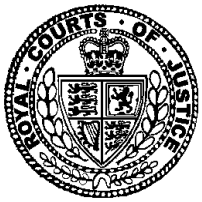

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Neutral Citation Number: [2020] EWHC 3555 (Fam)

Case No: ZZ18D88433 & BV19D24032

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/12/2020

Before :

MRS JUSTICE LIEVEN

- -

Between :

CAROLINE JILL CROWTHER

Applicant

and

(1) PAUL ANTHONY CROWTHER
(2) STEVEN ANDREW KNIGHT
(3) CARASOL GROUP LIMITED
(4) CASTLE TRUST AND MANAGEMENT SERVICES LIMITED
(5) CASTLE NOMINEES LIMITED
(6) CASTLE SHIP MANAGEMENT LIMITED
(7) MARITIME ATLANTIC LIMITED

Respondents

- -
- -

Mr Philip Marshall QC and Mr Alex Tatton-Bennett (instructed by **Hughes Fowler Carruthers**) for the **Applicant**
Mr Justin Kitson and Ms Alice Hawker (instructed by **Trainer Shepherd Phillips Melin Haynes & Collins Long**) for the **First Respondent**
Mr Robert-Jan Temmink QC (instructed by **Preston Turnbull)** for the **Second to Sixth Respondents**
The Seventh Respondent was unrepresented

Hearing dates: **10 December 2020**

- -

Approved Judgment

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MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This judgment concerns Mr Crowther's application that Mrs Crowther pays his costs of the preliminary issue on an indemnity basis.

2. Mr and Mrs Crowther have been engaged in highly acrimonious and litigious financial remedy proceedings since late 2019. The background to the litigation is set out in the judgment of the Court of Appeal in *Crowther v Crowther* [2020] EWCA Civ 762. I will merely recount those matters which are particularly relevant to the costs application before me.

3. Mr and Mrs Crowther had run a successful shipping business comprised of a number of ships providing services in the construction of offshore windfarms and oil and gas subsea operations. On 6 September 2019 each party issued a petition for divorce. Mrs Crowther made her application for financial remedies against Mr Crowther on 18 September 2019. On 17 December she made an urgent ex parte application for a freezing injunction against Mr Crowther and the Second to Sixth Respondents, "the Castle parties".

4. Mrs Crowther alleged that she and her husband were the beneficial owners of five ships worth approximately £7-10 million. She said that there was evidence that Mr Crowther, together with the Second Respondent Mr Knight, were conspiring to defraud her by reducing Mr Crowther's apparent financial position by transferring assets away from Mr Crowther and by various devices involving ending contracts with companies controlled by Mr Crowther and moving those contracts to new companies. She argued that unless a freezing order was granted, the assets of the marriage would be taken offshore and would effectively be impossible for Mrs Crowther to access in any matrimonial finance award.

5. Mrs Crowther contended in her application for the freezing order that although the ships were held under legal title by various iterations of the Castle parties, she and Mr Crowther were the beneficial owners of the ships. She said that the legal ownership was merely for "tax purposes".

6. I granted the freezing order, after an inter partes hearing, and gave a return date of 10 March 2020. On 24 February the Castle parties issued proceedings in the Admiralty Division asserting legal and beneficial ownership of four of the vessels and related relief. They also asserted that companies controlled by Mr and Mrs Crowther owed Mr Knight approximately £5 million. It is not necessary to set out the precise figures, not least because sums have varied considerably through the litigation. The important point for these purposes is that the Castle parties were alleging that the Crowthers, whether directly or through various companies, owed them a very large sum of money.

7. Mr Knight served two affidavits setting out his account of how Castle Ship Management had come to acquire title to the vessels. In essence, he said that the Crowthers' business was in considerable financial difficulty in 2012 and a deal had been struck by which ownership was transferred to companies controlled by him as a way of restructuring the Crowthers' finances. He asserted this was an entirely bona fide and arms length agreement and he and Mr Crowther denied that the purpose of the agreement was to evade tax in the UK. He alleged that the Crowthers, through the

companies, owed the £5 million for unpaid charter fees. Mr Crowther had immediately conceded the Castle claims in the Admiralty proceedings and entirely supported Mr Knight's version of events. Mrs Crowther set out a Defence and Counterclaim to the action and pleaded fraud and conspiracy against both Mr Knight and Mr Crowther.

8. On 10 March Holman J discharged the freezing order in respect of the ships. Mrs Crowther promptly appealed to the Court of Appeal and a stay was granted. The appeal was heard on 9 June, the Castle parties being represented by leading counsel but Mr Crowther representing himself. The appeal was allowed on the grounds that the hearing before Holman J had not been fair and the Court of Appeal determined to reinstate the freezing order.

