Neutral Citation: [2023] EWFC 111

Case No: BV20D01752

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2023

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

DH	**Applicant**
- and -	
RH	**Respondent**

- -
- -

Mr James Ewins KC (instructed by **Burgess Mee**) for the **Applicant**
The Respondent appeared in person

Hearing dates: 9 June 2023

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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.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter I am concerned with financial remedy proceedings between DH (who I shall hereafter refer to as 'the wife'), represented by Mr James Ewins of King's Counsel, and RH (who I shall hereinafter refer to as 'the husband'), who acts in person.

2. The applications that are before the court for determination at this point are (a) an application by the wife for a legal services payment order (LSPO) and an application by the wife for an order for maintenance pending suit (MPS). There are also a number of other applications before the court, but these will fall to be dealt with at a later date following the determination of the applications currently before the court.

3. In determining the wife's applications, I have had the benefit of reading the court bundle prepared by the wife's solicitors and a detailed written response to the wife's applications prepared by the husband, together with further sundry documents submitted by both parties ahead of this hearing. Following the hearing, both the husband and, through her solicitors, the wife attempted to submit documents via email not directed by the court and not accompanied by an application to admit further evidence. The court has been required on a number of occasions to remind the parties that the court does not conduct proceedings by correspondence and that any application to admit further evidence should be made by way of application in accordance with the requirements of the Family Procedure Rules 2010.

4. With respect to the nature and extent of the matrimonial assets, at this hearing the court has also had the benefit of a Schedule of Assets prepared by the husband on 23 April 2023. Whilst that Schedule is not agreed, and I have not treated it as such, both parties have relied on its contents at this hearing in support of their respective submissions. The Schedule details total assets of some £13.2M.

5. In light of the relative complexity of the circumstances in which the current interlocutory applications fall to be determined, having heard submissions on behalf of the wife from Mr Ewins KC and from the husband, I reserved judgment. I now set out my reasons for making the orders that I have determined are merited in this case.

BACKGROUND

6. For the purposes of the applications before the court, the background to this matter can be set out in relatively short order.

7. The wife is 54 and was born in April 1969. The husband is 57 and was born in July 1965. The parties have two daughters, M, born in 2005 and E, born in 2007. Both M and E are in private education. The parties met in New York in 1993 and were married in July 1995. They lived in New York until shortly after M's birth in July 2005 when they moved to London. The family relocated to central England in September 2016 so that the children could attend their current school.

8. Both parties have a background in the financial services industry. The wife started her career at Citibank, before joining Lehman Brothers where she remained until

2004. The husband was a trader at Goldman Sachs before being made redundant in 1996. He then worked at Deutsche Bank in New York before leaving Deutsche Bank to join Barclays Capital in 2004, where he remained until 2014. Following his departure from Barclays, the husband was employed in a series of roles in the financial industry. The husband is not employed at present but during the course of his submissions stated that he has a role with a publicly listed entity, which reimburses his expenses. Commencing in 2014, the husband began investing in cryptocurrency, to which investments I shall return.

9. The wife petitioned for divorce on 23 January 2020 and *decree nisi* was pronounced on 26 November 2020. The financial remedy proceedings were issued in the Family Court sitting at Bristol on 2 December 2020 and the parties exchanged Forms E on 17 March 2021. The First Directions Appointment took place on 7 April 2021. I pause to note that in his Form E the husband listed an investment in a company called Topanga Canyon Holdings LLC (hereafter 'Topanga'), to which I shall return. The stated value of the investment in the Form E was $75,000.

10. The parties own two properties in Wyoming, in addition to properties in New York. At the First Directions Appointment (FDA) on 7 April 2021, both parties gave undertakings to refrain from taking steps to diminish the balance of the funds held in all the parties' accounts with a US bank, save for the purposes of meeting mortgage payments in respect of the mortgages secured over those properties and meeting necessary costs referable to the maintenance, upkeep and administration of those properties. At the FDA the court dismissed the wife's application to instruct an expert to examine the extent of the husband's cryptocurrency holdings, it appearing on the face of the order that the court was not satisfied at that stage that there were legitimate grounds for the wife's suspicions regarding the nature and extent of those holdings.

11. A private Financial Dispute Resolution Appointment (FDR) was held on 20 July 2021, which did not result in the resolution of the financial remedy proceedings. Ahead of the private FDR, the Topanga investment referred to above received no treatment in the husband's Replies to Questionnaire on 24 June 2021. However, in July 2021 and just prior to the FDR, the husband disclosed that Topanga was a vehicle for holding shares in Coinbase, a cryptocurrency platform, and that as the result of the public listing of Coinbase 7 days after the FDA held on 7 April 2021, the Topanga investment had increased in value to circa $7M, the value standing at circa $5.28M at the time of the private FDR. The husband has continued to state that the wife was aware of the investment in Coinbase (relying on mention of Topanga in a US tax return in 2016 and further mentions in documents from 2017 to 2019), an assertion the wife denies. For present purposes, I simply record that it is clear that as a result of this incident of alleged non-disclosure, and later alleged incidents I shall come to, there is now no trust on the part of the wife that the husband has been frank in disclosing assets held as cryptocurrency and that she has continued and continues to entertain concern that there may be other deficiencies in this regard. A significant number of the applications made by the wife following the FDR held on 20 July 2021 have concerned the Coinbase investment.

12. A further application for an expert report on the husband's cryptocurrency holdings was made by the wife but dismissed by the court on 19 August 2021 on the grounds that there was insufficient information on the nature, scope and cost of such an expert instruction. On 19 August 2021, the court also dismissed an application by the wife

for a LSPO, without prejudice to any further application the wife may make in the future. The wife renewed her application for an expert report on the husband's private equity and cryptocurrency holdings on 18 February 2022, including on whether the husband's disclosure accurately reflected the extent of his declared holdings and dealings in such assets and the definability, certainty exclusivity, control and assignability of those assets. HHJ Cope acceded to that application, permitting the instruction of a firm called 'Another Day' to prepare a summary of all the husband's holdings and dealings, to include mining activities, including the return on such activities, and decentralised finance activities, including staking, lending, and liquidity providing, in crypto-assets since 1 January 2019. The wife contends that following the instruction of the expert, the husband revealed further cryptocurrency assets (in the form of electronic wallets and accounts) not previously disclosed by him. This is disputed by the husband. Following delays in the provision of information to the jointly instructed expert, on 31 May 2022 HHJ Cope adjourned the final hearing and directed that the expert be provided with the primary documentation with respect to the husband's holdings, rather than the spreadsheet prepared by the husband, together with updating disclosure. On 1 August 2022 the matter was re-allocated to a judge of High Court level.

13. As I have noted, at the FDA on 7 April 2021, both parties gave undertakings to refrain from taking steps to diminish the balance of the funds held in all the parties' accounts with the US bank, save for the purposes of meeting mortgage payments in respect of the mortgages secured over the two Wyoming properties and meeting necessary costs referable to the maintenance, upkeep and administration of those properties. On 15 September 2022, the US bank wrote to the parties stating that the parties' "financial condition, which was relied upon as a basis for the approval of the existing loan guarantee with the US bank, has materially deteriorated" and requested that the loan amount secured on Wyoming properties "be reduced by at least $1,720,000, to bring the balance owing to an amount no greater than $4,000,000." On the same day, and without reference to the wife, the husband made two transfers in the amount of $450,000 and $225,000 from the parties' US bank account to pay down the parties' mortgage with that bank. On 14 October 2022, the husband wrote to the wife's then solicitors to inform them that he had further reduced the mortgage liability to £1.77M "through the liquidation of all the Coinbase shares and all the Crypto in Coinbase and Coinbase Pro, as well as the liquidity available in the UBS account and the ETrade account".

