IN THE FAMILY COURT **[2023] EWFC 102**
SITTING IN THE CENTRAL FAMILY COURT

No: ZZ 22 D 17310
and 1653-9059-1136-8825

23rd June 2023

BEFORE RECORDER ALLEN KC

BETWEEN

RA

Applicant

and

KS

Respondent

(INTERIM ORDER FOR SALE)

Miss Sassa-Ann Amaouche and Mr. Simon Calhaem
instructed by Sears Tooth for the applicant
Miss Charlotte Hartley instructed by Jones Nickolds for the respondent

Hearing date: 17th May 2023

JUDGMENT

1) On 17th May 2023 I heard a directions appointment following a private FDR appointment which had been heard by Miss Jude Allen on 8th February 2023. Miss Sassa-Ann Amaouche appeared for the applicant ('W') and Miss Charlotte Hartley for the respondent ('H').

2) At that hearing I was asked to determine an application for an interim order for sale of a property known as the Barn. The application was made by W and opposed by H. Both counsel argued the case in their respective position statements on the merits. However, at the outset of the hearing, I raised a question of my own initiative which I phrased in my order in the following terms:

   "the jurisdiction to order vacant possession of the Barn under section 33 of the FLA 1996 on [W's] current applications made under FPR 2010 r20.2(1)(c)(v) on 28th April 2023 and MWPA 1882 s17 on 11th May 2023 given it is common ground that [W] and [H] both have a legal and beneficial interest in the said property and therefore [FLA 1996] s33(3)(d) rather than s33(3)(e) applies."

3) At Miss Amaouche's request I gave W the opportunity to consider her position in light of this question and, if she so chose, to file and serve a skeleton argument by 31st May 2023 and H the opportunity to file and serve a skeleton argument in reply by 14th June 2023. This was on the express basis that the costs of my deciding this issue would be live to be determined under FPR 2010 r28.2 and not r28.3.

4) A skeleton argument was subsequently filed by Mr. Simon Calhaem on W's behalf on 31st May 2023 and by Miss Hartley on H's behalf on 14th June 2023.

5) It is (rightly) common ground that (i) an order for sale of property stems from MCA 1973 s24A which (*per* s24A(1)) can only be made on or after *"… an order under section 22ZA … a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order…"*; and (ii) save for an order under s22ZA (i.e. a legal services payment order) orders for sale are final orders that (*BR v VT* (*Financial Remedies: Interim)* [2016] 2 FLR 519 *per* Mostyn J at [3]) *"cannot be made during the pendency of the proceedings".*

6) In *BR v VT* Mostyn J identified at [2] three procedural routes under which a party may seek an interim order for the sale of property prior to the making of a final order namely (i) MWPA 1882 s17;[1] (ii) TLATA 1996 ss13 and 14 (if both spouses have a beneficial interest in the property); and (iii) FPR 2010 r20.2(1)(c)(v) (described as the counterpart of CPR 1998 r25(1)(c)(v) which is phrased identically).

7) In *BR v VT* the husband's application was framed as seeking the removal of the wife's home rights notice via FLA 1996 Part IV. The husband had sole ownership of the property. The only obstacle to a sale was the wife's home rights notice. Therefore had no interim order been made, the husband would have been free to sell the property in any event (absent the wife seeking an injunction). Therefore although Mostyn J ultimately made an interim order for sale under FPR 2010 r20.2(1)(c)(v), he did not have to do so.

8) The ratio of *BR v VT* is therefore largely confined to the exercise of terminating a home rights notice and the giving up of vacant possession. However, Mostyn J made remarks about the interim jurisdiction more generally. Having considered *inter alia Short v Short* [1960] 1 WLR 833, *Wicks v Wicks* [1998] 1 FLR 470 per Ward LJ, and *Miller-Smith v Miller Smith* [2010] 1 FLR 1402 per Wilson LJ (as he then was) his view was that:

    a. Ward LJ had not meant to say in *Wicks* that there was no power to order vacant possession under the MWPA 1882 s17 given the Court of Appeal had previously said the contrary in *Short*;

    b. Ward LJ was right to say that the MHA 1983 s1 (the forerunner to the FLA 1996 s33) exercise (i.e. the test for the making of what under the latter statute is called an occupation order) should be considered before ordering vacant possession; and

    c. the Court of Appeal in *Miller-Smith* fell into error in concluding that FLA 1996 s33 could be bypassed given that TLATA 1996 s13 includes the power to order vacant possession because they were operating on the incorrect view that there was no power to order vacant possession under MWPA 1882 s17.[2]

