Neutral Citation Number: [2023] EWCA Civ 1048

Case No: CA-2022-000698

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT
SITTING IN THE ROYAL COURTS OF JUSTICE
Mr Nicholas Cusworth KC
(Sitting as a Deputy High Court Judge)
LV 16 D 01012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/09/2023

Before:

LADY JUSTICE KING
LORD JUSTICE MOYLAN
and
LORD JUSTICE POPPLEWELL

- -

Between:

PAUL MARK SIMON	**Appellant**
- and –	
(1) LAUREN BELINDA SIMON	**Respondent**
(2) INTEGRO FUNDING LIMITED ('LEVEL')	**Intervenor/Second Respondent**

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Richard Todd KC and Edward Benson (instructed by **Paradigm Family Law LLP**) for the **Appellant**
Jonathan Southgate KC and Simon Calhaem (instructed by **BloomBudd LLP**) for the **Intervenor/Second Respondent**

Hearing date: 12 July 2023

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Approved Judgment

This judgment was handed down remotely at 11.00am on 15 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice King:

1. This appeal arises out of long, bitter and extortionately expensive divorce proceedings between Lauren Simon ('the wife') and Paul Simon ('the husband'). The wife's litigation loan, which now amounts to over £1m including interest, has been funded by Integro Funding Limited, who trade under the name Level ('Level').

2. On 16 March 2021, a consent order was sealed following the approval of Deputy High Court Judge Nicholas Cusworth KC ('the judge') in the circumstances set out below. The effect of the order was to deprive Level of the prospect of repayment of any of the sum to which they were contractually entitled.

3. Level accordingly made an application to set aside the consent order, having already sought and been granted leave to intervene in the proceedings. Ultimately the consent order was set aside by consent.

4. The judge directed that Level should remain a party following the setting aside of the consent order and, in a separate order, went on to make extensive case management orders which were designed to drive the matter forward to a financial remedy trial listed for five days in which Level would play a full part as an equal party in the proceedings. The judge also transferred Level's parallel civil claim to the Family Court to be heard following the financial remedy proceedings.

5. The husband now appeals against those case management orders, and his appeal additionally throws up the issue as to what role, if any, a company who supplies litigation loans such as Level should be permitted to play in the financial remedy proceedings they are funding by way of the provision of a loan to one of the parties.

Background

6. I take the unusual and rather troubling background largely from the judge's judgment of 21 March 2022. I do so because whilst the orders made by the judge are challenged in this appeal, there is no substantive dispute as to the procedural chronology.

7. Financial remedy proceedings were issued on 12 February 2016. Disclosure was ordered in relation to a trust of which the husband was trustee as well as a beneficiary. Income and capital from the trust had been routinely used to support the family's lifestyle including a loan from the trust which had funded and was secured against the family home.

8. The final contested financial remedy hearing came before Parker J in July 2018. The husband's case was that the trust assets were not available for distribution. Parker J held that the husband had been guilty of 'misrepresentation', 'obfuscation' and 'distraction' and made an order for payment of £3m to the wife on a needs' basis. She assessed the assets as amounting to at least £9m, this included the husband's interest in the trust assets which she held to be an available resource.

9. The husband appealed: he asserted that the judge was in error as the trust assets were not available for distribution and that, as a consequence, the wife had been awarded all the available assets. I granted permission to appeal. In December 2018, in advance of the hearing of the appeal, the wife had applied to Level for a loan to enable her to

clear her outstanding costs due to her former solicitors under a 'Sears Tooth' agreement and which would also allow her to be represented in both the appeal and in the ongoing contested proceedings in relation to the children. In the usual way, prior to lending the wife the sums she needed, Level obtained a written opinion from the wife's then Queen's Counsel ('QC') seeking advice as to the likely outcome of future financial remedy proceedings in the event that the appeal was allowed.

10. On 14 December 2018, the wife and Level made the first of three loan agreements, the first being for £500,000 which sum was substantially used to meet the costs incurred under the Sears Tooth agreement. Subsequently on 20 June 2019, Level advanced a further £100,000 and, on 27 September 2019, an additional £30,000 was advanced to enable the wife to make an application for a legal services provision order. Altogether this amounted to a total of £630,000. By February 2021 the figure with interest was £865,828. Interest has continued to accrue in the intervening two plus years at 19%.

11. The appeal from Parker J's order was adjourned until the final determination of parallel children's proceedings. The husband was subsequently granted residence of the children and that appeal was allowed by consent and a retrial ordered.

12. The judge became the allocated judge in respect of the retrial and on 2 December 2020, dealt with the application made by the wife under s22ZA Matrimonial Causes Act 1973 ('MCA 1973') for legal services provision. The husband agreed to provide £45,000 to cover the costs of a private Financial Dispute Resolution Appointment ('the FDR'). The £45,000 was provided by the husband by withdrawing the funds from the trust.

13. The FDR took place on 12 February 2021. During the course of negotiations, the wife's QC and legal team became conflicted and withdrew. The wife continued unrepresented and has remained so ever since.

14. An agreement was reached at the FDR. Under the terms of the agreement, the wife was to receive a life interest in a residential property to be purchased for a figure of £1m by the husband's trust which trust would thereafter own the property absolutely; the wife was to receive no free capital or income in settlement of her claim. Given that the wife had and has no capital of her own, it followed that a consequence of the agreement was that she would have no funds with which to repay any part of the Level loan. A draft consent order reflecting the agreement was signed by the husband and the wife.

15. Shortly after the FDR, the wife contacted Level and told them that she would not be repaying the loan. Level, on learning of the proposed settlement, wrote to the court on 15 February 2021 copying in the wife's solicitors, the husband's solicitors and Mr Todd KC, who has throughout represented the husband. In their communication to the court Level said that they urgently requested being joined to the proceedings prior to the approval of any order. They continued: 'A formal application will follow, but in the meantime, we urgently request that no order is sealed in relation to this case and that we are heard in relation to any order which is presented'.