14. The matter first came before me on 17 November 2022 on the wife's application for a freezing order. On that date, an application by the wife for a freezing order was resolved by way of agreement between the parties. That agreement prevented each party disposing of, dealing with or diminishing the value of (including by way of borrowing against the security of) the Wyoming properties, properties in New York and a number of US registered companies. The order further required the parties to ensure that rental payments from the Wyoming and New York properties were paid into specified bank accounts and prohibited each party from disposing of, dealing with or diminishing the value of those accounts save to meet the mortgage payments and expenses on the properties. On 17 November 2022, and again by consent, I further directed a report from a single joint expert on the question of the potential tax consequences of disposing of matrimonial assets to be completed by 14 February 2023. I timetabled the matter to a final hearing with a time estimate of 10 days. The

final hearing was initially timetabled to a date in the Summer term 2023. However, due to judicial availability, it subsequently became necessary to list the final hearing as commencing on 30 October 2023. That listing remains in place.

15. The preparation and finalisation of the expert report directed by HHJ Cope has been a protracted exercise, with the wife continuing to assert that the husband has failed to disclose the full extent of his holdings in crypto currency to the jointly instructed expert and the husband asserting that the wife has failed to co-operate with proposed meetings with the expert. There are at least three versions of the expert's report in the bundle, dated 30 June 2022, 8 July 2022 and 16 September 2022, prepared as further information regarding the husband's holdings has become available.

16. On 17 November 2022, I made further directions with a view to bringing the jointly instructed expert report to a conclusion, directing *inter alia* that the jointly instructed expert reply to the husband's questions and clarifications by 24 November 2022, that, in response to the wife's contention that further disclosure was required, the expert indicate whether he was in a position to supply a comprehensive list of any further disclosure required to complete the report and, if so, to provide details of the further disclosure required. On 6 December 2022, and in response to the order of the court dated 17 November 2022, the expert suggested that each cryptocurrency exchange/service be approached to provide a list of all wallets associated with the husband and the transaction history. The expert has now produced a draft final report but indicated it would remain in draft until he had had an opportunity to speak to the parties. On 12 December 2022 the wife confirmed that she would attend a meeting subject to some additional questions being answered by the expert and to yet further third party disclosure orders being agreed by the husband. The husband accused the wife of seeking to interfere with the work of the single joint expert. The proposed meeting did not take place. In foregoing context the husband, who was now acting in person, filed an application on the 13 December 2022 for an order requiring the wife to comply with the outstanding case management directions made by the court on 17 November 2022.

17. The foregoing circumstances have seen the parties, and in particular the wife, expend quite eye watering sums on legal and third party costs. The Forms H provided ahead of this hearing detail a total expenditure on costs by the parties to date of some £2M. The wife has incurred by far the majority of those costs, her expenditure to date amounting to £1.35M. Part of the wife's costs have been funded with a litigation loan from Detach in the sum of circa £800,000 at an interest rate of 11.98% p.a. That loan remains to be repaid. In addition, the wife also owes £189,975 to her current solicitors, Burgess Mee, and £98,000 to her former solicitors, Withers.

18. On 5 December 2022, the wife wrote to the husband indicating the requirements that Detach Lending sought to attach to any extension of her litigation loan facility. Namely, that the wife pledge her shares of the holding company for one of the Wyoming properties and her ownership interest in the four residential units in New York as security. The wife is unable to comply with these conditions without being released from the undertakings given to the court on 17 November 2022. On 6 January 2022 the wife applied to be released from her undertaking in order to secure a further extension to her litigation loan and to stay the directions made on 17 November 2022 pending the determination of that application. On 10 February 2023 the wife wrote to the husband to seek his agreement to the reversal of the $675,000

the husband had transferred from the account at the US bank to pay down the Wyoming mortgages in September 2022 as detailed above. The wife suggested that those funds could, in their entirety, be used to meet her outstanding and ongoing legal fees.

19. On 28 February 2023, the wife, also now acting in person, filed a statement without the permission of the court in which she made clear that she sought a wide range of orders comprising an LSPO, an order for MPS, committal of the husband for contempt of court, an interim order giving her access to 50% of the rental revenue generated the properties in Wyoming and New York, an order to interdict what she contended was the diversion of the rental revenue into another account, freezing orders, an order for the husband to consent to the return of the $675,000 paid to the US bank, further orders for disclosure covering the period between January 2005 and December 2018 and an order for costs. The wife stated she was also seeking orders to resume the review of the a laptop that had been the subject of examination earlier in the proceedings under the Imerman principles and an Ubuntu computer said to be used for crypto mining and trading.

20. The matter came before me again on 1 March 2023 and I gave directions to ensure wife's applications were made in proper form, including the applications for an LSPO and an order for MPS that are before the court today, and gave directions in respect of the evidence in support of those applications. The wife issued her application for a LSPO and an order for MPS on 20 April 2023. Due to current deficiencies in the operation of the office of the Clerk of the Rules, the matter was not listed before me until 9 June 2023.

21. On 11 April 2023, the husband filed a response to the applications for an LSPO and an order for MPS directed in my order of 1 March 2023. The wife alleges that the husband's statement discloses further unilateral liquidations of assets, contrary to the undertakings given by the husband earlier during the proceedings. In the statement the husband contends that whilst he thought his Xapo cryptocurrency wallet was "zeroed out", the wallet in fact held 16.05 Bitcoin, which he "cashed" out for €420,720. The wife contends that this is simply another example of the husband failing to disclose assets until he has dealt with them unilaterally. The husband contends he is simply rendering liquid risky investments in the context of the highly volatile cryptocurrency market.

22. The wife now seeks an LSPO in the sum of £531,343 paid in four instalments on the first of the month in July, August, September and October of this year. That sum is broken down into an itemised schedule in the bundle and in broad terms provides for estimated expenditure of £221,564 to PTR and thereafter a further £217,133 to final hearing. Within this context, the wife contends that she is not able to secure legal representation unless an LSPO is made by the court. She submits that, unless she is released from her undertakings in respect of property held in the United States, she cannot extend her litigation loan from Detach and, further, that because Detach are the first creditor in line in respect of monies recovered by the wife in the proceedings, and again because there is no onshore security, she is not able to secure a legal funding loan from any other litigation lender. She further contends that she has no other resources from which to fund her legal fees and, relying on the principles in *Rubin v Rubin*, that she should not be required to further deplete her modest fund of savings to that end.

23. The wife also seeks to include in the terms of the LSPO payment of fees outstanding to her former solicitors, Withers LLP, and her current solicitors, Burgess Mee as detailed above. The wife contends that it is not possible for her to secure further representation from Burgess Mee until the fees she owes to them are settled. The wife further contends that it is not possible for her to secure further representation from Burgess Mee until the fees outstanding to Withers are settled, in circumstances where Burgess Mee will not act for her until their outstanding fees have been discharged *and* Burgess Mee have paid the fees outstanding to Withers pursuant to the following undertaking given by Burgess Mee to Withers:

> "We further undertake to include your firm's outstanding costs as part of any application for an LSPO that is filed by this firm on [DH]'s behalf in relation to the proceedings in the Family Court sitting at the Royal Courts of Justice (case number BV20D01752) between her and [RH], and to discharge your firm's outstanding costs within 14 days of funds being received by this firm on [DH]'s behalf pursuant to that application or, alternatively, from [RH] in respect of [DH]'s costs."

