



Neutral Citation Number: [2023] EWHC 2321 (Admin)

Case No: AC-2018-LON-001435

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 3rd October 2023

Before:

MR JUSTICE FORDHAM

Between:

PAUL JOHN ASPLIN

Applicant

- and -

DAS UK HOLDINGS LIMITED

Respondent

- and -

TERRY HOSIER

**Interested
Party**

Gary Pons (instructed by Bindmans) for Mr Asplin
Martin Evans KC (instructed by Edmonds Marshall McMahon) for DAS
Ashfords Solicitors (written submissions only) for Mr Hosier

Hearing date: 19.9.23

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. On 9 July 2018 the Applicant (Mr Asplin) was convicted at Southwark Crown Court, on a private prosecution brought by the Respondent (DAS), of conspiracy to defraud and false accounting in a period from 2000 to 2014. On 13 July 2018 he was sentenced to serve 7 years imprisonment. For temporal reasons (see Blackstone's Criminal Practice 2023 §E19.2), the associated confiscation proceedings – in their criminal and civil settings – have remained governed by Part 6 of the Criminal Justice Act 1988 rather than its successor the Proceeds of Crime Act 2002. Confiscation under the 1988 Act involves a division of labour between the Crown Court and the High Court, as with pre-2002 Act drugs confiscation under the Drug Trafficking Offences Act 1986 (see In Re Norris [2001] UKHL 34 [2001] 1 WLR 1388 at §15) and its successor the Drug Trafficking Act 1994. In this case, a civil restraint order was made in the High Court pursuant to s.77 of the 1988 Act on 12 July 2018. In this judgment I am going to call that “the Restraint Order”. The case has come before me in the form of an application made by Mr Asplin, issued on 15 September 2022, to vary the Restraint Order pursuant to s.77(6)(a) and (7).
2. There are two properties in Bristol, “in relation to” which the variation is being sought (using the language of s.77(6)(a)). They are known as Elberton Court (which I am going to call “the Family Home”) and Primrose Drive (which I am calling “the Rented House”). The Restraint Order prohibits Mr Asplin and his wife Mrs Karen Asplin from dealing – absent variation or discharge of the Order – with any assets in which Mr Asplin has an interest. The Restraint Order spells out that it does not prevent any financial institution or other charge holder from enforcing or taking any other steps to enforce an existing charge it has in respect of a property, provided 21 days written notice is given to Mr Asplin, DAS and any other affected party. On 25 July 2019 the Crown Court imposed a confiscation order requiring Mr Asplin to pay £5,286,289 (subsequently reduced by the Court of Appeal to £4,828,728). I will call that “the Confiscation Order”. At the same time the Crown Court made a back-to-back Compensation Order (see s.72(7)) for payment out to DAS – as the victim of the crimes – of compensation of £5,285,300 (subsequently reduced by the Court of Appeal to £3,500,000).
3. In making the Confiscation Order, in the course of identifying the ‘available amount’ (s.71(6)(b)), the Crown Court assessed Mr Asplin as having a 50% beneficial interest in the Family Home and a 72% beneficial interest in the Rented House. Mrs Asplin was assessed by the Crown Court as having the remaining 50% (Family Home) and 28% (Rented House) beneficial interests. Mrs Asplin holds the sole legal title to two of the three land titles comprising the Family Home and holds the sole legal title to the Rented House. The third land title comprising the Family Home is held by Mr and Mrs Asplin. There are two lenders. It is common ground that Barclays Bank has a registered charge dating back to 2006 over the Family Home in conjunction with lending and accruing interest on that lending, in respect of which a mortgage term expired in 2021 and the redemption figure as at 2 July 2023 was £897,487.62. A September 2023 valuation gives the Family Home a market value of £1,950,000. The monthly interest accruing in favour of Barclays Bank is described as being around £4,500 per month. As to the Rented House, it is common ground that the Interested Party (Mr Hosier) has a charge in conjunction with lending described in a 7 December

2015 Deed entered into by Mrs Asplin. Mr Hosier's charge was registered on 30 October 2019. The loan is said to be £200,000 and interest free. It has been variously described, always relating to legal costs of Mr Asplin or of Mr and Mrs Asplin, including one description of being lending associated with Mr Asplin's legal costs of his defence. The market value of the Rented House is informally put at around £375,000.

4. The parties to these proceedings are Mr Asplin and DAS, together with Mr Hosier whose application to join as an interested party was granted by consent on 30 January 2023. Barclays Bank and Mrs Asplin are aware of these proceedings but neither has applied to be joined as a party.

