000 (i.e. £344,600 plus £26,400) in costs. I believe it is not disputed (as Mr. Glaser stated) that she incurred £240,971 in costs prior to the first *inter partes* hearing. These costs are disproportionate (or in Mr. Glaser's word *"astronomical"*) even where W puts her needs as being (i) £2.765 million for a property in London; and (ii) £312,000 per annum in respect of maintenance. In my view W has chosen to incur these costs where there is some doubt as to the merits of her claim and the solicitors have assumed this risk. Her solicitors have of course already been paid c. £170,000 (including the £20,000 paid by H). Bearing in mind that as set out by Mostyn J at *Rubin* [13] iv) (i) *"the exercise essentially looks to the future"*; and (ii) *"[i]t 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*" I consider that (at least at this stage) W's unpaid costs should not be a liability that H should be required to discharge. Further, there is no evidence before me that W's solicitors are considering 'downing tools'. In saying this I bear in mind the points made in *BC v DE (Proceedings under Children Act 1989: Legal Costs Funding)* that I refer to above at 84 and which I shall not repeat.

129. Having taken this view I do not need to determine whether or not H's solicitors acted in accordance with paragraph 5 of my order of 29th November 2021 in respect of the report from Atlantic Solicitors dated 18th November 2021 exhibited to W's second witness statement dated 26th November 2021. I had directed that (i) either the parties were to agree the redaction of the report so as to remove any statement of opinion by 4pm on 9th December 2021; or (ii) absent such agreement the underlying invoices (redacted as to any privileged content not waived in the report of 18th November 2021) were to be served on H's solicitors by 4pm on 10th December 2021. W's solicitors duly proposed redactions to the Atlantic Solicitors' report. H's solicitors declined to agree the same (they did not propose reactions of their own) and sought production of the invoices. This led to a stalemate in *inter partes* correspondence.

Costs allowance – future costs

130. In my judgment H should discharge the costs W seeks to take this matter (i) to conclusion of the First Appointment (£32,760) within seven days;[25] and (ii) to conclusion of an FDR Appointment (£51,600). This should be paid within seven days of the First Appointment as sought (subject to what I say at 134 below). I do not consider that either of these figures are disproportionate. Further, there are issues in relation to both H's disclosure and Nigerian law that may need to be considered further by way of Questionnaires and consideration of the necessity or otherwise of SJE evidence (and the extent of these investigations may depend on what concessions (if any) H makes about his ability to meet W's stated 'needs'). In light of my findings as to H's disclosure to

[25] In his email of 7th January 2022 Mr. Glaser stated that H seeks six weeks from now (i.e. until 21st February 2022) to pay the legal fees for the First Appointment which has been listed for 15th March 2022. I decline this request given (i) my interim findings as to affordability; and (ii) I anticipate that significant work will be carried out by W's solicitors/counsel before a date which would be only three weeks before the First Appointment.

date I consider that W ought to have the funds to investigate these issues if agreed to by H or directed by the court.

Conclusion

131. I therefore order that H shall pay W (i) interim maintenance of £5,300 pm from 6th October 2021; (ii) a costs allowance to the conclusion of the First Appointment of £32,760 within seven days; and (iii) a costs allowance to the conclusion of an FDR Appointment of £51,600 within seven days of the First Appointment as sought (subject to 134 below).

132. In my judgment approaching the interim applications in the way that I have (i) (to adopt the words used by Mostyn J in *Rubin*) fairly reflects the doubts I have expressed as to the merits of W's substantive application and the subsequent caution with which I should therefore judge the interim applications; and (ii) (to adopt the words used by Nicholas Cusworth QC sitting as a Deputy High Court Judge in *R v R*) maintains a fair and proportionate financial balance between the parties.

133. I do not need to determine whether or not the Deed of Separation dated 6th September 2018 and subsequent financial order reflected H's assurances (as W asserts H promised he would voluntarily provide her with) an *"equitable split"* of the family wealth or was otherwise fair in that it met (and ought still to meet) W's capital and income needs. These and the other issues I have identified in this judgment (including whether the agreement was *Radmacher* compliant and whether or not there are *Edgar* factors that may materially taint the agreement) will be matters for investigation and determination as these proceedings continue.

