

This approved judgment was handed down by the Judge remotely at a hearing and by circulation to the parties' representatives by email. The time and date of hand down is deemed to be 9.00 a.m. on 14 September 2023.

IMPORTANT NOTICE This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the parties and members of their families must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Neutral citation number: [2023] EWFC 213

IN THE FAMILY COURT AT THE CENTRAL FAMILY COURT
IN THE MATTER OF THE MATRIMONIAL AND FAMILY PROCEEDINGS
ACT 1984

Date: 14 September 2023

Before : **HHJ Vincent (sitting as a s9 Deputy High Court judge)**

Between :

MRS FA

Applicant wife

and

MR OA

Respondent husband

and

Intervenor Ltd

Intervenor

Camilla Choudhury-Khawaja (instructed by Raphael Law Solicitors) for the applicant wife
Paul Infield (instructed by A. Donamart solicitors) for the respondent husband
Sam Stein KC and Jack Holborn (instructed by Judith Maurice solicitors) for the Intervenor

Hearing dates: 11 and 12 September 2023

APPROVED JUDGMENT

Introduction

1. The husband is 61. The wife is 39. They are both Nigerian nationals. They met in Nigeria when the wife worked for the husband in the guesthouse he owned. He owned two other hotels in Nigeria.
2. The husband and wife were married in Nigeria in December 2004. They have four children together, now aged 16, 14, 12 and 9.
3. In March 2009, when their oldest child was two and a half, and the wife was heavily pregnant with their second child, the family relocated to London.
4. In December 2009 the husband purchased in his sole name a home at [address in London, hereafter 'the FMH']. The property was bought for £1.35 million and was not subject to a mortgage. This became the family home.
5. In July 2010 the husband's business, [DS Hotel Limited], purchased a property known as [the Red House], and an orchard next to it. This property was relatively close to Heathrow airport. His intention was to develop it into a hotel, similar to one of the hotels he operated in Nigeria, which was close to Lagos airport.
6. The husband and wife separated in February 2015.
7. The wife issued an application for a non-molestation order and an occupation order, providing that she and the children should remain living in the FMH, and excluding the husband from the property. That application was resolved by undertakings given in April 2016.
8. In November 2015 the wife registered her home rights under the Family Law Act 1996, giving her address as her place of work.
9. The husband returned to Nigeria to live at around this time.
10. In February 2017 the husband petitioned for divorce in Nigeria.
11. The husband returned to the jurisdiction in July 2017 whereupon the wife renewed her applications for a non-molestation order and for a prohibited steps order, which applications were granted on 28 July 2017.
12. In August 2017 the wife petitioned for divorce in England.
13. In February 2018 the wife applied to the Family Court in this jurisdiction for an order that the petition for divorce should proceed in England.
14. In March 2018 the husband's brother's company, [L], commenced proceedings in Nigeria for enforcement of a loan agreement. It was asserted in the pleadings that [L] had loaned £1.6 million to the husband's

hotel business in August 2009, which sums had been used to buy the family home. The pleadings sought the return of the £1.6 million and in the alternative, repossession and sale of [the FMH].

15. The husband did not seek to defend this claim and within a couple of weeks of the claim form being issued, entered into a settlement agreement with [L], providing for him to repay £1.6 million to [L] in four instalments of £400,000.
16. The Nigerian Court pronounced decree nisi on 7 September 2018. There is a narrative judgment of the Court which states that the wife had been served with, but had not responded to the petition, which proceeded undefended. The judgment records that the husband had sought for an order that the wife and children be required to vacate the matrimonial home on the basis that he would provide alternative accommodation for them. This application was rejected, as the husband had not provided proof of his ownership of the matrimonial home, nor any evidence that he was in a position to provide alternative accommodation to the wife and their children. The order provided that the husband should pay £400 a month to the wife in maintenance.
17. In October 2018 the wife agreed to her English petition being withdrawn. She issued an application for the Nigerian divorce to be recognised in this jurisdiction, and applied for financial relief, pursuant to the Matrimonial and Family Proceedings Act 1984 (MFPA). Her application for financial relief was allocated to the Family Court at Barnet.
18. On 27 March 2019 the High Court of Justice of Nigeria issued a judgment in favour of [L], requiring the husband to pay £1.6 million plus judgment interest of 21%.
19. On 30 April 2019 this judgment was registered by order of Deputy Master Davidson in the High Court, Queen's Bench Division.
20. When he filed his Form E in the financial remedy proceedings in Barnet on 7 May 2019, the husband asserted that [the FMH] was worth £1.8 million, but that £1.6 million of the equity was effectively held on trust for his brother's company, because he said, the loan of £1.6 million had been used to fund the purchase of the property. This was the first that the wife or her representatives had heard of the loan.
21. On 16 August 2019 the Court made an order that the husband pay interim maintenance to the wife in the sum of £1,000 a month, in addition to the £400 already directed by the Court in Nigeria.
22. The husband's UK business [DS Hotel Limited], was put into liquidation on 28 August 2019. I understand that there had been a fire at [the Red House] which prevented it from being developed into a hotel as the

husband had intended, and the husband's business in this country thereby failed.