What is Being Permitted

5. It is common ground between the parties that steps should now be taken, through variation of the Restraint Order, with a view to seeking to effect the realisation of the realisable property held by Mr Asplin in the Family Home and the Rented House, with the consequence that monies are made available towards satisfying the Confiscation Order. What is being suggested is this. Mrs Asplin would buy-out Mr Asplin's interest in the Family Home, with the consequence that proceeds will become available for the Confiscation Order of what remains of the value of Mr Asplin's 50% beneficial interest, after payment to Barclays Bank of the current redemption figure. Mrs Asplin would sell the Rented House by marketing it through an estate agent, again with the consequence that proceeds will become available for the Confiscation Order.
6. It is important to emphasise that the variation is in nature permissive. The Court is not ordering that there be a buy-out of the Family Home. The Court is not ordering that there be a sale of the Rented House. The Court is ordering that these things can proceed, and lifting the prohibitions in the Restraint Order so that they can proceed, but with appropriate controls and conditions. The Restraint Order is prohibitory. What is mandatory within the variation is that – if there is a Family Home buy-out or Rented House sale – the controls and conditions within the variation, and the unvaried terms of the Restraint Order, must be complied with.

Two Previously Controversial Issues

7. After unsuccessful attempts to resolve contested issues by agreement, as directed by Sir Ross Cranston on 18 May 2023, the application was restored for hearing. That was in order to resolve two issues of controversy between the parties.
8. The first controversial issue was whether the variation of the Restraint Order should permit the Family Home buy-out by Mrs Asplin to be at a price which had been adjusted downwards (discounted) to reflect notional sale costs. The word “notional” is apt, because the Family Home would not be being marketed by estate agents taking their cut, because this is a private sale. Some of the solicitors' conveyancing costs were also “notional”. The notional sale costs were – I have understood – being put at around £30,000. That means the downward adjustment would make a difference of around £15,000 to the buy-out proceeds available for the Confiscation Order. My pre-reading included cases like R v Cramer (1992) 13 Cr App R (S) 390 (describing inevitable costs of the sale) and R v Lowther [2020] EWCA Crim 1387 [2020] 4

WLR 152 at §§53-59 (discussing market value in the context of “benefit”). I would have asked Counsel for their observations about R v Lemmon (1992) 13 Cr App R (S) 66 at §§69-70 (referring to the “reality” of the position).

9. The second controversial issue was whether the variation of the Restraint Order should permit the sale of the Rented House only if and after Mrs Asplin had first repaid from other sources the debt to Mr Hosier, Mrs Asplin having been described as the borrower in the December 2015 Deed. If that were correct, a full 72% of the net sale proceeds of a sale of the Rented House would have become available for the Confiscation Order. DAS had made clear that Mr Hosier’s charge was not being impugned. My pre-reading included R v Ryder [2020] EWCA Crim 1110 at §§22-23, 50-51.
10. On the day of the hearing, the parties succeeded in resolving these contested issues. No adjudicative decision was now being required of the Court in relation to them. Mr Asplin and DAS had agreed terms of a variation, which Mr Hosier did not oppose, whose features would include the following. First, the buy-out figure in respect of the Family Home would involve no discount for notional sale costs. Secondly, it would not be a precondition before any sale of the Rented House that Mrs Asplin would first have repaid the loan to Mr Hosier. Thirdly, it would be a condition of the sale of the Rented House that Mrs Asplin would disavow (and so surrender) her previously assessed 28% beneficial interest. That agreed position was an overall package. The variation would allow Mrs Asplin to sell the Rented House by marketing it through an estate agent, with the consequence that proceeds will become available for the Confiscation Order, subject to two points. The first is that there would be repayment (put at £200,000) of Mr Hosier’s loan. The second is that Mrs Asplin’s 28% beneficial interest would be disavowed to form part of Mr Asplin’s beneficial interest. Thus the proceeds available for the Confiscation Order would constitute 100% of the beneficial interest, after the payment to Mr Hosier.

The Contested Issue: The Precondition

11. The agreement at which the parties have arrived leaves a single issue on which it was necessary for me to hear argument. Having done so, I gave my ruling in open court – at the parties’ request – but with reasons to follow in a written judgment as they now do. The contested issue is whether the varied Restraint Order should include provision (which I will call “the Precondition”), which permits Mrs Asplin’s Family Home buy-out to proceed only following a completion of the market sale of the Rented House. My ruling was that the Precondition would need to be included in the variation order, alongside a “liberty to apply” mechanism so that the parties could revert to the Court if that were necessary and appropriate. What follows in this judgment are my reasons for that ruling, in light of the arguments advanced on each side.

