Neutral Citation Number [2025] EWFC 28

Case No: 1715-6903-6004-3295

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19th February 2025

Before:

MR. NICHOLAS ALLEN KC

(Sitting as a Deputy High Court Judge)

Between:

SM

Applicant

- and -

BA

Respondent

(No. 2: Maintenance Pending Suit)

Miss Deborah Bangay KC and **Mr. Phillip Blatchly**
(instructed by **Rayden Solicitors**) for the Applicant

Miss Sarah Phipps KC and **Miss Jessica O'Driscoll-Breen**
(instructed by **Levison Meltzer Pigott**) for the Respondent

Hearing date:

11th February 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30 am on 19th February 2025 by circulation to the parties or their representatives by email and by release to The National Archives.

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 children and members of their family 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.

Nicholas Allen KC:

1) I am concerned with an application made on W's behalf for maintenance pending suit ('MPS') which was listed on 11th February 2025 with a time-estimate of one day.

2) On 22nd May 2024 W's solicitors sent H by email an unissued application for a legal services payment order ('LSPO') and an application for MPS. It was said that the amount sought for MPS would be confirmed in a statement to be filed by 7th June 2024. No draft order was attached.

3) As I set out in my judgment of 16th January 2025 (published as *SM v BA (Legal Services Payment Order*) [2025] EWFC 7) both applications were compromised on the following day, 23rd May 2024, whilst both parties were at court for the return date of two *ex parte* orders made on 14th May 2024.

4) The MPS application was compromised on the basis that:

   a. H undertook to *"maintain the financial status quo in respect of the payments made by him towards the family expenses and the expenses on the family home, comprising household utility bills, school fees, reasonable medical expenses for [W] and the children and the children's educational costs until further order or written agreement"*;
   b. H would pay W MPS of £29,500 pm until further order; and
   c. W undertook that her use of H's AmEx card would be limited to reasonable holiday expenditure on accommodation and travel for her and the children until further order or written agreement.

5) On W's figures the total payable was £47,029 pm - i.e. the sum payable pursuant to H's undertaking (albeit variable) was £17,529 pm. On H's figures the total was c. £42,500 pm - i.e. the sum payable pursuant to H's undertaking (albeit variable) was c. £13,000 pm. Both these figures excluded W's reasonable holiday expenditure.

6) By August 2024 there was significant disagreement in inter-solicitor correspondence as to the meaning and extent of H's undertaking. This correspondence was voluminous over (at times) relatively *de minimis* sums.

7) By her second application notice dated 23rd October 2024 W therefore sought a determination that the meaning of *"maintain the status quo"* meant H should continue to meet all family expenses and expenses on the family home that he paid historically and not just those specifically identified. If I determined it in the way H contended for, W sought an increase in the MPS to include the additional family and household costs previously paid by H and now being borne by W which she quantified at £5,400 pm (i.e. an increase to £34,900 pm). W also sought that the

order be framed so the monthly figure be automatically increased further by the amount of any other household or family bills which H had historically paid but which he subsequently sought that W pay.

8) A third MPS application was then made by W on 6th January 2025 in which she no longer sought such a determination, put forward an interim budget for the first time, and sought the sum of £43,995 pm in addition to H meeting other specified expenditure which (per W) totalled £13,652 pm – a total of £57,647 pm (£691,764 pa). It was supported by a statement dated 3rd January 2025. On H's behalf it was said that the specified expenditure sought by W was c. £14,250 pm (with no cap) making the total c. £58,245 pm (c. £698,940 pa). On H's behalf it was said that to seek such a figure on an interim basis to meet immediate needs is *"extraordinary"*.

9) I gave an *extempore* judgment on 10th January 2025 stating that W's application notice of 6th January 2025 was a fresh application and procedural fairness required H to have the opportunity to respond. I therefore said W had the choice either to proceed with her second application notice or, if she wished to pursue her third application, for it to be adjourned to another date. Miss Bangay chose the latter and I therefore adjourned and relisted the same on 11th February 2025.

10) H filed his statement in response on 26th January 2025. H now offered an interim figure of £24,438 pm and to meet specified expenditure (i.e. broadband internet, electricity and gas, water rates, TV licence, children's tuition costs, children's medical costs (doctors, dental, optician, physio) save for those of one of the children's therapist (which W said she will meet), children's school fees, and school uniforms) of c. £11,966 pm – i.e. a total of £36,403 pm (£436,836 pa). He stated that the £29,500 pm he had previously agreed to was overprovision and described W's application as *"rapacious, full of errors and wholly without merit"*.

11) Having heard submissions, I reserved judgment in relation to this application.

12) There is much that is in factual dispute between the parties. On a macro level, based on the updated ES2 filed in advance of the hearing the parties have assets of c. £55.8 million on W's case (a figure which she believes to be materially understated) and c. £13.5 million on H's case (with one difference being whether H has c. £23.5 million in asserted loans to his father). In her Form E W described the parties as having *"always enjoyed an extremely high standard of living"* and that *"[m]oney has simply never been an issue and we have lived our lifestyle accordingly"*. By contrast H stated that the family's main expenditure was on holidays *"but the rest of the lifestyle … has been comfortable but not extravagant."*

13) In this context I note that W's solicitors served a 69-page Schedule of Deficiencies and Supplemental Questionnaire with 29 pages of supporting documents at 8 am on the morning of 11th February 2025.

14) This is of course an interim hearing conducted on the basis of written evidence (none of which has been tested by cross-examination) as well as written and oral submissions.

15) I cannot resolve each and every disputatious fact and must exercise caution in seeking to resolve any such facts at this stage. I am in a similar position to Peel J in *MG v GM (MPS: LSPO)* [2023] 1 FLR 253 where he observed at [40] *"I cannot be completely sure of the ground on which I stand where the positions are so polarised."*

16) However, with this caveat I am satisfied I have sufficient material to make an informed and fair decision. In doing so I have borne in mind the following guidance in *MG v GM (MPS: LSPO)* per Peel J:

> [41] … in my judgment I must be circumspect. I should not be afraid to draw adverse inferences if so warranted, but to my mind I should not make orders without either: (i) credible evidence that one or other party is able to access large sums of wealth; or (ii) being satisfied that the disclosure by either party is so deficient as to justify, even at this stage, making an award which that party denies is capable of being met. In this respect, I am most assisted by objectively verifiable facts, and contemporaneous documents.

Preliminary issue

17) On 6th February 2025 I received from W's solicitors an agreed core bundle of 374 pages. This included three witness statements from both parties which I have read with care. I also received from them a supplementary bundle of 1,072 pages. The covering email noted this second bundle was not agreed. It said *"[w]e acknowledge there is not permission for a supplementary bundle to be filed; ... [t]his bundle has been prepared to include documents which we consider are of assistance to the Court. Given that [H's] team do not agree that a supplementary bundle should be filed with the Court, we respectfully request that this issue is considered as a preliminary matter at the hearing on 11 February"*. This prompted an email from H's solicitors later the same day which said that *"[w]e had asked that it not be lodged with the Court in advance of you granting permission ... [W's] solicitors have not explained to us why these documents should be before the Court for an MPS application nor what relevance the documents have"*.