9. The following passages of the judgment are particularly relevant to the application before me:

> *"[Mrs Crowther] did so contending that the arrangements entered into in 2012 and described above were a sham. She acknowledged that "on paper it looks like Castle Ship Management have owned their ships since 2012", but said that this was not the reality and was only done to "reduce our tax liabilities", the reality being that "100% of the shareholding in Castle Ship Management Ltd is held on trust for us". Although she did not put it anything like so bluntly, what her evidence came to is that her husband conspired with Mr Knight to conceal from HMRC that ultimately the vessels were beneficially owned by the Crowthers; that this was done in order to evade tax; and that what Mr Knight gained from this arrangement was a relatively modest annual fee. Mr Charles Howard QC for Mrs Crowther confirmed in argument before us that Mrs Crowther's case is indeed that this was unlawful tax evasion as distinct from legitimate tax avoidance, albeit that her case will be that despite being a partner in the business and responsible for financial matters, and despite having attended the November 2012 meeting, she was not a participant in unlawful activity.*
>
> *…*
>
> *50. Only two possibilities have been suggested as the true nature of the 2012 arrangements. The first is that the arrangement reached was, as Mr Knight and Mr Crowther say, a commercial agreement to transfer both legal and beneficial title to the vessel owning companies to CSM in exchange for CSM taking responsibility for paying off the loan notes, combined with a bareboat charter to AMA which would enable it to continue in business and to earn a profit on sub-charters of the vessels. The suggested rationale for this arrangement was that the Crowthers were in default of their loan commitments due to cashflow difficulties and faced the vessels being taken over by Castle acting on behalf of their creditors. The second possibility is that it was a criminal conspiracy between Mr Knight and Mr Crowther, but also involving Mrs Crowther who attended at least one of the relevant meetings, to evade tax properly due on the Crowthers' earnings.*

> *51. The first of these possibilities has the support of some contemporary documents, by which I mean not only the agreements concluded themselves but also surrounding documents such as the letters and emails which say on their face that the Crowthers' business was unable to meet loan payments due to "cashflow issues" and that they were faced with a real prospect of losing control of the vessels in any event. If that was so, it would not be a commercially implausible arrangement to make, albeit that it has what I would regard as some unusual features, such as the hire provisions to which I have referred.*
>
> *52. I bear fully in mind that the second possibility is a very serious allegation, meaning that Mr Knight, who is apparently a respected professional man carrying on a substantial regulated business in Gibraltar, was prepared to put his career and professional reputation at risk in order to assist the Crowthers, whom at that stage he had only just met, to evade tax illegally, and that he was prepared to do all this for a relatively insignificant annual fee. Cogent evidence would be required to make good such a serious allegation at trial."*

10. Males LJ set out eleven reasons which he considered gave *"scope to question whether the substantial liability of the Crowthers and their business to Mr Knight has been exaggerated or even invented."* This was necessarily a hearing at an interlocutory stage of proceedings and no findings were made.

11. On 6 July the Admiralty claim was transferred to the Family Division on Mrs Crowther's application. The Castle parties and Mr Crowther resisted the transfer. On 17 July both matters came before me and I ordered a trial of a preliminary issue, which was set out as follows:

> *"IT IS ORDERED THAT:*
>
> *The Preliminary Issues*
>
> *1. There shall be a trial of the following preliminary issues ("the Preliminary Issues"):*
>
> *i) the beneficial ownership of Atlantic Enterprise, Atlantic Tonjer, Atlantic Endeavour and Atlantic Explorer and the respective offshore companies which legally own them;*
>
> *ii) the beneficial ownership of Atlantic Discovery;*
>
> *iii) the beneficial ownership of funds presently held offshore by the second to sixth respondents; who is entitled to the chartering income from the disputed vessels; and an appropriate account of such chartering income if it is owed to the applicant and/or the first respondent; and*
>
> *iv) whether the applicant wife and the first respondent husband and family companies owned by them are indebted to the second to sixth respondents (all of whom are represented by Mr Knight)*

> *upon the basis that the pleadings in the Admiralty division shall stand in the preliminary issues in relation to (i) and (ii) above."*

12. Mrs Crowther had filed a Defence and Counterclaim to the Admiralty proceedings that succinctly set out her case in respect of the ownership of the ships:

> *"1. The commencement of these proceedings is part of an elaborate conspiracy between the Claimants (through the Fifth Claimant, Mr Steven Knight) and the Second Defendant, Mr Paul Crowther, to perpetrate a fraud on the High Court and the First Defendant, Mrs Caroline Crowther in divorce proceedings that are already ongoing in the Family Division.*
>
> *2. Mr Crowther, as the de facto controlling mind of the First, Fourth, Sixth, Seventh, Eighth and Ninth Claimants, has procured the commencement of these proceedings by Mr Knight, as the de jure controlling mind of all the Claimants with a view to falsely establishing that neither he nor Mrs Crowther have any interests in the vessels "ATLANTIC ENTERPRISE", "ATLANTIC TONJER", "ATLANTIC DISCOVERY" and "ATLANTIC ENDEAVOUR" ("the Vessels") and therefore reduce the value of the assets available for distribution in the divorce proceedings between he and Mrs Crowther."*

13. In her Counterclaim she repeated the Defence and she sought declarations as to sham, conspiracy and fraud against Mr Crowther and the Castle parties. Mrs Crowther filed a large number of witness statements that set out her case that Mr Crowther and Mr Knight had entered into a conspiracy, initially to defraud HMRC of tax revenue and then to defraud her in relation to the matrimonial proceedings. Mr Crowther and the Castle parties filed various documents strenuously denying these allegations. In preparation for the trial there was a very extensive disclosure exercise in which thousands of documents were disclosed and there were a number of applications to the court relating to alleged failures to disclose relevant material, and by Mr and Mrs Crowther for funds to be released from the proceeds of sale of the Former Matrimonial Home in order to fund legal costs. I am told that in total Mrs Crowther has spent something in the region of £900,000 in legal fees.

14. On 15 October 2020 I ordered that Mrs Crowther set out with particularity (among other things): (i) the nature of any conspiracy including dates, identities of conspirators and the nature of any loss; (ii) documents or agreements which Mrs Crowther asserts are shams, the parties involved, the parties alleged to have been deceived, and the true agreement; (iii) the nature of any fraud, the parties thereto, their alleged knowledge and the alleged victim; (iv) the legal and factual bases upon which Mrs Crowther alleged that the Vessels (and the companies which own them) are beneficially owned "by the Applicant and the First Respondent". On 2 November she filed a further document particularising the claim. At this point her claim somewhat shifted to alleging that Mr Crowther was the sole beneficial owner of the ships rather than both of them holding the beneficial ownership. The Castle parties continued to argue that her case had not been properly particularised and indeed appealed my order (unsuccessfully) to the Court of Appeal.

15. The trial of the preliminary issue was due to start on 10 December with the first day as a reading day. However, on 3 December the Court received an email from Mr Marshall QC informing the Court that R2-R6 and Mrs Crowther had settled and that they wished to vacate the hearing. I asked for further information, particularly as to the position of Mr Crowther and on whether I should refer the Court of Appeal judgment to HMRC in the light of the very serious allegations of tax fraud which were made at that stage by Mrs Crowther. The Court was then sent on 4 December a two page document which said inter alia:

> *"W has reached a full and final binding settlement with R2-6 in respect of all claims in the Family Division and the Admiralty Court. The agreement is being reduced to writing and is likely to be signed today or early next week. The agreement is that both the Preliminary Issues Trial in the matrimonial proceedings and the Admiralty Court proceedings are discontinued.*
>
> *The binding settlement is a contractual agreement between W and R2-6. The Court is functus officio with regard to those parties in those matters and there is no need or requirement for the Court to "sanction" the parties' agreement.*
>
> *If and insofar as it might be necessary, R2-6 will seek to enter into a formal settlement agreement with R1 & R7 by which R2-6's claim in the Admiralty Court against R1 & R7 is discontinued with no order as to costs (R1 & R7 having admitted R2-6's claim in those proceedings)."*

16. Mr Crowther's Skeleton Argument for this hearing states that *"H had no knowledge of or involvement in the Settlement: he only learned of it after filing his reply witness statements on the afternoon of 3 December 2020".*

17. The settlement is set out in a consent order with the terms in a Tomlin order, which is confidential. However, the hearing on 10 December was in open court and the parties openly referred to the broad terms of the agreement. It is therefore both appropriate and necessary that I set them out here. I set out in the Postscript to this judgment why I have referred to the sums in the Tomlin Order. The Castle parties are to pay Mrs Crowther the sum of £750,000 in instalments and release her from £5,632,639 unpaid charter income and over £1million of other alleged loans; she is to discontinue all claims against them on a no admissions basis, and there is to be no order for costs. The lump sum was to be paid in tranches, the first £80,000 to be paid on 24 December 2020.