Mr Hosier’s Position

12. Written submissions had been filed on behalf of Mr Hosier, when the two controversial issues were due for argument and resolution. It was confirmed to me at the hearing, through his solicitors, that Mr Hosier did not take any stance either way on the remaining contested issue. It was expressed to me that Mr Hosier’s wish was that the Rented Home be sold as soon as possible.

The Law

13. I did not detect any material disagreement as to the legal framework. That framework provides a principled approach by which the Court should deal with an application for a variation and thus by which I should resolve the contested issue. The framework borrows, as appropriate, insights from cases discussing parallel provision in predecessor or successor legislation: the 1986 Act, the 1994 Act and the 2002 Act. The relevant legal framework is as follows.
14. The application for a variation is being made by Mr Asplin as a “person affected” by the Restraint Order (s.77(7) of the 1988 Act). What is sought is a variation “in relation to property” (s.77(6)(a)). The Court has been entrusted with a discretion – not a duty – as to whether a variation, and if so what variation, should be made. Mr Asplin has a “burden of persuasion” and the question for the Court is whether it would be “just” to vary the Restraint Order in the way in question: see Serious Fraud Office v X [2005] EWCA Civ 1564 at §§35 and 41. The Court’s approach is informed by the overall statutory purpose, which is to recoup from a criminal defendant the entirety of the benefit which they have obtained from their criminal conduct: see R v Wood [2022] EWCA Crim 1243 [2023] 1 WLR 156 at §§27, 30 and 32.
15. Against that general backcloth, the Court needs to apply ss.82(2) and (4) of the 1988 Act (cf. s.69(2)(a) and (3)(a) of the 2002 Act). These make important provision regarding the Court’s approach. I will set out s.82 of the 1988 Act here:

Exercise of powers by High Court or receiver. (1) This section applies to the powers conferred on the High Court by sections 77 to 81 above ... or on a receiver appointed under this Part of this Act or in pursuance of a charging order. (2) Subject to the following provisions of this section, the powers shall be exercised with a view to making available for satisfying the confiscation order or, as the case may be, any confiscation order that may be made in the defendant’s case the value for the time being of realisable property held by any person by the realisation of such property. (3) In the case of realisable property held by a person to whom the defendant has directly or indirectly made a gift caught by this Part of this Act the powers shall be exercised with a view to realising no more than the value for the time being of the gift. (4) The powers shall be exercised with a view to allowing any person other than the defendant or the recipient of any such gift to retain or recover the value of any property held by him. (5) An order may be made or other action taken in respect of a debt owed by the Crown. (6) In exercising those powers, no account shall be taken of any obligations of the defendant or of the recipient of any such gift which conflict with the obligation to satisfy the confiscation order.

16. Section 82(2) has been described as a “legislative steer”: see X at §§32-33, citing In Re Peters [1988] QB 871 at 879-880 (a case concerned with the equivalent provision in s.13 of the 1986 Act). The word “steer” may be suggestive of something softer than a statutorily-prescribed purpose. It is significant, in my judgment, that in both X and Peters the Courts were dealing with the situation where powers were being exercised in an anticipatory context. The phrase used was “a case of this kind” (X at §33). In terms of the statutory language, the powers were being exercised in the context of “any confiscation order that may [ie. in future] be made in the defendant’s case” (s.82(2)). In that situation, as it was put in Peters (X at §32), the Court is making or varying a Restraint Order to secure an appropriate restraint of assets “so far as is reasonable taking account of the fact that the accused may be acquitted”, being

concerned with “the preservation of assets at a time when it cannot know whether the accused will or will not be convicted”, so that there is a balancing exercise taking account of the interests of a defendant who “may be acquitted”; which contrasts with the situation where a variation is linked to “a process of execution in satisfaction” of a confiscation order made after conviction. There, the focus is on making the value of realisable property available “for satisfying the confiscation order” (see s.82(2)).

