Neutral Citation Number: [2022] EWFC 35

Case No: **LV 16 D 01012**

IN THE FAMILY COURT SITTING AT THE HIGH COURT FAMILY DIVISION
IN THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1/04/2022

Before :

MR NICHOLAS CUSWORTH QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

BETWEEN:

LAUREN BELINDA SIMON

Applicant

and

PAUL MARK SIMON

Respondent

And

INTEGRO FUNDING LIMITED ('LEVEL')

Intervener

- -

The **Applicant** did not appear or participate and was not represented

Richard Todd QC and **Edward Benson** (instructed by Paradigm Family Law) for the **Respondent**

Jonathan Southgate QC and **Simon Calhaem** (instructed by Bloom Budd LLP) for the **Intervener**

Hearing date: 21st March 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR NICHOLAS CUSWORTH QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

This judgment was handed down REMOTELY in private on 1 April 2022. It consists of 26 paragraphs and has been signed and dated by the judge.

[*The judge hereby gives leave for it to be reported.]*

MR CUSWORTH QC:

1. This matter has been listed remotely before me over 3 days, on the 17, 18 and 21 March 2022. During that time I have heard submissions from counsel for the husband, Mr Todd QC and Mr Benson, and for the Intervener, ('Level'), Mr Southgate QC and Mr Calhaem. A number of issues have required determination, in the circumstances set out in the judgment of Mrs Justice Roberts reported as *LS v PS and Q (a Litigation Lender)* [2021] EWFC 108, and by me in the judgment which I handed down at the commencement of the 3rd day of this hearing [2022] EWFC 29], which dealt with the question of the joinder of Level ('the joinder judgment'), following the husband's consent to the setting aside of my original order sealed on 16 March 2021.

2. That joinder was opposed by the husband, and not consented to by the wife, who is no longer represented and has chosen not to appear or take any further part in these proceedings. I made an order for joinder as sought by Mr Southgate for the reasons which I gave in that judgment. Mr Todd has sought permission to appeal my joinder order dated 21 March 2022, which permission I have at first instance refused. I also refused his application to extend time to seek permission to appeal from the Court of Appeal. I have made no substantive alteration to the joinder judgment which I handed down on that day.

3. FPR 2010 r.9.9A (5) provides: '*Where the court decides to set aside a financial remedy order, it shall give directions for the rehearing of the financial remedy proceedings or make such other orders as may be appropriate to dispose of the application*.' It is with those directions that the rest of the hearing, on 21 March 2022, has been concerned. I will deal with the parties' respective cases and contentions in turn.

4. First Mr Todd QC has invited me to consider simply resealing the order which was originally sealed on 16 March 2021, following approval by me in the circumstances which I explained in the joinder judgment. Those circumstances included the fact that, soon after the draft consent order was sent to me, those instructing him were informed that Level had made an application to be joined which had been allowed by Mr Justice Newton on a without notice basis. Level was expressly seeking to be heard on the question of whether an order in the terms of the agreement reached between the husband and the wife should be made.

5. I have required the husband's solicitors to produce a statement in which they address those circumstances, and by which they should explain the reason why they determined not to inform me of this apparently material change in circumstances. Had I known of it, the intervention would undoubtedly have been a relevant factor, on any view, in the decision which they were asking me to make about approval of the consent order. I am aware that they sought a stay of the initial order joining Level, pending a return date which at the time they expressed no urgency to have listed. Until I have seen their explanation, I shall express no concluded view about what lay behind their actions then, but I must remind myself of those actions now in order to deal with Mr Todd's application that I now reseal the same order which they placed in front of me in February 2021.