24. The wife seeks a further order for maintenance pending suit of £370,000 per annum to include monthly rent of £9,945, the wife now seeking to return to rented accommodation in central London, being £250,660 per annum maintenance and £119,340 per annum for rent. I note that this is as against the position sought by the wife in her draft order prepared for the hearing on 17 November 2022 which sought £104,000 per annum for maintenance and £66,000 per annum for rent.

25. The husband resists both applications. With respect to the application for an LSPO, he points out that HHJ Cope dismissed an application by the wife for an LSPO in August 2021. The husband contends that given the sums spent by the wife already on litigation, amounting to some £1.3M, in the context of what he submits is some thirty months of litigation, including ten directions hearings in three vacated final hearings, two cost orders against the wife and continuing non-compliance with case management orders, it would be irresponsible to channel further matrimonial assets into legal funding for the wife. The husband points to the fact that the proceedings having been ongoing since 23 January 2021, have resulted in the expenditure of circa £2M in costs and the incurring by the wife of a debt at a very high rate of interest. The husband further submits that the expenditure of that level of costs has still failed to result in a statement of case setting out in clear terms the wife's allegations concerning non-disclosure and hidden assets, leaving the question of the evaluation and division of the matrimonial assets in this case a relatively straightforward exercise. In the circumstances and where, when acting for the wife, Withers estimated the costs to final hearing to be circa £366,666, a further amount of £536,000 sought by the wife on top of the £1.3M she has already spent on legal costs cannot be justified.

26. Within this context, the husband proposes that the wife's desire to spend more on this litigation can be satisfied by each party having one of the houses in Wyoming and two of the apartments in New York, based on what the husband describes as "clear advice…provided by a reputable US tax lawyer", allowing the wife to utilise those properties to fund her legal costs. The husband submits that this will provide the wife with assets that she can choose to use for spending on legal costs if she chooses and that it is irresponsible of the wife to ignore what he contends are pragmatic proposals,

while incurring further legal costs and interest on the debt without a logical plan for resolution. The wife rejects this course of action as exposing her to significant transfer tax liabilities in the United States. During his oral submissions, the husband's opposition to an LSPO order at times appeared to become less firm, particularly were the deployment of the funds sought by the wife to result in a resumption of forward momentum in the case and if it were to be paid in instalments.

27. With respect to the application for MPS, the husband contends that the family cannot afford to continue to live at the level sought by the wife in circumstances where, during the marriage, the family lived beyond its means, where neither party are in high income employment and where, in consequence, they are now required to burn through their capital. The husband in particular points to the wife's intention to occupy one of the Wyoming properties during the height of the rental season, further depleting the families investment income and the ability to fund the interim maintenance sought. With respect to the sum sought by the wife for rent, the husband contends that the wife's wish to move back to London can be achieved by renting a cheaper property in an similarly central location for circa £4,400 per month as opposed to nearly £10,000 per month.

THE LAW

28. The law in relation to both an application for a LSPO and an order for MPS is well settled.

LSPO

29. On 1 April 2013 amendments made by ss. 49 to 54 of the Legal Services and Punishment of Offenders Act 2012 to the Matrimonial Causes Act 1973 gave the court power to make orders for payment in respect of legal services. Section 22ZA of the Matrimonial Causes Act 1973 as amended provides as follows (reflecting the formulation approved in the decision of the Court of Appeal in *Currey v Currey (No2)* [2006] EWCA Civ 1338 at [20]):

> "**Orders for payment in respect of legal services**
>
> (1) In proceedings for divorce, nullity of marriage or judicial separation, the court may make an order or orders requiring one party to the marriage to pay to the other ("the applicant") an amount for the purpose of enabling the applicant to obtain legal services for the purposes of the proceedings.
>
> (2) The court may also make such an order or orders in proceedings under this Part for financial relief in connection with proceedings for divorce, nullity of marriage or judicial separation.
>
> (3) The court must not make an order under this section unless it is satisfied that, without the amount, the applicant would not reasonably be able to obtain appropriate legal services for the purposes of the proceedings or any part of the proceedings.
>
> (4) For the purposes of subsection (3), the court must be satisfied, in particular, that—

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

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

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

(6) An order under this section may—

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

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

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

(8) The court may at any time in the proceedings vary an order made under this section if it considers that there has been a material change of circumstances since the order was made.

(9) For the purposes of the assessment of costs in the proceedings, the applicant's costs are to be treated as reduced by any amount paid to the applicant pursuant to an order under this section for the purposes of those proceedings.

(10) In this section "legal services", in relation to proceedings, means the following types of services—

(a) providing advice as to how the law applies in the particular circumstances,

(b) providing advice and assistance in relation to the proceedings,

(c) providing other advice and assistance in relation to the settlement or other resolution of the dispute that is the subject of the proceedings, and

(d) providing advice and assistance in relation to the enforcement of decisions in the proceedings or as part of the settlement or resolution of the dispute,

and they include, in particular, advice and assistance in the form of representation and any form of dispute resolution, including mediation.

(11) In subsections (5) and (6) "specified" means specified in the order concerned."

30. Section 22ZB of the Matrimonial Causes Ac 1973 as amended further provides as follows with respect to the matters to which the court is to have regard when considering an application under s.22ZA of the 1973 Act:

> "**Matters to which court is to have regard in deciding how to exercise power under section 22ZA**
>
> (1) When considering whether to make or vary an order under section 22ZA, the court must have regard to—
>
> (a) the income, earning capacity, property and other financial resources which each of the applicant and the paying party has or is likely to have in the foreseeable future,
>
> (b) the financial needs, obligations and responsibilities which each of the applicant and the paying party has or is likely to have in the foreseeable future,
>
> (c) the subject matter of the proceedings, including the matters in issue in them,
>
> (d) whether the paying party is legally represented in the proceedings,
>
> (e) any steps taken by the applicant to avoid all or part of the proceedings, whether by proposing or considering mediation or otherwise,
>
> (f) the applicant's conduct in relation to the proceedings,
>
> (g) any amount owed by the applicant to the paying party in respect of costs in the proceedings or other proceedings to which both the applicant and the paying party are or were party, and
>
> (h) the effect of the order or variation on the paying party.
>
> (2) In subsection (1)(a) "earning capacity", in relation to the applicant or the paying party, includes any increase in earning capacity which, in the opinion of the court, it would be reasonable to expect the applicant or the paying party to take steps to acquire.
>
> (3) For the purposes of subsection (1)(h), the court must have regard, in particular, to whether the making or variation of the order is likely to—
>
> (a) cause undue hardship to the paying party, or
>
> (b) prevent the paying party from obtaining legal services for the purposes of the proceedings.
>
> (4) The Lord Chancellor may by order amend this section by adding to, omitting or varying the matters mentioned in subsections (1) to (3).
>
> (5) An order under subsection (4) must be made by statutory instrument.

> (6) A statutory instrument containing an order under subsection (4) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.
>
> (7) In this section "legal services" has the same meaning as in section 22ZA."