18. Mr Crowther was not a party to this agreement and at the start of the hearing on 10 December it was wholly unclear, at least to me, where this left Mrs Crowther's allegations in respect of Mr Crowther. As I will refer to below, Mr Marshall QC, who appeared for Mrs Crowther, in his Skeleton Argument appeared to suggest that some part of the allegations could remain against Mr Crowther. However, in oral argument he quickly accepted that all claims of beneficial interest against Mr Crowther would also have to be discontinued, as would any allegations of sham, fraud or conspiracy. There was no dispute that this should be recorded in recitals to the order, quite apart from in this judgment.

19. Mr Temmink, on behalf of the Castle parties, stated in Court that his clients were not pursuing any of the alleged debts against Mr Crowther personally, and the company to which the unpaid charter income was allegedly owed was now in liquidation. My understanding from this was that Mr Crowther was not going to argue at the financial remedy proceedings that he had a large outstanding debt to the Castle parties which should be taken into account in any matrimonial finance award.

20. In the light of these events, Mr Crowther applied for his costs of and occasioned by the preliminary issues advanced by Mrs Crowther on an indemnity basis. Mr Kitson, who appeared on behalf of Mr Crowther, also applied for a payment on account in the sum of £80,000, which was the sum due to be paid to her by the Castle parties on 24 December.

21. The general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party save where conduct issues arise (FPR r.28.3(6) and (7)). However, preliminary issue applications, such as in this case, are not financial remedy proceedings for the purposes of FPR r.28.3, see the commentary at FPR 2010 r.28.3. Mr Marshall accepts this proposition and that therefore the CPR applies to the extent referred to in FPR r.28.2.

22. Mr Kitson argues that when considering the approach to costs, particularly where there are allegations of fraud, there should be a consistent approach across the different Divisions of the High Court. This proposition has been demonstrated in a range of different contexts where each division must apply the same law and principles to the facts of the case before it.

23. When considering allegations of 'sham' in the Family Division, Munby J held in *A v A* [2007] 2 FLR 467 at [21]:

> *"There is not one law of 'sham' in the Chancery Division and another law of 'sham' in the Family Division. There is only one law of 'sham', to be applied equally in all three Divisions of the High Court, just as there is but one set of principles, again equally applicable in all three divisions, determining whether or not it is appropriate to 'pierce the corporate veil'."*

24. In the case of *Tchenguiz v Imerman* [2011] Fam. 116, Lord Neuberger MR held at [129]:

> *"The applicable principles, and the requirements which a claimant has to satisfy, where the court is invited to grant relief are no different in the Family Division from those in the other two Divisions of the High Court, although, of course, in all three Divisions, the application of the principles has to be made to the facts and features of the particular case before the court."*

25. The Supreme Court emphasised the importance of consistency between the Family and the Chancery Divisions in the case of *Prest v Petrodel* [2013] 2 AC 415. At [37], Lord Sumption stated that: *"if a right of property exists, it exists in every division of the High Court and in every jurisdiction of the county courts. If it does not exist, it does not exist anywhere."*

26. Mr Marshall does not argue against the general principle set out in those cases. However, he relies heavily on Butler Sloss LJ in *Gojkovic v Gojkovic (No.2)* [1991] 2 FLR 233 at p.236. She was considering the position in relation to costs and said:

> *"…there still remains the necessity for some starting-point. That starting-point, in my judgment, is that costs prima facie follow the event … but may be displaced much more easily than, and in circumstances which would not apply, in other Divisions of the High Court."*

27. Mr Kitson then relies on CPR r.38.6 which provides that where proceedings are partly discontinued, the Claimant is liable for the costs relating to the discontinued part. There is a presumption in the CPR that the party who has discontinued should pay the other party's costs. That presumption is only rebutted in very narrow circumstances, which do not arise in this case. The following cases set out the principles of where costs follow discontinuance:

28. In *Brookes v HSBC Bank plc* [2011] EWCA Civ 354, Moore-Bick LJ summarised the relevant principles applicable under CPR r.38.6 at [6]:

> *"(1) When a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position;*
>
> *(2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;*
>
> *(3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;*
>
> *(4) the mere fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;*
>
> *(5) if the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed;*
>
> *(6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule."*

On dismissing the appeals, Moore-Bick LJ said at [10]:

> *"It is clear, therefore, from the terms of the rule itself and from the authorities that a claimant who seeks to persuade the court to depart from the normal position must provide cogent reasons for doing so and is unlikely to satisfy that requirement save in unusual circumstances. The reason was well expressed by Proudman J. in Maini v Maini: a claimant*