23. On 8 October 2019 [L] applied to the High Court for a charging order against [the FMH], to secure the judgment debt for £1.6 million. An interim charging order was made the following day.
24. On 11 November 2019 the wife applied to the Family Court in Barnet for an order under section 37 of the Matrimonial Causes Act 1973 to set aside *'the loan agreement of August 2009 and subsequent orders made on 27 March 2019 [the Nigerian judgment] and 30 April 2019 [registration of the Nigerian judgment in England] affecting the property at [the FMH] as reviewable disposition intended to defeat the Applicant's claim for financial relief.'*
25. On 18 December 2019 Master Eastman adjourned the application for the charging order to be made final, pending the outcome of the wife's claim for financial remedy under the MFPA 1984, in which a final hearing had been listed for three days in June 2020.
26. In January 2020 the wife filed a document within the family proceedings and in support of her application under section 37, called 'Points of Claim' in which she set out her case against the husband and [L]. She alleged that the loan agreement between the husband and [L] is a sham, created only after the marriage had broken down, and designed as a means of diverting a large part of the equity away from the assets that would otherwise fall to be considered within the proceedings for financial remedy. The document concludes by seeking declarations from the Court that the loan agreement is a sham and has no legal and beneficial effect, alternatively that the loan agreement and subsequent charging order be set aside pursuant to section 37(2)(b) of the Matrimonial Causes Act 1973. In the further alternative, the Court is asked to find that the 'documents' created in Nigeria have no legal effect in the UK, and the charging order should be set aside on that basis.
27. I consider further below the question of whether the Family Court has jurisdiction to make any of the declarations or orders sought.
28. The proceedings then seem to have been stalled by the coronavirus pandemic. Throughout 2020 a number of hearings were listed and then adjourned.
29. In March 2021 [L] was joined as an intervenor to the family proceedings. Both the husband and the intervenor filed defences to the points of claim in April 2021. The husband denies that the loan agreement is a sham, and asserts that the proceedings in Nigeria were legitimate. The intervenor asserts that if the wife seeks to challenge the validity of the Nigerian proceedings, she should have done so within that jurisdiction. It is noted

that no application had been made to the High Court in England to set aside registration of the foreign judgment. In the circumstances, the intervenor was entitled to enforce the judgment by way of a charge over the former matrimonial home, or any other asset of the husband.

30. A final hearing in June 2021 was adjourned due to one of the legal representatives becoming unavailable for health reasons. The financial remedy proceedings were then stayed, to give time for the wife to apply to intervene in the enforcement proceedings.
31. In September 2021 the wife applied to the High Court to intervene in the application for a charging order, and for permission to set aside the registration of the Nigerian judgment.
32. The first hearing of those applications was listed before a High Court Master in May 2022, but was adjourned to allow the wife to amend her application notice. The hearing was relisted on 28 November 2022. At that hearing Master Eastman made the interim charging order final, adjourned the application to set aside registration of the Nigerian judgment, and advised that the matrimonial proceedings should be transferred to the Family Division of the High Court, *'so that, if the Claimant herein applies to enforce its charging order, that application by the Claimant [[L]] and the proposed intervenor's [the wife's] claim may be heard together under the Matrimonial and Family Proceedings Act 1984.'*
33. The wife then applied to the Family Court at Barnet for the financial proceedings to be reallocated to a High Court judge.
34. The proceedings were transferred to the Central Family Court. At a directions hearing in April 2023, of which the intervenor was not given notice, this final hearing of the wife's application for financial relief was listed before me, sitting as a s9 Deputy High Court judge.
35. The wife's application under section 37 Matrimonial Causes Act 1973 was deemed to be an application for relief pursuant to section 23 of the MFPA 1984, to be heard at the same time as the final hearing. The order provided that, *'the preliminary issue relating to the intervenor shall be adjudicated upon on the first day of the hearing.'*

Issues for the Court to determine

36. At the outset of the hearing there remained some confusion as to my task, and in particular what orders the Court was being invited to consider making.
37. I believe that confusion may stem from some misunderstanding of Master Eastman's order. His suggestion that the proceedings be transferred to the Family Division of the High Court appears to be on the basis that if the intervenor were to seek to enforce the final charging order by applying for sale

of the home, that application should be heard by the same judge as is considering the application for financial remedies. The intervenor has not yet applied to enforce the charging order. Master Eastman was plainly not suggesting that transfer to a judge of the Family Division (or a Circuit Judge with a s9 ticket) opened up the possibility of a Family Court judge making orders to set aside either the judgments made in the King's Bench Division – the charging order, and the order registering the Nigerian judgment - nor the judgment obtained by the intervenor in the High Court of Nigeria. However, the wife's legal team appeared to be under this misapprehension.

