Neutral citation: [2023] EWFC 205 (B)
IN THE CENTRAL FAMILY COURT Case Number FD13D01876

B E T W E E N:

Y Applicant

- and -

Z (by her Litigation Friend X) Respondent

IMPORTANT NOTICE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published, but no other version.

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.

Ms Sarah Phipps KC (Counsel instructed by Goodman Ray, Solicitors) appeared on behalf of the Applicant husband.

The Respondent wife appeared without her litigation friend and without any legal representation.

Written Judgment of His Honour Judge Edward Hess dated 26th October 2023

1. This case concerns the financial remedies proceedings arising out of the divorce between Mr Y (to whom I shall refer as "the husband") and Dr Z (to whom I shall refer as "the wife"). I recognise that they have been divorced for a long time, but I hope they will forgive the nomenclature utilised for convenience and clarity.

2. The background to this hearing and the delivery of this judgment is unusual and needs to be set out in a little detail to enable any reader of this judgment to understand the context of the decisions made.

3. The husband was born in 1967 and is therefore now aged 56. He achieved a double first at Cambridge University and embarked on what was, for a time anyway, a high

achieving and impressive career in business finance. In more recent years his career has been hit by some adverse events, of which more below.

4. The wife was born in 1969 and is therefore now aged 54. She is also highly intelligent and educated, having studied medicine at Imperial College and is, even though currently and temporarily not working through sickness, an ophthalmic surgeon, currently with Registrar status, but (at least until fairly recently) with ambitions to reach Consultant status.

5. The parties married in 1998. The marriage produced two children: a boy, A (now aged 16) and a girl, B (now aged 14). The children have both received an education at fee-paying schools, of which more below. Both children live with the wife and, sadly, their relationship with the husband has long since broken down, in all probability a casualty of the relationship breakdown and subsequent litigation between the parties (for the avoidance of doubt I make absolutely no findings of fault here in either direction, but I am aware that each party blames the other for what has happened and I am aware that various orders made in separate Children Act proceedings relating to child arrangements did not solve the problems in this regard).

6. The marriage had broken down acrimoniously, at least by 2012, and the parties separated. Divorce proceedings followed in 2013 and a Decree Absolute was ordered on 29th April 2014.

7. Financial remedies proceedings also began in 2013 in the Central Family Court. They took place against a background of affluence in the husband's working life. He still had significant amounts of money coming in by way of carried interest from previous private equity work, most particularly the C Partners funds, of which more later, and, in the course of 2014, the husband began working for D Group, an apparently successful and wealthy private equity business based in the UAE, where he worked as Chief Executive Officer of a private fund with a substantial tax-free income. The wife and children remained living in London and the wife was their primary carer but was developing her medical career again as her children reached school age.

8. The financial remedies proceedings were difficult and complicated; but were eventually compromised in a consent order approved by DJ Alderson dated 1st May 2015 ('the 2015 order'), which was later clarified in various respects by a further consent order, also approved by DJ Alderson, dated 12th April 2017 ('the 2017 order'). These orders create a complex structure, but (for present purposes) it is possible and convenient to summarise some of the key features as follows:-

    (i) The order explicitly declares its intention to be that all the capital held by the parties, including capital received in the future from the carried interest in the various C funds (net of the potential 'contingent C EBT liability') and the funds held via the E Trust, would be shared equally between the parties. The agreed asset schedule which accompanied the 2015 order

suggested that an equal share of the assets at this stage represented each party ending up with a figure estimated to be c.£3,400,000 (albeit with a degree of speculation because it included some future C distributions).

(ii) The mechanism for receiving and sharing future C carried interest payments was itself complicated, has given rise to extensive arguments, and was perhaps the main cause of the need for a second consent order in 2017. In essence, the monies were supposed to be paid into a joint account from which neither party could withdraw money unless they both agreed or there was a further order of the court (see paragraphs 106 to 108 of the 2015 order and paragraphs 8 and 11 of the 2017 order). What had been happening in practice, as is expressly noted in paragraph 11 of the 2017 order, was that the carried interest payments had been made to the husband's solicitors (then, as now, Goodman Ray) and then (on the husband's account) divided equally between the parties by them. After 2017, some monies continued to be paid to Goodman Ray and then divided by them and other monies were paid into a F Bank joint account; the mechanics of extracting money from this joint account have been a major source of dispute, as I shall set out further below. It is appropriate for me to record that the wife's position is that the husband and/or Goodman Ray have not divided these assets equally and have unfairly given an advantage to the husband.

(iii) The order commits the husband to paying spousal periodical payments on a joint lives basis. The obligation comes in two parts. First, a basic sum of £35,000 per annum (CPI linked). Secondly, a sum calculated as being 20% of the husband's 'additional remuneration' capped at £40,000 per annum, and coming to an end after six years (i.e. in 2021).

(iv) The order commits the husband to paying child periodical payments at the rate of £15,000 per annum (CPI linked) per child, payable monthly on the first day of each calendar month, to continue (on fairly standard terms) until the children respectively cease tertiary education.