16. Two days later on 17 February 2021, without informing Level or copying them in, the husband's solicitors wrote to the barristers' clerk at the chambers from which the

judge practises as a specialist matrimonial finance barrister, attaching the signed draft order reflecting the agreement reached at the FDR together with a Statement of Information for a Consent Order in relation to a Financial Remedy D81 ('D81') which is required by the Family Procedure Rules 2010 ('FPR') rule 9.26, together with a schedule of assets, neither of which disclose the husband's interest in the trust. The court was not sent a copy and no formal application was made nor fee paid. The judge was not informed of the letter Level had written two days earlier asking that the proposed order not be made.

17. The following day on 18 February 2021, Level's solicitors, unaware of the direct communication which had taken place with the judge, wrote to the court in proper form attaching an application seeking joinder in the financial remedy proceedings with a witness statement in support. Although Level had not specifically sought an *ex parte* hearing, Newton J dealt with the matter on paper the same day and granted the application. The wife, the husband and his solicitors were each notified of the terms of the order.

18. The receipt of Newton J's order provoked a letter from the husband's solicitors to the court the following day (19 February 2021) asking why the order had been made *ex parte* and seeking the inclusion of a provision for liberty to apply and a return date. The letter indicated that a stay of Newton J's order would be sought pending an application to set aside the order joining Level to the proceedings. Unhappily, the husband's solicitors did not notify the judge or his barrister's clerk of these developments, nor did they inform the court that a draft order had been sent to the judge at his chambers to approve rather than by way of formal application through the court.

19. On 22 February 2021, in refusing to agree to a stay of the order which had joined them as a party to the financial remedy proceedings, Level's solicitors said that:

> "My client is deeply concerned that your client and Ms Simon entered into a collusive agreement (seeking to exclude our client's interests) against which you might seek court approval without further notification to them. You have now been prevented from taking that step…"

20. The same day, the court notified the parties that Newton J had amended his order to add a liberty to apply provision and to provide for there to be an 'on notice' hearing on the first open date after 11 March 2021. Mr Todd's clerk offered only a date towards the end of July 2021.

21. Despite repeated requests, Level were not provided with the correspondence which the husband's solicitors had had with the court. On 26 February 2021, Level's solicitors wrote to the husband's solicitors and to the wife expressing their concern that notwithstanding that they were now a party, the husband's solicitors had refused to inform them of the status of the proceedings and asking whether they had had 'any communications with the court since the private FDR or provide a draft order which I presume to be in existence. Please do so by return'.

22. There was no substantive reply to the request nor was the judge informed of it; rather, four days later on 2 March 2021, the judge's barrister's clerk received what was

referred to as a 'a very polite enquiry/chaser' in relation to the approval of the draft order which had been sent to him two weeks earlier. The judge was neither informed of the correspondence which had passed between the solicitors and the court nor that Level had been joined as a party by Newton J. Absent any of that information, the judge, understandably, made no further enquiries. He approved the draft order that day and returned it to the court office for sealing.

23. On 5 March 2021, having had no response from the husband's solicitors, Level issued an application seeking (i) disclosure from the husband and wife; (ii) that the matter be listed for case management directions; and (iii) seeking an order that no substantive orders should be made prior to that hearing. On 10 March, the application was put before Holman J who offered to deal with an urgent oral hearing.

24. Also on 10 March 2021, the husband's solicitors asked what order Level sought. They did not tell Level that the order had been approved and sent to the court for sealing. Level responded by telling the husband's solicitors that they were unable to identify the order they sought until there had been disclosure. The next day, the husband's solicitors replied stating that the 'matter has now concluded'. On 12 March, Level asked whether, in the light of that comment, the husband had 'succeeded in attaining an approved consent order notwithstanding our join(d)er to the proceedings'. The husband was invited to undertake not to apply without 14 days' notice for the approval of any consent order.

25. The husband's solicitors finally informed Level on 15 March 2021 that the agreement had been reduced to a consent order 'which should have been sealed by the court by now'. In the event it was not until the next day that the order was in fact sealed.

26. Also on 15 March 2021, the husband made an application for the order permitting Level to intervene to be discharged and for an order to be made that Level be enjoined from using any information they had obtained by virtue of having provided the wife with the loans in any collateral proceedings.

27. On 17 March 2021, Holman J ordered a stay of the consent order. At a further hearing on 19 March 2021, Holman J made a freezing order in respect of the former matrimonial home and a property in Israel. As a condition of the freezing order, Level gave an undertaking not to use the information they had other than in the financial remedy proceedings. Holman J ordered Level to plead their civil claim against the husband by 16 April 2021. Holman J subsequently clarified that he was not prepared to require Level to particularise precisely what orders they would be seeking in the set aside proceedings saying: 'In general the answer to that is obvious: that the wife receives a sufficient sum to at least equal the amount that she owes to the interveners. Above that they have no interest'.

28. On 6 April 2021, three weeks after the sealing of the consent order, Level issued their civil claim which alleged repudiatory breach on the part of the wife, procuring a breach of contract by the husband, procuring a court order by fraud and unlawful means conspiracy. They relied on ss423-425 Insolvency Act 1986 ('IA 1986'): 'Transactions Defrauding Creditors'. The transaction relied upon was the consent order approved by the judge on 2 March 2021 and sealed on 16 March 2021.

29. In the defence filed in response to Level's particulars of claim and again in his oral submissions, Mr Todd laid heavy emphasis on the fact that 'unconditional permission to appeal had been given' against the order of Parker J which had made provision for the wife to receive a lump sum of £3m. In my view the defence significantly overstates the significance of the grant of permission to appeal which simply said: 'the appeal has a real prospect of success for the reasons set out in the skeleton argument'. Contrary to para 15.4.1 of the defence, it is not correct to say that such permission is 'very rarely given'. Permission to appeal is not given unless there is a real prospect of success and to grant it by reference to the skeleton argument is a convenient shorthand commonly used. Further it is absolutely not the case, as stated at para 18 of the defence, that the Court of Appeal had 'already indicated that the appeal would succeed'.