18) Miss Phipps rightly observed that in relation to the supplemental bundle (i) W had no permission; (ii) it was not agreed; and (iii) it breached FPR 2010 PD27 para 4.1 (*"The bundle shall contain copies of only those documents which are relevant to the hearing and which it is necessary for the court to read or which will actually be referred to during the hearing"*). It was said that the bundle contained much of H's financial disclosure and his advisors had not been told why this material needed to be before the court. It was also said the bundle did not include any items which were *"inconvenient"* to W. I was also told that H's solicitors had about four hours' notice from W's solicitors that it would be filed.

19) I gave permission for the supplemental bundle to be admitted principally so as not to take up more court time with the issue than was necessary. However I made it clear that (i) it had been filed in breach of the rules; and (ii) I would bear in mind when taken to it that there were other documents that H might have wished me to see that were *"inconvenient"* to W.

20) Filing of a supplemental bundle in this way also breached PD27 para 5.1 (*"Unless the court has specifically directed otherwise, being satisfied that such direction is necessary to enable the proceedings to be disposed of justly, the bundle ... (if an electronic bundle) shall be limited to 350 pages of text"*). Like some (but by no means all) judges I am relatively relaxed about a higher page limit on electronic bundles given larger such bundles are no more unwieldy than smaller ones and the ability to search through them at speed for particular term(s) is not impacted by their size. However, this does not obviate the need for (i) such a direction being sought in advance for a larger bundle to be filed; and (ii) the filed bundle to be agreed.

21) This does not mean that both sides have to agree that a particular document should be in the bundle. Subject to the court's direction on page limit both parties can include in an agreed bundle such documents as each wish (so long as they consider that the document will be read, will be referred to, or is otherwise relevant). However what is not appropriate is that having agreed a bundle one party gives little or no notice to the other party of an intention to file unilaterally a supplemental bundle that 'cherry-picks' documents which they consider assists their case. This shall not happen again in this case.

The law

22) The law on MPS is well-settled and can be readily stated.

23) MCA 1973 s22 gives the court power to make an order for maintenance during the course of the proceedings until an order for a divorce (and thereafter it may continue as interim maintenance).

24) In *TL v ML And Others (Ancillary Relief: Claim Against Assets of Extended Family)* [2006] 1 FLR 1263 Nicholas Mostyn QC (sitting as a Deputy High Court Judge) summarised the applicable principles as follows:

> [123] The leading cases as to the principles to be applied on an application for maintenance pending suit are *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45, *G v G (Maintenance Pending Suit: Legal Costs)* [2002] 3 FCR 339, and *M v M (Maintenance Pending Suit)* [2002] 2 FLR 123.
>
> [124] From these cases I derive the following principles:

i) The sole criterion to be applied in determining the application is *"reasonableness"* (s22 Matrimonial Causes Act 1973), which, to my mind, is synonymous with *"fairness"*.

ii) A very important factor in determining fairness is the marital standard of living (*F v F*). This is not to say that the exercise is merely to replicate that standard (*M v M*).

iii) In every maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long term expenditure more aptly to be considered on a final hearing (*F v F*). That budget should be examined critically in every case to exclude forensic exaggeration (*F v F*).

iv) Where the affidavit or Form E disclosure by the payer is obviously deficient the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources (*G v G, M v M*). In such a situation the court should err in favour of the payee.

v) Where the paying party has historically been supported through the bounty of an outsider, and where the payer is asserting that the bounty had been curtailed but where the position of the outsider is ambiguous or unclear, then the court is justified in assuming that the third party will continue to supply the bounty, at least until final trial (*M v M*).

25) These principles were subsequently adopted in *Re G (Maintenance Pending Suit)* [2007] 1 FLR 1674 by Munby J (as he then was) at [5].

26) In *MET v HAT (Interim Maintenance) (No.2)* [2015] 1 FLR 576 Mostyn J stated at [10] that an award for MPS *"is by its very nature a measure designed to hold the ring and to ensure that the claimant can live reasonably pending the final determination of her claims"*.

27) Appellate guidance was given in *Rattan v Kuwad* [2021] 2 FLR 817 by Moylan LJ at [31] – [40] from which following principles can be drawn:

a. the substantive requirement is only that the order must be reasonable. This equates to *"fairness"*, consistent with the overarching objective in financial remedy cases which is that the outcome should be *"fair"* [32];

b. the purpose of an order for MPS is to meet immediate needs [33];

c. the word *"immediate"* in this context does no more than reflect the fact that the court is concerned with an order for maintenance *pending* the final resolution of the financial dispute between the parties. The fact that some items of expenditure are not incurred every month does not mean they should

be excluded for the purposes of determining what maintenance is reasonable [49];

d. the particular circumstances of each case will determine on which issues the court needs to focus and the degree of scrutiny which will be required [33];

e. in every case the key factors are likely to be the parties' respective needs and resources and the marital standard of living but beyond that the court's approach will be tailored to the facts of the particular case [33];

f. in the majority of cases, the family's financial resources are unlikely to be sufficient to enable the marital standard of living to be maintained for both spouses (and the children). However, as a generalisation, the parties' separation does not, of itself, provide a reason for that standard being reduced in the same way that it does not, of itself, provide a reason for that standard to be increased [33];

g. the extent to which a budget requires careful and critical analysis will depend on the circumstances of the case. If it is a *"straightforward list of income needs which were easily appraised"* the budget may not require any particular critical analysis [36 - 38]; and

h. the *"general effect"* of the *TL v ML* principles is accepted but, as with all guidance, they have to be applied in the particular circumstances of the individual case. It may not be necessary for the applicant to provide a specific MPS budget if the income needs as set out in the Form E match the needs for the purposes of the application for maintenance pending suit [38].

28) In *HAT v LAT* [2024] 1 FLR 755 Peel J having referred to *TL v ML* and *Rattan v Kuwad* stated at [19] that *"I reject the submission ... that W should be confined to emergency, immediate relief; that is not consistent with the overarching approach of reasonableness which the authorities endorse."* In *KV v KV* [2024] 2 FLR 951 Peel J having referred to the same two cases stated at [43] that *"I reject the suggestion by H that MPS should only cover emergency needs."*

29) Although in *TL v ML* Nicholas Mostyn QC stated at [124] ii) that the marital standard of living is *"a very important factor"* and in *Rattan v Kuwad* Moylan LJ said it was one of the *"key factors"* this does not mean that the *status quo* is to be maintained and the marital standard of living simply replicated. Nicholas Mostyn QC expressly stated this in *TL v ML and Others* at [124] ii) (*"[t]his is not to say the exercise is merely to replicate that standard"*). Likewise in *R v R (Interim Provision)* [2022] 1 FLR 272 Nicholas Cusworth QC (sitting as a Deputy High Court Judge) stated at [18] that "*As the authorities make clear, I need not strive to replicate exactly the standard of living enjoyed in the marriage, but rather I should*

provide the husband with a reasonable amount, in all of the circumstances of this case …". Most recently in *HA v EN* [2025] EWHC 48 (Fam) Richard Todd KC (sitting as a Deputy High Court Judge) rejected at [55] the submission that *"it is sufficient for this Court to be told that the Wife simply wishes to maintain the status quo"* as the court *"has an inquisitorial duty"* (and referred to *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45 per Thorpe J (as he then was)).