38. Section 23 of the MPFA 1984 (mirroring section 37 of the MCA 1973) provides that the Court may set aside or prevent any disposition of property by a party to a marriage where the relevant disposition has been or will be done *'with the intention of defeating the claim for financial relief'*. Defeating a claim for financial relief includes reducing the amount of relief which might be granted.
39. In general terms, the wife's case is clear. She says the loan agreement was set up only after the husband and wife's separation, with the intention only of stripping £1.6 m of assets out of the matrimonial pot, in order to defeat her claim for financial remedy. The loan agreement led to the Nigerian judgment, registered here and then secured by a charging order. This sequence of actions has, she says, effectively transferred £1.6 million of a beneficial interest in the property to the intervenor. The wife's case is that this transfer was for no consideration, because there never was a loan. She asserts that even if the charging order is enforced by sale of the property, any proceeds would effectively be held by the intervenor on trust for the husband, to be returned to him once the financial remedy proceedings have concluded.
40. Which of these actions amounts to a disposition that could or should be set aside within the meaning of section 23 of MPFA 1984 is harder to identify.
41. It is not obvious that there has been a disposition within the meaning of the Act. The intervenor has got a charge on the property, but the property or part of it has not been transferred into the intervenor's name. Both the intervenor and the husband assert that the husband has a liability to the intervenor that must be taken into account at the final hearing of the application for financial remedies. The charge could just as well have been secured on a property in Nigeria, or some other asset of the husband.
42. If accepted as a valid debt, the liability must be accounted for, and given that there is no evidence at present of other assets, the family home would require to be sold and the liability met from the proceeds. The outcome of the proceedings would be that money the wife previously thought was available is not, and the asset pool would be greatly reduced compared to what she has

contended it should be. That is not the same as there having already been a disposition of the assets within the meaning of section 23.

43. The wife's team has not so far been able to formulate her application pursuant to section 23 with any precision.
44. Despite (i) the lack of clarity about the section 23 application, and (ii) my confidence that I do not have the power to set aside orders made in the King's Bench Division, let alone orders made in the Courts in Nigeria, I decided I should proceed to deal with the preliminary issue within the Family Court proceedings. The issue is required to be determined before the application for financial remedy can progress further.
45. The Court needs to determine whether or not the loan agreement is a sham arrangement created after the breakdown of the marriage for the purpose of defeating the claim for financial remedy.
46. If a finding in line with the wife's case is made, that the loan agreement is a sham, then consideration will need to be given to the steps that could or should be applied for, whether in the Family Court pursuant to section 23 or otherwise, the King's Bench Division of the High Court, and/or in Nigeria, to unpick the orders that have been made consequent upon that agreement. Further directions would be required to be made to progress the application for financial remedies to its conclusion.
47. If a finding in line with the husband's and intervenor's case is made, that the loan agreement is genuine and the husband has a continuing liability to his brother, then the application for financial remedy may proceed to final hearing with the asset schedule drawn up to reflect that.
48. It was not realistic for me to hear evidence, submissions and give a judgment on the preliminary issue in one day.
49. Focusing only on the preliminary issue, over the course of two days I heard evidence from the wife, husband, and the husband's brother, considered the written and oral submissions of the advocates, and thereafter prepared this judgment on what was to have been the third day of the hearing.

The law

50. The burden of proving an allegation falls on the person who asserts it to be true. The standard of proof is a balance of probabilities; disputed allegations only become proven facts if it is more probable than not that they occurred.
51. Findings of fact must be based on the evidence (including inferences that can properly be drawn from the evidence), and not suspicion or speculation.

52. I must take account of all the evidence and each piece of evidence in the context of all other evidence:

'Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence and exercise a totality of the evidence to come to the conclusion of whether the case put forward by the local authority has been made out to the appropriate standard of proof.'

(Re T [2003] EWCA Civ 558 at para 33, per Butler-Sloss P.)

53. When considering the evidence of the witnesses, I must take care to identify those parts of their evidence which are part of their direct recollection, and those parts of their evidence where they are reporting what someone else has said, and to assess the relative weight of such evidence accordingly.

54. The evidence of the parties is very important and the Court must be able to form a clear assessment of their credibility and reliability. I further remind myself that credibility alone cannot decide this case and that, if a court concludes that a witness has lied about one matter, it does not follow that he or she has lied about everything.

55. I remind myself of the direction that, in a criminal case, would be called the 'Lucas' direction because it is based on the case of R v Lucas [1981] QB 720. If proved that a person has lied, the Court must analyse the relevance of the lie to the issues in the case. A lie may be in relation to an issue that has no relevance to the real issues before the court. Lies may be told for many reasons. A person may lie out of a sense of shame, misplaced loyalty, humiliation, embarrassment, panic, fear, confusion, emotional pressure, a desire to conceal other misconduct or for many other reasons. I have also been referred to the cases of In Re H-C (Children) [2016] 4 WLR 85 McFarlane LJ and H v City and Council of Swansea and Others [2011] EWCA Civ 195.