30. This submission was made by Mr Todd in order to support his submission that the fact that an earlier order had erroneously given the wife £3m should be ignored and should not infect the court's approach when considering whether to approve the proposed consent order once again put before the court which order would give the wife no free-standing capital of her own.

31. Whilst the circumstances which led to the appeal against Parker J's order being allowed have undoubtedly been overstated, I accept that, her order having been set aside, it would be wrong to use the terms of that defunct order to justify a refusal to make an order in the terms now sought.

32. On 29 November 2021, Roberts J heard an application by Level for permission to disclose material and information in their possession but which was subject to 'without prejudice' privilege. Level wished to be able to use without prejudice offers and materials, including counsel's position statements from the FDR, in support of their application to set aside the consent order by establishing, for the purposes of the engagement of s423 IA 1986, that the result of the transaction within the financial remedy proceedings was to defeat Level's claims as a creditor of the wife.

33. In her judgment (*LS v PS* [2021] EWFC 108), Roberts J between [70] and [74] said that Level did not stand in the same position as a third-party unsecured creditor. Different policy considerations, she said, are engaged where, as here, one is concerned with 'a professional corporate lender which offers bespoke services designed for the specific purposes of enabling a litigant to participate fully and effectively in litigation flowing from matrimonial breakdown'.

34. Roberts J said at [77] that on the facts of the case, Level had been entitled to 'seek and secure' party status as an intervener in the financial remedy proceedings 'when it became aware of the steps which had been taken to conclude a settlement which, on the face of it at least, had the appearance of defeating it[s] ability to recover its debt in whole or in part, from the wife'. Roberts J however refused the application considering that a court had 'ample evidence available to it in the absence of the privileged material to form a view as to whether or not this order should be set aside'.

35. It was not until 22 February 2022 that the husband conceded in correspondence that the consent order should be set aside 'to permit Level to make representations as to whether the order should be approved'.

36. The wife, in two brief emails to the husband's solicitors on 14 March 2022, said that she wanted no part in the proceedings and in the event of the consent order being set aside, she did not intend to take any further steps 'other than asking the court to approve the consent order'. She concluded by saying: 'To be clear I do not want to be involved in further damaging, expensive and time consuming litigation'.

37. On 21 March 2022, the first day of the trial listed for three days to determine the set aside issue, the husband agreed to the consent order being set aside. This represented a delay of a year in the litigation which had, by now, been going on for over five years and which prevarication inevitably resulted in an order for indemnity costs being made by the judge against the husband.

The Judgments:

38. In his first judgment, the judge set out the litigation history. He said that he had approved the draft consent order on 2 March 2021 'entirely without knowledge' of Level's party status and that 'in the light of the chain of events', the concession by the husband that the order should be set aside was 'undoubtedly an appropriate [one]'.

39. The judge said that the litigation between the husband and wife, and latterly Level, had not only been acrimonious and exorbitantly expensive, but procedurally chaotic, in large part as a result of Level having been kept in the dark as to what was happening in the financial remedy proceedings.

40. The judge, having heard submissions, concluded that the test for joinder of a party set out in FPR rule 9.26B(1)(b) was satisfied and that Level would therefore continue to be a party to the proceedings.

41. The judge adopted the view Roberts J had set out in her judgment in relation to the different policy considerations which she had said apply to litigation lenders like Level when considering Mr Todd's submission that there are no public policy considerations which would support Level being treated other than any other unsecured third-party creditor and that therefore they should not be granted party status in the financial remedy proceedings.

42. The judge, having determined that Level should remain a party to the proceedings, moved on to consider Mr Todd's application that he should now summarily make a consent order in the same terms as those contained in the original order now set aside. The judge refused saying that 'but for Level's intervention, the extraordinary series of selective communications… would never have been released to the Court'. He went on to say:

> "No explanation for what happened has yet been offered, and the husband's consent to the set-aside has deferred the occasion when such an explanation will be required. I should therefore express no view today about why the husband has consented, but I am very clear that explanation will be required before any consideration can be given to re-sealing the consent order."

43. In his second judgment, the judge clarified this view saying that it would be premature to make the order sought without first having considered more fully (i) the

consequences of the husband and wife's concluding that agreement, including its impact on Level, and (ii) whether or not those consequences were either intended or at least understood by them at the time. The judge went on to make a raft of orders designed to dispose of the financial remedy application. These included the filing of Forms E and questionnaires. The wife was ordered to attend a two-day directions hearing.

44. Mr Todd argued then, as he does now, that there should be no rehearing of the financial remedy proceedings and that if the FDR agreement is not approved by the court, the husband and wife will simply put the agreement into effect without the benefit of a court order. The wife, he said, should not be forced to litigate against her husband if she does not wish to do so. In any event, he submitted, Level's unsecured claims against the wife will be unaffected by the outcome proposed by her and the husband.

45. The judge disagreed and was clear that in his mind the proper course was to list a full hearing of the financial remedy proceedings at which 'all of the parties' competing contentions as to the factual matrix and appropriate outcome' could be determined. He concluded that Level's civil claim should be transferred to the Family Court to be heard following the financial remedy proceedings.

The Grounds of Appeal

46. The grounds of appeal in summary are:

    i) The judge was wrong to permit Level to intervene in the financial remedy proceedings.
    ii) If Level were allowed party status then after their representations were heard, the judge should have either made the consent order or made no order.
    iii) One of the consequences of allowing the intervention and directing the new financial remedy hearing was to trespass on confidential proceedings as Level were intervening solely for the collateral purpose of recovering their civil debt.
    iv) The judge was wrong to find that litigation lenders fall into a special category to be treated better than secured creditors.
    v) The judge was wrongly influenced by the circumstances of the making of the consent order.