(v) The order commits the husband to paying the children's school fees (and agreed extras). The order defines this obligation further (in paragraph 3 of the 2015 order) as being the children's then (named) prep schools '*or such other schools as the children attend from time to time, whether by agreement between the parties or by order of the court'*. The children have subsequently progressed to separate independent senior schools. In the case of A's senior school, the husband's account is that he agreed to the choice of school on the express basis that he would have to pay only 50% of the fees. In the case of B's senior school, the husband's account is that he was never asked to agree the choice of school and thus never agreed it. The wife has not directly challenged these accounts, nonetheless does not accept that the husband has discharged his obligations in full.

9. Shortly after the compromise of the financial remedies proceedings in the divorce, in September 2016, the wife issued a fresh application under Children Act 1989,

Schedule 1, seeking additional financial support for the children, in particular A. On any view this litigation had a very troubled and slow procedural path. Ms Phipps' note describes what happened as follows (and, although I have not seen all the documents filed in these proceedings, the documents I have seen broadly support this summary):-

"When the ink was barely dry on the consent order, W started requesting significant funds from H to pay for activities and clubs for the children which were not captured by the order. H did agree to pay some additional funds, in the sum of £39,000 in total, but was still met with what he describes as a "barrage" of requests for additional sums, usually unsupported by any receipts or evidence…It can be seen from the chronology that the progress of the Schedule 1 proceedings was slow, and delayed by W. She said she lacked litigation capacity. On 17th May 2018 DJ Duddridge determined that W was a protected party and he invited the Official Solicitor to act as a litigation friend. W refused to release funds paid into the joint account for the OS's fees and abandoned her application on 11th October 2018. It was adjourned generally with liberty to restore."

Plainly, the wife's ill health created difficulties for the expeditious resolution of this application which were never resolved. The services of the official Solicitor were never secured and the proceedings have never been restored. As will be seen below, this has a resonance with what has happened in the current proceedings.

10. I also note in passing that there was another significant and litigious dispute about what was to happen in relation to the E Trust and this led to litigation in Jersey, which was concluded by a judgment by Commissioner Clyde-Smith of the Royal Court of Jersey (Samedi Division) dated 27th March 2019. It is a complicated judgment, but could perhaps be characterised as broadly resulting in the outcome sought by the husband rather than the wife; but also dissolving the trust in a manner which divided the assets equally between the parties.

11. The husband, once divorced, quickly married again (in 2014) and there is a child of this relationship, a boy (now aged 9). Sadly, this marriage also broke down and has ended in divorce and financial remedies proceedings in the courts in Dubai. He has been ordered to pay a substantial lump sum to his second ex-wife, but he is appealing against this decision and this situation remains so far unresolved.

12. A key event in the husband's life was the emergence in 2018 of a fraud scandal in the D Group. It is not suggested that the husband was personally involved in the fraud, but it has led to the collapse of the once powerful and wealthy group and, in June 2019, to the loss of the husband's employment with D Group. His association with the scandal has (on his account) made it very difficult to find alternative employment, so he has been unemployed for more than four years. He has given a detailed account of the effect of all this on him personally and on his financial situation. If true, it has been a very bad time for the husband. He has had to borrow extensively from family members and others to keep afloat. He has tried to dig himself out of the position by starting up and/or investing in various businesses which have not, yet anyway, produced any income, indeed some have been loss-making. He has also suffered from

a depressive order for which he is still being treated. It is appropriate for me to record that the wife challenges a good deal of this account, but it has been far from clear to me what is the real basis of her challenge and the written evidence produced by the husband in support of his account is persuasive. There are also many publicly available documents which broadly confirm the overall problems of the D Group. I have no reason at this stage to doubt what the husband has told me in this regard.

13. On 19th February 2020 the husband sought a variation / discharge of the periodical payments orders in the 2015 order, based on what he presented as his significantly deteriorated financial circumstances brought on by the events in D Group described above.

14. The procedural path of this fresh application has been a slow and difficult one, mirroring what had happened in the 2016 Schedule 1 proceedings. In its early days the application was affected by the difficulties created by the sudden outbreak of the Covid pandemic, as it happens very shortly after the application was issued, and the First Appointment was delayed until 1st September 2020. Thereafter, it seems to me that most of the delays have been caused by acts and omissions of the wife. As the First Appointment approached, the wife made an application for a 10 month adjournment on the grounds of her ill health. This application, although not having been formally dealt with, appears to have caused the First Appointment to be put back to 11th January 2021 and then (after the wife was unable to join the remote hearing) to 26th April 2021.

15. By now 14 months had passed without any progress in the case at all and, in the meantime, another problem had emerged. The process directed in the 2015 and 2017 orders in relation to the joint F Bank account (which required the agreement of the parties or an order of the court to withdraw monies) had broken down as a casualty of the ongoing litigation and the husband, by applications dated 16th March 2021 and 6th August 2021, sought an order, inter alia, approving the release of funds from the F Bank account, in equal shares as between the parties and a change in the methodology of dividing the C payments.

16. The case came before DDJ Butler on 26th April 2021. I note in passing that, at this hearing the wife was represented by Mr Christopher McCourt of Counsel and he remained instructed, at least until April 2023, of which more below. At 7.22 a.m. on the morning of 26th April 2021, however, the wife communicated with the court to the effect that, by reason of her ill health, she had (in breach of the order) not produced a Form E and that she sought a further long adjournment of the case until the following year, i.e. for a further 8 months. DDJ Butler made an order (which was not apparently perfected until October 2021 – I note in passing that it is a feature of this case that almost every hearing ends up with a ferocious dispute about the wording of the consequent order) which included the following directions:-

    (i) He suspended the spousal periodical payments orders.