31. In *Rubin v Rubin* [2014] EWHC 611 (Fam), Mostyn J gave comprehensive guidance on the operation of the statutory provisions set out above. It is useful to set out the terms of paragraph [13] of Mostyn J's judgment in full:

> "[13] I have recently had to deal with a flurry of such applications and there is no reason to suppose that courts up and down the country are not doing likewise. Therefore it may be helpful and convenient if I were to set out my attempt to summarise the applicable principles both substantive and procedural.
>
> i) When considering the overall merits of the application for a LSPO the court is required to have regard to all the matters mentioned in s22ZB(1) - (3).
>
> ii) Without derogating from that requirement, the ability of the respondent to pay should be judged by reference to the principles summarised in *TL v ML* [2005] EWHC 2860 (Fam) [2006] 1 FCR 465 [2006] 1 FLR 1263 at para 124 (iv) and (v), where it was stated:
>
> > 'iv) Where the affidavit or Form E disclosure by the payer is obviously deficient the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources. In such a situation the court should err in favour of the payee.
> >
> > v) Where the paying party has historically been supported through the bounty of an outsider, and where the payer is asserting that the bounty had been curtailed but where the position of the outsider is ambiguous or unclear, then the court is justified in assuming that the third party will continue to supply the bounty, at least until final trial.'
>
> iii) Where the claim for substantive relief appears doubtful, whether by virtue of a challenge to the jurisdiction, or otherwise having regard to its subject matter, the court should judge the application with caution. The more doubtful it is, the more cautious it should be.
>
> iv) The court cannot make an order unless it is satisfied that without the payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings. Therefore, the exercise essentially looks to the future. It is important that the jurisdiction is not used to outflank or supplant the powers and principles governing an award of costs in CPR Part 44. It is not a surrogate *inter partes* costs jurisdiction. Thus a LSPO should only be awarded to cover historic unpaid costs where the court is satisfied

that without such a payment the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings.

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

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

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

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

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

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

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

xii) When ordering costs funding for a specified period, monthly instalments are to be preferred to a single lump sum payment. It is true that a single payment avoids anxiety on the part of the applicant as to whether the monthly sums will actually be paid as well as the annoyance inflicted on

> the respondent in having to make monthly payments. However, monthly payments more accurately reflects what would happen if the applicant were paying her lawyers from her own resources, and very likely will mirror the position of the respondent. If both sets of lawyers are having their fees met monthly this puts them on an equal footing both in the conduct of the case and in any dialogue about settlement. Further, monthly payments are more readily susceptible to variation under s22ZA(8) should circumstances change.
>
> xiii) If the application for a LSPO seeks an award including the costs of that very application the court should bear in mind s22ZA(9) whereby a party's bill of costs in assessment proceedings is treated as reduced by the amount of any LSPO made in his or her favour. Thus, if an LSPO is made in an amount which includes the anticipated costs of that very application for the LSPO, then an order for the costs of that application will not bite save to the extent that the actual costs of the application may exceed such part of the LSPO as is referable thereto.
>
> xiv) A LSPO is designated as an interim order and is to be made under the Part 18 procedure (see FPR rule 9.7(1)(da) and (2)). 14 days' notice must be given (see FPR rule 18.8(b)(i) and PD9A para 12.1). The application must be supported by written evidence (see FPR rule 18.8(2) and PD9A para 12.2). That evidence must not only address the matters in s22ZB(1)-(3) but must include a detailed estimate of the costs both incurred and to be incurred. If the application seeks a hearing sooner than 14 days from the date of issue of the application pursuant to FPR rule 18.8(4) then the written evidence in support must explain why it is fair and just that the time should be abridged."

32. Two of the principles set out above require further elucidation on the particular facts of this case. The first concerns the question of costs already incurred ahead of the application for an LSPO.

33. The wife seeks to recover the costs owed by her not only to Burgess Mee, who act for her currently, but also to her former solicitors, Withers. As I have noted, the wife contends that, in consequence the undertaking given by to Withers by Burgess Mee that I have described, Burgess Mee cannot act for her unless those latter costs are provided. In this case, on behalf of the wife Mr Ewins urges the court to adopt the approach taken by Francis J in *DR v ES* [2022] EWFC 62, in which the court agreed to encompass within the LSPO historic costs owed to the wife's solicitors. Within that context, Francis J determined that historic costs should be provided for in circumstances where if the debt was not paid there was "a serious risk that they will not continue to act". It is not clear from the judgment in *DR v ES* the extent to which the court was referred to the terms of statute and the authorities dealing with the issue of historic costs in the context of an LSPO, Francis J observing that "Both counsel properly agree that I have the jurisdiction to deal with this, both in terms of a lump sum to clear previous costs incurred if I think it is appropriate, and to deal with future costs to be incurred." It would also not appear from the judgment that the LSPO granted by Francis J to the wife included costs owed to former, as opposed to current, solicitors (Francis J referring at [56] only to the husband's former solicitors).

34. The terms of s.22ZA(1) provide that the court has jurisdiction to award an amount for the purpose of enabling the applicant to *obtain* legal services for the purposes of the proceedings. As I have noted, Mostyn J held in *Rubin* that, given the manifest undesirability of an LSPO being used to outflank or supplant the powers and principles governing an award of costs in CPR Part 44, an 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.

35. In *BC v DE* [2016] EWHC 1806 sub nom *Re F (A Child)(Financial Provision: Legal Costs Funding)* [2016] 1 WLR 4720, Cobb J drew a distinction between an order in respect of the historic costs of proceedings which have already concluded (which was the position Mostyn J was dealing with in *Rubin*), and historic costs already reasonably and legitimately incurred within ongoing proceedings, recognising as he did that:

> "[22]… However, for as long as any client has incurred significant outstanding legal costs with his or her solicitor, there is no doubt but that they become bound ("beholden" per Mr Harker, see para 9 above) to each other by the debt; this may well impact on the freedom of, and relative strengths within, their professional relationship. Further, the solicitor may feel constrained in taking what may be important steps in relation, for instance, to discovery, or in relation to exploring parallel non-court dispute resolution. The debt may materially influence the client's stance on possible settlement, and the solicitor's advice in relation to the same: a client - without independent resources - is in a vulnerable position, and may be more inclined to accept a settlement that is less than fair simply because of the concerns about litigation debt. This would not be in the interests of this, or any, child in Schedule 1 proceedings. A level playing field may not be achieved where, on the one side, the solicitor and client are "beholden" to each other by significant debt, whereas on the other there is an abundance of litigation funding. Though there is an increasingly familiar and commendable practice of lawyers acting pro bono in cases before the family courts, particularly where public funding provision previously available has been withdrawn, legal service providers, including solicitors and barristers, are not charities, nor are they credit-agents. It is neither fair nor reasonable to expect solicitors and the Bar to o›er unsecured interest-free credit in order to undertake their work; there is indeed a solid reason for lawyers not to have a financial interest in the outcome of family law litigation."

36. By contrast, in *LKH v QA AL Z (Interim Maintenance and Costs Funding)* [2018] EWHC 1214 (Fam) Holman J noted, in comments that were plainly *obiter* in circumstances where the statute did not apply on the facts in *LKH v QA AL Z (Interim Maintenance and Costs Funding)*, that s.22ZA looks forward to the obtaining of legal services and not backwards to legal services already obtained. In these circumstances, and recalling the observation of Mostyn J on this issue in *Rubin*, Holman J considered that an LSPO that covers historic costs should be made only very sparingly indeed. On the question of whether the court can be satisfied that without an award to cover historic unpaid costs the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings, Holman J took the following approach

in *LKH v QA AL Z (Interim Maintenance and Costs Funding)* at [28] with respect to the impact on that question of outstanding costs:

> "Mrs Carew Pole submitted that if Payne Hicks Beach are not relatively swiftly paid all their outstanding costs they would not continue to act for this client, even if there is an appropriate award of monthly payments to cover future costs. With the utmost respect to Mrs Carew Pole, I cannot accept that as a matter of submission. If a partner of Payne Hicks Beach had made a clear and unequivocal witness statement, to be publicly relied upon, to the effect that they would now, to quote Mostyn J. "down tools" or, to use another metaphor, pull the plug on their client unless the past costs are rapidly paid, even if the future costs are provided for, then I would have to consider that. But it would in my view be a regrettable and regressive development in this class of expensive family litigation. I am not prepared to assume, on the basis of a submission, that this very distinguished firm would act in that way."