47. As the judge rightly identified, the case has become a procedural quagmire, with hearings before five different High Court judges (or equivalent) over a period of five years. I will therefore attempt to untangle the issues so that those matters with which this court needs to deal in order to consider the grounds of appeal can properly be identified and addressed. The issues for consideration seem to me to be as follows:

    i) Should Level have been granted party status for the purpose of making submissions as to whether the proposed consent order should be made, and, if so, should that status have continued once the consent order had been set aside?
    ii) Was the judge right to have refused summarily to remake the consent order?
    iii) If so, having declined to make the order summarily, was the judge right to move directly to a full hearing of the financial remedy proceedings and, if so, what, if any, part in those proceedings should Level play?

iv) Was the judge right to transfer Level's civil claim to the Family Court to follow on from the financial remedy proceedings?

v) Should Level's role as a litigation lender put them in a different or better position than that of an 'ordinary' third party creditor?

(i) Party status for Level

48. FPR rule 9.26B provides:

> "Adding or removing parties
>
> 9.26B.—(1) The court may direct that a person or body be added as a party to proceedings for a financial remedy if—
>
> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
>
> (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

49. In oral submissions, Mr Todd accepted that the initial decision to join Level as a party for the purpose of being heard on the issue as to whether the draft consent order should be approved and made into an order of the court was, in the circumstances of the case, correct.

50. It follows therefore that Mr Todd did not pursue Ground 1 of the grounds of appeal which goes to Level's intervention and as a consequence the court heard no arguments from either side as to whether the judge had been correct in his interpretation of FPR rule 9.26B and therefore whether the judge had been correct in law to hold that Level's application properly fell within rule 9.26B(1)(b).

51. It is not therefore necessary for this court to decide whether the judge was right to have made the order under FPR rule 9.26B(1)(b) rather than rule 9.26B(1)(a). The concession made in correspondence by those instructing Mr Todd that Level should be permitted to intervene in order to make representations in respect of the making of the proposed consent order was right. In my view, it is equally the case that they should continue to be an intervener, at least in relation to any further argument as to whether an order should be remade in the same terms as the original consent order.

52. Absent having heard any submissions on the point, I make no comment as to whether that order would have been more appropriately made under rule FPR rule 9.26B(1)(a) rather than rule 9.26B(1)(b) but would only emphasise that in the event that an application is made to join a party under r.9.26B(1)(b), care must be taken to identify properly the issue relied upon in support of the application.

(ii) Summary determination

53. Mr Todd submitted that the judge should have summarily 'resealed' the order. I regard reference to 'resealing' the order, used throughout the proceedings by those representing the husband, as inappropriate. The order is not being 'resealed'. There is

no order. It has been set aside by consent. The court, and therefore the judge, accordingly approaches the matter in accordance with the provisions of s33A MCA 1973:

> "Consent orders for financial provision or property adjustment.
>
> (1) Notwithstanding anything in the preceding provisions of this Part of this Act, on an application for a consent order for financial relief the court may, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of the prescribed information furnished with the application."

54. What Mr Todd was asking the judge to do was to make an order in the terms previously agreed on the basis only of the information found in the D81. Whilst permitted by s33A MCA 1973, the judge was in my judgment, on any view, knowing what he did about the circumstances which had led up to the making of the original consent order, going to reject such an application and conclude that there were 'other circumstances into which it ought to inquire' as:

    i) The circumstances in which the original order came to be made would undoubtedly lead the judge to want a better understanding before being satisfied with the propriety of the order he was being asked to make. To this end he had made an order on 21 March 2023 requiring the husband's solicitors to file a witness statement addressing 'the circumstances leading up to the sealing of the order'.

    ii) Mr Todd accepted that the D81 was 'not accurate'. In my judgment, it was frankly misleading. Whilst the reference to the wife earning £31,000 per calendar month rather than annually could well have been a typographical mistake, the same cannot be said for the omission to make any reference to the husband's trust assets despite the obvious inference that he was in a position to procure a payment of £1m from trust funds in order to provide a housing fund for the wife.

55. In my judgment, given the history of the case and the deficiencies in the D81, the judge was inevitably going to decline summarily to make a fresh order in the terms of the original consent order.

56. Having set aside the consent order and declined summarily to make a fresh order in the same terms, the judge was obliged under FPR rule 9.9A(5) to 'give directions for the rehearing of the financial remedy proceedings or make such other orders as may be appropriate for the disposal of the application'.

(iii) having declined to make the order summarily, was the judge right to move directly to a full hearing of the financial remedy proceedings and, if so, what, if any, part in those proceedings should Level play?

57. What then should have been the next step, the judge having declined to make an order summarily?

58. The judge noted that the husband made forceful submissions that he does not wish to litigate further, and that the wife should not be forced to litigate. The judge was aware that the wife had said in the two brief emails to the husband's solicitors that she did not wish to play any further part in the proceedings. The judge however commented that she had not 'so far' sought to take an active role in the proceedings "following the conclusion of the agreement with the husband on 12 February 2021". He went on: 'However she must now engage to the extent of complying with the orders which I will make for the filing of a Form E.... She cannot in the circumstances of her agreement with Level simply absolve herself of any involvement in or responsibility for the need to properly conclude these proceedings which need her agreement has brought into focus'.

59. Level's position is that as a party to the proceedings they would be able to make representations to the judge when considering the wife's claims so as to 'caution against' approving any order which gave her less than that to which she was entitled in circumstances where such an order had the effect of neutralising what was in effect a charge over any assets recovered by the wife as a result of the matrimonial litigation, which litigation had been funded by way of loans from Level.