(ii) He directed the filing of a statement by the wife (to cover the matters in dispute, including her request for an adjournment) by 11th October 2021.

(iii) He directed a hearing to take place on 24th February 2022 to consider the matter again, including the wife's application for an adjournment and the husband's applications in relation to the joint F Bank account.

I note in passing that the listing in 10 months' time of the hearing of a contested application for an 8 month adjournment has a certain irony about it; but (for the wife) the downside was that the spousal periodical payments order was suspended (though not the child periodical payments orders).

17. The wife then sought permission to appeal against the suspension of the spousal periodical payments order and, at this stage, HHJ Gibbons took over the case, initially in an appellate role. Because of HHJ Gibbons' concerns about the wife's health, nothing substantive appears to have happened on 24th February 2022 and the emails exchanged between judge and counsel in the course of April / May 2022 illustrates the difficulties which were being encountered – the wife wanted to rely upon medical evidence in support of her case, including now (possibly) an assertion that she lacked litigation capacity, but was very hostile to the husband seeing any details about her health, in a situation where he vehemently disputed that her health situation undermined her litigation capacity or justified any adjournment and wished to have an SJE analysis of her health. The final email of HHJ Gibbons in this sequence (dated 26th May 2022) expresses her frustrations with the positions being taken by the wife and comments: "*It is clear that the pragmatic approach I had hoped would progress this matter for both parties will no longer work…I can see no alternative but to list a further hearing (t/e 1 day) at which the court would consider…(a) (the wife's) application for permission to appeal…(b) whether the proceedings should be stayed…(c) general case management directions…At some point (the husband's) variation application, which was issued a long time ago, must be heard.*" This hearing was duly listed before me on 26th October 2022 and I have dealt with all the hearings from then onwards.

18. I make the following comments about the hearing on 26th October 2022:-

(i) Both parties were represented by Counsel (Mr David Burles for the husband and Mr Christopher McCourt for the wife). Very little was agreed between the parties and even the drafting of the order was hotly contested.

(ii) By this stage the case stood at two years and eight months since the husband's variation application had been made and there had been little substantive progress.

(iii) By now the court was presented with a certificate dated 18th October 2022 of the wife's incapacity by Dr Paul Loughlin, Consultant Psychiatrist, supported by a fairly detailed report. The husband was very reluctant to accept these conclusions and a contested hearing, with cross-examination

of Dr Loughlin, was contemplated, though acknowledged as an unattractive step.

(iv) The initial proposal from Mr McCourt was that the official Solicitor should be brought on board for the wife (although no steps had been taken in that regard); but the wife was accompanied at the hearing (albeit remotely) by a friend of hers, Dr X, a Consultant Ophthamologist in his fifties working in the NHS. It was proposed in the course of the hearing that he be made the wife's litigation friend if the court accepted that she lacked capacity. I was told that he had discussed with Mr McCourt the nature of the role of a litigation friend and understood what it involved and was willing to take the role. I heard from him briefly (via CVP) and there was nothing to suggest that he would not be a suitable person to fulfil this role. He was willing to (and in due course did) sign an undertaking in relation to the payment of costs in the standard form required by FPR 2010 Rule 15.4(3)(c). It was anticipated, I assume by the wife and certainly by me, that he would be assisted in his task by the instruction of suitable lawyer(s), probably the continued instruction of Mr McCourt, probably (but not necessarily) on a direct access basis as before. This way forward seemed at that stage to me to represent the most expedient way forward in a difficult situation and, although the husband wished to have recorded on the face of the order his reservations and opposition to these steps, the opposition was muted (and the decision was certainly not appealed) and I decided therefore to accept Dr Loughlin's view on the wife's incapacity and to appoint Dr X as her litigation friend.

(v) I should say that, notwithstanding this declaration of incapacity, it does not follow that the wife is unable to have a view which she is willing to express in articulate manner on many issues. As she told me, correctly and powerfully, on 23rd October 2023, her litigation incapacity absolutely does not equate with stupidity or an inability to follow a good deal of what is going on; but in the course of my involvement with the case I have often sensed that her litigation incapacity does perhaps interfere with her decision-making abilities.

(vi) It followed from the appointment of the litigation friend that the case could (at last) make some progress and I directed some disclosure from the wife (including the production of a Form E) by 13th January 2023 and listed a hearing (in effect a First Appointment) before me on 27th January 2023.

(vii) By the time of this hearing it had emerged that the joint F Bank account had, until a few days before the hearing, held a sum of c.£1,151,118, on the face of it this was owned equally between the wife and the husband; but that (somehow) the wife had persuaded F Bank to pay to her half of that sum (i.e. c.£575,559). F Bank declined, however, to do the same for the husband's half share and his share of the monies remained inaccessible (though not frozen by any court order) in the account. Later disclosure from F Bank (obtained via a Third Party Disclosure Order) shows that F Bank paid this money to the wife on 17th October 2022 on the strength of a concise written opinion from Mr McCourt. It has been asserted before me

in the current hearing that Mr McCourt's opinion (deliberately or otherwise) failed to draw F Bank's attention to the 2017 order and that, if he had, then F Bank may have made a different decision. I make no finding at this stage on this dispute; but I note that it has caused a good deal of mistrust and ill feeling between the parties and the lawyers. On 26th October 2022 I directed that this issue should be raised again on 27th January 2023.