9) Therefore *per* Mostyn J in *BR v VT*, under each of the three procedural routes, the court must perform the evaluative exercise provided by FLA 1996 s33(6) before terminating home rights and ordering vacant possession. Applying this metric Mostyn J ordered at [36 (i)] the wife's rights of occupation be terminated under FLA 1996 s33; (ii) the wife's home rights notice be vacated; and (iii) a *"positive order"* for the sale of the home under FPR 2010 r20.2(1)(c)(v).

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[1] Section 7(7) of the Matrimonial Causes (Property and Maintenance) Act 1958 made explicit what may have been ambiguous before: "… *any power conferred by* [s.17 MWPA] *to make orders with respect to any property includes power to order a sale of the property*".

[2] However in *Miller-Smith* it was also observed by Wilson LJ at [23] *"that it would be surprising if an order that in effect a spouse should give vacant possession of a matrimonial home under TOLATA were to be made in circumstances in which the applicant could not have secured an occupation order".*

10) In *WS v HS (Sale of Matrimonial Home)* [2018] 2 FLR 528 the property at issue was in the parties' joint names. The husband made an application using the FPR Part 18 procedure for an interim sale of the family home but failed to identify the jurisdiction upon which he relied within the application notice. At first instance, counsel for the wife conceded there was a freestanding jurisdiction to make an order under FPR 2010 r20.2(1)(c)(v). The first instance judge was not referred to the test under the said rule, the MWPA 1882 s17, the FLA 1996 s33 exercise or the remit of TLATA 1996. The application was granted and an interim sale ordered.

11) On appeal before Cobb J, the wife argued that her rights of occupation could not be terminated through the FPR 2010 alone and that the judge had failed to conduct the FLA 1996 s33 exercise as required. During the hearing, the submission was clarified further – as the wife's right to occupy derived from a legal and beneficial interest in the property (different to *BR v VT*), the extent of what could be achieved under FLA 1996 was an order under section 33(3)(d) (emphasis added):

    (3) An order under this section may— …

    (d) if the respondent is **entitled** as mentioned in subsection (1)(a)(i), **prohibit, suspend or restrict** the exercise by him of his right to occupy the dwelling-house;
    (e) if the respondent has **home rights** in relation to the dwelling-house and the applicant is the other spouse or civil partner, **restrict or terminate** those rights.

12) It was said that unlike a subsection (e) case, where the right to occupy is borne solely of home rights, a subsection (d) case cannot terminate the right to occupy – the most it can do is prohibit, suspend or restrict that right.

13) Cobb J allowed the appeal on the following bases:

    a. orders for sale under MCA 1973 s24A cannot be made on an interim basis save for the payment of a legal services funding order (s22ZA);
    b. FPR 2010 r20.2(1)(c)(v) does not provide the court with a freestanding jurisdiction to make an interim order for sale – if that were right, it would be inconsistent with the prohibition circumscribed by MCA 1973 s24A;
    c. the routes available to the husband were the MWPA 1882 and/or TLATA 1996;
    d. such an application under either statute requires a FLA 1996 s33 analysis to provide vacant possession (again disagreeing with *Miller-Smith* where the Court of Appeal did not agree that such an exercise was needed under TLATA 1996);
    e. the husband would need to surmount the difficulty that by virtue of the wife's legal and beneficial interest, her rights of occupation could not be 'terminated' in any event. At [53](iv) he stated as follows:

        > There is a material difference between the 'termination' (s 33(3)(e)) of a spouse's home rights, and the 'prohibition, restriction or suspension' of his/her rights of occupation (s33(3)(d)). I do not consider – indeed neither counsel argued – that prohibition, suspension or restriction is synonymous with termination, and I do not consider that a 'prohibition' could be used to exclude a wife during the period of the conveyance of sale simply so as to give vacant possession to the buyer. It is important for the applicant for an order to assert his/her case specifically and clearly as to the respondent's 'rights';

    f. it was therefore questionable whether the court could even order vacant possession on an interim sale in such circumstances; and

g. as the only substantive application the husband had made was for financial relief under MCA 1973 ss23 and 24 no jurisdiction had been identified in the application under appeal for the interim order sought and made.