> *who commences proceedings takes upon himself the risk of the litigation. If he succeeds he can expect to recover his costs, but if he fails or abandons the claim at whatever stage in the process, it is normally unjust to make the defendant bear the costs of proceedings which were forced upon him and which the claimant is unable or unwilling to carry through to judgment."*

29. In addition, the factors listed in CPR r.44.2 ought properly to be taken into account as was made clear by the Court of Appeal in *Nelson's Yard Management Co v Eziefula* [2013] EWCA Civ 235. See the judgment of Beatson LJ (at [15]). Mr Kitson relies on *Messih v McMillan Williams* [2010] EWCA Civ 844 that the discontinuance principles apply where proceedings are settled against one party but discontinued against the other; and *Re Walker Wingsall Systems* [2004] EWCA Civ 247 at [37] that it does not matter if Mrs Crowther surrendered her case or rather acknowledged defeat.

30. Mr Kitson also submits that these principles should be applied particularly rigorously in circumstances where Mrs Crowther has alleged sham, conspiracy and fraud. The following cases deal with what the Court requires where fraud is being alleged:

31. *JSC BTA Bank v Ablyazov* [2013] EWHC 510 (Comm) in which Teare J said the following (at [76]):

> *"…although the standard of proof is the civil standard, the balance of probabilities, the cogency of the evidence relied upon must be commensurate with the seriousness of the conduct alleged."*

32. *Playboy Club London Ltd v. Banca Nazionale Del Lavoro Spa* [2018] EWCA Civ 2025, in which Sales LJ said the following (at [46]):

> *"The pleading of fraud or deceit is a serious step, with significance and reputational ramifications going well beyond the pleading of a claim in negligence. Courts regard it as improper, and can react very adversely, where speculative claims in fraud are bandied about by a party to litigation without a solid foundation in the evidence. A party risks the loss of its fund of goodwill and confidence on the part of the court if it makes an allegation of fraud which the court regards as unjustified, and this may affect the court's reaction to other parts of its case. Moreover, as Birss J observed in Property Alliance Group v Royal Bank of Scotland [2015] EWHC 3272 (Ch) at [40], allegations of fraud "can cause a major increase in the cost, complexity and temperature of an action." For these reasons parties are well-advised, and indeed enjoined according to usual pleading principles, to be reticent before pleading fraud or deceit."*

33. As can be seen from Sales LJ in *Playboy*, the court *"may react very adversely"* when allegations of fraud or bad faith are advanced unsuccessfully, and it will award costs to the injured party on the indemnity basis. The situation must be even more serious where fraud allegations are advanced but then abandoned by discontinuance just before the trial, particularly where the injured party has no opportunity for vindication.

34. In *Clutterbuck v HSBC* [2016] 1 Costs LR 13 David Richards J held at [16 – 17]:

> *"[16]The general provision in relation to cases in which allegations of fraud are made is that, if they proceed to trial and if the case fails, then in the ordinary course of events the claimants will be ordered to pay costs on an indemnity basis. Of course the court retains a complete discretion in the matter and there may well be factors which indicate that notwithstanding the failure of the claim in fraud indemnity costs are not appropriate, but the general approach of the court is to adopt the course that I have indicated.*
>
> *[17] The underlying rationale of that approach is that the seriousness of allegations of fraud are such that where they fail they should be marked with an order for indemnity costs because, in effect, the defendant has no choice but to come to court to defend his position."*

35. In *PJSC Aeroflot – Russian Airlines v Leeds* [2018] 4 Costs LR 775, Rose J held at [53]:

> *"I respectfully consider that the approach in Clutterbuck is sound. Where a claimant makes serious allegations of fraud, conspiracy and dishonesty and then abandons those allegations, thereby depriving the defendant of any opportunity to vindicate his reputation, an order for indemnity costs is likely to be the just result, unless some explanation can be given as to why the claimant has decided that the allegations are bound to fail."*

36. Mr Kitson submits that Mrs Crowther's decision to discontinue has deprived Mr Crowther of his ability to vindicate his position and essentially clear his name of the allegations of fraud. In *Far Out Productions Inc v Unilever UK & CN Holdings Ltd* [2009] EWHC 3484 (Ch), Mr N Strauss QC stated at [4]:

> *"In my view, the underlying rationale of the rule, or at least a substantial part of it, was succinctly expressed by Mr. Prescott Q.C., when he said that the effect of discontinuance is to deprive the party, against whom (at least in some cases including this one) serious allegations have been made, of the opportunity of vindicating himself. A defendant who establishes that the claim is without foundation, and so vindicates himself, is normally entitled to the costs of the action. Therefore, if the claimant chooses to bring proceedings, but then discontinues them, it is only natural that he should pay the defendant's costs unless there are substantial reasons justifying a different result."*

37. Mr Marshall submitted that the appropriate order is that costs be reserved to the end of the financial remedy proceedings. He relies on *Gojkovic* for the proposition that Family Division proceedings should be considered differently from those in other Divisions with respect to costs. This is because the Court is ultimately concerned with the fair distribution of the matrimonial assets and has an inquisitorial role which can only be properly exercised once all the evidence has been heard.