56. The Court should consider how much weight to attach to discrepancies in accounts between witnesses or from one witness at different times. See Re A (A Child) [2020] EWCA Civ 1230 and in Lancashire v R [2013] EWHC 3064 (Fam); per Mostyn J:

[8]...(xi) The assessment of credibility generally involves wider problems than mere "demeanour" which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. With every day that passes the memory becomes fainter and the imagination becomes more active. The human capacity for honestly believing something which bears no relation to what actually happened is unlimited."

57. Any findings of fact are for the Court to make based on the evidence before it. No weight should be given to the opinions of others about the credibility of a particular witness.

58. In Bhura v Bhura [2014] EWHC 727 (Fam) Mostyn J reviewed the law concerning sham transactions, and gave the following summary, at paragraph 9:

I revert to the law concerning sham transactions. I myself had to consider this in Kremen v Agrest [2010] EWHC 2571 (Fam), [2011] 2 FLR 478. At paras 12 I quoted from the convenient summary expressed by Munby J in A v A [2007] 2 FLR 467 at paras 32-33, 50 and 53. He in turn analysed the classic definition of a sham by Diplock LJ in Snook v London and West Riding Investments Ltd [1967] 2 QB 786, and the more recent exposition by Arden LJ in Hitch v Stone (Inspector of Taxes) [2001] EWCA Civ 63, [2001] STC 214. I think all this learning can be summarised (at least for my purposes) as follows:-

- i) A sham means acts done or documents executed by the alleged shamers which are intended by them to give to third parties or to the court the appearance of creating between them legal rights and obligations different from the actual legal rights and obligations (if any) which they intend to create.*
- ii) Subject to the next point, all the shamers must hold an expressed common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a shamer affect the rights of a party whom he deceived. The test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.*
- iii) A sham transaction will still remain a sham transaction even if one of the parties to it merely went along with the shamer not either knowing or caring about what he or she was signing.*
- iv) The court is not restricted to the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.*
- v) The fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement*

which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them.

- vi) *The fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the agreement as varied.*

- vii) *Because a degree of dishonesty is involved in a sham there is a very strong presumption that parties intend to be bound by the provisions of agreements into which they enter, and intend the agreements they enter into to take effect. However, this does not elevate the standard of proof, which is set at the balance of probability. Nonetheless the test is a stiff one and there is a requirement of very clear evidence given the seriousness of the allegation.*

59. I note in particular that the burden of proof does not change depending on the severity of the allegation.

The evidence

60. I have read the contents of the core bundle and the supplementary bundle. I heard evidence from the wife, the husband and the husband's brother, who is a director of the intervenor.

The wife

61. I was satisfied that the wife was attempting to give me a true account of her own recollections and understanding of her husband's financial situation in 2009. However, I was not convinced that her understanding was at all reliable. I find that she herself had not had any involvement in the husband's business or personal financial arrangements, either in Nigeria or in England.

62. She told me that she worked in the husband's guesthouse in Nigeria, and that after their marriage they lived in the small two-bed property that was immediately behind it. Her work was housekeeping and working on reception. She had some involvement in booking rooms and arranging for takings in cash to be collected and banked. There was no evidence that she had any wider management, strategic or financial responsibilities in the business. This puts her at some disadvantage in establishing her claim, because she was not able to give me direct evidence about the husband's financial position. She is reliant upon the information she says he gave to her. On any view, he does not appear to have shared very much with her. The wife

told me that he had shown her financial documents, but she was not able to say what those documents were, or what they proved in support of her claim.

63. I have been shown a single page undated document on headed with the husband's name, listing a series of properties said to be in his ownership, comprising two guesthouses, a sales office, and two residential properties let out to tenants. The combined value of these properties is said to be 1.255 billion Naira. On 2009 exchange rates (Mr Holborn helpfully produced a schedule of exchange rates that has been agreed by all representatives) that would equate to £6.6 million. But on the figure I was given for today's exchange rates that would equate to just under £1.4 million. The husband denies creating this document. I am sceptical about his claim that his letterhead paper had been stolen and this document was a forgery. This claim of theft was made for the first time in the witness box, and has never been alleged before.
64. But however it came into existence, the document cannot be seen as reliable evidence of the value of the husband's assets, now or in 2009, or at any time. It is undated and gives no explanation as to who has given the valuations, how they were reached, and for what purpose. Even if it were to be accepted at face value, this document does not tell me the husband had cash available to him to purchase the family home outright in 2009.
65. The wife said the husband told her he had paid for their family home in London in full, that there was no mortgage, and that he was its sole owner. She was 'unaware' of her husband having borrowed any money to fund the purchase. She said she believed he had no need to borrow, because he was a wealthy and influential man in Nigeria, and had run a successful business as a hotelier. I have not been shown evidence to assist me in making findings of his income, savings, assets or borrowing capacity in or around 2009.
66. The wife's evidence that the occupancy rate was always one hundred percent in the guesthouse, as well as in the other two hotels owned by the husband, was unconvincing. She said that in 2009 the hotels collectively made two million Naira a day. The parties have researched relevant exchange rates and that would amount to about £10,000 a day, but that figure is not much good to me, firstly because the husband's evidence was that occupancy was usually between somewhere between thirty and fifty percent, and secondly, because I was given no evidence about running costs, staff and all the other overheads associated with running a hotel.