14) Cobb J agreed with Mostyn J to the extent that Ward LJ could not have meant to say in *Wicks* that an order under MWPA 1882 cannot encompass the power to order vacant possession. However he observed that in allowing the husband's appeal against the order for vacant possession and an interim sale, Ward LJ specifically rejected the notion that the old RSC 1965 and the then FPR 1991 provided a freestanding jurisdiction to make an interim order for sale and had pointed out that it would be odd if the procedural rules allowed a litigant to circumvent the express prohibition in the MCA 1973 on an interim order for sale. Cobb J also observed that whilst in *Miller-Smith* the Court of Appeal had upheld an interim order for sale with vacant possession under TLATA 1996 without the need to perform the FLA exercise, the court had been reluctant to endorse such a strategy in matrimonial litigation given that by such an order "*the court lays down only one piece of the jigsaw, namely that the home be sold, without its being able to survey the whole picture by laying down the others"* (per Wilson LJ at [59]).

15) Cobb J went on to consider the alternative – that there is a freestanding jurisdiction under the FPR 2010 to order an interim sale – and concluded there remained the difficulty that the wife's rights of occupation could not be terminated under FLA 1996 s33.

16) In many ways, the judgments of Mostyn J and Cobb J complement one another. They both agree that:

    a. Ward LJ is not to be taken literally when saying in *Wicks* there is no power to order vacant possession under the MWPA 1882;
    b. there is the jurisdiction to order an interim sale under both the MWPA 1882 and TLATA 1996; and
    c. an analysis of FLA 1996 s33 is required before terminating rights of occupation and giving vacant possession (albeit *Miller-Smith*, being Court of Appeal authority, contradicts this as regards TLATA 1996).

17) Where they disagree is whether or not FLA 1996 r20.2(1)(c)(v) offers a freestanding jurisdiction.

18) In *SR v HR (Property Adjustment Orders)* [2018] 2 FLR 843, a decision of Mostyn J dealing mainly with the extent of the court's executory jurisdiction as considered in *Thwaite v Thwaite* (1981) 2 FLR 280 and the restrictions on varying capital orders, he included the following footnote in relation to his divergence of opinion with Cobb J:

    An order under section 24A can only be made when making an award for capital provision; it cannot be made as an interim measure. There is a regrettable difference of opinion between Cobb J and myself as to whether an interim order for sale can be made under FPR 20.2(1)(c)(v): see *BR v VT* [2015] EWHC 2727 (Fam) and *WS v HS* [2018] EWFC 11. I firmly and respectfully maintain my view. An order for the sale of property is essentially procedural; of itself it does not alter proprietary rights. I cannot see that words should be read into the rule to the effect that to make such an order an underlying statutory power must be identified. In my opinion to provide in the rules the independent power to order an interim sale is not *ultra vires* the parent statute (sections 75 and 76 Courts Act 2003). However, until the matter can be resolved by a higher court I suggest that applications for an interim sale are made under section 17 of the Married Women's Property Act 1882. Such an application is to be made in short form under the Part 18 procedure within the financial remedy proceedings: see FPR 8.13 and 8.14.

19) Mr. Calhaem submits on W's behalf that if the MWPA 1882 s17 provides the court with the power to order vacant possession it is unnecessary to consider whether the order for vacant possession is being made by virtue of s33(3) or whether the powers available under the 1882 Act encompass an order for vacant possession with the *"now accepted view"* that such an order can only be made having met the conditions in s33(6).