134. It will of course be a matter for the judge who hears the First Appointment (which I am advised is listed for 15th March 2022) to make appropriate case management directions. Mr. Glaser suggested that there should be no further disclosure (or at least it should be strictly tied to the issues in the case), there should be SJE evidence in relation to Nigerian law and the case should be listed either for a final hearing or an interim hearing as to whether W can (and if so should) apply to set aside and/or vary the orders in Nigeria and whether the English proceedings should be permitted to proceed pending such application being made by her. I express no views in relation to these suggestions. I simply observe that if the case is not listed for FDR Appointment with directions being made to timetable the application thereto then there may need to be an adjustment to the quantum of the figure (£51,600) that I have allowed in this regard.

135. That is my judgment.

Addendum

136. This judgment was circulated to both counsel in draft on 2nd January 2022. Both counsel replied with suggested typographical/factual errors and requests for clarification as I requested. I have made such corrections/clarifications as I considered appropriate in finalising this judgment and have referenced counsels' responses as appropriate.

137. Both parties have applied for costs. W seeks an order for H to pay her costs to be summarily assessed and paid within 14 days. H seeks an order that (i) W pays the costs of the hearing on 29th November 2021 on an indemnity basis; and (ii) the costs should otherwise be reserved or there should be no order made in relation to them.

138. W's arguments are as follows:

    a) W *"won"* on both heads of claims (interim maintenance and costs allowance). H openly offered nothing;

b) on 25th November 2021 H made a *Calderbank* offer in which her offered to pay (i) £1,800 per month; and (ii) £20,000 towards W's legal costs up to and including the FDR Appointment;

c) W had to bring this claim. H offered nothing until two working days before the hearing and this offer was *"was hopelessly late and hopeless in content"*. W achieved an outcome far in excess of the *Calderbank* proposal;

d) W filed an N260 in advance of the hearing on 29th November 2021. The total costs to that point were £43,997.40. The additional costs to the hearing on 15th December 2021 were £26,400 and hence the total costs sought are £70,397.40; and

e) H will say that my decision not to award past costs as part of the costs allowance application has predetermined this issue against W. This cannot be right as:

   i) the amount of costs sought by W was reduced by more than costs relating to this application – partly on the basis that W had filed an N260 and would be seeking her costs on judgment; and

   ii) in *Rubin* Mostyn J opined at [13] iv) that *"[i]t 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.*"

   The question of *inter partes* costs is entirely separate and must follow the normal rules.

139. H's arguments are as follows:

a) in relation to the hearing on 29th November 2021 the time estimate was clearly insufficient, H's solicitors notified W's solicitors of this and sought for the hearing to be adjourned. W's solicitors refused (only seeking to extend it by one hour to three hours). This hearing was wasted; and

b) in relation to the costs of the application:

   i) I have already determined that historic costs should not be recovered;

   ii) although H made a late offer, W made no attempt to reduce her demands. Her interim maintenance claim was *"drastically reduced"* by nearly half and her legal fees application refused in relation to historic costs; and

   iii) I was not in a position to make findings on a number of issues (e.g. Nigerian law issues, the credits to W's bank accounts, and W's earning capacity), as opposed to making interim findings against H. If H is correct in his arguments in relation to these issues and W receives nothing H will be unable to recover the costs of this hearing. I have found that W's solicitors will continue to act in any event.

140. The starting point is set out in FPR r.28.1 namely that the court may make any order as to costs *"as it thinks just".* Although neither counsel addressed me on the applicable rules in my view this application is thereafter governed by the costs rules set out in r.28.2. As a consequence:

a) the costs are not governed by the 'general rule' set out in r.28.3(5) that the court will not make an order requiring one party to pay the costs of another party;

b) the CPR costs rules set out in Part 44 apply but r.44.2(2)(a), which provides a 'general rule' that the unsuccessful party will be ordered to pay the costs of the successful party, does not apply; and
c) the position is therefore a 'clean sheet' - as so described by Wilson LJ (as he then was) in *Judge v Judge* [2009] 1 FLR 1287 and *Baker v Rowe* [2010] 1 FLR 761 - as neither the 'no order for costs' presumption nor the 'costs *prima facie* follow the event' presumption apply.