30) This view is consistent with *M v M (Maintenance Pending Suit*) [2002] 2 FLR 123 where Charles J stated at [123]:

> In my judgment, the wife is seeking to read too much into *F v F* when she relies on it to found an argument that the award in this or most cases concerning the super rich shall be designed to maintain the *status quo* or to establish a yardstick that more nearly reflects the marital standard of living and, thus, the *status quo*. In my judgment, such a restriction on the judicial discretion in the determination of what is reasonable in any given case is not something Thorpe J intended.

31) That *"reasonable"*, *"reasonableness"* and *"fairness"* in this context does not mean simply the *status quo* is to be maintained and the marital standard of living replicated even in cases concerning the super rich is also consistent with the fact that in most (but post *Rattan v Kuwad* not every) MPS applications there should be a specific interim budget which excludes capital or long-term expenditure.

32) In *BD v FD* [2016] 1 FLR 390 Moylan J (as he then was) after setting out the *TL v ML* principles quoted at [34] from *G v G* [2010] 2 FLR 1264 (an interim application under CA 1989 Schedule 1) where he had stated at [51] that interim hearings should be pursued only when *"on a broad assessment, the court's intervention is manifestly required"* because at [52] *"[o]therwise parties will be encouraged to engage in what can often be an expensive exercise in the course of the substantive proceedings when the proper forum for the determination of those proceedings, if they cannot be resolved earlier by agreement or otherwise, is the final hearing when the evidence can be properly analysed and the parties' respective submissions can be more critically assessed."* He stated that these remarks *"apply equally"* to MPS applications.

33) In *Rattan v Kuwad* at [40] Moylan LJ contextualised these comments as to when the jurisdiction should be invoked as follows:

> The wife had cash and investments of approximately £1.4m and was living in a house purchased, following the breakdown of the marriage, for £2.9m with funds provided by the husband. The husband was paying, and proposed to continue to pay, maintenance pending suit at the rate of just over £200,000 per year. The wife was seeking an additional sum of between £70,000 and £190,000.

34) As to the nature of the exercise, the court's approach to the calculation of MPS was described in *F v F (Maintenance Pending Suit)* (1983) 4 FLR 382 at p385 by Balcombe J (as he then was) as *"com[ing] to a rough and ready conclusion"* and in *Moore v Moore* [2010] 1 FLR 1413 by Coleridge J (sitting in the Court of Appeal) at [22] as *"sometimes somewhat rough and ready"*. In *Baker v Baker* [2022] EWFC 15 Mostyn J stated at [2] that *Rattan v Kuwad "makes clear that the analysis does not have to be undertaken with close numerical exactitude; a broad approach to the assessment of immediate needs is not only acceptable, but is likely to be commonplace."* However, in *Collardeau-Fuchs v Fuchs* [2022] 2 FLR 957 the same judge stated at [46] (original emphasis) *"the court should try to paint its decision with a fine sable rather than a broad brush, <u>where it has the ability to do so</u>. Of course, in most cases the court will not have either the time or the material to conduct an exhaustive investigation and so the exercise will perforce be rough and ready."* In *HA v EN* Richard Todd KC (sitting as a Deputy High Court Judge) stated at [59] that *"[a]ll maintenance pending suit applications require the application of a broad-brush"* and on specific facts of that case where W had provided no budget he was compelled to exercise his discretion in a way which (at [62]) was *"part paint-roller and part meat-cleaver"*.

35) In the context of cases which concern *"exceptional wealth"* (as so described in *Rattan v Kuwad* per Moylan LJ at [36]), in *F v F (Ancillary Relief: Substantial Assets)* - where the husband accepted that he had capital assets (in 1994) of not less than £150m (a sum which Mostyn J observed in *Collardeau-Fuchs v Fuchs* at [40] made him *"vastly rich"*) and the wife asserted that the husband had said during the marriage that their annual expenditure amounted to £4m - Thorpe J (as he then was) stated at p50:

> I think that it is very important to recognise that in measuring affluence, extravagance and reasonable needs there are no absolutes. All these concepts are comparative … Thus in determining the wife's reasonable needs on an interim basis it is important as a matter of principle that the court should endeavour to determine reasonableness according to the standards of the ultra-rich and to avoid the risk of confining them by the application of scales that would seem generous to ordinary people. Thus I conclude that it would be wrong in principle to determine the application on some broad conclusion that if the wife cannot manage at the rate of a quarter of a million a year, she ought to be able to. I think that it is necessary to establish a yardstick that more nearly reflects the standard of living which has been the norm for the wife ever since marriage and for the husband for considerably longer.

36) This paragraph was cited with approval by Peel J in *KV v KV* at [43] before noting that the wife's annual budget for herself was £4,579,290, and in respect of the children was £515,070 against a background where H put forward the so-called 'millionaire's defence'. H had given no disclosure as to his finances (and was criticised by the court for not having done so at least on an outline basis) but accepted that he would be able to meet reasonable orders made by the court albeit, depending on time frames, he may in due course have to borrow funds. W described

him at [13] as a *“multi-billionaire”* (and in *KV v KV (No. 2)* [2024] EWFC 359 per Sir Jonathan Cohen she described him at [2] as having a net worth of *“several billion dollars*”). Peel J later observed in *KV v KV* as follows:

> [46] … I take into account (i) that H is a man of vast wealth, who falls in the super rich bracket; (ii) from November 2021 when the parties separated there was in practical terms no restraint on W's expenditure until W issued her divorce petition; and (iii) W led a lifestyle both during and after the marriage of the sort available only to the super rich.

37) However Thorpe J went on in *F v F (Ancillary Relief: Substantial Assets)* at p50/51:

> … even in the case of a family of unusual riches it would surely be wrong for the court not to look carefully and indeed critically at the suggested budget. … Inevitably it is a litigation exercise. It is in part an advocacy exercise. There is every incentive to put figures as high as they reasonably can be put and perhaps some temptation to gild the lily … I suppose in a sense the neatest example is the estimated figure for petrol. As the wife's evidence makes plain, if you are very rich you can spend £40 on buying a candle. But a gallon of petrol or a litre of petrol costs the same whoever you are … from the dog's point of view there is not a lot of difference in being owned by a very rich family or simply a comfortably off family …

38) Any underprovision or overprovision in the order for MPS can be corrected when the account comes to be taken at the final hearing (*F v F (Ancillary Relief: Substantial Assets*), *H v H* [2009] 2 FLR 795 per Singer J, *MET v HAT (Interim Maintenance) (No.2)* per Mostyn J, and *HAT v LAT*).

39) Miss Bangay submitted that with assets at this level, any injustice can properly be remedied at final hearing and that would be *“far preferable”* than W and the children living at a level removed from what they are used to.

<u>H’s income</u>

40) On W’s behalf I am invited to assess H’s income for the last three years as follows:

	2022	**2023**	**2024**
Company A [salary]	3,204	3,204	3,204
	49,463	49,463	49,463
Company N [salary]	<u>55,502</u>	<u>55,502</u>	<u>55,502</u>
	108,169	**108,169**	**108,169**
Company B [dividends] [X currency][1]	259,643	324,553	557,377
[GBP]	**282,221**[2]	**352,775**	**605,845**
Company E [dividends] [X currency][3]	235,349	235,349	176,512
[GBP]	**<u>255,814</u>**	**<u>255,814</u>**	**<u>191,860</u>**

[1] This is the calendar year in which the dividends were paid but they relate to the previous calendar year (e.g. the dividends paid in 2024 relate to 2023). I have adjusted Miss Bangay and Mr. Blatchly’s table which showed the Company B dividends in the year to which they related but the Company E dividends in the year in which they were paid.