20) Mr. Calhaem further submits that (i) *"the words in s33(3) do not have the effect of altering the jurisdiction to order vacant possession under s17 of the 1882 Act, clearly Parliament would have amended the Act in order to say this if that is what had been intended. What the judges have done subsequently (and subsequent even to the 1983 predecessor to it) is to require, quite properly, that any discretionary exercise on an order for sale/vacant possession also considers the balancing factors now to be found at s 33(6). The Family Law Act 1996 was never designed to provide the courts with distributive powers of property, these are to be found in the Matrimonial Causes Act and the Married Women's Property Act 1882 under which this application is made …"*; and (ii) *"s33(3) has little (if any) relevance to an application for an interim order for sale."*

21) I agree with this submission to the extent that it states that the test in s33(6) needs to be satisfied. However it does not follow that it is unnecessary also to consider s33(3). In my view it makes little sense for it to be common ground that applications under MWPA 1882 (and indeed under both of the other potential routes if the views of Mostyn J and Cobb J are preferred over those of the Court of Appeal) require a court to be satisfied of the matters set out in FLA 1996 s33(6) and for s33(3) then not to also be engaged given that it is the application of the s33(6) criteria that determines whether a court makes an order under s33(3) or not.

22) I am fortified in this conclusion by the fact that in *BR v VT* Mostyn J stated at [10] that *"both counsel are agreed that an order for interim sale cannot be made unless I am satisfied that the wife's home rights should be terminated pursuant to an order under s33(3)(e) of the 1996 Act applying the evaluative factors in s33(6)."* There would have been no need for Mostyn J to have referred to s33(3) if (as Mr. Calhaem submits) it has "*little (if any) relevance"* to an application for an interim order for sale. I therefore disagree with Mr. Calhaem when he submits that references to s33(3) in *BR v VT "are not germane to the jurisdiction in this case"* relying (as he does) on the fact that in *BR v VT* there was no application under the MWPA 1882 s17 and that both counsel *"agreed"* that s33(3) was applicable. I do not understand why this means that the references to s33(3) are not relevant.

23) Further, if Mr. Calhaem was correct it would have been unnecessary for Cobb J to address as he did at [53] (iv) of *WS v HS* the *"material difference"* between *"termination*" in s33(3)(e) and *"'prohibition, restriction or suspension"* in s33(3)(d)).

24) In this context I agree with Miss Hartley when she submits that none of those words conveys permanent extinction given that prohibit means 'to prevent an activity', suspend means 'temporarily prevent from being in force or effect', and restrict means 'to limit movements or actions.' None of these words mean permanently or irrevocably to extinguish.

25) In my view had the drafters of the FLA 1996 intended a proprietary right to be capable of permanent extinction under FLA 1996 the word 'terminate' would have been included in s33(d). This is of particular note given that, as Miss Hartley observes, s33(3)(d) and s33(3)(e) are the only two sub-paragraphs in s33(3) in which a distinction is made between the types of rights and the powers the court has to interfere with them.

26) Miss Hartley offers an explanation for the distinction between s33(3)(d) and s33(3)(e) from a *"policy perspective"*. She submits that FLA 1996 Part IV is not intended permanently to create or terminate beneficial estates in property (nor contractual rights to occupy) but to regulate use of homes that are occupied in different ways by associated persons. She notes that the diminishing powers starting with s33 and ending with s38 reflect lesser degrees of connection between the respondent and either the applicant or the property, or both. The duration as well as the extent of such powers is different, depending once again on the strength of the respondent's connection to the property. The difference between s33(3)(d) and (e) is consistent with those distinction, operating as a brake on the court's powers.

27) I do not need to speculate whether Miss Hartley is correct in this explanation for the purposes of determining the issue that arises in this case.

28) Mr. Calhaem also addresses the different wording in s33(3)(d) and s33(3)(e). He accepts that the two subsections are (in his words) *"subtly different"*. He submits the reason for this is that (d) – where the court may *"prohibit, suspend or restrict the exercise"* of a right to occupy where a party has a beneficial interest in the dwelling-house relates to substantive rights due to an existing estate or interest whereas (e) – where the court may *"restrict or terminate"* home rights in relation to the dwelling-house – relates to rights that only exist due to the fact of the marriage (or civil partnership), rights that are terminated on divorce, and this subsection permits the court to terminate them at an earlier time.