38. He also submitted that if a costs order was made at this stage a costs judge would not be able to determine what items are or are not referable to the preliminary issues. Mr Crowther has not provided any detailed breakdown of the costs he was seeking and that would leave the costs judge with an almost impossible task. Mr Marshall argued that much of the disclosure relevant to the preliminary issue would remain relevant at the final hearing.

39. I note that Mr Kitson had given a total figure of Mr Crowther's costs of £498,000, but when asked to further particularise this he produced a figure in the afternoon of the hearing of £340,000 for the cost of the preliminary issue. Mr Marshall argued that this was still unparticularised and thus not possible to respond to in any detail.

40. If the Court orders Mrs Crowther to pay Mr Crowther's costs at this stage, then that will have to be taken into account as a liability when it comes to the ultimate division of assets and it may not fairly reflect the overall conduct of the litigation. Further, Mr Marshall argues that a costs order now simply becomes circular because the effect would be to reduce Mrs Crowther's assets and increase those of Mr Crowther, thus not changing the eventual equation.

41. Mr Marshall argued that CPR r.38.6, which creates the presumption in favour of costs on discontinuance, does not apply because FPR r.28.2 specifically applies certain parts of CPR r.44 but does not apply CPR r.38.6.

42. He relies strongly on what he describes as Mr Crowther's poor litigation conduct. Mr Marshall's Skeleton Argument has some five pages of examples of that poor conduct. These include:

    a. Evidence that Mr Crowther deleted large numbers of Mrs Crowther's work emails, presumably to obstruct Mrs Crowther's attempts to show the truth of her allegations;

    b. Did what he could to prevent Mrs Crowther getting access to Maire Levenson's computer, she being Mr Crowther's assistant;

    c. Obstructed the disclosure ordered by HHJ Harris in respect of Ms Levenson's computer, including making the whole process significantly slower and more expensive;

    d. Made allegations that are demonstrably untrue in respect to their being no settlements when it is accepted that there is the "Crowther Family Children's Trust" created at the time of the November 2012 agreement;

    e. Supported the Castle parties refusal to agree to transfer to the Family Division and the appeal to the Court of Appeal;

    f. Dumped 700-800 boxes of papers on Mrs Crowther, thus significantly increasing the costs of the litigation;

g. Describing the documents in his car as being irrelevant, when according to Mrs Crowther these were "absolutely key documents (being two letters from Mr Knight sent in May 2012)";

h. Findings by HHJ Harris that he had deliberately acted to thwart her orders;

i. That his disclosure has been consistently extremely late and deficient;

j. That his replies to questionnaires have been deficient.

43. Mr Marshall also argues that Mr Crowther has made frequent unwarranted applications, including for money to fund his litigation costs. Mr Marshall refers to the fact that on a number of occasions I have expressed considerable scepticism about Mr Crowther's alleged impecuniosity given the lifestyle that he appears to have adopted throughout this litigation. At the hearing of 15 October, I found that Mr Crowther was guilty of material non-disclosure in respect of money that he had received from one of Mr Knight's companies but failed to disclose to the court whilst pleading impecuniosity.

44. Mr Crowther also applied on more than one occasion for the preliminary issue to be stayed in an effort to delay the trial.

Conclusions

45. Mrs Crowther's conduct of this litigation has been fairly extraordinary. For a year she has been arguing in the strongest possible terms that she has been a victim of a conspiracy to defraud her of millions of pounds of matrimonial assets. She has left no stone unturned in her pursuit of disclosure to support these allegations and in ensuring that the disputed assets were protected through worldwide freezing orders. She has spent in the region of £900,000 in pursuit of those goals, albeit that some of that expenditure will not be attributable to the preliminary issues.

46. The allegations that she has made, in open court, are extremely damaging to the reputation of Mr Crowther (and indeed Mr Knight). However, five working days before the trial of the preliminary issue was due to start, she told the Court (and Mr Crowther) that she had settled the case with the Castle parties and is no longer pursuing any case against them or making any allegations against them. Although there was in his Skeleton Argument some attempt by Mr Marshall to keep a part of the allegations alive against Mr Crowther, he quickly accepted in Court that that was untenable and the discontinuance of the preliminary issues had to apply to Mr Crowther as well as the Castle parties and that he could not continue to allege fraud and conspiracy against Mr Crowther.