6. Mr Southgate QC summarises the reasons why he says that a simple re-sealing of the order would be inappropriate as follows:

    a. '*The court could not properly approve an order which prima facie is instrumental of a fraud on a creditor within the meaning of s423-425 IA 1986 (and which would in any event render the resealed order liable to be set aside).*

b. *The court could not properly approve an order which amounts to an act of bankruptcy where there are assets available to avoid such an outcome other than perhaps in exceptional circumstances which do not arise here.*

c. *The court could not properly sanction an agreement which prima facie is instrumental of an unlawful means conspiracy, a breach of contract or the tort of inducing a breach of contract (and which would lead to satellite litigation).*

d. *For important public policy reasons, the court should specifically protect litigation lenders who have lent money for the purpose of the facilitating one of the parties to be represented in the proceedings;*

e. *The court does not have sufficiently reliable, undisputed and up to date financial information to enable it to discharge its statutory duty;*

f. *It is unclear that the wife remains properly informed or that she presently has access to independent legal advice;*

g. *This is no longer a "consent order" application and the summary procedure under section 33A and FPR 9.26 does not apply to it;*

h. *Level as a party to the proceedings quite properly wishes to pursue a positive case (following disclosure and evidence) that the court should make orders inter alia for:-*

   i. *A payment to W secured in its favour;*
   ii. *An indemnity order*
   iii. *Relief under IA86 s425'*

7. I do not wish to express any view at this stage as to even the prima facie consequences of the events leading to the parties' agreement. I consider that it would be unwise to do so in the absence of better evidence than that which is currently before me. However, I am entirely satisfied that to take the step of resealing the order, without having considered more fully (i) the consequences of the husband and wife concluding that

agreement, including its impact on Level, and (ii) whether or not those consequences were either intended or at least understood by them at the time, would be premature; just as it was (unknowingly) premature for me to have approved the draft order last year without being informed of Level's intervention.

8. Because the set aside application which Level has made has been consented to, the factual background leading up to the order's sealing has not yet required any detailed judicial investigation. To determine what orders are now required to dispose of the financial remedy application – as I am required to do by r.9.9A(5) – will amongst other things require that investigation. I consequently decline to make an order which has the effect of resealing the March 2021 consent order.

9. Next, I will consider the application which Level has made to transfer their stayed civil proceedings, relating to these events, to the Family Court. Mr Todd QC argues vociferously that these proceedings are a completely different animal from the financial remedy proceedings, and that as such they should be dealt with separately, and in a different court, at a time inevitably when all of the wife's claims in the financial remedy proceedings have been dealt with. He cites the Family Division judges' comparative inexperience in dealing with such claims, and suggests that dealing with the multiplicity of issues raised in those civil proceedings will cause unnecessary delay in the financial remedy proceedings. He suggests that a listing of all of the claims to be heard at the same time will cause the required time to be greatly extended and the issues before the court to be complicated. He also asks what remedy Level can possibly seek in the financial remedy claim, as opposed to within those civil proceedings.

10. Mr Southgate QC makes it clear that Level's preferred course is to pursue its remedy in these proceedings, and makes the point that his client's application for relief under s.423-425 of the Insolvency Act 1986 ('IA') is already before this court. He also argues that a transfer would enable all necessary relief to be granted appropriately and on one occasion. This he says, would also be both efficient and bring the advantage of judicial continuity. He reminds me that it is not unheard of for applications under ss. 423-5 IA to be brought within financial remedy proceedings, and cites the decision of Mrs Justice Knowles in *Akhmedova v Akhmedov & Others* [2021] EWHC 545. He also relies on the Court of Appeal's decision in *Haines v Hill & Anor* [2007] EWCA Civ 1284.

11. I am clear that until the financial remedy proceedings have been concluded, with Level as a party, whether there is a need for further, more complex, civil litigation cannot be determined. The claims (i) between the husband and wife, and (ii) between Level and the wife and the husband are evidently interwoven, given that the debt which the wife owes to Level was incurred to enable her to fund the children and financial litigation consequent upon her separation from the husband, and her ability to repay that debt is a central element in the financial circumstances before the court in the financial remedy proceedings. Until a court has considered what order to make in the financial remedy proceedings, Level cannot know to what extent their civil claims are either valuable or useful to them.

12. A listing of the 2 sets of proceedings together to be heard at the same time is not therefore currently appropriate, in my judgment. Thus far I agree with Mr Todd. However, given the interconnection of the issues, it does make obvious sense for the court dealing with the financial remedy claims to be able to deal with those civil claims quickly and comprehensively, if appropriate, at the conclusion of the financial remedy proceedings. That is what Level hope to be able to achieve.