29) This does not, in my view, explain why the word *"terminate"* is not included in (d). Although Mr. Calhaem asserts that there *"is no evidence that the rule-makers wished for women with home rights to be treated any differently to those with substantive rights, and no record of a court ever discriminating between them"* I do not consider that this answers this point.

30) Mr. Calhaem further submits that *"[i]n reality an occupation order is an order for vacant possession, whether this is by termination of a home right or an ouster order. Either way the court also retains a power to make an interim order for sale under the procedure adopted by this applicant. The two are considered (and have been by all the judges' hand in hand)."*

31) I do not agree that it is right to conflate the making of an occupation order and an order for vacant possession in this way nor do I agree with Mr. Calhaem's further submission that *"[v]acation of a property is no different than ordering sale (which is a disposal of the property and with it the rights including to occupy) … "vacant possession" in a conveyancing context is simply what the purchasers will require …"* for the same reason. This would also seem to contradict [53] (iv) of *WS v HS* when Cobb J stated that *"I do not consider that a 'prohibition' could be used to exclude a wife during the period of the conveyance of sale simply so as to give vacant possession to the buyer."*

32) Mr. Calhaem states that the above analysis is aligned with *"Mostyn J's view that in reality an order for vacant possession is merely an administrative act pursuant to substantive powers (i.e. order for sale)"*. This is of course not the view taken by Cobb J (after citing Ward LJ in *Wicks*).

33) For these reasons I disagree with Mr. Calhaem when he then submits that *"there is no need then for this court to disassociate the "order for sale" question from the "vacant possession question" (for the purposes of the court's powers), an order for sale is essentially the same thing as an order for vacant possession ..."* As the s33(6) balancing exercise must be considered on an application for an interim order for sale the question the extent of the court's powers to order vacant possession under s33(3) then arises. The fact that this is not an application for an occupation

order does not obviate the need to consider s33(3).

34) Although in *WS v HS* Cobb J states at [48] that *"I am satisfied that applications under either statute [i.e. MWPA 1882 and TLATA 1996] would provide the court with inherent power to order vacant possession of the property"* I do not consider that this statement precludes the need to consider s33(3).

35) Mr. Calhaem further submits that s33 must be read alongside ss35, 36, 37 and 38 (the other sections under which occupation order can be made), notes that the maximum duration of orders differ from section to section, and that, *per* the editorial notes to the Family Court Practice 2023 at p956, each section is a *"self-contained code"*. I do not consider that this adds anything to the analysis.

36) Mr. Calhaem then puts forward an alternative argument stating that H is now estopped from standing in the way of a sale (an argument not made in either *BR v VT* or *WS v HS*). He submits that a promise to provide a right of occupation (or in this case a promise not to exercise a right of occupation) is capable of giving rise to an estoppel - *Southwell v Blackburn* [2015] 2 FLR 1240. In this case he submits that H agreed both not to occupy but also to sell the Barn and as a result of his assurances the property was removed from the rental market and marketed for sale between September 2022 and February 2023 in order to defray the running costs (met entirely by W from her interim maintenance). He states that H's unilateral decision to refuse now to market for sale is (as *per* Ms. Amaouche's Position Statement) "*motivated by his desire to prevent her access to funds to meet litigation costs and to place undue financial pressure on her"*. Either way, W has lost the rental income which she might otherwise have enjoyed had H's promises to sell not been acted on to her detriment, and so for him to assert a right of occupation (which he had agreed to surrender on sale), or to seek to prevent the sale from now occurring is clearly unconscionable.