47. On the face of it, this situation is grossly unfair to Mr Crowther. He has faced a barrage of allegations by Mrs Crowther, and hugely complex litigation, for some of which time he has not been represented. He has been put to enormous expense, but also massive personal inconvenience. His reputation must also have been greatly damaged by these allegations, particularly as they have been widely publicised. Mrs

Crowther has now decided not to pursue the allegations, thus preventing Mr Crowther of the chance to clear his name.

48. The analysis under the FPR is as follows. Under FPR r.28.1 the Court may make such orders as to costs as it thinks just. FPR r.28.3 does not apply because, as is accepted by Mrs Crowther, the trial of the preliminary issue is not financial remedy proceedings for the purpose of the Rules, and therefore costs would normally follow the event. Under CPR r.38.6, the presumption is that the party who discontinues is liable for costs, but that Rule does not apply because it is not referred to in FPR r.28.2.

49. However, in my view, the principle in CPR r.38.6 is highly relevant to my determination. If a party decides to discontinue an action or part of an action, then they should generally be expected to pay the costs. This is merely a reflection of the obvious position that if one party necessitates the other party to incur costs and then does not pursue the point, they would normally expect to be liable for the wasted costs incurred.

50. This proposition is strongly reinforced in this case by the fact that the allegations which have been withdrawn are those of fraud and conspiracy. It is a basic principle, in any Division, that fraud should not be pleaded without sufficient evidence. As Sales LJ said in *Playboy Club v Banca Nazionale Dei Lavori Spa* [2018] EWC Civ 2025, pleading fraud has serious reputational consequences and parties should therefore be reticent before pleading it.

51. This must mean that where a party pleads fraud, and then withdraws that claim, the argument that they should pay the other party's costs must be even stronger than in the withdrawal of other types of claim.

52. Mr Marshall has relied on a very long list of Mr Crowther's alleged poor litigation conduct to support his argument that costs should be dealt with holistically at the end of the litigation. I have been heavily critical of Mr Crowther's conduct in a number of hearings during these proceedings. Indeed, Mr Crowther applied for me to recuse myself on the grounds that I was biased against him, and he relied on some of the comments I had made both in hearings and in rulings in respect of his litigation conduct. However, on the basis that the allegations made against him are not now being pursued, much of that conduct may be more understandable.

53. In any event, in my view, Mr Crowther's litigation conduct is largely irrelevant to the issue before me. I am only being asked to decide the principle of whether Mrs Crowther pays the costs of the preliminary issue. If there are particular parts of the litigation where Mr Crowther behaved unreasonably and ran up unreasonable costs unnecessarily, for example by blocking access to Ms Levenson's computer, then that is a matter which can be considered by the costs draughtsmen, and ultimately the costs judge. It does need to be remembered that a large part of Mr Crowther's poor litigation conduct related to allegations of fraud which are not now being proceeded with.

54. Mr Marshall argues that material parts of the disclosure carried out for the preliminary issue trial remain relevant to the financial remedy proceedings. However, I do not consider that to be the case. The preliminary issue concerned the beneficial ownership

of the vessels. That issue is no longer being proceeded with. Whatever arrangements were made between Mr Knight and the Crowthers in 2012, and allegations those arrangements were a sham, will no longer be the subject of the Court's consideration in the financial remedy proceedings. I therefore cannot see that the disclosure in that regard remains relevant to the proceedings.

55. Mr Marshall argues that I should defer costs to the end of the proceedings because at that stage I, or any other judge who hears the financial remedy proceedings, will have a full overview of the case. In my view that is the wrong approach. The preliminary issues were deliberately "hived off" to be dealt with separately. They are a discrete issue about discrete assets from the rest of the case, which concerns more conventional assets such as the FMH, various cars and chattels. It is therefore appropriate to deal with those costs now.

56. Mr Marshall submits that it will be very difficult, if not impossible, for the costs draughtsman and costs judge to differentiate what has been spent on the preliminary issue and what is referable to the wider matrimonial dispute. Again, I do not accept this point. In fact, the preliminary issue concerned separate assets and a separate dispute, namely that involving the Castle parties. Costs draughtsman are very used, where there is a partial order for costs, to differentiating parts of the litigation and I do not consider there to be any particular complexities in doing so here.

57. He further submits that Mrs Crowther is disadvantaged because Mr Kitson has not submitted a detailed breakdown of the costs being claimed. In my view, that is to confuse an in-principle costs decision, relating to a part of the litigation, from an application for summary assessment or indeed an order for a specific sum. It will be for the costs process hereafter to fix what sums are referable to the preliminary issue.