60. To date, the court has obtained the view of the wife only through the prism of her two short emails. In my view, the judge fell into error in moving straight on to make orders for the filing of fresh Forms E, questionnaires and for the listing of a five-day trial of the financial remedy proceedings as well as directing that the wife attend in person for a two day directions hearing. Failure to comply with these orders would place the wife in contempt. The judge should have taken an intermediate step and set the matter down for an *inter partes* hearing of the application by the parties for an order to be made in the terms of the earlier consent order, an order which is still sought by both the wife and the husband.

61. At such a hearing, the wife would have the opportunity to tell the judge exactly what her intentions are. She would understand that if she wishes the protection of an order, then the court will need to consider whether the draft agreed order is appropriate and, if not, only then to consider what further directions or order to make. If the wife made clear that she did not wish to pursue her financial remedy application, and the husband did not seek the continuation of the proceedings, a court cannot require her to do so. This was acknowledged by Mr Southgate KC, as referred to below. That is one reason why I consider that the judge was wrong to make the directions which he did.

62. Mr Southgate accepts that no matter how unattractive the withdrawal by the wife of her application for financial remedies would be as an outcome so far as Level are concerned, if the wife, who is the applicant in the financial remedy proceedings, does withdraw her application for financial remedies there will be little they can do about that other than making her bankrupt and they would be unable to recoup any of the debt she owes to them. Level, Mr Southgate says, would simply be left with having to be vigilant in order to see if her circumstances changed and whether, after the dust has settled, she and the husband tried to 'slip through' an order at a later date.

63. An *inter partes* hearing listed specifically to consider whether an order should be made in the terms of the consent order could be conducted with more limited disclosure than that required for a full trial. Such disclosure as necessary only to

enable the court to decide whether to make an order in the terms agreed between the parties would substantially ameliorate the understandable concerns held by the husband about the role Level would assume in a fully contested financial remedy trial. Concerns about Level playing a full role in a trial would be heightened, Mr Todd points out, if the wife declined to engage and as a consequence Level, a creditor and the only party wanting to proceed to trial, became, as Mr Todd put it, 'the ringmaster'.

64. The judge would at such an *inter partes* hearing have the benefit of the witness statement from the husband's solicitors ordered by the judge on 21 March 2022. By Ground 5 of the grounds of appeal it is said that the judge was in error in being influenced by the circumstances of the making of the consent order. I disagree. The judge rightly said at [37] of his first judgment that if the court had to re-exercise its function to approve any proposed outcome, then 'a proper understanding of those circumstances will be very likely crucial in determining whether to give such approval'.

65. Unlike a full trial, at a discrete hearing to determine whether to remake the consent order, there would be no oral evidence, the issue would be dealt with on submissions only and such disclosure as the judge ordered would be protected by the implied undertaking.

66. The husband would no doubt object to such a route. Mr Todd submits that the judge should simply either make the order sought with no more ado or make no order. He cannot, he says, force the parties to litigate and the judge was therefore wrong to make the raft of orders for full disclosure. Even if, as I find, the judge fell into error in moving directly to provide for a full financial remedy hearing, there still needs to be a resolution of the case which will, if only given the circumstances leading up to the approval of the original consent order and the misleading D81, require some additional disclosure. The form and extent of that disclosure will be a matter for the first instance judge, having, in the circumstances of this case, heard submissions from all three of the parties.

67. In answer then to my issue (iii), in my judgment, the judge was in error in making directions to order a full financial remedy hearing and should first have listed for determination the outstanding application for a consent order to be made in the terms agreed between the parties and only made any necessary directions for the purpose of such a hearing.

(iv) Transfer of the Civil Proceedings

68. Section 423 IA 1986 concerns 'Transactions Defrauding Creditors'. It gives the court, broadly, the power to set aside a transaction on the suit of a creditor where a person has entered into a transaction at an undervalue for the purposes of putting assets beyond the reach of creditors.

69. The interplay between IA 1986 and matrimonial law was settled in *Hill v Haines* [2007] EWCA Civ 1284, [2008] 1 FLR 1192 ('*Hill v Haines*'). In his judgment, Sir Andrew Morritt C, at [29], observed that money and property received by a party under the terms of a financial remedy order are prima facie the measure of the value of the rights he or she has given up. It is for this reason, as Mr Southgate accepted on behalf of Level, that once an order has been made in financial remedy cases, the task

of a creditor to persuade a judge to set aside that order is difficult. The judge, in his first judgment, observed that whilst Level can still pursue a civil claim 'such a claim, if the agreement is converted into an order would be almost inevitably worthless'.

70. In my judgment, the judge was entirely correct in his conclusion that on the facts of this case, if the agreement was made by him into a fresh court order, the civil claim would be 'almost inevitably worthless'. A consent order in matrimonial proceedings derives its authority from the court and not from the consent of the parties, whereas in ordinary civil proceedings, a consent order derives its authority from the contract made between the parties: *Sharland v Sharland* [2015] UKSC 60, [2015] 2 FLR 1367 at [29]. Although the court should not act as a 'bloodhound or a ferret' (*L v L* [2006] EWHC 956 (Fam), [2008] 1 FLR 26 at [73]), it does retain an inquisitorial role as s25 MCA 1973 sets out the 'Matters to which the court is to have regard in deciding how to exercise its powers'. It follows that before making an order pursuant to s33A MCA 1973, the court scrutinises the statement of information, with the list of factors from s25 MCA 1973 at the forefront of its judicial mind and conducts an independent assessment to enable it to discharge its statutory function to make such orders as reflect those criteria.

71. Thorpe LJ said at [46] in *Hill v Haines*:

> "Plainly if the ancillary relief order was the product of collusion between the spouses designed to adversely affect the creditors the trustee would intervene in the ancillary relief proceedings and apply for the order to be set aside."