37. The foregoing authorities deal with outstanding costs owed to a firm who remains acting for the applicant at the time the LSPO application is made in proceedings that are ongoing. In *Re Z (A Child)(Schedule 1: Legal Costs Funding Order; Interim Financial Provision)* [2020] EWFC 80 Cobb J was concerned with an application for legal funding in proceedings under Schedule 1 of the Children Act 1989 in which the mother claimed as part of the LSPO *historic* legal costs owed to two firms who were no longer instructed by her, or where work was paused due to active litigation against the solicitor in question. Having reminded himself of the need, articulated by Mostyn J in *Rubin*, to ensure that any award made under an LSPO does not have the effect of outflanking or supplanting the powers contained in CPR Part 44 to make orders for costs, Cobb J declined to encompass within the LSPO the historic costs owed to firms no longer acting for the mother. Cobb J was not satisfied that without payment of those historic costs the mother would not be able to obtain appropriate legal services for the proceedings going forward. In encompassing within the LSPO historic costs to the firm that the mother *continued* to instruct, Cobb J repeated his view expressed in *Re F (A Child)(Financial Provision: Legal Costs Funding)* that:

> "I am satisfied that there is no other legitimate or accessible funding stream, and this firm should not carry a significant debt in working for the mother unpaid; the firm is not a charity, nor it is a credit agent, and, as in *Re F*, I am of the view that it is neither fair nor reasonable to expect the firm, and chosen counsel, to offer unsecured interest-free credit in order to undertake their work. In this respect, I am concerned that the mother and Hunters should not become bound or 'beholden' to each other by the existing debt; the position of the mother vis-à-vis Hunters is closer to that which I described at [22] of *Re F* (above)."

38. The second of the principles set out in *Rubin* requiring further elucidation on the particular facts of this case concerns control by the court of the use of legal funding awarded under an LSPO.

39. Section 22ZA of the Matrimonial Causes Act 1973 makes clear that in granting an LSPO the court, pursuant to s.22ZA(5), maintains a high degree of control over the type of legal services, the period over which they are provided and the purpose for

which they are provided. Further, pursuant to s. 22ZA(6), the court may provide that the amount awarded to obtain legal services may be paid in instalments secured to the satisfaction of the court. Section 22ZA(7) allows the court to defer all or part of the payment and s.22ZA(8) empowers the court to vary the LSPO consequent on a material change of circumstances since the order was made. As Mostyn J made clear in *Rubin*, court should make clear in its ruling or judgment which of the legal services mentioned in s22ZA(10) the payment is for.

40. Where a litigant can demonstrate that without an LSPO they would not reasonably be able to obtain appropriate legal services, but in the view of the court that litigant has, prior to the application for an LSPO, spent profligately on legal services to little effect, the power of the court to control the deployment of amounts awarded under an LSPO will be of particular importance, as it will be where those representing a party have failed to act responsibly when deploying funds for legal services. In *Re Z (No.2) (Schedule 1: Further Legal Costs Funding Order; Further Interim Financial Provision)* [2021] EWFC 72 Cobb J, whilst not resiling from his comments in earlier authorities that legal service providers, including solicitors and barristers, are not charities, nor are they credit-agents, and that is neither fair nor reasonable to expect solicitors and the bar to offer unsecured interest-free credit in order to undertake their work, made clear that an LSPO is not a licence for lawyers to bill as they choose:

> "If I had thought that my comments in *Re F* and in the earlier judgment in this case would have the effect of encouraging the mother's solicitors, or indeed any solicitors in similar cases, to assume that they had *carte blanche* to bill their clients as they choose, I would not have made the comments, or I may have expressed myself differently."

MPS

41. The Matrimonial Causes Act 1973 s.22 provides that the court may make an order for maintenance pending suit requiring either party to make periodical payments for maintenance. In *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family)* [2006] 1 FLR 1263, the court distilled the principles applicable for an application for an order for maintenance pending suit.

42. In *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family)*, having reviewed the authorities, Mostyn J made clear that the sole criterion to be applied in determining the application is "reasonableness", which is synonymous with "fairness". In determining the question of reasonableness, the focus of the court should be on immediate needs. In *Rattan v Kuwad* [2021] 1 WLR 3141 at [33] the Court of Appeal observed as follows in respect of the concept of immediate need:

> "[33] It is also clear that, as set out in the Red Book, the purpose of an order for maintenance pending suit is to meet "immediate" needs. The principal issue raised by this appeal is what needs qualify as being immediate and how should the court approach the determination of this question. However, I would stress that the particular circumstances of each case will determine on which issues the court will need to focus and the degree of scrutiny which will be required. 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."

43. In *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family),* Mostyn J further made clear that a very important factor in determining fairness is the marital standard of living. However, that is not to say that the exercise is merely to replicate that standard of living. The Court of Appeal observed as follows in *Ratan* in this regard:

> "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."

44. In *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family)* Mostyn J stipulated that 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 and that budget should be examined critically in every case to exclude forensic exaggeration. Within this context, in *Collardeau-Fuchs v Fuchs* [2022] EWFC 6, Mostyn J recognised that whilst a claim for maintenance pending suit should be subjected to the same degree of careful scrutiny as any other interlocutory claim, and the court should "try to paint its decision with a fine sable rather than a broad brush" where it has the ability to do so, in most cases it will not have the time or the material to conduct an exhaustive investigation and therefore "the exercise will perforce be rough and ready". In *Baker v Baker* [2022] EWFC 15, Mostyn J observed that in light of the decision of *Rattan* "the analysis does not have to be undertaken with close numerical exactitude; a broad approach to the assessment of immediate needs is not only acceptable but is likely to be commonplace".

45. Finally, in *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family)* Mostyn J stated that where the evidence of the payer is obviously deficient the court should not hesitate to make robust assumptions about his or her ability to pay and the court is not confined to the account of the payer regarding extent of income or resources. In such a situation the court should err in favour of the payee. Where the paying party has historically been supported through the bounty of an outsider but asserts that the bounty has been curtailed but the position of the outsider is ambiguous or unclear, the court is justified in assuming that the third party will continue to supply the bounty, at least until the final hearing.

DISCUSSION

46. Having considered the evidence in this matter and listened carefully to the submissions of Mr Ewins on behalf of the wife and the submissions of the husband, I am satisfied that the wife's applications for a LSPO and for an order for MPS should be granted. My reasons for so deciding are as follows.

LSPO

47. I am satisfied in this case that without the provision of funds under an LSPO the wife would not reasonably be able to obtain appropriate legal services up to and including the final hearing (the private FDR in this matter already having taken place) and provision to obtain those legal services should be made by way of an LSPO, albeit it is appropriate to stage those payments, and for the court to revisit at the PTR the question of whether the LSPO should be varied. I am not however, satisfied in this case that it is appropriate for the court to encompass within the LSPO payment of the historic costs owed by the wife to Withers and to Burgess Mee.