(viii) I noted that the application for permission to appeal the suspension of the spousal periodical payments order remained outstanding and I indicated that I would likewise put that application over to 27th January 2023.

19. Notwithstanding an application by the wife to adjourn the hearing on 27th January 2023, that hearing went ahead, and (the time estimate proving to be too short for all the arguments which the parties wanted to articulate) some unfinished business was left over to a further hearing with a longer time estimate on 16th March 2023. At both these hearings Mr McCourt appeared for the wife (now instructed via Dr X as litigation friend) and there was every expectation that the wife would continue to instruct Mr McCourt at the final hearing. Ms Phipps took over from Mr Burles from March 2023 onwards on the husband's side, instructed (as always) by Goodman Ray.

20. In relation to one of my directions on 27th January 2023 there was an appeal to Sir Jonathan Cohen, the substance of which was in the end compromised by agreement at the suggestion of Sir Jonathan Cohen. In relation to some of my directions on 16th March 2023 there was a further appeal to Sir Jonathan Cohen. As far as I can see from the paperwork made available to me these have not been pursued to a decision and, in any event, they may have been superseded by other developments. Amongst my decisions on 16th March 2023 were that I would deal with the application for permission to appeal against the order of DDJ Butler and the application by the husband in relation to the F Bank account as part of the final hearing. In doing so I recognised that these applications had been long delayed and the husband's case was that the inaccessibility of his money in the F Bank joint account was causing him ongoing and significant financial hardship.

21. At the hearing on 16th March 2023 I had indicated that the final hearing of all the issues would be for the five days commencing on 11th September 2023 (it had already been in the diary for the first three days, but I added the fourth and fifth days at the request of Mr McCourt based on the wife's vulnerabilities). After the hearing I received a specific request from Mr McCourt to put the case back from that date because he would not be available for the two additional days and that the wife very much wished him to represent her. I received written submissions on this subject from both sides and, having considered them, responded by email of 9th April 2023, saying:-

"Dear All,

I have carefully considered all the representations made on the issue of the hearing date of this unusual case (which, for ease of reference are set out below).

I remind myself on the one hand:-

(i) that the hearing dates of 11th to 13th September 2023 have been in my diary for some time;

(ii) that this case has made extremely slow progress towards a conclusion and that I have to be fair to both sides in deciding how to progress the case (and remind myself that it is the husband's contention – on which I have no view at all yet - that he will be deprived of the use of assets which are rightfully his until the conclusion of this case);

(iii) that I have to bear in mind the overriding objective under FPR Rule 1, including to deal with cases expeditiously as well as fairly; and

(iv) that I took the decision on 16th March 2023 (after hearing argument) to extend the time estimate to five days by including 14th and 15th September 2023 to accommodate the wife's vulnerabilities and at her request as outlined to the court on 16th March.

I remind myself on the other hand:-

(i) that I have specific evidence of the vulnerability of Dr. Z;

(ii) that Dr. Z plainly has very strong views on her representation and has confidence in, and has been dealing with Mr McCourt for a long time and Dr X has strongly echoed these views;

(iii) that (because of the hybrid nature of the hearing on 16th March it was not possible for Dr Z or Dr X to give their views to Mr McCourt on 16th March; and

(iv) that I can accommodate a hearing in week commencing 23rd October 2023, which is within the October deadline set by the husband's team and avoids the husband's objection to the week commencing 9th October 2023.

In attempting to do fairness to both sides, in all the circumstances, I propose to vacate the hearing in w/c 11th September and relist it for w/c 23rd October. I am unlikely to be sympathetic to any further argument about lawyer availability in that week."

22. I did not receive any further communication on this subject from Mr McCourt or anybody else on the wife's side or the husband's side and the five day fixture commencing on 23rd October 2023 was placed in my diary and remained there unchallenged (until very recent developments). I have been told by Ms Phipps that neither she nor anybody on her team had heard any objection to the 23rd October 2023 date and they assumed that Mr McCourt would be representing the wife at that hearing until, in early October 2023 in response to being sent the bundles for the

hearing, he communicated the fact to the wife's solicitors that he was no longer involved. I had made the same assumption as the husband's legal team. I have learned only in the last 24 hours that Dr X was aware by 17th April 2023 (from a communication from Mr McCourt) of Mr McCourt's non-availability and was reminded of this fact in an exchange of emails with Mr McCourt's clerk (Mark Betts) on 20th June 2023. Dr X appears (on the basis of the documentation provided by him) to have done nothing at all in response to this knowledge – neither has he sought alternative counsel nor has he requested (until very recently, far too late, after the husband had incurred his counsel's brief fee) a change of trial date. In April or June 2023, or indeed some weeks or even months later, there was plenty of time to instruct a different counsel, but nothing was done to achieve this or even signal the problem to the other side or the court. I note from recently produced medical letters that, in this period, Dr X was himself beginning to suffer from depression and that at some point he was signed off his own work with sickness, but this does not adequately explain or excuse his failures to do something in response to what he had been told about Mr McCourt's non-availability.