[2] I have used the same *fx* rate as for 2023 for simplicity.

[3] As per fn. 1.

	646,204	716,758	905,874
Company L [dividends]	3,500,000	3,500,000	3,500,000
	4,146,204	4,216,758	4,405,874

41) It is common ground that no tax is declared on these dividends in this jurisdiction or elsewhere.

42) On H's behalf the salary figures (which total £108,169) are accepted as are the Company E dividends (save that a slightly different *fx* rate is used so the figure for 2024 is £188,566 rather than £176,511). It is said, however, that whilst the salary is paid to H directly, the dividends are paid into an account in H's father's name (as the dividends received by H and his siblings have always been). This is an issue to which I shall return. However, in addition it is said that:

    a. H is entitled to receive only 69.874% of the dividends on the Company B shares as he holds the balance of the shares on trust for his father who is entitled to the dividends paid in respect of these shares; and

    b. H has no entitlement to the dividends received by virtue of his 25% shareholdings in Company L.

43) H's total income for 2024 is therefore said to be £712,795 (i.e. salary of £108,169, Company B dividends of £416,060 (which differs from 70% of £605,845 – i.e. £424,092 – due to a slightly different *fx* rate), and Company E dividends of £188,566).

44) The parties differing approaches arise in part from the following:

    a. H disclosed with his Replies to Questionnaire a Deed of Confirmation and Indemnity dated 24th July 2019 signed by his father and other family members including W. This provides that legal title to an asset is determinative of beneficial interest. W relies on this document; and

    b. H disclosed at court on 10th January 2025 a Deed of Trust between himself and his father, also dated 24th July 2019, which lists a schedule of assets owned by H legally and beneficially (including the Company B and Company E shares) but states that any assets in H's name which are not identified in the schedule are to be treated as being owned beneficially by his father. H relies on this document.

45) In relation to the shares held in Company L, H states that as the company was not incorporated until 2020 it is not caught by the 2019 Deed of Confirmation and Indemnity (and for the same reason by the 2019 Deed of Trust). H states that the beneficial ownership of the underlying assets rests with his father and the dividends have always been paid to his father. On W's behalf it is said that H has produced no

evidence of the beneficial ownership and whether the dividends have been paid to his father or not, H is the legal owner of the shares, the presumption is that beneficial title follows legal title, H is therefore entitled to receive the dividends and has received £7m in the past two years. In response, Miss Phipps reminds me that she sought permission to file a statement from H's father at the hearing on 10th January 2025, Miss Bangay objected to the same, and I refused permission. As such she submits it is unfair for Miss Bangay to say there is no third-party evidence of the beneficial ownership.

46) I do have some third-party evidence in relation to the Company L shares. H has adduced an email from H's father's accountant dated 24th January 2025 in response to a letter from H's solicitors dated 21st January 2025. In this email he states *inter alia* that "*[a]ll of the dividends for [Company L] is always received from day 1 by [H's father] and used mainly for [philanthropy]. Some is used for other expenses of [H's father]. The company is fully owned by [H's father].*"

47) I accept (per *TL v ML*) that where the disclosure by the payer is *"obviously deficient"* I may make *"robust assumptions"* about his ability to pay, that I am not *"confined to the mere say-so of the payer"* and in such a situation I should err in favour of the payee. However, in this case (or more accurately I should say at least at this stage of this case), and with one exception that shall I deal with below, I do not consider H's disclosure to be *"obviously deficient"*. As Miss Phipps has submitted, H's disclosure has been voluminous. Of course, this is not necessarily the same as giving full and frank disclosure but it is not inconsistent with the same whereas a paucity of disclosure is more likely to be. Further, as Miss Phipps also submitted W does not accept the truth of H's disclosure but this is not the same as it being deficient.

48) I do not know what conclusion I will reach when the issue of beneficial ownership of the Company L shares is fully ventilated and the evidence tested before me in due course. However, at this interim stage I do not find on the balance of probabilities that H is entitled to receive dividend income on these shares of £3.5 m a year in part because I am not satisfied that in relation to this issue H's evidence is *"obviously deficient"* and in part because this is such a significant amount.

49) As to the dividends from the shares owned by H in Company B, the email from H's father's accountant dated 24th January 2025 states that although there are 1,857,924 shares held in his name, 559,710 of these are beneficially held for H's father to support his philanthropy and so H receives the dividends only on the 1,298,214 shares (i.e. 69.874%) that he actually owns.

50) I take a different view at this interim stage in relation to these shares than I do those held in Company L. First, they have been held by H since prior to 2019 and hence they are *prima facie* caught by the 2019 Deed of Confirmation and Indemnity

(which would suggest that all these shares are beneficially his) and they are also listed in the 2019 Deed of Trust as all being beneficially owned by H with no caveat. I say *prima facie* because H states that he had transferred c. 576,000 of the shares to his father in 2015 (this would in fact be a transfer back to his father as they were all originally held by him), hence they were not in H's ownership in 2019 (and hence were outwith both Deeds) and were not transferred back to him until 2023. As a consequence it is said they are held for the benefit of H's father.

51) At this stage at least I am unwilling to make such a finding given this is inconsistent with both Deeds. I am also conscious that this is at least in relative terms a small sum.

52) There is one area, however, where I do agree with Miss Bangay that H's disclosure is *"obviously deficient"* and hence I may make *"robust assumptions"* about his ability to pay. H's father's accountant's email dated 24th January 2025 stated he was on holiday and not back into his office until 26th January 2025 and so the information he provided was without access to his files. In relation to the public shares (i.e. Company B and Company E) H's father's accountant confirmed that all dividends due were paid into an account held by H's father. Thereafter he continued as follows:

> When siblings need to take from the balance they have credit for, they can if funds are available or they wait until funds are available. They ask me to send funds to their account or somewhere else to pay bills or for other things. At most times of the many years we have done this, siblings have usually been in credit which is added to every year when a new dividend comes since they have not needed the funds and have left them in [H's father's] account to be used for [philanthropy]. Less often siblings are in debit if they take out more than their credited dividends, but this is automatically fixed when the next dividend comes and we do not let any debits grew too large. We do not apply interest on credit or debit amounts as these are running accounts and not loans …
>
> I cannot provide now a schedule of payments since I do not have the files.
>
> Like I said, for the payments made from [H's father] to [H] (or anywhere else [H] requests), all dividend amounts are credited to the sibling who owns the shares and then they draw on those credits and are debited with the amounts withdrawn. It is a system we have used for many years.
>
> I keep a record of the debits and credits mentioned above.

53) H's father's accountant was back in his office from 26th January 2025. Miss Bangay submitted, and I agree, that it would have been possible for him to have made available to H (and therefore to me) H's running account. She also submitted, and I also agree (by way of a *"robust assumption"*) that this has not been disclosed as to do so would be unhelpful to H. When I asked Miss Phipps whether there were monies standing to H's credit she said she did not know but she *"doubted it"*. Miss

Bangay observed in her response that Miss Phipps could have taken H's instructions at that point but chose not to do so and H is the one person who does know what monies stand to his credit.