37) I do not accept this alternative analysis. I agree with Miss Hartley when she states that if the 'promise' W relies on is H's alleged agreement not to occupy the property and to sell it then 'detriment' of an alleged loss of rent is somewhat inconsistent. Further, and in any event:

    a. in relation to the alleged 'promise' (i) this is based on disputed issues of fact; and (ii) the reliance on H's previous open offer was for *both* properties to be sold (an offer that was not accepted) and H's most recent open offer is for W to retain the London property and for H to retain the Barn. I agree that it would be wrong to characterise an unaccepted offer as a 'promise' capable of founding an estoppel; and

    b. as to 'detriment' although rent will be lost permanently by a sale, as Ms. Hartley observes, rent has always been much lower in winter as the Barn is partly used by the family and partly a holiday let, and it is H's position that retention of the property will enable the parties to generate a decent rental income over the summer months assuming the property is not being actively marketed in that period. I therefore do not see the alleged detriment.

38) I therefore reach the following conclusions. If an application for an interim order for sale made under MWPA 1882 s17 seeks vacant possession of a dwelling house to be ordered against a respondent, the court's powers are limited by what is set out in FLA 1996 s33(3). If the respondent has a legal and beneficial interest in the property then, by virtue of s33(3)(d), the right to occupy may be prohibited, suspended or restricted (provided that the court retains the power to vary or discharge the order, and that it would automatically terminate on the death of either party).

However the court does not have the power to extinguish permanently or irrevocably these rights. The position is different if the respondent's rights of occupation derive solely from home rights arising from the marriage (where s33(3)(e) applies).

39) It is for this reason in my view that Cobb J states in *WS v HS* at [53] (iv) "*It is important for the applicant for an order to assert his/her case specifically and clearly as to the respondent's 'rights'."*

40) In such circumstances if the respondent has a legal and beneficial interest in the property it would appear that there is no choice but for the applicant to have recourse to a TLATA 1996 application. However both Cobb J in *WS v HS* and Wilson LJ in *Miller-Smith* have cautioned against that approach (*the "jigsaw"* point) and, in any event, Mostyn J takes the view the Court of Appeal were wrong in *Miller-Smith* to not undertake the FLA 1996 s33 exercise in any event.

41) Although this is not an application pursued under FPR 2010 r20.2(1)(c)(v) (rightly in light of *SR v HR (Property Adjustment Orders)*) I would have reached the same conclusion had such application been brought under this rule (assuming that Mostyn J's view is to be preferred to that of Cobb J – a difference of opinion upon which I do not need to – and do not – express a view).

42) For completeness I should record that Mr. Calhaem referred me to *Bramwell v Bramwell* [1942] 1 KB 370, and *Stewart v Stewart* [1948] 1 KB 507 in addition to *Short v Short* [1960] 1 WLR 833 as being three illustrations of cases where on a MWPA 1882 s17 application the court ordered vacant possession. However as Miss Hartley observes, in *Bramwell* the family home was owned in the sole name of the applicant husband; and in both *Short* and *Stewart* the tenancies were held in the sole name of the applicant husband. So these cases, like *BR v VT*, fail to provide guidance where the respondent has a proprietary interest.

43) In reaching my conclusion on this issue I express no view on the merits of W's application and hence have not taken into account anything said in relation to the merits in W's statement in support dated 28th April 2023 or in H's statement in response dated 16th May 2023. I do not need to consider the merits given my conclusion that on the facts of this case there is no jurisdiction for the court to make the order that W seeks.

Costs

44) The starting point is set out in FPR 2010 r28.1 namely that the court may make any order as to costs *"as it thinks just".* It is common ground that this application is thereafter governed by the costs rules set out in FPR 2010 r28.2. As a consequence:

    a. the costs are not governed by the 'general rule' set out in FPR 2010 r28.3(5) that the court will not make an order requiring one party to pay the costs of another party;
    b. the CPR costs rules set out in Part 44 apply but r44.2(2)(a), which provides a 'general rule' that the unsuccessful party will be ordered to pay the costs of the successful party, does not apply; and
    c. the position is therefore a 'clean sheet' - as so described by Wilson LJ (as he then was) in *Judge v Judge* [2009] 1 FLR 1287 and *Baker v Rowe* [2010] 1 FLR 761 - as neither the 'no order for costs' presumption nor the 'costs *prima facie* follow the event' presumption apply.