17. In the present context, and in the present case, the “shall ... with a view to” provisions in ss.82(2) and (4) operate as “Prescribed Purposes” (which is what I will call them). The first Prescribed Purpose (s.82(2)) requires that the power of variation “shall be exercised with a view to making available for satisfying the confiscation order... the value for the time being of realisable property held by any person by the realisation of such property”. In the context of the Family Home and the Rented House the “realisable property” as property held by Mr Asplin (s.74(1)(a)) constitutes his beneficial interests held in those properties (see s.102(7)). The first Prescribed Purpose involves seeking to achieve an outcome where the value of Mr Asplin’s interest in the Family Home and the Rented House is realised and made available for satisfying the confiscation order.
18. That first Prescribed Purpose (s.82(2)) is expressly qualified by the words “subject to the following provisions of this section”. It is therefore subject to the second Prescribed Purpose (s.82(4)), requiring that the power of variation “shall be exercised with a view to allowing any person other than” Mr Asplin (or the recipient of the gift governed by s.82(3)) “to retain or recover the value of any property held by” that “other” person. It is common ground between the parties – for the purposes of the agreed variation and the contested issue – that there are three “other” persons who are relevant. They are the holders of property by virtue of the interest which they hold in that property (s.102(7)). First, there is Barclays Bank with its interest in relation to the Family Home. Secondly there is Mr Hosier with his interest in relation to the Rented House. Thirdly, there is Mrs Asplin with her 50% beneficial interest in the Family Home. By virtue of the agreement reached between the parties, and the overall resolution which it represents, I am invited to proceed on the basis that Mrs Asplin – if she chose to proceed under the permissive terms of the variation – would not have an interest in the Rented House for the purposes of s.82(4) or any other purpose, because of the disavowed 28% beneficial interest.
19. Put shortly, the Prescribed Purposes mean that the exercise of my power of variation should be approached (i) so as to maximise for the satisfaction of the confiscation order the realisation of the present value of Mr Asplin’s beneficial interests in the Family Home and Rented House, (ii) while at the same time maximising the recovery by Barclays Bank and Mr Hosier of the value of their interests and maximising the retention by Mrs Asplin of the value of her 50% beneficial interest in the Family Home.

The Argument Against the Precondition

20. Mr Pons, appearing for Mr Asplin, argued against the Precondition. The essence of his submissions, as I saw it, was as follows. The agreed variation, to allow Mrs Asplin’s buy-out of the Family Home and the market sale of the Rented House, should not involve a mandated sequence, under which the Family Home buy-out can proceed only after completion of a market sale of the Rented House. Mrs Asplin

should be free to proceed with the buy-out of the Family Home. The marketing and sale of the Rented House can and should come second. Mr Asplin is able to discharge the burden of persuasion, and demonstrate that the variation – without the Precondition – is a just one, having regard to the overall statutory purpose and the two Prescribed Purposes. That is for the following reasons.

21. As to the first Prescribed Purpose, the buy-out of the Family Home will realise the value – and the value for the time being – of Mr Asplin’s interest in that realisable property. As to the second Prescribed Purpose, Mrs Asplin will retain the value of her 50% beneficial interest in the Family Home, and Barclays Bank will recover in respect of its interest. These should not be delayed. There is, moreover, the looming prospect of repossession action being taken by Barclays Bank to recover in respect of lending at the level of more than £897,000 as at July 2023. The mortgage term expired in 2021. Barclays confirmed the referral of the case to solicitors in October 2022. Those solicitors formally wrote to DAS on 12 July 2023 giving what was described as 21 days’ notice of action to enforce a possession order. Although the reference to a possession order was subsequently recognised in correspondence to have been an error, the Barclays solicitors – by a letter of 2 August 2023 to Mr Asplin and Mrs Asplin – have confirmed that they had been instructed to start mortgage repossession proceedings, given that the sums outstanding had not been repaid. The solicitors also confirmed that the letter of 12 July 2023 had been written because of the requirement in the Restraint Order to provide 21 days’ notice of an intention to commence possession proceedings. There is now the very real prospect of repossession action by Barclays Bank and a forced sale. The Restraint Order would not prohibit a mortgage repossession. It would clearly risk both the maximisation of the realised value of Mr Asplin’s interest in the Family Home (the first Prescribed Purpose) and also the retention by Mrs Asplin of the value of her interest (the second Prescribed Purpose). It also threatens her interest in continuing to live in the Family Home. Liberty to apply to the Court is no solution. That would simply defer the Court grasping the nettle.
22. There is another problem. The debt to Barclays continues to increase at the rate of £4,500 every month. That far exceeds the £925 monthly rental received on the Rented House. That has been used towards the mortgage debt and would be under the agreed variation, until vacant possession is obtained in relation to the Rented House. If the sale of the Rented House is required to take place first, vacant possession will be needed, and the rental income will stop. There is, moreover, the shortfall of more than £3,500 every month. The ongoing increase in the indebtedness to Barclays increases the prospect of Barclays taking the mortgage repossession action. But it has another consequence. The equity in the Family Home continues to reduce. Under the agreed mechanism in the parties’ draft variation order, Mrs Asplin would not pay more. But Barclays would be paid out more. And there would be less – to the tune, I was told, of 50% of the accumulating interest on the debt to Barclays – subsequently realised for the Confiscation Order. That clearly undermines the first Prescribed Purpose.
23. All of this is entirely avoidable. Mrs Asplin is ready and able, through a loan from a Mr and Mrs Gibson, to proceed immediately with the buy-out (within 7 days, in fact). That means other necessary steps can be taken. In particular, land which is part of the Family Home and the buy-out would need to be sold in order to pay the entirety of the debts to Barclays. That is all the more reason why it is necessary to make a start. It is