54) In all the circumstances - and conscious of the principles as to adverse inferences as summarised in *NG v SG (Appeal: Non-Disclosure)* [2012] 1 FLR 1211 per Mostyn J and the subsequent appellant guidance given in *Moher v Moher* [2020] 1 FLR 255 per Moylan LJ – I am satisfied that there stands additional monies on which H may draw. However, and consistent with *Moher*, I cannot make a specific determination either as to a figure or a bracket.

55) Miss Bangay does not include within what she describes as W's *"best sketch of H's current income"* H's income (if any) from his 20% shareholding in Company O (and H discloses no income from this source), any additional monies provided to H by his father (which H asserts to be loans) nor whether he has any additional income from Company A or via its majority shareholder (Company N) or any other Company N related companies. At least at this interim stage I do not likewise.

56) At this stage of the proceedings I therefore compute H's income for the last three years to be as follows:

	2022	**2023**	**2024**
Company A [salary]	3,204	3,204	3,204
	49,463	49,463	49,463
Company N [salary]	55,502	55,502	55,502
	108,169	**108,169**	**108,169**
Company B [dividends] [X currency]	259,643	324,553	557,377
[GBP]	**282,221**	**352,775**	**605,845**
Company E [dividends] [X currency]	235,349	235,349	176,512
[GBP]	**255,814**	**255,814**	**191,860**
	646,204	**716,758**	**905,874**
Company L [dividends]	n/a	n/a	n/a
	646,204 + unknown credit balance	**716,758 + unknown credit balance**	**905,874 + unknown credit balance**

57) H states that he does not as yet know what the dividends for year-end 2024 (payable in 2025) will be on the Company B or Company E shares, as they have yet to be declared (the dividends on the Company E shares have been paid in May or June in the last three years). It is said on H's behalf that given the ongoing volatility in the geographical area these companies are located (and it is said that Company E has been particularly badly affected) he expects to receive a lower level of dividends in 2025.

58) It is difficult for me to form a view as to the likelihood of this. However, given that the Company E dividend paid in 2024 in respect of 2023 was already materially

lower than that paid in respect of 2021 and 2022 (where the figures were identical) I shall not assume any reduction for the current year in comparison to 2024.

59) Therefore on an interim basis I assess H's income to be c. £900,000 pa (plus an unknown credit balance) rather than the c. £4 million pa contended for on W's behalf or the c. £700,000 pa contended for on H's behalf.

<u>W's historic receipt of monies</u>

60) Miss Bangay and Mr. Blatchly prepared an analysis of monies said to have been received by W from H from 1st January 2023 – 6th March 2024, and either credited into one of three bank accounts, received in cash (an average amount of £1,000 pw/£4,333 pm) or W's spend as a secondary cardholder on one of H's credit cards. It includes materially higher receipts of credits into one of the bank accounts in May 2023 – July 2023 inclusive which W states was needed to pay household and other costs in advance of and during the summer.

61) This analysis suggests an average receipt by W of £34,191 pm in 2023 and of £28,766 pm for the first c. nine/ten weeks of 2024 which annualised is £44,940 pm. It is said that this figure does not include W's spending on three other of H's credit cards.

62) H disputes these figures. He submits that the cash figure paid was an average of c. £3,562 pm rather than £4,333 pm and the amount paid into W's bank account was higher in May 2023 – July 2023 inclusive as it was paid to allow her to pay the builders working on the family home (which W in turn disputes as she says H paid for almost all of the building work). H's figure for 2023 is therefore between £25,607 pm and £27,614 pm. As for 2024, it is said that it is flawed simply to *pro rata* the figure over the year as annualisation assumes payment at the same rate beyond May 2024 which is when the MPS order was originally made by consent. H's position is therefore £307,279 (i.e. his lower annualised figure for 2023) + £86,298 (i.e. the actual receipt for January 2024 – March 2024) = £393,577 ÷ 15 months = £26,238 pm (although of course the receipts do not go to the end of March 2024 and therefore the figure calculated on this basis is probably about £1,000 pm higher). It is also said that W's figure of £44,490 pm for 2024 cannot be right for the same reason as it assumes a position beyond the May 2024 order and the actual monthly amount is the relevant figure. It is also said that there was no expenditure by W on H's three other credit cards.

63) Both these analyses differ from the ones in the parties' respective statements. W's analysis of her historic receipts from January 2023 – August 2024 was said to be an average of £38,161 pm (a schedule which H described as being *"breathtaking in its intellectual and mathematical dishonesty"*) whereas H's analysis was an average of £25,912 pm.

64) I prefer Miss Phipps' analysis of these figures for two reasons. First I was not satisfied as to the reason(s) why it was said on W's behalf that the credits received into one of her bank accounts was higher from May 2023 – July 2023. There was a lack of specificity as to why (for example) the housekeeper had to be paid in advance for these months. To the extent it was suggested that W had to pay these costs before she was abroad with the children over their summer holidays these would not have started until July 2023. I am therefore satisfied (at least on an interim basis) that the increase related to having the funds to make payment to the builders. Secondly, it is clearly artificial to annualise payments made for the first nine/ten weeks of 2024 when from late May 2024 these payments ceased and were replaced by the agreed MPS figure of £29,500 pm.

65) I therefore determine (on an interim basis) that W received a sum from H which fluctuated but was in the region of c. £27,000 pm.

<u>W's interim income needs</u>

66) I have received detailed analyses of W's interim budget from both parties' counsel. Miss Phipps' and Miss O'Driscoll-Breen's version has 90 numbered lines. As a consequence, I am mostly able to paint with something of a fine sable in this case. Where there are differences between the presentation of the parties' respective figures, I have used Miss Phipps' and Miss O'Driscoll-Breen's figures.

67) W's Form E budget totals £801,213 pa (there is an internal arithmetical error which shows it at £801,462 pa). Her interim budget (including the sums H agrees to pay) totals £678,467 pa. H's interim budget for W (including the sums he agrees to pay) is £437,240 pa.

68) As Miss Phipps observes, where W has not excluded an item entirely from her Form E budget on an interim basis (i.e. boiler replacement, tree surgeon, cash, charity, private health insurance, professional and legal fees, electrical equipment, household furniture, gardening furniture, white goods, PayPal/Amazon, and Klarna) she has either increased her figures by 3% from September 2024 for inflation or used a higher figure in her interim budget than in her Form E budget.

69) I see no reason to increase W's figures by any inflation rate just a few months after her Form E budget or for any of the interim figures to be higher than her Form E budget. In respect of these figures (and save for the figures that I shall go on to deal with individually) I therefore prefer and adopt the figures put forward by H.