45) I am therefore to have regard to all the circumstances and the matters set out in r44.2(4) and r44.2(5). There have, however, been a number of cases as to the relevance in the exercise of the judge's discretion that one party has been successful and the other unsuccessful in a 'clean sheet' case. These include *Baker v Rowe*, *KS v ND (Schedule 1: Appeal: Costs)* [2013] 2 FLR 698, *Solomon*

v Solomon [2013] EWCA Civ 1095, and *H v W (No. 2)* [2015] 2 FLR 161. In essence they conclude that, as in *Gojkovic v Gojkovic (No. 2)* [1991] 2 FLR 232 per Butler-Sloss LJ (as she then was) at p236, there remains a starting point that costs 'follow the event' even in a 'clean sheet' case albeit the presumption may be somewhat 'softer' and therefore more easily displaced.

46) My provisional view (and I emphasise the word 'provisional') is that there may be no good reason to depart from the starting point in this case.

47) If the position on costs cannot be agreed I invite brief written submissions on the sole issue of costs (limited to two pages of A4 per party and accompanied by N260s) to be filed with me directly within seven days of this judgment.

Addendum

48) I circulated this judgment to the parties on 15th June 2023. I subsequently received submissions on costs as directed. H seeks his costs in the sum of £6,915.60 (supported by an N260 in this sum). W submits that the correct order is no order as to costs (or in the alternative costs in the application or reserved).

49) On H's behalf Miss. Hartley adopts the analysis that I set out at paragraphs 44) and 45) above and submits that (i) I had put the parties on notice on 17th May 2023 that costs would be a live issue; (ii) there is no reason to depart from the (albeit 'softer') starting point; (iii) having regard (under CPR 1998 r44.2(4)(b)) to *"whether a party has succeeded on part of its case"* W's failure to satisfy the court that had jurisdiction to make the order sought *"is a fundamental failure [and] one that should sound even more firmly in costs than an application which failed on an exercise of discretion (which may have been appropriately pursued, even if ultimately unsuccessful)"*; (iv) I had specifically drawn the parties' attention to the (potential) limitations on the court's statutory powers on 17th May 2023 when H's costs were limited to reading W's application and preparing his witness statement in response and W chose to pursue her application after this date with my order making it clear she was not obliged to do so; (v) *per* Mostyn J in *KS v ND (Schedule 1: Appeal: Costs)* at [21] whether a party has been successful in whole or in part would along with admissible offers (of which there are none) be *"the first things to write on the clean sheet"*; (vi) having regard (under CPR 1998 r44.2(4)(a) and (5)) to the *"conduct"* of the parties H sought to keep the costs of responding to W's applications down by not seeking an adjournment on grounds of insufficient time at the post-FDR directions hearing on 17th May 2023 and had no choice to respond to W's decision to continue to pursue her application; and (vii) W should not have pursued these interim applications on grounds of merit.

50) On W's behalf her solicitors Sears Tooth seek to identity what *"event"* occurred to which the *"soft"* costs follow rule applies. It is submitted that as H had not taken the jurisdictional point in advance of the hearing but rather it was a point identified by the court and one in relation to which I made a direction for both parties to file submissions so as *"to satisfy the court's interest in the potential jurisdictional lacuna under 33(d)"* it is *"arguable"* that the court *"was requesting the parties to act as Amicus Curiae (or in modern parlance - Advocates to the Court)"*. It is therefore said the *"event"* that occurred is that the court determined its <u>own</u> point of its <u>own</u> initiative and both parties have assisted the court in reaching its own conclusions (as the appointment of an independent *Amicus* would not have been practicable).

51) It is further said on W's behalf that the origins of the *"soft"* rule is *Gojkovic*, the rationale being that this was because it was possible to identify one party as being *"culpable"* for the generation of costs. On this interpretation of the *"event"* it would be unusual to consider that either party should be penalised. Given how the issue arose and how it was determined it can hardly be said

that W was *"culpable"* of the incidence of costs. H withdrew his agreement to sale and then the court raised the issue of jurisdiction. In circumstances where there was no avoidable opportunity to avoid the costs of resolving this issue it would be wrong in principle for an *inter partes* costs order to be made and the correct order is therefore no order as to costs.