23. It is undoubtedly the case that the wife did not comply with a significant number of my directions and, in late August 2023, the husband applied for a further directions appointment to remedy this, which I listed on 7th September 2023. At this hearing, neither Mr McCourt nor DrX attended, but the wife did attend and made some representations of her own, including (again, as ever) for the adjournment of the October hearing. I decided to make most of the directions sought by the husband, which were substantially repeats of what I had previously ordered and the wife had not complied with. Given the proximity of the impending final hearing there simply was not time to adjourn the directions hearing and really no purpose in doing so. The wife has sought permission to appeal this order as well from Sir Jonathan Cohen, but again this has not been pursued to a decision and, in any event, the appeal may have been superseded by other developments. It continues to be the case that the wife has not complied with the majority of the directions I made in January and March 2023 and repeated on 7th September 2023 – for example there is no section 25/31 narrative statement from her, there has been no updating disclosure, no answer to questionnaire and no cooperation with valuations. Nearly four years after the application was made, the wife's disclosure is lamentably bad. In contrast the husband has made very extensive disclosure.

24. In the weeks leading up to, and at, the hearing commencing on 23rd October 2023, the court, and the husband's legal team, have been told, by the wife or Dr X or both of them that:-

    (i) The wife still lacks litigation capacity (I accept that this is the case on the medical evidence, notwithstanding her willingness articulately to engage with some of the issues on 23rd and 25th October 2023).

    (ii) Dr X is now unwell himself, is suffering from depression and other ailments and has, apparently since about April 2023 it now emerges, given up doing anything very much in his role as litigation friend. The wife told me he had long since ceased responding to her messages, though she

appears to have done very little about this. Even if primary responsibility for these things lies with the litigation friend Dr X, I do not accept that the wife was unaware that the directions orders had not been complied with (indeed she vehemently declined to cooperate with some of them) nor that the case was not being properly prepared for trial.

(iii) Dr X has now formally applied to be discharged as the wife's litigation friend and has suggested that the wife needs to seek the assistance of the Official Solicitor instead (though neither of them has done anything about this, mirroring what happened in relation to the Schedule 1 litigation in 2016-2018).

(iv) As I have said, there is no evidence of any attempt to find a replacement for Mr McCourt at any stage since April 2023. In any event, Mr McCourt certainly did not appear on 23rd October 2023 or subsequently.

(v) Dr X failed to appear (in person or remotely) on 23rd October 2023 and so the wife was left without a litigation friend and without any legal representation. In common with her presentation at so many previous court hearings, she has applied for an adjournment of proceedings. She has asked me not to make any substantive orders, but to re-list the case for another five day hearing for which (she says) she will take steps to make sure she is represented by the Official Solicitor. In listing terms this would, of course, put the case back for at least another six months, possibly more. Further, the history of this case leaves me with very low levels of confidence that the wife will, in fact, take the necessary steps to secure the involvement of the Official Solicitor.

25. Ms Phipps has made some written and oral submissions in which she, in essence, invites me to continue with the final hearing, and to decline to release Dr X from his role as litigation friend (my attention is drawn to a reported case with some similarities: *Major v Kirishana* [2023] EWHC 1593). Ms Phipps has pointed out that, if the wife has no assistance at the hearing, then that is not the husband's fault and he has the right to have his variation/discharge application adjudicated upon, nearly four years having passed since the application was made and also has the right to seek a determination on his wish to have access to what is his own money in the inaccessible F Bank account, some two years after his application was made.

26. Having heard submissions from both sides on this most unusual situation, having reminded myself of the history of this dispute and having reminded myself of the court's duties under FPR 2010 , Rule 1 (the overriding objective, in particular the need to deal with cases expeditiously and fairly, the need to ensure the parties are on an equal footing as far as possible and the need to allot to any particular case an appropriate share of the court's resources, taking into account the need to allot resources to other cases) I have decided to deal with the case as follows:-

(i) I propose <u>not</u> to deal with this hearing as a final hearing. Having, because of the wife not having a litigation friend or lawyer with her, not been able

to hear oral evidence properly challenged in cross-examination it would be wrong for me to make any final findings of fact which could not later be challenged or final orders which could, if and when a full hearing with cross-examination has taken place, not be undone. In particular, it would not be appropriate for me to grant the husband's application for an immediate clean break at this hearing because that could not be undone.

(ii) I do propose to deal with the case as an interim hearing. Just as with all interim hearings the court needs to make decisions which govern the position pending the final hearing in a way which is fair to both sides and which does its best to draw reasonable interim conclusions from the written evidence which has been presented and/or reasonable interim inferences from the failure to produce relevant written evidence. In the context of the periodical payments orders the court now is in a similar position to a judge dealing with a Maintenance Pending Suit application, who has to make a broad assessment of fairness on the information available (which, by definition, has not been challenged by cross-examination). In the context of the F Bank joint account, the court now is in a similar position to a judge dealing with an interim freezing application, balancing the fairness to one party of having an asset made inaccessible against the fairness to the other party of losing the opportunity subsequently to enforce against a frozen asset. Amongst the factors which may be involved here is my thoughts about how likely it will be, given her track record, of the wife ever in reality getting her act together and taking the steps necessary to be properly represented by the Official Solicitor (if nobody else is available). For whatever reason, she has found this very difficult to achieve over a long period and the repeatedly extended deadlines create a good deal of unfairness for the husband.