all the more reason why failing to do so makes a Barclays repossession action the more likely and the more imminent.

24. By permitting Mrs Asplin to proceed immediately with the buy-out in relation to the Family Home there is no impediment or inhibition so far as progress of the sale of the Rented House is concerned. It is true that the agreed variation would involve an outcome in which she would need to disavow what was previously assessed as a 28% beneficial interest in the Rented House. It is true that she would be selling a property over which she holds the legal title but would hold no beneficial interest or receive any proceeds. Nevertheless, she plainly has every incentive to proceed and sell the Rented House in accordance with the variation. After all, Mr Asplin – her husband – faces the very real prospect of serving a further period of custody as a consequence of a default in paying the sum due under the confiscation order. It is obvious that she will act to avoid that consequence. And there is another point. There is every prospect that, were Mrs Asplin in any way materially to delay, Mr Hosier would take action for possession and forced sale of the Rented House. That, again, would serve to reduce the realised value in respect of Mr Asplin’s interest in the Rented House, undermining the first Prescribed Purpose. It is highly relevant that Mrs Asplin has previously (in 2019/2020) attempted the marketing and sale of the Rented House. That did not proceed as a consequence of the combination of Mr Hosier’s charge, the Restraint Order and DAS’s insistence that the loan to Mr Hosier be discharged by Mrs Asplin before any sale of the Rented House. Again, as at July 2022, Mrs Asplin was proposing to buy-out Mr Asplin’s beneficial interest in both the Family Home and the Rented House. There is a clearly evidenced appetite on her part to sell the Rented House. The Court should have no concerns as to any inhibition at present, or on making the variation. It is obvious, however strong the appetite, that there may inevitably be delay in selling the Rented House, for reasons out of Mrs Asplin’s control, during which time she should not be prevented proceeding the Family Home buy-out and Barclays Bank should not be deprived of recovering the indebtedness which it is owed.

Discussion

25. I have not been persuaded by these arguments. I am satisfied that the variation – with, and not without, the Precondition – is just, best promotes the overall statutory purpose, and best achieves the Prescribed Purposes. My reasons reflect the essence – as I saw it – of Mr Evans KC’s submissions for DAS.
26. The starting point is that the variation is a permissive one. It is permitting, but not requiring, that the buy-out of the Family Home can proceed in accordance with the terms of the variation order. It is permitting, and not requiring, that the marketing and sale of the Rented House can proceed in accordance with the terms of the variation. The only obligations which the variation order imposes are imposed by way of requirements where those permitted action are proceeding because Mrs Asplin is choosing to proceed. That has important consequence. It means that, consistently with the variation order, Mrs Asplin could in fact decide not to proceed with the buy-out. It also means, absent the Precondition, that – whether or not proceeding with the Family Home buy-out – Mrs Asplin could decide not to proceed with the sale of the Rented House. She could decide not to sell the Rented House. She could decide to continue to assert her previously assessed 28% beneficial interest in the Rented House.