That proposition undoubtedly resonates in relation to the obtaining of the March 2021 order. Each of the parties accepts however that it is highly unlikely that a new consent order would be set aside, even if made in identical terms, if made by a judge having heard the submissions of Level and with the benefit of such disclosure as had been ordered. Even though such an order would again deprive Level of their money, it would have been made in circumstances where the judge was in complete possession of all the facts upon which Level rely in support of their case and with the judge having made the order in possession of all the background and sufficient financial information to satisfy him that the order adequately reflected the s25 MCA 1973 factors.

72. At the date of Roberts J's judgment and the commencement of the hearing before the judge on 21 March 2022, there was an order in place the making of which signified, pursuant to s33A MCA 1973, the approval by the court of its terms. It follows therefore that in relation to the original consent order sealed on 16 March 2021, there was a transaction upon which s423 IA 1986 could bite.

73. The judge was not invited to reconsider whether there remained a 'transaction' between the parties for the purposes of s423 IA 1986 once the order had been set aside, or whether there would be such a 'transaction' if he declined to make the consent order afresh. As a consequence, the judge proceeded on the basis that s423 continued potentially to apply to the conduct of the husband and wife on the facts of the case.

74. *Hill v Haines* was concerned with s339 IA 1986 (transaction at an undervalue). The observations of Sir Andrew Morritt C as to what amounts to a transaction apply equally to transactions under s423 as they do to transactions under s339. In this context he said at [31]:

> "…. I do not think that it helps to resolve the issues in this case to dwell on what the legal effect of an out of court compromise of ancillary relief proceedings may be. Such a compromise cannot amount to the transaction for the purposes of s.339 Insolvency Act 1986 so that the extent to which it may have been made for consideration or is otherwise enforceable is immaterial."

75. It follows, in my judgment, that once the consent order was set aside by consent at the hearing on 17 March 2022, there was no longer a transaction for the purposes of s423 IA 1986.

76. The judge however treated Level's contractual and s423 IA 1986 claim as continuing to be properly made in the financial remedy proceedings. He held that the claims between the husband and wife and between Level and the wife were 'interwoven' given that the debt owed by the wife was incurred to enable her to fund the children and financial litigation consequent upon her separation from the husband and that her ability to repay that debt, is a 'central element in the financial circumstances before the court in the financial remedy proceedings'. The judge, whilst agreeing with Mr Todd that listing the two sets of proceedings to be heard at the same time was not appropriate, took the view that the civil claim should be transferred to the Family Court to be listed behind the financial remedy proceedings.

77. Whilst I can quite see why the judge felt that that was an appropriate order to make, I cannot think he would have made that decision had he understood that the consent order having been set aside, there was no transaction for the purposes of s423 IA 1986 and therefore no valid s423 claim for Level to pursue at that stage. Nor would there be if the Court declined to make a fresh consent order in the future. Further, if the judge made a fresh order upon submissions or following a trial then, for the reasons set out above, the new transaction which would result would be almost impossible to challenge by way of a fresh s423 claim. Whilst Level's civil claim was not limited to that under s423, the focus of the hearing which led to the transfer of the civil claim was firmly on s423.

78. It follows that, in my judgment, the judge was in error in transferring the civil proceedings to the Family Court.

(v) Level as a litigation Lender

79. That then leaves the public policy issue.

80. By virtue of s58A(1)(b) Courts and Legal Services Act 1990, ('CLSA 1990') family proceedings 'cannot be the subject of an enforceable conditional fee agreement'. It is because of that prohibition that funding in family proceedings is by way of a loan repayable with interest as opposed to repayment of funding being by way of a percentage of monies recovered.

81. With the loss of legal aid for most financial applications occasioned by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPOA 2012'), the issue of how to access funding for legal services for financial remedy applications became more acute.

82. Section 22ZA MCA 1973 was inserted by ss49-54 LASPOA 2012 and was designed to place on a statutory footing the jurisprudence which had developed in cases such as *A v A (Maintenance Pending Suit: Provisions for Legal Fees)* [2001] 1 FLR 377 and *Currey v Currey No 2* [2006] EWCA Civ 1338, [2007] 1 FLR 946, whereby orders were made for the financially stronger party to pay a costs allowance to the financially weaker applicant to fund matrimonial finance proceedings, but only in circumstances where the applicant could demonstrate that they could not "*reasonably* procure legal advice and representation by any other means"; Wilson LJ (as he then was) at [20] (emphasis in original).

83. Section 22ZA MCA 1973 provides that:

> "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) ….
>
> (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".
> >
> > *My emphasis*

84. Critically, it should be noted that the court will not make an order unless satisfied that the applicant 'is not reasonably able to secure a loan'. As a consequence, no matter how wealthy the husband is and no matter how long the marriage has lasted, consideration has to be given to this requirement. This is the case even in circumstances such as the present where any award will be made from non-matrimonial property and is therefore likely to be constrained by needs.

85. In this case, any application by the wife for the husband to pay her legal fees under s22ZA MCA 1973 would have failed because a litigation funding agreement was available.

86. There have been a number of reported cases both inside and outside the field of matrimonial law as to the importance of the availability of legal funding in order to enable access to justice, see for example: *Sears Tooth (A Firm) v Payne Hicks (A Firm)* [1997] 2 FLR 116; *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 292; *Young v Young* [2013] EWHC 3637 (Fam), [2014] 2 FLR 786 at [9] and *Weisz v Weisz* [2019] EWHC 3101 (Fam), [2020] 2 FLR 95 at [53].

87. Holman J in the present case similarly recognised how important litigation funding is, saying: 'we all have familiarity with these litigations loans, and it is in fact important that they should be available and the appropriate protection afforded to the funder'.