52) In the alternative it is said on W's behalf that the Barn may yet be sold but as a result of my decision this will now only be determined at the final hearing. If a sale is ultimately ordered, then W should be at liberty to seek *all* of her costs in relation to H's initial agreement (then refusal) to permit the sale. Further, and *"[l]egal niceties aside"* it was H's reneging on his agreement which gave rise to the application in the first place and if the application for sale ultimately succeeds the court should be in a position properly to consider the costs of that issue and therefore "*to make an order today would be to predetermine what the fair order for costs should be in light of the outcome (or "event")"*. On this basis the correct order would be costs in the application.

53) Having considered the parties' respective submissions I maintain my provisional view that there is no good reason to depart from the starting point in this case. I adopt as my reasoning Miss. Hartley's submissions save for the last one in relation to the merits of the application as I have not taken these into account at all. In particular (i) H has been successful; (ii) I put the parties on notice on 17th May 2023 that costs would be a live issue; (iii) one of the reasons I gave W the time I did to decide whether to pursue her application was to consider whether or not to do so (and she was not obliged to do so); and (iv) H was obliged to respond to W's decision to pursue her application thereafter. I do not agree with the analysis that I was asking the parties to act as *Amicus Curiae* not least because it was for W to decide whether or not to pursue her application. Further, whether or not the Barn is sold at final hearing has no bearing in my view on the costs of an application for it to be sold in advance of that hearing.

54) I therefore order that W shall pay H's costs of the application.

55) As to quantum it is said that H seeks solely the costs incurred in (i) considering W's interim applications; (ii) preparing a witness statement in response; and (iii) reading and responding to her skeleton argument. H does not seek his costs of preparing for or attending the hearing on 17th May 2023 on the basis that those costs did not arise as a consequence of W's applications and would have been incurred in any event. It is submitted that costs of £6,915.60 (inclusive of VAT and disbursements) are eminently reasonable.

56) W makes no specific submissions on quantum. It is simply said that if a costs order is made then payment should be delayed until the conclusion of the final hearing given that any costs order will compound W's current funding difficulties and that if the judge at final hearing accepts W's case as to the motivations for H's actions in resiling from an agreed sale *"then the making of a costs order now would offend natural justice and have rewarded the H's poor conduct"*.

57) The costs in this case are being summarily assessed on the standard basis. A standard assessment is dealt with under CPR 1998 r44.3(2) and PD 44 para 6.2, whereby the court will *inter alia "(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred ….".*

58) As Mostyn J observed in *JM v CZ (Costs: Ex Parte Order)* [2015] 1 FLR 559 when considering this provision at [25] *"the effect ... is to deflate or drive down the yardstick which would otherwise have been applied"*. He went on at [26] to record that he had asked counsel to give him their anecdotal experience as to the usual percentage tariff allowed on a standard assessment. Perhaps unsurprisingly counsel for the receiving party said it laid between 70–80% whereas counsel for

the paying party said that it was around 66%. Mostyn J adopted 70%.

59) In my view considering H's N260 in the context of the relevant rules and the issues in this case it is appropriate for him to receive 80% of his costs by way of summary assessment. This is £5,532.48 which I shall round down slightly to £5,500 (inclusive of VAT and disbursements).

60) In reaching this conclusion I have noted from W's N260 that she incurred costs of £11,475.00 on this discrete issue. However given that proportionality to the matters is the driver, a comparison between the parties' respective costs is of less relevance than it was before the Jackson reforms took effect on 1st April 2013.

61) I see no reason to depart from the default position that the costs are payable within 14 days. W's arguments in this regard in respect of natural justice and H's poor conduct are a repeat of her submissions on the merits. However in light of W's current funding difficulties I consider that the order should not be enforceable until the making of a final order at the conclusion of the financial remedy proceedings.

RECORDER NICHOLAS ALLEN KC

23rd June 2023