27. It is important to look at the position in the round, and as a whole, and not to view one or other of the two properties in isolation. What has been agreed between the parties represents a package with interrelated features. It works, and secures the Prescribed Purposes, when it all happens.
28. There is clearly a strong incentive on the part of Mrs Asplin to effect the buy-out of the Family Home. She has been assessed as having a 50% beneficial interest in that property. That is her home. She plainly and understandably wishes to remain there. Equally plainly, she cannot remain there – consistently with the statutory scheme – while the Confiscation Order remains unsatisfied and while her husband Mr Asplin retains a beneficial interest in the Family Home. I am satisfied that she has and would have every incentive to proceed with the buy-out.
29. It is, however, important and appropriate that Mrs Asplin – if she is to proceed with the Family Home buy-out – should also be fully incentivised to proceed with the sale of the Rented House, in accordance with the agreed terms of the permissive variation order, and that this happens. It could stall through inaction, passivity or lack of urgency. There could be a refusal to sell. There could be a refusal to disavow the 28% previously assessed beneficial interest, which could be reasserted. Mrs Asplin holds the legal title. She is in an important position so far as progress of that sale is concerned. She would not be being ordered to effect that sale; nor to divest herself of the 28% previously assessed. Mr Hosier might or might not take action to seek to recover his debt. He is described in the papers as a friend who made an interest-free loan at least 8 years ago. In my judgment, the real and obvious ‘lever’, so far as the realisation of the Rented House is concerned, is the Precondition which requires it to take place before the Family Home buy-out. That achieves the agreed package which, in my judgment, best achieved the first Prescribed Purpose while also achieving – and not materially undermining – the second Prescribed Purpose. It is important, in my judgment, that the Court is satisfied, and should act to secure, full incentivisation towards a prompt sale of the Rented House. The more so, since Mr Asplin’s position is to urge that Mrs Asplin would proceed full steam ahead with that course. It is best to be sure that this will be so. If and insofar as Mrs Asplin is – as is claimed by Mr Asplin – willing to proceed promptly with the sale of the Rented House in accordance with the agreed package, then an Order designed to promote precisely that of itself causes no prejudice so far as the Rented House is concerned. If and insofar as there is any prospect of inhibition, delay or passivity, the Precondition serves to promote their elimination.
30. There is no reason why the marketing of the Rented House should not now proceed promptly and successfully. If anything, the evidence of what had been achieved through to a memorandum of agreed sale in November 2019 support that conclusion. Fully incentivising the prompt sale of the Rented House is, moreover, consistent with the position adopted by Ashfords solicitors on behalf of Mr Hosier, emphasising his wish as being for the Rented House to be sold as soon as possible.
31. I have weighed against this incentivisation the factors which have been relied on in favour of the buy-out of the Family Home being permitted to proceed immediately. Ultimately, the central concerns relate to the Barclays Bank indebtedness increasing, and the prospect of Barclays losing patience and proceeding with repossession and a forced sale. Given that the agreed mechanism involves Mrs Asplin paying a buy-out price which starts from the same £1.95m (the market value), and then involves the

deduction of whatever Barclays are owed at the time of the buy-out, I do not see any undermining of any retention or recovery of the value of her interest in the Family Home for the purposes of the second Prescribed Purpose. In any event, the position needs to be considered overall and in the round. The clocking up of ongoing interest at the rate of £4,500 every month is clearly a concern. However, it is fair to say that clocking up interest at a significant rate has been the ongoing position for a very considerable period in this case. It is not a new feature. There is a significant downside in the clocking up of interest, and it relates to what can ultimately be recovered for the purposes of the Confiscation Order. That is not a ‘hit’ for Mrs Asplin, but rather for DAS. The position adopted by DAS is that – viewed overall and in the round – realisation and recovery for the Confiscation Order (the first Prescribed Purpose) is best achieved by securing both the Family Home buy-out and the Rented House sale, through the Precondition and the full incentivisation which I have discussed. In my judgment, that is a fully justified position.

32. So far as concerns repossession action by Barclays Bank, that is clearly a concern. It is a concern for Mrs Asplin, and also for DAS. But it needs to be seen in the context where a Barclays referral to solicitors was first communicated back in April 2019, and then a further referral in October 2022, in the context of a mortgage term which expired in 2021. Barclays Bank’s loss of patience, culminating in the purported notification of 12 July 2023 – I say purported in light of the error in the content of that letter referring to there being a “possession order” – needs to be seen in the light of what subsequently ensued. Barclays were understandably anxious to know what progress was being made in the application to this Court for a variation of the Restraint Order. Having been informed that the matter was to be listed for resolution, Barclays has taken the position that it would wait to see and would then communicate its position. There is nothing in the evidence before me which indicates that Barclays would not be willing to await the implementation of the linked Rented House sale, and then the speedy Family Home buy-out. There is ample headroom in the context of a Barclays debt below £1m and the Family Home valued at just under £2m. I do not accept that it is the inevitable, or even likely, consequence of variation with the Precondition that Barclays will proceed with repossession action, such that the recovery under the Confiscation Order and retention by Mrs Asplin of the value of her interest will be undermined.
33. Finally, the provision for liberty to apply is an important safeguard. There is no reason why an application to return to this Court – should it be necessary, for whatever reason – should not be dealt with speedily. There are various design features which could be included within the liberty to apply to promote effectiveness and promptness. Should there be an eventuality – whether it relates to Barclays and the Family Home, or to Mrs Asplin or Mr Hosier and the Rented House – an application can be made for a further variation and the position can be re-evaluated in the changed circumstances.
34. It was in the circumstances and for these reasons that I made the ruling on the contested issue, that the otherwise agreed variation should include the Precondition, as I communicated in open court on 19 September 2023.