13. I do not yet know what the outcome of the financial remedy proceedings will be, but I consider that it will be preferable for all parties if, at the conclusion of those claims, all actions between these parties are at least available for determination and disposal by the same judge. I will consequently direct the transfer of the civil claim to the Family Court, to be listed behind, but not together with, the financial remedy proceedings. I will not make any order for disclosure specific to those proceedings at this stage.

14. I now come to the parties' various disclosure applications. Mr Todd QC states accurately that applications for set aside under FPR r.9.9A are not proceedings for a financial remedy and therefore fall under FPR PD21A paragraph 2.1. However, I consider that the set aside application has been disposed of by his client's consent to such an order being made, and the wife's lack of substantive opposition. Going forward, the further disclosure which will be required must be within the financial remedy proceedings which remain to be determined now that the consent order has been set

aside. This means that FPR PD21A paragraph 2.2, which prescribes the service of Forms E, followed by the exchange of questionnaires, should apply.

15. Notwithstanding this, the husband seeks a list of the documents in Level's possession custody or control emanating from the financial remedy proceedings, or from the FDR appointment on 12 February 2021; and all correspondence between Level and the two firms of solicitors who have acted for the wife during the course of these proceedings. Mr Southgate QC does not oppose the provision of such a list of documents, as the husband is surely entitled to know what Level has got in its possession. As those documents will also already be in the husband's possession, there is no need to go further at this stage, but the production of such a list is both appropriate and proportionate, and is directed.

16. The same is not necessarily true of the correspondence between Level and the solicitors. It may well be correspondence to which the wife is entitled in any event. Mr Todd QC argues that his client should be entitled to understand how the wife came to discharge her previous solicitors, Laytons LLP, with whom she had a Sears Tooth agreement, and take on their successors, McAllister Family Law, who were funded by the loan from Level. Such information may become relevant to any attempt by Level to enforce its loan against the wife, and also possibly to the enforceability of the loan within the financial remedy proceedings. In the first place, appropriate information should be produced by the wife in the context of her Form E. I do not therefore consider it necessary or proportionate to order its disclosure at this stage against Level, but it is an application which may be renewed at the later directions hearing which I propose to list, if there then remains any issue after the responses to questionnaires have been received.

17. This disclosure is not obviously relevant to the question of how the sealing of the March 2021 consent order came to be procured. It follows that there is no reason to delay the statement which I have directed the husband's solicitor to file addressing the circumstances which led to the sealing of that order. Whatever the circumstances of Level's original involvement, an order for its joinder had been made by Mr Justice Newton, that order had not been stayed or set aside, and yet decisions were evidently

taken that it was not necessary or appropriate either to inform me of the intervention, or to inform Level that the draft order had been submitted to me for sealing, without the court office having been copied. Those are the circumstances which the statement must primarily address.

18. There has been some contention about the use to which those documents which Level has can be put. Plainly, as parties to the financial remedy proceedings, Level is within the 'ring' for disclosure purposes and is bound by the implied undertaking that it will not use the documents which it has, or which it comes to have, for any collateral purpose beyond those proceedings. In those circumstances, the fact that the husband's disclosure is made under compulsion in these proceedings is not a defence to the production of any relevant documents to which the implied undertaking applies. In the first instance, those documents can be employed only in the disposal of the financial remedy proceedings, which, as I have indicated, will be first determined. I determine that Level must also, as a party, be entitled to any other disclosure within the proceedings to which it has not yet had access.

19. At the conclusion of those proceedings, it may be possible for the additional civil proceedings to be disposed of without further action or investigation. If it is not, then questions of the availability of certain documents from the financial remedy claim for use in those proceedings may become a live issue. But first, the claims under the Matrimonial Causes Act 1973 ('MCA') must be determined, and for that purpose, the disclosure made within those proceedings must be available to all joined parties, including Level. It would be both inappropriate and impractical to seek to limit the provision of such disclosure, given that Level are full parties to whom the implied undertaking applies with full effect.

20. Mr Todd QC further argues that there should anyway be no '*rehearing of the financial remedy proceedings*' under FPR r.9.9A(5). He maintains that the accord between the husband and the wife, if not approved, would simply be what the husband and wife respectively put into effect, without there being any determination of their respective claims. He points out that the wife, with whom Level have their agreement, has nothing in her name which she is giving up by the agreement. She should not, he says, be forced

to litigate against the husband if she does not wish to. He stresses that Level's unsecured claims against her are not affected by the outcome which she and the husband propose.