The husband

67. With the agreement of all parties, the husband gave evidence from Nigeria by video-link. He gave his evidence in a rather florid and grandiose manner, at times finding it hard to contain his emotions. He found it difficult to focus on

any particular question, but tended to give long explanations and speeches, protesting his innocence, and expressing his outrage at the accusation of fraud levelled at him by the wife. When taken to various discrepancies or oddities in the documents, and asked to comment or explain, he was quick to dismiss them as trifling issues, not worth troubling about, and did not often address the question directly.

68. Nonetheless, when it came to giving evidence about his hotel business in Nigeria, and the business he intended to pursue in London, underneath the somewhat dramatic presentation, his evidence was clear and cogent. He was precise and consistent about things like hotel occupancy, room rate, takings, and overheads. He gave clear and consistent evidence about the chronology of the family travelling to London, establishing the UK branch of his Nigerian hotel business [DS] shortly thereafter, buying first the family home and then the property called [the Red House], which he intended to develop into a small airport hotel, similar to that which he had operated in Nigeria.
69. He described the small two-bed property he and the wife had lived in behind the guesthouse in Nigeria and in which he currently lives. In cross-examination the wife accepted the husband's characterisation of their standard of living, which was rather different from the life of luxury with servants and drivers that she had described the husband living in written documents for the Court.

The intervenor's witness

70. The husband's brother gave his evidence dispassionately and with an air of detachment. He was anxious to stress that his involvement in the case was only commercial. He did not acknowledge or refer to the other parties as his brother and former sister-in-law, and corrected anyone who implied that he was one and the same as the intervenor company. He seemed keen to establish himself at arm's-length, stressing that it was the intervenor company as a commercial entity that had advanced the loan, and later sought to enforce its payment through the Courts. This is notwithstanding that he and his wife are the only directors of [L].
71. He wasn't asked in any detail about the circumstances in which his company was asked to lend his brother £1.6 million, how it was that he and his wife as directors agreed to do so, and why it was that he seemed indifferent to his brother's failure to repay the loan for some years.
72. Like his brother, he dismissed any questions put to him about discrepancies in dates, typographical errors on legal documents or apparent anomalies as trivial, and repeatedly blamed his solicitor for any mistakes that may have occurred.

73. His oral evidence was consistent with his written response to the points of dispute, that the money loaned was made to [DS] in Nigeria, but was for the purpose of funding the purchase and development of a hotel in the UK. He said that when he discovered his brother had in fact used the funds to buy a family home he was angry with his brother. I wasn't clear from his evidence when he said this was. He gave evidence to me that the lack of this £1.6 million continues to cause him difficulties in his business and he has had to lose staff as a result.
74. I did not find him a particularly helpful witness, and somewhat evasive. At the same time, there were no significant discrepancies between his oral evidence and his written statement, and his evidence was consistent with that given by his brother (but not to the extent that there were striking similarities that gave the appearance of collusion or coaching). The steps his company has taken to enforce payment of the loan have been scrutinised by the Court in Nigeria and the High Court in London, and the debt judged to be legitimate, (although it is right to note that the wife's allegation that the loan agreement is a sham was not raised in either proceedings).

Conclusions

75. I have considered carefully all the evidence I have heard and read.
76. Some elements of the evidence point towards the loan agreement being a fiction, created only after the husband and wife separated:
- (i) the husband did not tell the wife that he had borrowed money to buy the family home in London. The first time she became aware of the existence of the loan was when the husband filed his Form E in May 2019. This was long after the separation, and only came up once financial proceedings were underway;
 - (ii) the husband's brother insists this was a commercial loan, but the terms of the loan brought no benefit to the intervenor company at all, not even charging interest. The loan was not secured against the property nor in any other way. The intervenor apparently took no steps to ensure that the loan had been used for its intended purpose of purchasing a hotel, and was relaxed to the point of inertia when no repayments were made. However, I bear in mind Mostyn J's words:

'The fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them.'
 - (iii) the loan agreement is asserted to have been drawn up by the intervenor company's lawyers, but is suspiciously identical in format, font, paragraph

numbering and content, to another loan agreement purportedly between the husband's Nigerian [DS] and the husband personally, advancing £800,000 to enable purchase of [the Red House]. This loan agreement also only came to light after the parties' separation, and during the lifetime of the application for financial remedies;

- (iv) there is a scent of collusion about the two sets of proceedings in Nigeria. As well as repayment of the debt, the intervenor's claim form in the Nigerian proceedings seeks repossession and sale of the property at [the FMH] as an alternative remedy. In his petition for divorce to the Nigerian Court, the husband sought an order that the wife and children be evicted from the property and rehoused in another one. It would seem that the husband and, through his company, his brother, shared the same objective. That objective is consistent with the husband's objective in the financial remedy proceedings, for the wife and children to be evicted from the property, so that it can be sold, and the vast portion of the equity in the house effectively removed from the pot of marital assets;
- (v) if the loan agreement, subsequent settlement agreement and pleadings are truly commercial and legal documents, they contain a suspiciously high amount of typing errors in respect of dates, the name of the intervenor company which is alternatively named as [LVT] Ltd and at other times just [LT] Ltd. The loan agreement dated 6 August 2009 itself is made between DS Nigeria and [LVT] Ltd. However, a document apparently from the Nigerian Corporate Affairs Commission, certifies that the company (incorporated in January 2007) was previously known as [LDS] Limited, and only became known as LVT Limited by operation of special resolution on 18 August 2009, twelve days after the loan agreement was made. (As to this last point, the intervenor's witness said that the name change had happened sooner, but it took Nigerian officials some time to catch up with it).

77. All of these matters, together with the way in which the husband and his brother gave evidence to the Court, have raised suspicion that the legal documents upon which they rely were created by them after the marriage broke down, in order to give the appearance of creating legal rights and obligations which were a fiction. However, the applicant has to do more than raise suspicion. She has to satisfy the Court to the standard of a balance of probabilities that the husband and his brother have fabricated the loan agreement after the event.

78. I have weighed up each piece of evidence and looked at it in context of all the rest of the evidence. I have arrived at the conclusion that the wife has established reasonable grounds for suspicion, but ultimately, I have not been

satisfied that she has established to the standard of a balance of probabilities that the loan agreement is a sham. In summary, my reasons are as follows:

- (i) I preferred the husband's evidence to the wife's about his financial situation at the time he moved to England. I do not accept that his hotel business was as wildly successful as she suggested. I prefer his evidence that they lived in modest quarters at the back of the guesthouse and that she continued to work in the hotel after the marriage. I would be prepared to accept that he was able to draw funds from his business in order to purchase [the Red House] and land for £800,000. But there is no evidence before the Court to enable me to find to the standard of a balance of probabilities that he did have access to the £1.35 million and associated costs required to purchase the family home in cash. It is for the wife to prove that the property was bought without recourse to a loan from the intervenor;
- (ii) I accept the husband's evidence that he entered the UK on Tier 1 (entrepreneur) visa. In January 2009 this was a route available for migrants who wished to establish, join or take over one or more business in the UK. That is exactly what the husband's intention was. Having successfully run small hotels in Nigeria and a hotel/boarding house near Lagos airport, his intention was to expand the business by creating a similar type of hotel near Heathrow airport. I accept his evidence that the requirements that applied to him on a Tier 1 entrepreneur visa, were for him to have access to not less than £200,000, to be held in a regulated financial institution, and that it was disposable in the UK;
- (iii) It was asserted on behalf of the wife in her counsel's position statement that the husband entered the UK on a Tier 1 (investor) visa, which among other things required the investor to have (i) not less than £1 million in a regulated financial institution, disposable in the ; or (ii) £2 million in net personal assets and a loan disposable in the UK of not less than £1 million loaned from a financial institution regulated by the Financial Services Authority. The wife has not provided any evidence to support the assertion that the husband did enter on this visa, or that he was at any time able to satisfy those criteria. The husband was indeed entering the UK with the intention of setting up a business, consistent with the Entrepreneur visa, he was not intending to invest in other businesses, nor did he. In the circumstances, I reject the wife's claim that the husband must have had at least £2 million in cash in his bank account when he arrived in the UK;