70) The per annum figures that I deal with individually are as follows:

   a. internal/external maintenance – W seeks £32,188 (about 50% of her Form E figure) which was calculated by Pennywise at 1% of the overall property value per annum and is their standard working practice). She emphasises that the

property is Grade 2 listed; H states £2,500 on the basis that W's own case is that the parties have spent £300,000 - £315,000 on the FMH since 2023. In my view (and here I do paint with a broadbrush) the reasonable figure is £7,500;

b. part-time (weekend) housekeeper – W seeks £10,712; H states this is not an interim cost. Given this housekeeper has been with the parties for 14 years I am satisfied the uninflated figure of £10,400 is a reasonable expense;
c. *fx* charges – W seeks £124; H states this is not an interim cost. I agree;
d. life insurance – W seeks £7,692; H states this is not an interim cost (not least because neither party currently has life insurance). I agree;
e. Western Union – W seeks £381 (a little under 50% of her Form E figure); H states this is not an interim cost. I agree;
f. groceries – W seeks £74,984 on the basis that she has to feed seven people three meals a day; H states £52,000. I agree and consider £1,000 pw a (more than) reasonable figure particularly as an additional dining-out figure of £12,000 pa for W and £7,800 pa for the children was not challenged;
g. household sundries – W seeks £1,601; H states this is covered by the grocery budget. I agree;
h. children's activities and classes – W estimates a figure of £25,000 which she seeks that H pay with no cap; H suggests £16,631 which was her uninflated Form E figure. I agree;
i. children's health (doctors, optician, physio) – H agrees to pay these save for one of the children's therapists which W will pay;
j. clothes and shoes – W seeks £30,000; H states £6,000. In my view (and again here I paint with a broad brush) the reasonable figure is £15,000;
k. dermatologist – W seeks £6,180; H states £1,000. I disagree;
l. holidays – W seeks £123,800; H states £25,202 both on the basis that W's figure was predicated on a false analysis of the holidays the parties took during the marriage and was also a grossly exaggerated sum. It was also said that as the children's time would now be divided between the parties the most W could seek would be 50% of her budget even if it were correct. I heard lengthy submissions as to how many holidays the parties took in 2023, where they stayed, the class of travel and/or hotel and who paid for the same. There has been much inter-solicitor correspondence on the issue which Miss Bangay described as *"unedifying"* which is a description I agree. In my view (and again here I paint with a broadbrush) the reasonable figure is £55,000;
m. car wash – W seeks £400; H states this is not an interim cost. I disagree; and
n. taxis – W seeks £9,600; H states £2,500. Both parties agree that this is a legitimate cost principally incurred by one of their children. I shall use W's uninflated Form E figure of £5,844.

71) Having made these adjustments W's interim budget comes to £500,807 pa (as opposed to the £678,467 pa sought or the £437,240 pa offered). After deducting those costs which H proposes to pay directly (c. £143,759) this reduces the payment

to be made to W to £357,048 pa or £29,754 pm. I shall round this down to £29,750 pm.

72) I attach for the benefit of the parties my schedule which sets out these figures.

73) In my view £29,750 pm is the reasonable and fair figure for H to pay on an interim basis rather than the £43,955 pm sought or the £24,438 pm offered. It takes proper account of the marital standard of living (which was clearly very high even if W may have perhaps overplayed it and H perhaps underplayed it) rather than simply (and without more) replicating the same. It allows W to meet her immediate needs. In particular I am satisfied that I have determined reasonableness according to the standards of the rich or the HNW (if not the super-rich, the ultra-rich, or the exceptionally wealthy although no doubt the boundaries between these categories may be difficult to determine).

74) I am fortified that this is the appropriate sum because it is not dissimilar to the figure of £29,500 pm the parties themselves agreed on 23rd May 2024 (it is not all but identical as this figure excluded reasonable holiday expenditure on H's AmEx card). Miss Bangay described this figure as both the *"starting point"* and *"foundation stone"* of W's application but she urged me to depart from it significantly on the basis that W was not fully appraised of H's financial affairs during the parties' marriage, the figure was not supported by a statement and/or a budget, and was simply one W worked out without access to documents as being what she had broadly received into her accounts and in cash each month to meet her day-to-day expenses, and pay the housekeepers and gardener.

75) However, this was the figure sought by her on that occasion. As W stated at paragraph 5 of her statement of 23rd October 2024, it *"was alighted on as it represented a broad continuation of the financial support during the marriage."*

76) Miss Bangay also submitted the parties *"hadn't expected to address interim provision"* on 23rd May 2024. If correct, I find this somewhat surprising given W had served her unissued application on H the previous day which suggests it might have been expected to be the subject of negotiation at court. This is also potentially inconsistent with paragraph 3 of W's statement of 23rd October 2024 when she stated that a statement in support of her MPS application *"was to follow in the event that the application was contested by [H]"*.

77) It is also relevant in this context that (although disputed by Miss Bangay) it appears that W had begun preparing for an interim maintenance application in February 2024 (i.e. some three months previously). On 16th May 2024 W sent H a copy of an invoice from her solicitors from which it can be seen that she first met with her solicitors on 15th January 2024 and a statement in support of her claim for MPS was drafted in part on 13th February 2024 and in part on 15th February 2024.

78) Further, the parties were not short of time on 23rd May 2024 and were represented by solicitors and counsel of the highest calibre. Both parties were at court (or in counsel's chambers) all day and represented by Miss Bangay and Miss Phipps respectively. They did not come in before me to confirm they had reached agreement until shortly after 5 pm.

79) It is also of relevance that H agreed to pay the base figure of £29,500 pm sought without demur or negotiation. He could have required an interim budget before agreeing a figure but did not do so (although I acknowledge he states he did so in a state of shock and disbelief at from his perspective the sudden implosion of his marriage).

80) I am likewise fortified that this is the appropriate interim figure as it is not dissimilar to my assessment of the fluctuating figure of c. £27,000 pm which W has historically received.

81) I am satisfied that this figure is affordable for H both because of my assessment (on an interim basis) of his income and because (as I have observed) it is relatively close to the figure H agreed to pay on 23rd May 2024.

82) For completeness I should record that I do not accept the submission made on W's behalf that H agreed to transfer the FMH to W on 23rd May 2024 which he considered to be worth £7.8m "*as if it was nothing*" and he agreed to pay £29,500 pm *"at a time when he was expecting to have to live elsewhere and meet all those costs too"* and that *"[w]hen he gave the undertaking to maintain the status quo, it was expected that he would be living elsewhere".*

83) As to the former there is no evidence to support the same and H did so as a *quid pro quo* for the interim preservation order made on 14th May 2024 pursuant to FPR 2010 r20.2(1)(c)(i) being discharged. As to the latter this ignores the fact there is a recital to the relevant order of 23rd May 2024 that H agreed to transfer the FMH to W *"without prejudice to his position in the financial remedy proceedings and the question of the treatment of the property within those proceedings"* and *"upon the basis that he has an absolute right to continue to occupy the property and his matrimonial home rights are respected"*. Given this recital it cannot be right for W's solicitors to have said in their Open Proposals of 4th February 2025 that in his MPS Statement of 26th January 2025 H *"loses no opportunity to accuse [W] of acting dishonestly and in bad faith. Yet, [H] insists on remaining in the family home whilst accepting that the marriage has ended and the property having been transferred to [W]."*

84) I also do not accept Miss Bangay's submission that given the asset level in this case level it would be *"far preferable"* to remedy any injustice at the final hearing (which the parties agree is likely to be sometime next year) rather than W and the

children living at a level removed from what they are used to. The court should always seek to avoid injustice whatever the asset level in a case may be. As Balcombe J (as he then was) observed in *F v F (Maintenance Pending Suit)* at p385 *"administrative expediency ... cannot be allowed to work injustice in an individual case."* In any event I do not consider that W and the children will be living at a level materially removed from what they are used to.