Further and Consequential Matters

35. In the version of this judgment which was circulated to the parties as a confidential draft on 22 September 2023, I said that at this point in the judgment I expected to be able (a) to address any further matter which required consideration and (b) to describe the Court’s finalised Order on the issues ventilated before me. The Court’s instructions to the parties, accompanying the draft judgment, required submissions on any unagreed consequential matters, together with a draft Order (agreed to the extent possible), by a deadline of 4pm on Thursday 28 September 2023.
36. By consent of the parties, I gave prompt permission for the embargoed judgment to be communicated with Mrs Asplin (herself a solicitor) on the terms of the embargo. I have recorded (§4 above) that Mrs Asplin was not a party and had not applied to join the proceedings. I have also recorded (§6 above) that the variation sought is by nature permissive. I record here that, after the hearing at which I announced my ruling, and again after circulating the draft judgment giving my reasons, I was made aware of correspondence from Mrs Asplin. The parties have made clear that they are not asking me to consider the contents of that correspondence or rule on any further matter. The Order which I am making will contain a recital to record that Mrs Asplin has been given notice of the terms of the Order.
37. At 12:07 on Monday 2 October 2023, Ashfords solicitors – to whom the embargoed judgment had been circulated on 22 September 2023 had been circulated and who were well aware of the instructions to the parties – raised for the first time the suggestion that the Order should make provision for costs submissions within 14 days. This was said to be so that Mr Hosier could now make a “claim” for “his costs from the time that he joined the application to the point that the Prosecution conceded that his charge had priority”. I have decided against making any such provision in the Order. This was all far too late in the day. No reason, still less good reason, has been advanced why this was not raised promptly, as a consequential matter with submissions for resolution in the judgment and Order. I had made very clear that this was the mechanism for any contested consequential matter. There has been no proper application for costs. There is, however, a general liberty to apply. If so advised, and if considered justified, Mr Hosier will need to use that mechanism to make this or any other application. If this mechanism is invoked, for this or any other reason, I will need to consider what procedural and substantive course is appropriate to deal with any contested application for a variation of my Order, including any issue as to the costs of such an application.

Order

38. I am conscious that the Order which I have made is a document available to any person from the Court records. But I think open justice is promoted by my recording its substantive terms at the end of this judgment. I do not need to set out the recitals or the headings. As to definitions found in the Order, it suffices to say the following: “Defendant” is Mr Asplin; “Hosier charge” is the Equitable charge recorded in deed dated 7 December 2015 between Mr. Hosier and Mrs Asplin and currently registered on the Rented House Title; “Primrose Drive” is the Rented House; “Elberton Court” is the Family Home; “Prosecutor” is DAS; “Consent of the Prosecutor” means “the prior written consent of the prosecutor or in the absence of such consent, the prior consent of the High Court” and “Confiscation Order” means the confiscation order made at Southwark Crown Court on 25 July 2019 in the sum of £5,286,289 and varied on appeal on 13 January 2022 to require the payment of £4,828,728.

39. Here, then, are the substantive terms of the Order which I am making. These were agreed between the parties, and so the Order is “by consent”, except for the opening phrase of paragraph (12) which was the subject of my ruling, and except for paragraph (21) which Ashfords solicitors have requested be varied. The substantive Order is as follows:

(1) The Restraint Order made by the Honourable Mr Justice Mostyn dated 12 July 2018 is varied as follows.