27. In this context I have decided to make the following orders at this stage:-

(i) I shall (instead of formally dealing with the suspension issue as an appeal against the order of DDJ Butler) make the decision myself to vary the spousal periodical payments order to a nominal level and backdate this decision to the date of DDJ Butler's order. It follows from this that the application to seek permission from the DDJ Butler order is superseded and should be treated as having been dismissed. In any event, I have not been persuaded that there was ever sufficient merit to pass the permission to appeal test under FPR 2010 Rule 30.3(7).

(ii) For the reasons argued by Ms Phipps (reflecting a CMS style assessment against the husband's only apparent present income, his rental income) I shall vary the child periodical payments order to £498.59 per month with effect from 1st June 2022 and direct that there be a capital payment of £15,447.80 from the F Bank joint account to the wife to reflect the outstanding arrears for the period from February 2022 onwards up to and including the end of January 2024. Also at the suggestion of Ms Phipps, I shall round the payment up to £500 per month (£250 per child per month)

with effect from 1st February 2024. I shall not change the term or other consequential directions of the child periodical payments order.

(iii) I shall vary the school fees part of the child periodical payments order with immediate effect (i.e. the next payment due is the first day of the January 2024 school term) to require the husband to pay 50% of the school fees for both the children's attendance at their respective current schools for the remainder of their secondary education or further order of the court on the basis that it is anticipated that the wife will pay the remainder. In relation to the arrears of school fees I shall adopt Ms Phipps' suggestion that a figure of £27,864.68 should be paid directly from the F Bank Joint account to the wife to reimburse her for past non-payment of school fees.

(iv) None of these decisions will necessarily preclude a future court (whether me or another judge) from looking at the past, present and future periodical payments issues again after a full hearing with cross-examination if it thinks fit.

(v) I shall direct that the remainder of the monies held in the joint F Bank account (i.e. c.£575,559 less £15,447.80 less £27,864.68 = c.£532,246.52) is to be regarded as the property of the husband and should be paid to him. The distribution should be made forthwith, save that I shall direct that it shall not be carried out until 16th November 2023 (i.e. 21 days from today, the standard appeal period). I have included this provision lest the wife decides (as she has already told me she is considering) to pursue an appeal against this part of the order which would potentially be rendered nugatory if the payment is made before the appeal judge has had the opportunity to consider a stay. In doing so, I want to express my clear view that delaying the distribution beyond that point would be unfair to the husband, but I recognise that another judge (whether Sir Jonathan Cohen or another judge in an appellate capacity) might, if an appeal is indeed pursued by the wife, take a different view and decide to extend the stay.

(vi) I shall adjourn all outstanding applications generally, giving liberty to restore. In the wife's case she may only apply to restore the proceedings if and when she can satisfy the court that her representation is secure enough to ensure that the case can properly be moved forward without unreasonable delay – this could be via the Official Solicitor or another suitable litigation friend (assuming she continues to lack litigation capacity). If she regains litigation capacity the court is likely to be more sympathetic to a reopening of the proceedings if she has instructed a suitable legal representative. In the husband's case he may apply to restore the case to seek a clean break only if he has given the wife at least six months from the date of this order to secure representation and she has not done so. It may be that both parties can live with the present order without seeking to restore the proceedings at all, thus achieving a less litigious and perhaps more peaceful life for themselves, but I am not precluding an application to restore, subject to the above conditions.

(vii) It follows that I shall suspend with immediate effect the outstanding disclosure orders.

(viii) I propose to discharge the appointment of Dr X as the wife's litigation friend with effect from 4.00 pm on 26 October 2023. In view of his unwillingness/inability to perform the role there seems little purpose in requiring him to remain beyond my considering of the costs orders arising from this hearing, of which more below.

(ix) I shall send a copy of this judgment and the consequent order to Sir Jonathan Cohen so that he is aware of the state of proceedings so that he can take such steps on the outstanding appeals as he so wishes. It may be that he reaches the conclusion that the existing appeals have become otiose as a result of the decisions made in this judgment, but that is a matter for him.

(x) For avoidance of doubt, none of these orders affects the capital orders which are ongoing from the original 2015 and 2017 orders, in particular if there are future carry interest payments from C 1 or 2 funds. In view of the understandable wish of F Bank to close down the joint account after this hearing (which I accept exists, notwithstanding the suggestion otherwise by the wife), and in recognition of the difficulties which have been created by the joint bank account mechanism, I shall discharge all the directions in relation to placing monies into a joint account and the practice of these payments being made to Goodman Ray on the basis of a 50% equal share being onward sent to the wife shall be restored for all C payments. I should say that this would still be my decision even if the wife obtained a letter from F Bank saying that they had no objection to the joint account remaining open as it seems to me that the Goodman Ray option is more administratively convenient, and I have not been persuaded that there is any cogent evidence that it has been abused.

28. In reaching these decisions I have in particular taken into account the following facts and matters:-

(i) I have identified no reason in the paperwork or arguments I have heard to cause me to disbelieve, in broad terms, the presentation of the current financial position set out in the Form ES2 prepared by the husband's legal team (in relation to which neither the wife nor Dr X nor Mr McCourt have engaged).