85) The parties are released from their undertakings as given to me on 23rd May 2024 and/or the same are varied (pursuant to *Birch v Birch* [2017] 2 FLR 1031) so far as is necessary to give effect to this judgment.

Backdating

86) In W's solicitors' letter of 4th February 2025 (said to be her Open Proposal for the MPS application) it was said that W proposed H pay her the sum of £43,955 pm with effect from 1st February 2025. No backdating was sought. However on W's behalf Miss Bangay sought that the order be backdated to 23rd October 2024.

87) If backdating was justified at all, I cannot see that it would be to a date earlier than the application that set out what W was seeking (i.e. 6th January 2025) and when she put forward an interim budget for the first time. However, given the relative closeness between what I have ordered and what H has been paying since my order of 23rd May 2024 I do not consider that backdating is justified or proportionate. I also fear that backdating may well generate extensive inter-solicitor correspondence as to the sums that should be credited against the backdated element of the award. Hence there are no arrears payable.

Other

88) W seeks she is reimbursed for the deductions H has made from sums paid to her pursuant to my order of 23rd May 2024. Miss Bangay submitted that given H's wealth his *"sheer pettiness"* has been *"breathtaking"*. She also stated that it was not possible fully to quantify the same at this stage as H had only provided piecemeal information in relation thereto despite repeated requests.

89) Miss Phipps disagreed and referred to paragraph 32 of H's statement of 26th January 2025 in which he listed the amounts deducted over the eight months and when and how this had been dealt with between the parties and/or their solicitors. She stated the total deductions including those made in respects of February 2025 were c. £20,000. It is said that H made deductions when either (i) these were agreed; or (ii) W incurred expenditure on his credit card which was not reasonable and therefore not in accordance with her undertaking.

90) In relative terms these sums are *de minimis* (although I am aware of W's contention that they are an exercise of coercive and controlling behaviour on H's part which he

denies). In an exercise of proportionality, I do not consider that reimbursement is appropriate.

91) W also seeks to be repaid the sums paid by her to the builders since 23rd May 2024 for the renovation works on the children's bedrooms. It was, however, Miss Bangay's position that these works had been almost entirely funded by H (and hence were not the reason why W received the increased sums from H in May 2024 – July 2024 inclusive) although some relatively small sums were paid by W.

92) These sums have not been quantified and, in the circumstances, I do not consider it proportionate for this to be interrogated further.

Costs

LSPO

93) In my judgment of 16th January 2025 I stated I would deal with the costs of the LSPO application on 11th February 2025.

94) W seeks an order that H shall pay W's costs of that hearing to be summarily assessed on the indemnity basis at £44,081 by 25th February 2025. An N260 in support of that figure was served dated 28th January 2025. Miss Phipps submits there should be no order for costs.

95) By way of comparison, H's costs referable to that application are £55,043.

96) In my judgment of 16th January 2025 I noted that in *Rubin v Rubin* [2014] 2 FLR 1018 Mostyn J stated at [13] (xiii) as follows:

> If the application for a LSPO seeks an award including the costs of that very application, the court should bear in mind s22ZA(9), whereby a party's bill of costs in assessment proceedings is treated as reduced by the amount of any LSPO made in his or her favour. Thus, if a LSPO is made in an amount which includes the anticipated costs of that very application for the LSPO, then an order for the costs of that application will not bite save to the extent that the actual costs of the application may exceed such part of the LSPO as is referable thereto.

97) Miss Bangay confirmed to me that my LSPO award did not include the costs of that application.

98) The general rule in financial remedy proceedings that the court will not make a costs order against a party does not apply to interim financial orders (FPR 2010 r28.3(4)(b)(i)). CPR 1998 Part 44 (as amended by FPR r 28.2(1)) applies. By r44.2(1) the court has discretion as to whether costs are payable by one party to another, in what amount, and when they are to be paid. By r44.6(1)(a) the court may summarily assess the same. As there is no presumption that there will either be no

order for costs or that costs will follow the event these have become known as ‘clean sheet’ cases (as so described in *Jones v Jones* [2009] 1 FLR 1287 per Wilson LJ (as he then was) at [53]). Following *Gojkovic v Gojkovic (No. 2)* [1991] 2 FLR 233 (as approved in *Solomon v Solomon* [2013] EWCA Civ 1095) ‘clean sheet’ cases are sometimes referred to as having a ‘soft presumption’ or ‘soft starting point’ in favour of costs. *Calderbank* offers are admissible.

99) In support of her application it was said on W’s behalf that (i) W served a full LSPO budget on 20th November 2024; (ii) there was no response so W had no option but to issue her application; (iii) H made no offer at all until 12.31 pm on the day before the hearing; and (iv) his offer was only £250,000 whereas I ordered £752,975.

100) On H’s behalf it was said that W had sought £1,121,467 and as the application was not made until 18th December 2024 there were relatively few working days to respond prior to the hearing on 10th January 2025 given the Christmas and New Year break. H had no choice to defend the application given the enormous sum sought and W made no effort to compromise. It was also said that there would have been a day’s hearing whatever sum H had proposed. Miss Phipps also submitted (rightly) that although W’s solicitors provided at H’s request detailed invoices evidencing her historic legal costs H was not informed as to the breakdown of the figures between the financial remedy proceedings (which I ordered to be paid) and the FLA 1996 proceedings (which I did not) until during the hearing on 10th January 2025 itself.

101) Miss Phipps also submitted that had W not issued a fresh application for MPS, both the LSPO applications could have been determined on the same day but W’s application led to another full day’s hearing being listed. Given that the LSPO hearing concluded at 4.15 pm and the MPS hearing at 4.45 pm I am unsure whether this is likely to have been correct.

102) Neither party made a *Calderbank* offer.

103) Pursuant to CPR r44.2(4), in deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including (a) the conduct of all the parties (which includes at sub-rule (5)(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim); and (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful.

104) W brought the application and she succeeded. The ‘soft presumption’ is therefore engaged. I see no reason for it to be displaced given that H made no offer until the day before the hearing and it was materially less than the sum I ordered. As to what is the appropriate order, and taking into account the degree to which W succeeded in her application, and the other matters referred to above, I consider an order should be made in W’s favour as to 80% of her costs.

105) The basis of such assessment (standard or indemnity) is set out in CPR r44.3. An appellate expression of the test whether costs should be awarded on the indemnity basis can be found in *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879 per Walker LJ at [39] when he said:

> The question will always be: is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?

106) A similar observation was made in the family law context by Mostyn J in *JM v CZ (Costs: Ex Parte Order)* [2015] 1 FLR 559 at [23]:

> … Indemnity costs are awarded in cases only where there has been some conduct by the party liable to pay the costs which takes the case out of the norm – see in that regard *Three Rivers District Council & Ors v Governor and Company of the Bank of England* [2006] EWHC 816 (Comm), per Tomlinson J (as he then was).