88. In *Akhmedova v Akhmedov* [2020] EWHC 1526 (Fam), [2021] 1 FLR 1 at [40]-[45], Gwynneth Knowles J, when addressing an argument that the wife's litigation funding in that case was champertous, cited a number of authorities emphasising the importance of the availability of litigation funding including *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144, [2017] 1 WLR 2221 where at [31] Tomlinson LJ regarded the risk of litigation funding as being champertous as 'unrealistic'. Champerty, he said, involves behaviour likely to interfere with the due administration of justice but 'Litigation funding is an accepted and judicially sanctioned activity perceived to be in the public interest'.

89. With specific reference to funding in family proceedings, Gwynneth Knowles J said that:

> "71….Mr Owen QC's contentions came perilously close to a submission that there was an issue of principle as to whether third-party funding was per se permissible in family proceedings. Those submissions are misplaced, in my view, in circumstances where third-party funding has been accepted in this jurisdiction to be desirable to facilitate access to justice and where first-instance decisions in the Family Division have concluded that (a) it is "*a necessary and invaluable service in the right case*" (per Mr Justice Francis at paragraph 53 in Weisz v Weisz [2019] EWHC 3101 (Fam)) and (b) that nothing should be said "*that makes it even more difficult for litigants to obtain litigation funding in the future, particularly given that there is no legal aid available in this area anymore*" (per Mr Justice Moor at paragraph 9 of Young v Young [2013] EWHC 3637 (Fam))."

90. I should add that since the hearing of the appeal, the Supreme Court handed down its decision in *R (PACCAR Inc) v Competition Appeal Tribunal [2023] UKSC 28 ('PACCAR Inc').* This was a case which was concerned with whether litigation funding agreements ('LFAs') under which the funder is entitled to recover a percentage of any damages recovered, were damages-based agreements ('DBAs') within the meaning of the relevant statutory scheme and therefore subject to the conditions required by that scheme. Lord Sales, for the majority, said that they were, with the consequence that the scheme in issue was unenforceable as it failed to meet the conditions under the scheme. Lord Sales recognised that it is not usual for those conditions to be met in relation to other, similar, third-party funding arrangements.

91. The decision in *PACCAR Inc* may significantly alter the landscape for litigation funding. I did not however find it necessary to obtain supplementary submissions from counsel on the decision as it seems to me that it has no relevance to this appeal. The kind of agreement that Level made with the wife was for a litigation loan, to be paid back with interest, as opposed to an agreement for funding in exchange for a percentage of any award at the conclusion of the proceedings which form of litigation funding would have been prohibited by s58A CLSA 1990.

92. Against that legal backdrop, Mr Todd, before Roberts J and again before this Court, was robust in asserting that Level should not be afforded preferential treatment by virtue of being a litigation funder over and above that which would be given to any other third-party creditor. Level, he said, had simply made a poor commercial decision by lending the wife the money to fund the litigation and they must now pay the commercial penalty for that decision.

93. Mr Southgate submits that litigation lenders can only ever lend on an unsecured basis with the consequence that there is potentially a 'generous field' for borrowers to engineer their finances at the point of divorce in order to cut out their lenders. That risk if not recognised would, he says, make the business model unviable so that the lenders would have to increase their rates to be more in line with commercial funding rates or simply exit the market. Roberts J, he submits, was right to say that litigation lending would break down as a concept if lenders thought that the court could or would sanction outcomes where the litigation loan was left unpaid. The result would be many more unfunded litigants and many more applications under s22ZA MCA 1973 clogging up the courts.

94. Mr Southgate pointed to the well-established concept of the solicitor's lien over the fruits of litigation as being the product of similar public policy considerations which allow a solicitor to intervene in a claim if collusion is afoot to defeat their lien. The availability of such a lien, Lord Briggs said in *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] UKSC 21, [2018] 1 WLR 2052 at [1], is because it promotes access to justice by enabling solicitors to offer services to clients without the funds to pay upfront.

95. The judge at [39] of the first judgment adopted in full Roberts J's analysis in relation to what she held to be the different policy considerations which apply to a litigation lender from that of a third party unsecured external creditor.

96. In *LS v PS,* Roberts J said at [74]:

> "…In its quest to ensure equality of arms and a level playing field, the court has always been astute to ensure that both parties should have access to resources from which they can meet legal fees."

97. Roberts J went on to refer to a number of cases where judges in the Family Division have 'recognised and endorsed' the valuable function which litigation lenders such as Level can provide and went on at [75]:

> "….The availability of this form of finance is now recognised specifically by the court in the context of the provisions of

> s.22ZA of the 1973 Act . For the purposes of any application made to a court for a legal services provision order against the other party, a litigant generally has to show that he or she has been refused lending by "two commercial lenders of repute": see *Rubin v Rubin* [2014] 2 FLR 1018 at para 13(vi) per Mostyn J. In this context Mr Southgate QC makes the obvious point that litigation lending and its interrelationship with s.22ZA would break down if applicants and lenders perceived a real risk that a court could, or would, sanction an outcome which left an applicant without any resources to repay the loan at the end of the litigation."

98. In the context of the present case Roberts J said:

> "77. [Level's] status in this litigation derives from the fact that the wife entered into a direct contractual arrangement with it in order to enable her to continue to participate in complex and highly contentious litigation where there was every prospect of an appeal, a rehearing of the financial remedy proceedings, or both….
>
> 78. In my judgment, on the basis of the facts in this particular case, [Level] was entitled to seek, and secure, party status as an intervener in the financial remedy proceedings when it became aware of the steps which had been taken to conclude a settlement which, on its face at least, had the appearance of defeating its ability to recover its debt, in whole or in part, from the wife…."

99. Mr Todd made the submission that the same policy considerations apply to a litigation lender as to an 'ordinary' third party creditor. I disagree. For the reasons set out above, commercial litigation lenders are not in the same position as other creditors.