141. I am therefore to have regard to all the circumstances and the matters set out in r.44.2(4) and r.44.2(5). There have, however, been a number of cases as to the relevance in the exercise of the judge's discretion that one party has been successful and the other unsuccessful in a 'clean sheet' case. These include *Baker v Rowe*, *KS v ND (Schedule 1: Appeal: Costs)* [2013] 2 FLR 698, *Solomon v Solomon* [2013] EWCA Civ 1095, and *H v W (No. 2)* [2015] 2 FLR 161. In essence they conclude that, as in *Gojkovic v Gojkovic (No. 2)* [1991] 2 FLR 232 per Butler-Sloss LJ,[26] there remains a starting point that costs 'follow the event' even in a 'clean sheet' case albeit the presumption may be somewhat 'softer' and therefore more easily displaced.

142. I do not consider that H should have his costs of 29th November 2021 whether on an indemnity basis or otherwise. As I have noted at paragraph 18 above W's applications came before me on 29th November 2021 with a time-estimate of three hours. I accept that the time-estimate was first raised by H's solicitors on 9th November 2021 when it was suggested that there was a risk of an adjournment and that the hearing length should therefore be increased to one day. I also accept that after W's solicitors said in response on 17th November 2021 that the time-estimate had been extended to three hours (as only a half-day and not a full day could be accommodated) H's solicitors repeated their concern (on 18th November 2021 and 19th November 2021). However I do not consider that the hearing on 29th November 2021 was *"wasted"* given that I (i) dealt with a preliminary issue that had been first raised by H's solicitors on 1st November 2021 as to whether W had permission to rely on the Prima & Co report (which I determined in W's favour); and (ii) gave directions in relation to *inter alia* expert evidence which I considered to be necessary and to which I have referred in this judgment. I shall therefore not determine the costs of 29th November 2021 separately to those of the overall application.

143. As to the overall costs I consider that the appropriate order is that they be reserved. I accept both that (i) there is a 'soft' presumption that costs should 'follow the event' and that the 'event' in this case is that W succeeded in her applications in that she has been awarded more than H offered openly (which was nothing) or by way of a *Calderbank* offer which was only made a few days before the first hearing before me in any event. The applications were therefore properly brought. However I consider that the starting point is displaced in this case. W's costs of the application are included within the historic costs that I have declined to order to be paid. However this does not *"predetermine"* (to use Mr. Warshaw's word) that these costs can never be recovered from H. I have simply determined that they should not be paid by H on an interim basis. Whether such costs are ultimately ordered to be paid by H will be a matter for future determination once another court makes findings on issues that I was unable to make and determines W's substantive application. I also consider there to be force in Mr. Glaser's submission that if were to determine the issue of costs now in W's favour and she is ultimately unsuccessful in her substantive application H will be unable to (seek to) recover the costs of this hearing. Hence the costs of both hearings before me shall be reserved to the final hearing judge.

[26] In *Gojkovic v Gojkovic (No. 2)* [1991] 2 FLR 232 per Butler-Sloss LJ (as she then was) at p236:
"… in the Family Division there still remains the necessity for some starting point. That starting point, in my judgment, is that costs prima facie follow the event … but may be displaced much more easily than, and in circumstances which would not apply, in other divisions of the High Court."

144. I also make it clear (as I was asked to do so by Mr. Warshaw) that my order is made on the basis that (i) H remains bound by the undertaking given to Deputy District Judge Brooks on 21st May 2021 to *"[m]eet any repair/maintenance obligation and the ongoing mortgage payments and other outgoings in respect of the [London] property"* (and Mr. Glaser's email of 7th January 2022 stated *"[c]learly, [H] will comply with his undertakings given to DDJ Brooks"*); and (ii) H will continue to meet Y's school fees and associated extras.

RECORDER ALLEN QC

10th January 2022