107) Miss Bangay and Mr. Blatchly specifically referred me to *Three Rivers*. The principles are as summarised at [25]. At sub-paragraph (2) it was said that *"[t]he critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstance which takes the case out of the norm"*.

108) *Excelsior* also makes it clear that the pre-CPR authorities which often suggested that indemnity costs were only warranted as a punishment or where there was a need to express moral outrage were to be put aside.

109) Miss Bangay and Mr. Blatchly summarised why this case is taken *"out of the norm"* at paragraph 46 of their Note as follows:

> Where a litigant fails to engage in any discussion to resolve an issue and fails to make an offer until the eve of the hearing and, when they do make one, it is both hopeless and contains unwarranted attacks on W and her solicitors, such conduct is out of the norm and should be deprecated. H can seemingly litigate with impunity having regard to his resources whereas, as H well knows, W is entirely dependent on H to fund her costs. Not to mark its disapproval of H's conduct with an indemnity costs order the court would be in effect giving approval to H's deliberately obstructive approach to this aspect of the litigation.

110) Miss Bangay doubled down on this in her oral submissions. She stated that if I did not make an order for indemnity costs I would be *"sending a message*" to H that he can litigate *"with impunity"*.

111) In my view notwithstanding Miss Bangay's submissions there is nothing in H's litigation conduct that can properly be said to take this case "*out of the norm"*. In

my view the costs order should be assessed on the standard basis.

112) Pursuant to r44.4(1), in assessing costs on the standard basis the court shall have regard to all the circumstances in deciding whether costs were (i) proportionately and reasonably incurred; or (ii) proportionate and reasonable in amount. The court shall also have regard to the matters set-out in sub-rule (3) which include (a) the conduct of all the parties (which includes in particular the efforts made, if any, before and during the proceedings in order to try to resolve the dispute); (b) the amount or value of any money or property involved; and (c) the importance of the matter to all the parties.

113) Taking all these matters into account I consider that by way of summary assessment the costs ought to be reduced by 15%.

114) I therefore order that W shall receive 85% of 80% of the costs claimed on her behalf – i.e. £29,975 (inclusive of VAT and disbursements). This sum shall be paid by H within 14 days.

<u>MPS</u>

115) W seeks an order that H shall pay W's costs of the MPS application to be summarily assessed on the standard basis at £72,031 by 4 pm on 25th February 2025.

116) I shall await to hear from the parties as to their respective positions in relation to the costs of this application. The same costs rules apply as in relation to the LSPO application. I do not know if any *Calderbank* offers have been made.

117) I shall therefore limit my observations at this stage to the following that may (or may not) have some relevance to the question of costs of this application.

118) First, with hindsight I can see the tension in H's undertaking of 23rd May 2024 between the words *"maintain the status quo"* (on which W relies and says it means what it says) and the words *"comprising"* (on which H relies and says it means what it says). The question is whether the latter qualifies (and restricts) the former: W says that it did not and she expected H to continue to pay all that he had paid hitherto in relation to family expenses and expenses in respect of the family home (what she described as the *"spirit"* of the undertaking) and that Miss Phipps did not say to the contrary when the undertaking was given to me; whereas H says that it did and he expected W to take over those costs not specifically listed.

119) Second, the figure I have found to be reasonable (at least in relation to the payments that are to be made directly to W) is very similar to the figure the parties agreed upon on 29th May 2024. I have been told that W's costs of this application are £72,031 and H's costs are c. £82,000 (i.e. a total of c. £154,000). On <u>both</u> sides

there must surely be some reflection on whether these costs were justified. I am aware in saying this that it is said on H's behalf that his response was a reactive one in that he would have been willing to continue to comply with the order of 29th May 2024 in full and it was only when W made her application and produced an interim budget that H analysed the same, considered he had agreed an excessive sum, and hence offered a lower figure.

120) Third, in *LM v DM (Costs Ruling)* [2022] 1 FLR 393 Mostyn J observed (at [1]) that the obligation to negotiate openly and reasonably *"is especially important in interim applications, which ought to be pragmatically settled in circumstances where by definition they do not make a final determination of the parties' positions"*. Although the applicant succeeded she (at [3]) *"made no serious attempt to negotiate openly and reasonably beyond setting out her in-court forensic position in her witness statements"* and litigants (at [4]) *"must learn that they will suffer a cost penalty if they do not negotiate openly and reasonably"*. The wife was therefore deprived of 50% of the costs award which would otherwise have been made in her favour.

121) I am also mindful of *LI v FT (Maintenance Pending Suit: Costs)* [2024] EWFC 342 (B) where (although not technically citeable) Deputy District Judge Mark Harrop observed as follows before concluding there should be no order for costs:

> [36] Looking at the situation in the round, and considering in particular the factors listed at CPR 44.2(4), I consider that both parties bear some responsibility for this application reaching a contested hearing, that both failed to make reasonable concessions that could have avoided (or reduced the scope of) the hearing, and that having come to court for determination both have succeeded in part and lost in part. Overall, I struggle to find either of them significantly more culpable than the other such that it would be just to impose a costs order one way rather than the other.

122) Fourth, I must always bear in mind the overriding objective at FPR 2010 r1.1(1) to deal with cases justly and this includes so far as is practicable saving expense and of allotting to a case an appropriate share of the court's resources (sub-rules (2)(d) and (e) respectively). As Moylan J (as he then was) stated in *BD v FD (Maintenance Pending Suit)*:

> [37] … To state the obvious, the overriding objective puts proportionality at the centre of litigation. Courts, in the past, might have been more willing to provide an opportunity for parties to have interim issues addressed. The climate has changed. Courts are more aware of and more focused on the need to protect their own resources and on the need to seek to ensure that legal costs are not disproportionate.

123) More widely, according to their respective Forms H, W's financial remedy costs are now £469,717 and she expects to incur further costs of £630,000 between now and the Private FDR Appointment to be heard by Sir Philip Moor on 2nd and 3rd June

2025. H's figures are £432,818 and £309,054 respectively. The parties' combined figures are therefore c. £902,000 incurred and c. £939,000 anticipated to the PFDR Appointment – an estimated total of £1.84 million by this date. This obviously takes no account of the costs the parties have incurred in the FLA 1996 proceedings (which remain listed for final hearing on 30th June 2025 with a time-estimate of five days).

124) I remind both parties about what I said in my judgment of 16th January 2025 about the current costs trajectory in this case.

Addendum

125) I circulated this judgment in draft on 17th February 2025 and sought editorial corrections and/or requests for clarification.

126) I received a small number of such corrections from both counsel and have accepted the same. Neither party made any requests for clarification.

127) Miss Phipps confirmed that an application for costs would be made on H's behalf. She suggested, and I agree, the most cost-effective way of dealing with this is for me to determine costs at the next directions hearing which is listed on 2nd April 2025.

128) In accordance with the *Practice Guidance: Transparency in the Family Courts: Publication of Judgments* issued by the President of the Family Division on 19th June 2024 I consider it is appropriate for this judgment to be published. Having carried out the *"balancing exercise"* espoused in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 which has regard to the interests of the parties and the public as protected by ECHR Articles 6, 8 and 10, considered in the particular circumstances of this individual case, the judgment shall be published on a fully anonymised basis.

129) That is my judgment.

NICHOLAS ALLEN KC

19th February 2025