48. On the evidence before the court, I am satisfied that the wife is not in a position to further expand her litigation loan with Detach. Without being released from her current undertakings in respect of the properties in the United States, and in the absence of assets in this jurisdiction against which a loan could be secured, the wife is not in a position to advance security for an extension to the Detach litigation loan, or indeed for a loan from an alternative provider. For the reasons I gave at the hearing on 1 March 2023, it would not in my judgment be appropriate to release the wife from those undertakings to enable further litigation borrowing to be secured against those assets at a punitive rate of interest. I likewise do not consider that the husband's proposal for funding the wife's legal costs by transfer of the New York properties is one the court could endorse absent independent evidence of the tax consequences of that step being taken. I am satisfied that the wife is not able to obtain legal services by granting a charge over the assets that she might recover in the proceedings. I do not consider it would be reasonable to expect the wife to now exhaust the modest amounts remaining in her bank accounts and investments to fund her legal costs.

49. In circumstances where the parties have been acting in person prior to this hearing, and hence the court has not been given an accurate agreed Schedule of Assets, the assessment of the income, earning capacity, property and other financial resources which each of the wife and the husband has or is likely to have in the foreseeable future must necessarily be a provisional and relatively broad exercise. However, on the unagreed Asset Schedule prepared by the husband, it is clear on his own case that the husband has financial resources, in sufficiently liquid form, to fund an LSPO in favour of the wife, the balance of his bank accounts being £719,743, with savings and investments of £514,443. The liquid assets in this case are, in the vast majority, currently in the husband's name. Within this context, and cognisant as I am that the husband will be required also to fund an order for MPS I intend to grant, I am satisfied that the LSPO I intend to make will not cause undue hardship to the husband or prevent him from himself obtaining legal services for the purposes of the proceedings should he choose to do so moving forward. Pursuant to s.22ZA(9), for the purposes of the assessment of costs in the proceedings, the wife's costs will be reduced by the amount paid to her by the husband under the LSPO.

50. All that being said, I do have considerable sympathy with the husband's submissions concerning the wife's expenditure on legal costs to date. These are complex matrimonial proceedings, made more complex by the issues centring on the matrimonial assets that have been held in cryptocurrency. In the circumstances, it is reasonable for the wife to look to instruct specialist matrimonial solicitors with expertise comparative to those engaged historically by the husband. However, the court cannot but be concerned by the fact that the wife has to date already incurred some £1.3M in legal costs, including a substantial debt at a punitive rate of interest, as

compared to the circa £600,000 costs incurred by the husband. Whilst this is not the occasion to make findings in relation to the wife's litigation conduct, and I make clear I do not do so, it would appear that a significant part of those costs have been incurred in the wife's desire to prove her contention that the husband is hiding assets, including holdings in cryptocurrency. Notwithstanding this, and whilst some of the husbands actions will have fed into the wife's concerns, the wife has to date failed to itemise with particularity any deficiencies in disclosure, even though directed to do so by the court.

51. These circumstances must necessarily give the court pause when considering an application by the wife for a further circa £500,000 to be provided to meet her legal costs. Against this, the wife would not reasonably be able to obtain appropriate legal services without funding and, as recognised by the husband, there is an urgent need to get these proceedings back on track, which I am satisfied will be assisted by the wife having specialist legal representation. In the circumstances, I am satisfied that the court's concerns regarding the wife's expenditure on legal costs to date are best dealt with by carefully proscribing the manner in which the funds made available under the LSPO are to be deployed and by staging those payments. As I have noted above, where a litigant can demonstrate that without an LSPO they would not reasonablely be able to obtain appropriate legal services, but in the view of the court that litigant has, prior to the application for an LSPO, spent profligately on legal services to little effect, the power of the court to control the deployment of amounts awarded under an LSPO will be of particular importance.

52. The costs estimate provided by the wife's legal team is broken down into costs to PTR and costs to final hearing. As I have noted, the estimate provides for estimated expenditure of £221,564 excluding VAT to PTR and thereafter a further £217,133 excluding VAT to final hearing.

53. Having reviewed the schedules, and having regard to the directions that remain outstanding from 17 November 2022, including the finalisation of the tax and pension positions, the work outlined in the estimate to for the work up to PTR appears broadly reasonable. In particular, it does not contain provision for further investigation of the question of undisclosed assets. I consider that to be the correct approach. An award under an LSPO made a significant way through the proceedings is *not* a licence to start again with respect to case management or otherwise to fundamentally change the established shape of the case. As I have noted, after some 30 months of litigation the wife has not provided a schedule of alleged non-disclosure of assets notwithstanding the extensive costs expended by her. In such circumstances, I am satisfied that it would not be appropriate to authorise any further costs to be expended on that question, save those required to facilitate the meetings required to finalise the current joint expert report, to take legal advice in respect of the conclusions of that report (as already provided for in the estimate of costs) and to give instruction on it.

54. Within the foregoing context, I am further satisfied that it would not be appropriate for there now to be a wholesale re-examination of the directions that remain to be complied with in this case to take the case to PTR if required. The court gave directions to PTR on 17 November 2022. That order has not been appealed. There has been no fundamental change of circumstances since that date. As the court made clear to the parties at the hearing on 1 March 2023, the court expects those directions

will be complied with. The wife now has the legal funds to do so, albeit that they will require to be re-timetabled.

55. With respect to the costs between PTR and final hearing, I am not persuaded that a costs estimate of £217,133 excluding VAT to final hearing is reasonable. By the time of the PTR the vast majority of the work required to ready the matter for final hearing will have been completed. In such circumstances, it is not reasonable to provide for a figure for the work to between PTR and final hearing that is almost equivalent to that applying to the work ahead of the PTR. Further, elements of the cost estimate are plainly unsustainable. By way of example, the total given for the preparation of the bundle is £4,230, notwithstanding that the task at that point will be simply to update the existing bundle. I consider a more realistic figure for solicitors costs to be £65,000 excluding VAT plus counsel's fees, bringing the figure between PTR and final hearing down to £151,000 excluding VAT.

56. I am not satisfied in this case that it is appropriate for the court to encompass within the LSPO payment of the historic costs owed to by the wife either to Withers or to Burgess Mee.

57. As recognised by Mostyn J in *Rubin*, the exercise to be carried out under s.22ZA and s.22ZB of the 1973 Act essentially looks to the future, Holman J further observing in *LKH v QA AL Z (Interim Maintenance and Costs Funding)* that, as such, the statute looks forward to the obtaining of legal services and not backwards to legal services already obtained. Within this context, nowhere in the statute is the court expressly given the power to order one party to the marriage to pay to the other party legal costs that the latter has *already* incurred. Indeed, when dealing with the question of historic costs, at s. 22ZB(1)(g) the statute refers only (as a factor to be taken into account when considering whether to grant an LSPO) to the historic costs owed by the applicant *to the paying party* in respect of costs in the proceedings or other proceedings to which both the applicant and the paying party are or were a party. There is no mention of historic costs owed by the applicant to their own current or previous lawyers.

58. The justification for making an order under s.22ZA that includes payment of historic costs owed by the applicant to their lawyers, notwithstanding that the statute is silent on the point, is said to be that if such costs are not provided for then the solicitor may refuse to act for the applicant. I accept, of course, that the existence of outstanding debt to a solicitor informs the question of whether the party would reasonably be able to obtain appropriate legal services for the purposes of s.22ZA(3). In such circumstances, and absent a loan or a charge over assets to be recovered, the applicant indebted to their solicitor and without funds may not be able to obtain further legal services where their solicitor refuses to act without the debt being paid. However, whilst that may well be the entirely understandable position of the solicitor in the absence of an LSPO, it is difficult to see why it should *inevitably* be the position of the solicitor *after* an LSPO has been granted. Whilst there will remain a risk, assumed by the solicitor, that the client will not pay the sums owed for *past* work, once funding under the LSPO is in place there is no risk that the client will not pay the sums owed for *further* work, provided the solicitor adheres, contrary to the position in *Re Z (No.2)(Schedule 1: Further Legal Costs Funding Order; Further Interim Financial Provision)*, to the stipulation of the court as to the type of legal services

provided, the period over which they are provided and the purpose for which they are provided under the LSPO.