(ii) It follows from this that, for the purposes of this interim hearing, while noting that it could be changed by future disclosure and / or cross-examination, I accept that the current capital position of the parties is broadly as represented by the table in Ms Phipps' case summary, which I reproduce in full below:-

	Net value	H	W
H property	£ 1,581,537	£ 1,581,537	
W Home	£ 1,020,514		£ 1,020,514
Riad in Morocco	£ 577,635		£ 577,635
W investment property 1	£ 1,600,500		£ 1,600,500
W investment property 2	£ 776,000		£ 776,000
Net property	**£ 5,556,186**	**£ 1,581,537**	**£ 3,974,649**
Bank accounts (NB H's total includes money in F Bank a/c)	£ 844,780	£ 581,923	£ 262,857
Investments	£ 568,552	£ 266	£ 568,286
Other	£ 148,585	£ 48,585	£ 100,000
Liabilities	-£ 1,528,421	-£ 1,459,529	-£ 68,892
Net other	**£ 33,496**	**-£ 828,755**	**£ 862,251**
Property + other	**£5,589,682**	**£ 752,782**	**£ 4,836,900**
Potential payouts from C 1 and 2 Funds	***£ 2,330,168***	***£ 1,165,084***	***£ 1,165,084***
Total potential receipts from C	***£ 2,330,168***	***£ 1,165,084***	***£ 1,165,084***
Business	£ 283,500	£ 283,500	
Net business	**£ 283,500**	**£ 283,500**	**£ -**
Pension	£ 151,341	£ 151,341	NHS
Net pension	**£ 151,341**	**£ 151,341**	**£ -**
Total excluding C payments	**£6,024,523**	**£ 1,187,623**	**£ 4,836,900**

(iii) It can be noted from this table that the wife has substantial wealth, now significantly more wealth than has the husband. Whilst this fact should not, on its own, take away the obligations he has to his former family, it is a relevant matter in considering the level of the obligations. Although the wife has challenged the reasons advanced by the husband as to why his position has deteriorated, his narrative statement gives a very full and detailed explanation which is prima facie convincing and there is no reason, at an interim hearing, for me to have substantial doubts about his presentation.

(iv) It follows from the above that, for the purposes of this interim hearing, while noting that it could be changed by future disclosure and / or cross-examination, I accept that the current income position of the husband is that his only income comes from letting his property in Switzerland, which produces for him c.£46,834 per annum gross. I have not been persuaded that he has, at the current time, any earned income from his businesses. It follows that, on the basis of an interim assessment, his income is

substantially lower than it was when the income provisions of the 2015 order were fixed, and there is therefore ample justification for a reduction in the periodical payment obligations. The figures I have selected as interim orders are informed by this position.

(v) I accept and note that there are large question marks over the wife's current actual income, significantly caused by her considerable non-disclosure. Although her Form E suggests that, in sickness, she receives 50% of her normal salary, the up to date position is far from clear. I note that some of the figures in the Form ES2 represent a 'potential rental income assessed by drive by valuers' and I am not at all clear what actual letting is taking place, because of the non-disclosure. Nonetheless, the apparently healthy capital position of the wife gives her some options for accruing income which cannot be ignored in the context of an assessment of 'earning capacity' and 'resources'. I have borne in mind all these matters in selecting the figures I have for interim variations.

(vi) I have thought carefully about whether it is fair to allow the husband to have access to the substantial amount of his own money in the F Bank account at this stage. I have listened carefully to the articulate and forceful representations made on this subject by the wife herself, notwithstanding her incapacity. I have decided that in carrying out a balancing exercise it is appropriate for the husband to have access to this money (subject to the deductions to be paid to the wife this is c.£532,246.52) now and it would be extremely unfair to deny him access to that money for a further indefinite period or at all (save for the limited appeal period). Amongst the matters which have steered me in this direction are the following:-

(a) The husband is in substantial debt and has a great and immediate need for the money. He has already been denied access to it for a long period of time and the delays are substantially the outcome of acts and omissions of the wife.

(b) The wife has already had her equivalent half share of this money and there is no reason obvious to me why F Bank should have treated them differently.

(c) For the wife to justify effectively freezing this money she would need to have made out at least a good prima facie case to the effect that she is likely to persuade a court in due course that she has a sustainable claim for capital which could be enforced against this money. I have not been remotely persuaded that such a case exists on the evidence which has been presented. Making an interim assessment, which could later be changed of course, I think it unlikely that she will have any substantiated claim which may be enforced against this money. Certainly, there is a paucity of evidence which points in that direction.

(d) I understand the wife's argument that enforcement of a debt (if and when established) would be made more difficult if that money is distributed to the husband and used by him, perhaps to repay his substantial debts or to defray his living expenses, but there are other assets against which an enforcement process could in due course be possible (for example, his interest in real property in Switzerland or his UK private pensions). The court should not without a persuasive reason freeze assets on the basis that there is an outside chance that an enforcement application may in due course be justified.

(e) I declined the husband's application (in October 2022 and March 2023) to have these monies freed up for himself on the basis that the hearing this week gave the wife an opportunity to explain with evidence why the husband should not have access to the monies. It is not the husband's fault that the wife has not been able to take this opportunity because of the problems on her side's preparation of the case.