100. I do however note that, in certain unusual circumstances, third party debtors or alleged debtors have properly been joined as parties to a financial remedy application in order to be heard as to whether a consent order should be made.

101. In *Bogolyubova v Bogolyubov* [2023] EWCA Civ 547 *('Bogolyubova'*) at [13] a bank (PrivatBank) ('the bank') which alleged that the husband had executed a substantial fraud against it was allowed by consent to intervene in financial remedy proceedings for the purposes of making submissions as to why there should be an adjournment of an application made by the husband and wife for a consent order to be approved by the court. The order, if made, would have potentially reduced the funds available to meet the bank's claim if established. Of note is the fact that the bank was discharged as a party to the financial remedy proceedings once the case management decision in respect of the approval of the order had been made.

102. Whilst in *Bogolyubova* the court was unable to determine the net assets without the fraud claims having been determined, what was at the heart of that case was the suggestion that the purpose of the proposed consent order was to enable the transfer of

a substantial sum into the hands of the wife and out of the reach of any enforcement proceedings that the bank may have taken in due course (see [20]).

103. I also accept that there will be occasions when the needs of (usually) a wife will mean that provision is made for her at the expense of a creditor; see for example *HM Customs and Excise v MCA & Anor, A v A* [2002] EWCA Civ 1039, [2003] 1 FLR 164, where the wife's needs were met at the expense of satisfying an outstanding criminal compensation order which had been made against the husband.

104. In my judgment, contrary to the submission of Mr Todd and for the reasons given by Roberts J and adopted by the judge, somewhat different considerations apply where the creditor is the commercial provider of a litigation loan. The policy interest that underpins the overall scheme of litigation funding is that articulated by Lord Phillips MR in *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 292 at [54]: the desirability of third parties being available to provide assistance to ensure that those in litigation have legal representation. To repeat what Tomlinson LJ said, 'Litigation funding is an accepted and judicially sanctioned activity perceived to be in the public interest'. In the context of matrimonial proceedings, such funding enables the financially disadvantaged spouse to secure legal representation in order to pursue an application and thereby to seek such orders as she is entitled in order to meet her needs and those of any children of the family.

105. Parliament legislated within s22ZA MCA 1973 that a litigant in matrimonial proceedings without the financial means to litigate must, before they may seek an order that their spouse cover the costs of litigation, first demonstrate that they are not reasonably able to secure a loan. In my view, those who provide such loans are entitled to expect some measure of protection from the improper manipulation of the outcome of the proceedings by the parties in order to avoid repayment of the loan. It should be remembered that there may well be little or no security reasonably available; in this case for example there was nothing: even the matrimonial home is held in the husband's name. Level, in common with most lenders, therefore depended on the borrowing party receiving a fair and appropriate award at the conclusion of the proceedings which award properly takes into account that party's liability in respect of their litigation loan.

106. It will be very rare for it to be appropriate for a lender to have party status in relation to any aspect of financial remedy proceedings. They will need to satisfy the provisions of FPR r. 9.26B in order to achieve party status and their interest will ordinarily be apparent and taken into account without their intervention. Where however, as here, the lender wishes to intervene in circumstances where the debt has been incurred exclusively in order to enable the recipient to litigate and the lender has become aware of steps which they believe to have been taken by the parties to conclude a settlement which has the appearance of defeating its ability to recover all or part of its debt, the lender should be entitled to be heard in whatever form is felt to be appropriate by the court. This is because as Thorpe LJ put it in *Hill v Haines*, there is evidence of 'collusion between the spouses designed to adversely affect the creditors'.

107. Such intervention would usually be achieved by limited participation at the stage when the court considers whether to approve a consent order. Such limited intervention would avoid the consequence of full disclosure to the lender, or the

ability for them to file questionnaires and to cross-examine the parties or to make submissions as to the appropriate settlement for the wife, which figure may be substantially over that which is owed to the lender or be in a form which would otherwise be inimitable to the wife's wider interests. As Holman J said, the lender's interest is limited to such sum as would satisfy its contractual debt. Where the issue arises other than through a proposed consent order, the wide case management powers of a judge are again likely to allow for limited participation by a lender, for example by way of a preliminary finding of fact hearing. I find it difficult to envisage circumstances where the full participation of a lender in financial remedy proceedings would be justifiable, but I would not go so far as to say that the evidence of collusion, and the procedural circumstances in any particular case could never make it appropriate.

Outcome

108. Pulling together the various threads, the appeal is allowed to the extent only that the judge was in error in (i) directing there to be a new full financial remedy hearing (with Level participating as a party), and (ii) transferring the civil proceedings to the Family Court. The judge was otherwise entirely correct in his approach to this difficult and unusual case and accordingly the appeal is otherwise dismissed. It follows that Level remain a party for the purposes of the outstanding application by the husband and wife for a consent order to be made in the terms agreed between them at the FDR.

109. The case will be remitted to Peel J, the lead judge for financial remedy cases, in order for him to give directions for an *inter partes* hearing of the application by the husband and wife for the making of a consent order under s33A MCA 1973.

Lord Justice Popplewell:

110. I agree with the judgment of King LJ.

Lord Justice Moylan:

111. I agree with the outcome of the appeal for the reasons given by King LJ.

112. Although it does not arise directly in this appeal, I just want to add a very few words of my own about the purposes for which a litigation lender might be joined as a party under rule 9.26B of the FPR.

113. First, as King LJ has noted, they would first have to satisfy the court that either 1(a) and/or (1)(b) of that provision applied.

114. Further, however, apart from the very limited intervention which has been accepted as being appropriate in the unusual circumstances of this case, namely for the purposes of making submissions as to the proposed consent order, no circumstances were identified during the course of the hearing which, in my view, would justify any more extensive participation either in this case or more generally. Accordingly, I would rather not speculate as to whether there could be such circumstances as, at present, I cannot envisage what they might be.