59. Within the foregoing context, I consider that Holman J was correct in stating in *LKH v QA AL Z (Interim Maintenance and Costs Funding)* that LSPOs encompassing historic costs should only be made sparingly and only on proper evidence that the applicant's lawyers *will* refuse to act unless the historic costs are paid, notwithstanding the grant of an LSPO. I accept that in some of the authorities a general principle to the effect that legal service providers, including solicitors and barristers, are not charities, nor are they credit-agents, and that it is neither fair nor reasonable to expect solicitors and the bar to offer unsecured interest-free credit in order to undertake their work, has formed the basis for making an LSPO that encompasses historic costs. However, in the circumstances set out above, and where the reality is that some firms are willing to carry credit and some firms are not, and thus that some firms will "down tools" and some will be willing to carry on, I consider that the approach of Holman J, to require specific sworn evidence of an intention by the solicitor in the particular case to refuse to act unless the historic costs are paid notwithstanding the grant of an LSPO, is to be preferred to reliance on a general principle that firms and members of the bar should not carry credit in circumstances where they are not charities or credit agents.

60. Within the foregoing context, I am not satisfied that it would be appropriate for the LSPO to encompass the historic costs owed by the wife to her former solicitors, Withers. In his Skeleton Argument, Mr Ewins concedes that the inclusion in an LSPO of costs owed to a former solicitor would be unusual. I would go further, and hold that the inclusion of such historic costs in an LSPO would be unprecedented. None of the authorities cited above has approved such a course and in *Re Z (A Child) (Schedule 1: Legal Costs Funding Order; Interim Financial Provision)* Cobb J expressly declined to do so (I also noted that in *R v R* [2021] EWHC 195 (Fam) the submission that the LSPO should encompass costs owed to a former solicitor was withdrawn). There is obviously no risk in this case that Withers will refuse to act for the wife if the costs owed to them are not included in the LSPO as they are no longer on the record. Whilst the wife seeks to rely on the terms of the undertaking given by Burgess Mee to Withers in the terms set out above to demonstrate that the former will not act for her unless all historic costs are paid, it is difficult to see the terms of that undertaking as anything other than a rather transparent artifice to try to bring the wife's former solicitors within the circumstances that are understood by matrimonial lawyers to justify the inclusion of historic costs in an LSPO. In any event, if the court has power under s.22ZA to make an order that includes payment of historic costs owed by the applicant to their solicitors (and I assume for the purposes of this case that it does) then for the reasons I have given it is a power that falls be exercised sparingly and only on proper evidence. Within this context, there is no sworn statement of evidence before the court deposing to the fact that, notwithstanding the making of an LSPO, Burgess Mee will refuse to act for the wife unless that LSPO encompasses the costs owed to Withers, nor indeed a statement from Withers indicating it will sue Burgess Mee for breach of the undertaking if Burgess Mee acts for the wife by way of funds secured through an LSPO without having recovered the costs owed by the wife to Withers. Given their significance, these are not matters I am prepared to take on submission.

61. I accept that Burgess Mee is in a different position to Withers as they remain on the record for he wife. I further acknowledge that through Mr Ewins the wife submits that Burgess Mee "cannot act without payment in full of their historic costs and provision for future costs". However, I am also not prepared to encompass the historic costs owed to Burgess Mee within he LSPO. Once again, any power that exists to make an LSPO that encompasses historic costs falls to be exercised sparingly and on proper evidence. There is no evidence before the court to prove the assertion that, notwithstanding the making of an LSPO to provide for their fees moving forward to final hearing, Burgess Mee *will* still not act for the wife unless their historic fees are paid. To put it in the terms used by Holman J in *LKH v QA AL Z (Interim Maintenance and Costs Funding)*, there is not before the court an unequivocal, sworn witness statement from Burgess Mee, to be publicly relied upon, to the effect that they will pull the plug on the wife unless the past costs are now paid, even if the future costs are provided for by the court under an LSPO. Once again, given its significance, I am not prepared to take that assertion on submission.

62. In the circumstances, I am satisfied that the LSPO that I intend to grant should be limited to providing funds to the wife moving forward to final hearing but should not encompass the historic costs owed either to Withers or to Burgess Mee.

63. As noted above, I am concerned in this case to ensure that, in circumstances where the wife has spent in excess of £1.3M to date, that the funds provided under the auspices of an LSPO are deployed by her responsibly moving forward. In the circumstances, the order made by the court will provide for the payment of £221,654 to PTR to encompass the work detailed in the first section of the costs estimate, dealing with work up to the PTR, prepared by Burgess Mee. The LPSO will thereafter provide for further £151,000, to be paid in two further instalments f*ollowing* the PTR, to permit the court to reassure itself at the PTR that the costs provided for under the LPSO are being utilised proportionately. Within this context, the court will also invite the parties to agree a revised timetable for compliance with the outstanding directions contained in the order of this court of 17 November 2022. Absent an agreement, the court will determine the appropriate revised case management timetable.

MPS

64. Whilst the assessment of reasonable maintenance is an exercise that should "try to paint its decision with a fine sable rather than a broad brush" where the court has the ability to do so, in many cases the court will be limited at the interim stage in the extent to which it is able to conduct an exhaustive investigation. As Francis J noted in *DR v ES*, the task of the court is complicated by the fact is that these interim applications involve contrasting presentations as to value, as to income and as to need, and the fact that it is neither possible nor appropriate to resolve those competing positions at an interim hearing. That is the case here. Within this context, the court is not required to undertake an analysis of the position with respect to MPS with "numerical exactitude" and a broad approach to the assessment of immediate needs is acceptable.

65. In this case, the wife submits that the benchmark of reasonableness that underpins her MPS budget of £370,000 per annum is provided by a combination of the fact that this was a high spending family during the marriage and by the concomitant figures for spending set out in her Form E budget of circa £330,000 per annum (a budget that the

wife contends was reduced by the fact it reflected actual expenditure during COVID-19 lockdown and so did not include the full extent of her usual spending). The wife further submits that her budget is also corroborated by an analysis of her actual expenditure in the years 2019-20 as derived from disclosure within these proceedings. Against this, the husband submits that, in assessing reasonableness, the court should conclude that the current situation with regard to the matrimonial pot cannot sustain spending at historic levels, which the husband maintains were not in any event sustainable in the long term.

66. As Moylan LJ noted in *Ratan*, 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 but, as a generalisation, the parties' separation does not provide a reason on its own for that standard being reduced or increased. In short, each case will depend on its own facts.

67. I am not able to accept he wife's submission that the court should assess the reasonableness of her MPS budget against the position set out in her Form E. The financial position of the parties has changed considerably from the point at which the Form E was prepared and for the worse. As I have noted, on 17 November 2022 the wife provided the court with a draft order for maintenance pending suit which provided for £104,000 per annum for maintenance and £66,000 per annum for rent, albeit that provision did not find its way into the order ultimately agreed by the parties. In my judgment, at this stage of these proceedings, the proper starting point for the assessment of reasonableness must be the current position of the parties, including any proposed material change of circumstances, the most obvious of which is the desire of the wife to return to live in London.