(vii) I have decided to change the 2015 and 2017 orders by requiring any future C payments to be paid via Goodman Ray rather than the joint F Bank account mechanism. This decision has been informed by the difficulty and complication which has been caused by the joint account provisions in the original orders – I fear that if continued there would inevitably be further unnecessary court hearings. It has also been informed by the cogent evidence presented by the husband as to how the C payments made through Goodman Ray have been distributed with efficiency and scrupulous fairness by Goodman Ray (see, for example, the Bidwell Henderson analysis). In contrast, there was no compelling or persuasive evidence presented by the wife to justify her assertion that Goodman Ray could not be trusted.

29. I turn to the question of costs. I propose to leave the majority of the costs issues at large, to await the restoration of the proceedings, if that actually happens. I remind myself that the husband has incurred, overall, some £276,256 in costs so that is a substantial outstanding matter. The wife has disregarded orders and rules and filed no costs figures, but I suspect her costs spending was also significant, but lower than that of the husband.

30. I cannot, and should not, however ignore the costs wasted by this week's hearing, intended as a final hearing, being abortive or at least not final. Ms Phipps has told me (and I accept and assess this as a reasonable figure in the circumstances) that the husband's costs of the present hearing amount to £42,128.79. Ms Phipps has argued (and I accept) that the fault for this hearing not being properly effective does not fall to the husband and that he should have his wasted costs paid.

31. I sought submissions from Ms Phipps as to whether these costs should be paid by the

wife or by Dr X and she has addressed me on the law on this subject – see FPR 2010 Rule 15 and the Court of Appeal decision in *Barker v Confiance Limited* [2021] 1 WLR 231. In this context I remind myself of the undertaking given by Dr X to the court when he took on his role as a litigation friend, this being in the standard form required by Rule 15.4.

32. I wanted to give Dr X the opportunity to respond to the costs application against him. I sent this email to him on the afternoon of 23rd October 2023:-

"Dear Dr KX,

I am forwarding this message received this afternoon from Ms Phipps, Counsel for Mr Y:-

"The final hearing in this matter was listed to commence this morning with a time estimate of 5 days. HHJ Hess felt unable to proceed with the trial owing to the fact that Dr. Z has been found to lack capacity and that you – her litigation friend - were absent and no arrangements had been made for her to be legally represented at the hearing. HHJ Hess therefore indicated that he is minded to make interim orders as he was not able to proceed with a fully contested hearing.

HHJ Hess will be delivering a written judgment on interim matters in this case, either tomorrow or first thing on Wednesday. Mr. Y is seeking an order for costs against you and/or Dr. Z in respect of the wasted costs for preparing for trial, in the sum of around £50,000. HHJ Hess will determine this application on Wednesday 25th October 2023 at 10am. If you wish to make submissions in relation to costs, you are invited to do so either by attending in person or, if you prefer, by video link. Please let the court know as soon as possible if you intend to attend and, if so, whether you would prefer to attend by video link, in which case suitable arrangements will be made.

You should be aware that in discussion with the judge today, Dr. Z appeared to put the blame for her failure to be prepared for trial on you. There may be an argument as to whether she or you should be responsible for any costs ordered and in what proportions.

The judge has indicated that he will terminate your appointment as litigation friend at the hearing on Wednesday, after the costs issue has been determined."

This is a correct account of what happened this morning and you are accordingly invited to attend on Wednesday (25th October)."

33. Dr X felt too unwell to attend the hearing on 25th October 2023, either in person or by way of CVP video link, but he was able to send me a lengthy email in the early hours of 25th October 2023 with ten attachments which explained his position in detail so that my view is that he has had the opportunity to make such representations as he wished to make.

34. In deciding what costs orders to make I remind myself that the starting point (under FPR 2010 Rule 28.3(5)) is for there to be no order as to costs, but Rule 28.3(7) allows me to depart from this in certain circumstances, including where there has been relevant non-compliance with orders or litigation conduct (as there has been here, as described above). The Court of Appeal decision in *Barker v Confiance Limited* [2021] 1 WLR 231 suggests that, whether pursuant to the undertaking or by reference to Senior Courts Act 1981, section 51, the court can make a costs order against a litigation friend if, in all the circumstances, it is just to make a costs order.

35. I have reached a clear view that the fair and just outcome here is for me to make an order for Dr X to pay the whole of the costs wasted by the hearing this week not being able to be dealt with as a full final hearing and I assess this at £42,128.79, to be paid within 14 days. While Ms Phipps invited me to consider apportioning this 50:50 between the wife and Dr X, I have decided that the appropriate order is to hold Dr X 100% responsible for these costs. He willingly took on the role of litigation friend and his performance has been wholly inadequate. I accept that he has not been well, but this fact does not adequately excuse or explain his conduct and he should not escape the consequences of what has happened.

36. These are my decisions and, starting with the draft order helpfully produced by Ms Phipps, I have produced an order which matches these decisions.

37. In accordance with transparency guidance I propose to publish an anonymised and redacted version of this judgment on TNA / BAILII and request Ms Phipps to produce a version which such anonymisations / redactions as she seeks, which I will forward to the wife and Dr X for any comments they may have.

HHJ Edward Hess
Central Family Court
26th October 2023