- (iv) I accept that the property was registered in the husband's sole name and no charge registered against it. This could be evidence that the loan was a sham, but it is also consistent with the evidence of the husband and the intervenor, that the husband had not been honest and straightforward with his brother about how he was going to use the funds. The loan agreement provides that the loan should be used to further the business, and repayments would start once the business was trading. It was not intended as a mortgage. In the circumstances, it would not be expected for the intervenor to register a charge on the property when the expectation was that the loan would be repaid once the business started trading;
- (v) I have only been shown one page of a bank statement from 2009. It is obviously only a snapshot, but it appears to be a contemporaneous document. Its validity has not been challenged. The statement shows the account in excess of £360,000 on 11 September 2009, and over the next couple of months, a further £333,000 coming into the account in five instalments from [Y Commodities]. On 30 November 2009 a payment of £557,000 was made to [*name redacted*]. The husband gave evidence that this is the name of the solicitors' firm that did the conveyancing on the purchase of the family home (corroborated by correspondence within the bundle). The husband and his brother gave evidence that [Y Commodities] was the foreign exchange service that was used in order to transfer the money from the intervenor's account to the husband's account. The amounts and timings of these transfers are consistent with the husband's account of receiving the monies in instalments, which in turn is consistent with the terms of the loan agreement which provides for payment to be made in a succession of instalments until the sum of £1.6 million was reached;
- (vi) I recognise the possibility that [Y Commodities] could have nothing to do with the intervenor company, and could be a foreign exchange service used by the husband to transfer his own funds from Nigeria to his English account. However, I was presented with no evidence to contradict the evidence of the husband and his brother that the payments shown on the statement were from the intervenor, and made pursuant to the loan agreement;
- (vii) The applicant has raised suspicion as to the validity of the documents relied upon. I have only been shown photocopies. They are date stamped by the Nigerian Court. I am told that the Court service performs a notary service to certify commercial documents as genuine. It is of course possible that this is not the case, or that it is, and the documents have been back-dated and stamped using

stamps obtained as part of a fraud. However, I have not been shown any evidence to support such an assertion. There is no expert evidence as to standard procedure for notarising contracts, as to the types of stamps used, nor any handwriting evidence in respect of signatures purporting to be those of the husband and the intervenor. What I have been told is that these documents were accepted and approved by the High Court in Nigeria as valid evidence of a debt owed by the husband to the intervenor company, and judgment was entered on that basis. In the circumstances, I must be cautious to come to a conclusion that they are fakes, fabricated only in the aftermath of the husband and wife's separation;

- (viii) The wife did not receive notice of the Nigerian divorce proceedings, nor of the intervenor's application in this jurisdiction for a charging order. She asserts this is further evidence of collusion on the part of the husband and the intervenor to go behind her back. The husband has been aware that she and the children have remained living in the former matrimonial home, so it is arguable that he could and should have arranged for service there. However, it is also of note that those proceedings were served on the wife at the address which is formally recorded on the title deeds for the property in order to register her home rights under the Family Law Act 1996.

79. Ultimately, the chronology of events does fit the husband and the intervenor's narrative.
80. The husband and wife moved to England in March 2009 in order to pursue the opportunity of developing the husband's business. I accept that it was also their intention to build a new life in England and for their children to be educated here in due course, but at the time they had only one child of pre-school age, and another due to be born imminently, so that cannot realistically have been the primary motivation for the move as the wife has subsequently sought to suggest.
81. I accept and make a finding that the loan agreement was agreed in discussions that took place between June and July 2009, and the loan agreement document was drawn up and date stamped 6 August 2009.
82. The UK arm of the husband's [DS] business was registered on 12 August 2009.
83. The extract from the bank statement supports the husband and the intervenor's case that between August and December 2009 monies were thereafter transferred to the husband further to the loan agreement.

84. I find that the husband did then use the money to buy the family home, and later raised funds from his Nigerian business to purchase [the Red House].
85. While the marriage lasted, the husband was still living in the UK and the business appeared viable, the intervenor did not seek repayment of the loan.
86. On one view the intervenor seemed remarkably laid back about pursuing repayment of the loan, and only started to take active steps to recover it once the marriage had broken down. This change in position could be regarded as somewhat hard-hearted and cynical, but that in itself is not evidence that the loan was never a reality in the first place.
87. For all these reasons, I find that the wife has not established to the standard of a balance of probabilities that the loan agreement was a sham.
88. I find that the husband does have a continuing liability to repay his brother the £1.6 million for which he has obtained judgment in Nigeria, subsequently registered in the High Court in this jurisdiction, and now secured by a final charging order.
89. I am not satisfied that the loan or subsequent actions to enforce repayment could be said to amount to a reviewable disposition within the meaning of section 23 FMPA 1984. The application for relief under that section shall be dismissed.

Next steps

90. The intervenor can be discharged from the proceedings.
91. This litigation has proceeded for too long and the costs incurred on both sides will surely have become grossly disproportionate to the assets. While I appreciate that my decision will be difficult reading for the wife, I hope that it will enable the parties to narrow the issues between them and resolve the application for financial relief without the need to expend significant further costs at final hearing.
92. I hope that the parties can agree an order reflecting my decision, and that I can then hand this judgment down in their absence.

HHJ Joanna Vincent
Sitting at the Central Family Court
14 September 2023

Supplementary judgment on costs

1. I received written submissions from Mr Infield on behalf of the husband on 12 October 2023, from Mr Holborn on behalf of the intervenor on 26 October 2023, Miss Choudhury-Khawaja on 2 November 2023, and then a brief note in reply from Mr Holborn on 3 November 2023.
2. The respondent husband and the intervenor seek orders that the Applicant wife pays their costs.