[The Rented House] (2) The prohibition in paragraph 4 and 7 of the Restraint Order which prevents the Defendant and Mrs Asplin from dealing with the Defendant’s assets is varied to permit Primrose Drive to be sold on the open market with an indicated sale price of £380,000. No offer lower than £375,000 is to be accepted (at any stage) without the written consent of the Prosecutor, such consent not unreasonably to be refused. (3) The Prosecutor has the right upon request to see any document relating to the sale/purchase of Primrose Drive and irrespective of client confidentiality. The Estate Agent and the conveyancer instructed in the said sale shall, within 48 hours of completion, supply to the prosecutor a copy of their VAT invoice and a copy of any completion statement. (4) Prior to any appointment, the principal of any estate agent to be appointed must confirm in writing to the Prosecutor their status in the organisation and that they have read and understood this variation order. (5) Estate Agency fees to be no more than 1% of the sale price plus VAT without the prior written consent of the Prosecutor. (6) Prior to any appointment, the principal of any solicitor’s firm to be appointed (the Primrose Drive solicitor) must confirm in writing to the Prosecutor their status in the organisation and that they have read and understood this variation order. (7) Conveyancing fees to be agreed in advance with the Prosecutor and shall not include any work in relation to any tenancy of the property. (8) Prior to exchanging contracts for Primrose Drive, Mrs Asplin is to provide: (a) to the solicitor appointed pursuant to the above paragraphs: irrevocable instructions in accordance with paragraph (8)(c) below; and (b) to both the said solicitor and to the Prosecutor, a fully executed deed to bring about the result required by paragraph (8)(c) below: (c) Mrs Asplin to disclaim, in favour of the Defendant (and accordingly for payment in part-settlement of the Defendant’s confiscation order in accordance with paragraph (10) below) any and all sums otherwise due to her from the sale of the said property. (9) On the sale of Primrose Drive, the Primrose Drive Solicitor shall apply the sales monies towards the discharge of the legal charge held by the Interested Party in the sum of £200,000 (the Hosier charge as defined above). (10) After the discharge of the legal charge held by the Interested Party in accordance with paragraph (9) above and deductions for (i) the Estate Agent fee (including VAT) and (ii) the Primrose Drive solicitor’s fee, disbursements and VAT, the entire balance shall be transferred forthwith to the account set out below at (10) (b), in part satisfaction of the Confiscation Order. (a) Confirmation of the transfer and its value shall be sent at the same time by email to the Prosecutor. (b) Bank Account Name: HMCTS London Regional Confiscation Unit [details and reference given]... (11) All monies received in respect of rent from Primrose Drive shall, from the time of making of this variation order, be applied first to any expenses of renting Primrose Drive (for which an account supported by invoices are to be provided to the Prosecutor) and thereafter the entire balance towards payment of any mortgages on Elberton Court.

[The Family Home] (12) After the completion of the sale of Primrose Drive, the prohibitions in paragraph 4 and 7 of the Restraint Order are varied to permit the Defendant to convey his legal and beneficial interest in Elberton Court to Mrs Asplin in accordance with the terms of this Order. (13) Mrs Asplin may purchase the entirety of the Defendant’s interest in Elberton Court for a sum (the ‘Purchase Price’) calculated as follows: (1) agreed value £1.95 million, (b) less total amount required by Barclays Bank to discharge Elberton Court mortgages with Barclays bank, then (c) less Defendant’s solicitor’s costs, then (d) multiplied by 0.5. (14) The Defendant shall appoint a solicitor for the purposes only of providing necessary independent advice to the Defendant and supervision of documentation prepared by the Elberton Court Solicitor (as defined below) and the total cost thereof shall be no more than £1,000 plus VAT without the prior written consent of the Prosecutor. (15) Prior to any appointment, the principal of any solicitor’s firm to be appointed must confirm

in writing to the prosecutor their status in the firm and that they have read and understood this variation order. (16) Mrs Asplin shall appoint a solicitor to conduct her purchase of the Defendant's interest in Elberton Court. (17) Prior to any steps being taken in respect of the sale of the property, the principal of any solicitor's firm to be appointed must confirm in writing to the prosecutor their status in the firm and that they have read and understood this variation order. (18) The earlier of exchange or, if there is no exchange, execution of any transfer document, the provision to the Prosecutor of the mortgagee(s)'s consent to the proposed sale of the Defendant's interest in Elberton Court to Mrs Asplin. (19) Upon completion, the Elberton Court solicitor is to transfer the Purchase Price forthwith to the Court Bank Account set out at paragraph (10)(b). and at the same time to provide an email confirmation of the same to the Prosecutor specifying the value transferred and to provide a completion statement to the Prosecutor within 24 hours of completion. (20) Mrs Asplin shall be responsible for the fees, disbursements and VAT of the Elberton Court Solicitor and no part of their account shall be deducted from the sale proceeds.

(21) No order for costs.

(22) The Parties do have liberty to apply in writing on notice to the other parties to vary this Order or for further Order, such application to be dealt with by Fordham J if available, and the determination thereof to be on the papers or at a remote hearing unless the Court otherwise directs.