58. Mr Marshall argues that financial remedies litigation is different from other litigation because the judge has to be concerned with the fair distribution of matrimonial assets. In my view, that is to try to create an exceptionalism for financial remedies litigation which does not and should not exist. The basic principles of proper litigation conduct should apply, and be enforced, in the financial remedies jurisdiction as in any other. It should not be allowed to develop into a discrete world where normal principles of disclosure, pleading and discontinuance no longer apply. If a party chooses to plead fraud, and then withdraws that allegation at the eleventh hour, then s/he must expect to pay for the consequences of those decisions. The principle that fraud should only be pleaded with considerable reticence, and if the allegation is then withdrawn then the alleging party should pay costs on an indemnity basis, in my view applies as much in financial remedies as in any other area of law.

59. He argues that this process will delay the FDR and make settlement more difficult. It may be that this point is correct, given that much depends on timing. However, I do not consider that any reason not to make a costs order which properly reflects the principles that I have outlined in this judgment.

60. The caselaw referred to above makes it very clear that a party who pleads fraud unsuccessfully can expect to pay indemnity costs, see *Clutterbuck v HSBC*. There is no reason why that principle should not apply here. Therefore, Mrs Crowther should pay Mr Crowther's costs of, and occasioned by, the preliminary issues on an indemnity basis.

61. Mr Kitson also asks that the Court orders a payment on account under CPR 44.2(8). The Court will order the party to pay a reasonable sum on account unless there is a good reason not to do so. The principles to be applied were set out by Clarke LJ in *Excalibur Ventures v Texas Keystone* [2015] EWHC 566 (Comm) at [24].

62. Mr Crowther seeks £80,000 payment on account and there is no prospect of him recovering less than that on detailed assessment. There is equally no prospect of a successful appeal given that the costs are occasioned by a settlement. There is likely to be a long delay to detailed assessment given that there are on-going financial remedy proceedings. I also consider it appropriate, given the way Mrs Crowther has conducted the litigation in respect to the preliminary issues as set out above, that Mr Crowther should be able to recover this part of his costs at this stage. I will therefore order a payment on account in the sum of £80,000.

63. In relation to the possibility I raised of referring the Court of Appeal judgment to HMRC I have decided to take no further action in relation to that at this stage.

64. Postscript: After I circulated this judgment in draft, Mr Temmink on behalf of R2-R6 submitted a document arguing that I should not disclose the amount that his clients had agreed to pay Mrs Crowther because this figure was in a Tomlin Order and was confidential. I invited him to make further submissions as to why the sum was confidential other than the fact that it was in the Schedule to the Tomlin Order.

65. His response set out passages on *Foskett: The Law and Practice on Compromise* (9th ed.) which refer to the benefits of compromise and the fact that parties may wish to keep the terms of such compromise agreements confidential. However, when it comes to the actual reasons for confidentiality Mr Temmink raised two short issues. The first is the reputational damage to R2 from the allegations that have been made by Mrs Crowther. The second is that the "settlement sum is commercially sensitive". He says that the parties (R2 and Mrs Crowther) deliberately put the terms in a separate confidential document. He then goes on "*that information is commercially sensitive and, where the Crowthers appear to have funded their lifestyles by borrowing from others without repaying them; and by failing to pay tax, confidentiality in the settlement may also be important to the Applicant."*

66. Neither Mr nor Mrs Crowther have argued in their responses to the draft judgment that the settlement sum should not be set out in the judgment. On Mr Temmink's first point, the further publicity arises not from the naming of the sum, but rather from the fact of a further judgment. That was inevitable once Mr Crowther was not a party to the settlement and pursued his costs before me. On the second point, Mr Temmink does not explain why the sum of £750,000 is commercially sensitive. There are no commercial competitors who could have any possible interest and there are no other transactions which it could affect. The facts of this case are unusual and cannot possibly have any relevance to future agreements. It may be that the tax authorities are interested in the sum, but that cannot be a reason not to refer to it in an open judgment.

67. In my view, the amount that Mrs Crowther and R2-R6 settled for is relevant to the judgment set out above. Mrs Crowther settled for a sum significantly less than the costs that she said she had already incurred in fighting this litigation. Unless the amount of the settlement is clear on the face of the judgment, the overall context of

this litigation and how the preliminary issue came to an end is much less clear. Naturally, if there was a genuine commercial sensitivity, that would amount to a good reason not to refer to the amount, but in the absence of evidence of such a sensitivity, the need to give a full and transparent judgment overrides R2's arguments.