The law

3. Rule 28.1 of the Family Procedure Rules 2010 (FPR 2010) provides that the Court may make such order as to costs as it thinks just. 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 unless conduct issues arise (FPR 2010, r 28.3(6) and (7)). However, preliminary issue applications are not financial remedy proceedings for the purpose of FPR 2010, r 28.3.
4. So the starting point in respect of this application is that costs follow the event.
5. Further, Mr Infield and Mr Holborn say the costs should be payable on the indemnity basis. Mr Infield refers me to the case of Crowther v Crowther and others [2021] 2 FLR 1313. In that case the wife sought to set aside transactions she alleged were a sham, but then settled with the intervenors and withdrew the application shortly before hearing. She was ordered to pay the husband's and the intervenors costs on an indemnity basis.
6. Lieven J reviewed the authorities, noting the desirability of consistency of approach across all jurisdictions. At paragraph 32, she cited the cases of Playboy Club London Ltd v Banca Nazionale Del Lavoro spa [2018] EWCA Civ 2025, per Sales LJ at para 46, and Clutterbuck v HSBC [2016] 1 per David Richards at paragraph 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.

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.'

7. Mr Infield and Mr Holborn submit that the wife's allegations of sham in this case amounted to allegations of fraud. Having made such serious allegations and failed to prove them, it is submitted that costs should be assessed on an indemnity basis, the benefit of any doubts in respect of assessment being resolved in favour of the party in whose favour the costs order has been made.
8. On behalf of the Applicant, Miss Choudhury-Khawaja does not dispute that the wife should pay the husband's and the intervenor's costs. She submits that any order for costs should not be paid until after the conclusion of the financial remedy proceedings, as the wife and children are living in the family home. She opposes any order for a payment on account of costs. She submits that any order for costs should be subject to detailed assessment if not agreed.
9. Miss Choudhury-Khawaja informs me that an application for permission to appeal my judgment has been made, and asks that this is taken into consideration when considering the date for payment of any costs orders.
10. I understand that neither the husband nor the intervenor are seeking any payment on account of costs at this time.
11. It is agreed between the Applicant and the intervenor that if not agreed, the costs should be subject to detailed assessment.

Conclusions

12. In early correspondence it was suggested that submissions might be made in respect of the enforcement proceedings in which an order for sale may be sought in respect of the family home. I do not have jurisdiction to deal with the enforcement proceedings, and cannot interfere with the charging order that has been made nor order a stay on any order for sale. It would appear that this has been accepted by all parties, as this was not dealt with in written submissions.
13. Having considered the procedural rules, case law, and the submissions from each of the parties, I will make the following orders:
 - **the applicant wife do pay the respondent's costs of the preliminary issue on the indemnity basis, to be subject to detailed assessment if not agreed, and payable upon the conclusion of the MFPA application;**
 - **the applicant wife do pay the intervenor's costs of the preliminary issue on the indemnity basis, to be subject to detailed assessment if not agreed.**
14. The starting point is that costs follow the event. Costs should be paid on an indemnity basis because the wife alleged that the relevant transactions were a sham, effectively requiring both the husband and the intervenor to come to Court to defend themselves, and incur costs as a result. In the event, the Court

found that the wife had not proved her case. Where there is any doubt in the assessment, in all the circumstances it should be resolved in favour of the receiving parties.

15. I agree with Mr Holborn's submissions in respect of the time for payment of the intervenor's costs. While the continuation of the financial remedy proceedings may well be a good reason to delay any steps taken to enforce a costs order, it is not a good reason to delay the time for payment in the order. It is helpful however that the intervenor has agreed not to seek enforcement of the order at this time.
16. I do not regard the application for permission to appeal as a good reason to defer the date for payment of costs. I have not been asked to stay execution of my order. It is open to the applicant to seek a stay of execution from the Appellate Court.
17. I consider that the husband's costs should not be subject to assessment until after the conclusion of the financial remedy proceedings. In Crowther, the Court was concerned the parties' business interests which had been hived off to be dealt with as a discrete issue, separate from the financial remedy proceedings. In this case the preliminary issue has concerned the former matrimonial home, which is at the heart of the financial remedy proceedings. There is likely to be some overlap in respect of costs incurred for the preliminary issue and the main case, which will be better identified once those proceedings have ended.
18. Further, the husband has submitted a schedule for summary assessment. The costs of his current solicitors and counsel's fees amount to £37,703. There is then a further sum of £170,917 sought in respect of 'fees to other law firms as instructed by party'. There is no explanation of what any of these fees relate to. Further investigation is required, which is better done through the process of detailed assessment.

HHJ Joanna Vincent

Central Family Court, 6 November 2023