68. The wife has plainly established her need for maintenance pending suit. She has no current employment and is required to maintain herself and the children of the family pending the determination of these proceedings. I accept that, during the course of the marriage, the family had a very high standard of living. However, this family is now in a very different position by reason of the highly contentious divorce proceedings they have each chosen to pursue for the past two and half years. This litigation, and the reduction in the value of the matrimonial assets that appears to have occurred during the course of it, means that, whilst the families' former lifestyle is relevant, that lifestyle is now much less affordable than it was.

69. In circumstances where the family previously lived in London, and where one daughter will now commence tertiary education in the United States and the other will commence boarding, it is not in my judgment unreasonable for the wife to seek to return to London, where the parties resided for a considerable period during the marriage. Pending the determination of proceedings, the husband must make reasonable provision for the wife's rent, absent which provision I am satisfied she would not be able to secure reasonable accommodation. However, I am not satisfied that it is reasonable to thereby *double* her expenditure on rent from £66,000 per annum to £119,340 per annum. The particulars provided by the husband demonstrate that it is possible for the wife to obtain a rented property in central London for a rent that does not require the budget to be doubled. In my assessment, in light of the wife's reasonable wish to move back to London, and in the context of the limited information before the court, I consider that a reasonable budget for rent to be £7,000 per month, amounting to annual rent of £84,000. With respect to the deposit, removal

and storage costs, it is reasonable in my judgment for the deposit and *reasonable* costs of removal and storage be paid by the husband in the circumstances I have set out, to enable the wife to move to the new property.

70. With respect to the wife's MPS budget in addition to rental costs, I also consider that it contains a number of very obvious examples of forensic exaggeration. That this is so is demonstrated by the fact that notwithstanding the draft order for MPS provided with the wife's application for the hearing on 17 November 2022 provided for MPS excluding rent in the sum of £104,000 per annum, the wife now seeks, some seven months later, an annual sum of £251,364, excluding rent and the cost of the children's summer academic programmes and M's university fees. In particular, the following matters appear to me to constitute incidences of forensic exaggeration, duplication or expenditure which cannot withstand critical examination:

i) The funding of digital equipment appears duplicated a number of times in the MPS budget, totalling some £8,300, including mobile phone fees of some £3,055 per annum. I consider a reasonable annual figure for digital equipment, including mobile telephones, for the family to be £2,500.

ii) Subscriptions to video streaming services and other online subscriptions appears duplicated in several places in the budget, amounting to £3,646 per annum. I consider a reasonable figure for online services and streaming subscriptions to be £500 per annum.

iii) The budget for gym membership is stated as £3,500 per annum, in additional to gym equipment at £1,500 per annum. I do not consider that, pending determination of the proceedings, £5,000 per annum on gym memberships is reasonable, and that a more reasonable figure in the circumstances is £1,750 per annum.

iv) Charitable donations are stated to be £2,500 per annum. Whilst charitable giving is both important and to be commended, I do not consider that such expenditure is reasonable at the current point in time pending the determination of the proceedings.

v) Holiday travel is put at £54,000 per annum together with annual travel expenses for the children of £7,600 per annum. A total of £61,600 per annum on holidays and travel expenses is not reasonable in all the circumstances and will be substituted with a more reasonable figure of £25,000.

vi) Car maintenance and servicing is stated at £3,750 per annum. This is not a reasonable figure for annual maintenance and servicing of a single car, and I consider that the proper figure is £1,500.

vii) There is duplication in the annual budget for food and household products of £20,950 per annum and by way of the figure given for "Water/Snacks" of £2,500.

viii) The figure for membership of clubs of £6,500 is a luxury I am satisfied it is not reasonable to provide pending the determination of these proceedings.

ix) In the current circumstances, I do not consider it reasonable to include in the budget for maintenance pending suit a figure for a full time housekeeper in the total sum of £25,300 per annum, particularly in circumstances where the wife now intends to move without the children to a smaller property in London. I consider a more reasonable figure to be £3,900 per annum, which would permit the wife to employ a cleaner for 5 hours per week at £15 per hour.

x) The position in respect of the budget for medical expenses is confused, with in particular little or no evidence to support the contention of *annual* expenditure of £12,785 for "consultations". The medical expenses figure of £750 per annum in Schedule 7 appears to be a duplication. Having regard to the contents of the Schedule in respect of medical expenses, I have some sympathy with the husband's description of those expenses as "overkill". In the circumstances, I am not prepared to ascribe the figure of £34,064 claimed for healthcare above and beyond the health insurance policy and will substitute a figure of £6,000. The position with respect to the health insurance policy, costing £18,000 per annum, is dealt with in more detail below.

71. With respect to the health insurance policy, the husband contends that he has offered to pay the premiums on this policy but seeks to be named on the policy in circumstances where he has parental responsibility for the children. I consider that it is reasonable for the husband to fund the health insurance policy that provides health cover for the wife and the children. Whilst the parties dispute the extent to which the children have specified health needs, it is reasonable for health insurance to be in place. I likewise consider however, that in circumstances where the husband shares parental responsibility for the children, that he should be named on the policy.

72. The wife also includes in the MPS budget ongoing tuition fees for both children of £44,520. Whilst the father disputes the proportionality of these latter costs, I am prepared to conclude that they are reasonable. The husband will also be responsible for the sums owing in respect of the educational support for the Easter holidays in the sum of £10,725. With respect to the separate costs of the children's education, the father stated during his evidence that he is "committed" to paying for E's pre-college program, the costs of the program amounting to £18,859 including summer expenses. The husband implied his position was the same in respect of M's place at university, those costs being stated as £115,772.

73. In the circumstances, in addition to rental expenses of £84,000 per annum, I am satisfied that the wife should receive MPS of £141,154 per annum, which figure includes the payment of the health insurance policy premium. The figure excludes the separate costs of the children's education, which the husband is committed to meeting. This amounts to total maintenance pending suit of £18,762 per month. As I have noted, the husband will also be responsible for the sums owing in respect of the educational support for the Easter holidays in the sum of £10,725. I am *not* satisfied on the evidence before the court that, in addition, the husband should be responsible for discharging by way of backdated maintenance the debts incurred by the wife in the sum of $31,265 or circa £25,000.

74. I do not have a clear picture of the husband's income, and equally do not have a clear picture of his expenditure (the wife extracting from the husband's records expenditure from a single month in 2021). However, whilst the husband asserts before this court

that he does not have high earning employment at present, during the course of proceedings he intimated he is undertaking work for a publicly listed entity. More significantly, on his own Schedule of Assets the husband also has very significant liquidity. For the purposes of the wife's application for maintenance pending suit, I am satisfied that the husband can afford to pay the figure for maintenance that I have arrived at whilst also funding the LSPO that I have made in the total sum of £372,654 excluding VAT in circumstances where that sum is to be paid in monthly instalments and subject to review at the PTR.

CONCLUSION

75. In the circumstances, I grant an LSPO order and an order for MPS in the terms I have described above. The parties should now submit orders for my approval incorporating the matters set out in this judgment including, as I have stated, an agreed revised timetable for compliance with the directions towards final hearing that this court gave on 17 November 2022.

76. Finally, I cannot leave this case without again observing that the parties have now spent the best part of £2M in legal costs on proceedings that have been ongoing now for two and a half years. Despite this, the parties are no closer to reaching an agreement on the issues between them and, at the same time, have failed to advance the proceedings to final hearing in the manner directed by the court. Unless the parties now concentrate on, preferably, negotiating a settlement of these proceedings or, in any event, preparing this matter for trial, they risk the further dilapidation of the assets they have carefully assembled during the course of this long marriage, to the ultimate detriment of both themselves and, most importantly, to the detriment of their children.

77. That is my judgment.