21. The complication for the wife, and so for the husband, is that her agreement with Level was undoubtedly predicated upon the expectation that she would pursue her claims against the husband, whatever they may be found to be worth. If the court determines that her case, as advanced before Mrs Justice Parker, ascribing to the husband valuable trust interests, was wrong, and that her needs can only properly be met within the confines of the sort of provision in trust that she has subsequently agreed, then Level will be left with a claim against her that may prove valueless. That remains a possible outcome at the conclusion of this case. On the other hand, if the court determines, on the basis of the available evidence, that notwithstanding the successful appeal proceedings in 2019 she does have an entitlement to a transfer of valuable assets into her own name, then the court's order may appropriately reflect that. If so, then Level's claim against the wife may become capable of some enforcement, at least in part. Whether that is the case must await the determination of the financial remedy application.

22. I am clear that, now that the March 2021 order has been set aside, the right course is for the court to list a hearing of the financial remedy proceedings, at which all of the parties' competing contentions as to the factual matrix and the appropriate outcome can be determined. The potential outcome of that hearing remains completely open, and must await updating evidence from the husband and wife, which I direct should be in Forms E, but in respect of which the completion of Parts 4 and 5 shall be optional for them. I am satisfied that the court will need this evidence properly to discharge its statutory duty under the MCA, and the husband and wife should ensure that the matters covered by the directions order which I made on 2 December 2020 are properly refreshed and covered by their updating disclosure.

23. I understand that the wife has so far not sought to take an active role in the process following the conclusion of the agreement with the husband on 12 February 2021. Having not heard from her, I cannot determine what lies behind that decision. However, she must now engage to the extent of complying with the orders which I will make for

the filing of a Form E, and whilst she may not choose to serve a questionnaire, she must answer any questions which I direct are properly put to her in due course. She cannot in the circumstances of her agreement with Level simply absolve herself of any involvement in or responsibility for the need properly to conclude these proceedings, which need her agreement has brought into focus.

24. Level's own financial circumstances are not relevant to the matters in dispute in these proceedings, so I am satisfied that no disclosure in Form E is required from it. However, in due course the husband and the wife may each serve a questionnaire upon Level given its status as a party to the proceedings, which it will be expected to answer so far as is proportionate and relevant to the issues which the court has to decide.

25. I will not deal today with the extent to which the circumstances of Level's receipt of any of the documents prior to its joinder might be relevant. If this is a point which Mr Todd for the husband wishes to pursue then he can do so in due course, but Level has now been joined as a party and can make appropriate use of the documents now in its possession or to be provided to it accordingly. I also acknowledge that in *Akhmedova v Akhmedov & Others (Litigation Funding)* [2020] EWHC 1526 (Fam) at [99], Mrs Justice Knowles accepted that it was both permissible and justifiable to provide confidential documents from the litigation to a litigation funder.

26. Consequently, I will make the following directions to progress these proceedings, slightly extending the time-frames sought by Mr Southgate QC, which should be read alongside the directions which I gave at the conclusion of my judgment in the joinder application:

    a. Pursuant to FPR 9.26B(3), all existing disclosure to be made available to all parties electronically where possible within 7 days.

    b. The husband and wife to provide fresh Forms E (in which the narrative parts shall be optional) by 25 April 2022.

    c. Questionnaires by 16 May 2022.

d. Replies by 13 June 2022.

e. A further hearing with a time estimate of 2 days to be listed before the trial judge not before 1 July 2022, to deal with:

    i. The costs of Level's set aside and joinder applications;

    ii. Any disputes about the parties' replies to questionnaires;

    iii. Any other matters of evidence or case management generally which are required to be addressed before the final hearing.

f. The case to be set down for a final hearing with a time estimate of 5 days on the first available date for counsel's convenience, on application by counsel's clerks (and in consultation with Mrs Lauren Simon) to the Clerk of the Rules - all parties to be present unless otherwise ordered at the hearing listed at (e) above.

NICHOLAS CUSWORTH QC

1 April 2022