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Case No: 1673-2644-9143-6651
Appeal Court Ref No: FA-2023-0000115

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
On appeal from Her Honour Judge Ellis
sitting in the Family Court at Gloucester

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 October 2023

Before :

The Honourable Mrs Justice ROBERTS

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Between :

RG	**Applicant**
- and -	
TA	**Respondent**

(Apeal: Legal services funding order: Schedule 1 Children Act 1989)

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Katherine Dunseath, counsel, (instructed by **Michelmores LLP**) for the applicant
Jennifer Kavanagh (instructed by **Wilson Family Law**) for the respondent

Hearing date: June 2023

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APPROVED JUDGMENT

Mrs Justice Roberts:

1. This is an application by RG for permission to appeal a decision made by Her Honour Judge Ellis sitting in the Family Court at Gloucester in April 2023. The issue before the court on that occasion was whether TA, his former partner and the mother of his two young children, should be required to provide financial assistance in respect of his ongoing legal costs. Those costs have been, and will be, incurred in connection with two substantive applications under the Children Act 1989 which are ongoing in that local Family Court. It was, and remains, RG's case that without such assistance he will not be able to afford representation and will have to conduct proceedings as a litigant in person. The judge dismissed his application for a legal costs funding order and he now seeks permission to appeal that decision.

2. It will be convenient to refer to the parties in this judgment as "the father" and "the mother". Whilst they were in a relationship for some seven years, they were not married which is why the father's substantive application for financial provision is brought under Schedule 1 of the 1989 Act and not under the Matrimonial Causes Act 1973.

Current litigation: the applications before the Family Court

3. The first application issued by the father in September 2022 concerns the arrangements which should be put in place for the children to spend time with him. Contact had been progressing uneventfully for several weeks after the parties' relationship came to an end. It was stopped by the mother in July 2022. She has since made a number of serious allegations against him in relation to the physical and emotional abuse which she alleges she suffered during the course of their seven-year relationship. She maintains that the children have been adversely affected by their exposure to that abuse. There is currently a four-day fact-find listed in the Family Court which is due to commence in September this year. Pending resolution of those allegations, the majority of which are vigorously contested, the time which the father spends with the two children (now 6 and 3 years old) is supervised.

4. The second application which is ongoing in the local Family Court is the father's application pursuant to s.9 and Schedule 1 of the Children Act 1989 whereby he seeks substantive orders against the children's mother for financial provision. Following separation he has vacated the family home which remains in joint names. He relies on what he claims to be the vast disparity in their respective financial positions as justifying a financial contribution from the mother to his and the children's future needs (presumably as a parent and one of the children's carers whilst they spend time with him). In terms of his future housing needs, he has a joint interest in the former family home currently occupied by the mother, their two children and two older children of the mother's from a previous relationship, although this property is heavily mortgaged. He has a joint interest in another property which remains home to

his former wife and their two teenage children. Whilst that property is mortgage free, he maintains that it cannot be sold until 2024 when the younger child is 18.

5. His application for a legal costs funding order in respect of both sets of proceedings was issued at the end of March this year and listed for hearing in April 2023. By her order the judge dismissed his application. It is that order in respect of which he now seeks this court's permission to appeal.

6. In May 2023 I made directions in relation to the future conduct of the permission application. I listed the matter for a day on the basis that I would hear the permission application and, if leave to appeal was granted, the substantive appeal would follow immediately thereafter. Because I had other matters in my list on that day, there was not time to deliver judgment at the conclusion of counsel's detailed submissions and I was obliged to reserve my judgment which I agreed to hand down in writing.

7. Because there is a significant degree of elision between the submissions which are relevant to the permission application and those relating to the substantive appeal, I invited counsel to address me on both aspects. For these purposes I had access to a substantial appeal bundle running to some 600 pages. It included a full transcript of the extempore judgment delivered by Her Honour Judge Ellis in April together with a full transcript of the two-hour hearing on that date, including counsel's submissions, which preceded that judgment. I have within the appeal bundle a great deal more information than was available when the father issued his appellant's notice. All the information which was available to Her Honour Judge Ellis is now before me including both counsel's written position statements filed in advance of the hearing in April, the parties' witness statements in relation to the legal costs funding application, and their Forms E with supporting annexes and disclosure. Ms Katherine Dunseath (who did not appear below) represents the father in this appeal and Ms Jennifer Kavanagh continues to represent the mother.

The father's case in relation to financial disparity and inequality of arms: the picture presented to the court in April 2023

8. These parties met in August 2015 at a time when each had children from their former relationships. They began living together in a rented property in the early part of the following year. Their first child was born in October 2016. Their younger child arrived in February 2020. During the course of their relationship they purchased a family home in their joint names although the mother claims to be the sole beneficial owner of the property having provided the entirety of the deposit which came from the sale of a previous home. It is said to be worth £1.3 million but is subject to an interest only mortgage provided by a private UK bank in the sum of c.£863,000. The father is jointly liable with the mother for that mortgage although he is currently making no contribution towards servicing the monthly interest payments. The parties agreed to separate in May 2022 and the father left the family home the following

month. He claims that he is now living under his mother's roof in Bristol because he cannot afford to rent a property of his own.

9. In terms of their respective backgrounds, the father had a career in the military services and with the police for almost 30 years and was living in Kenya when he met the mother. She was living in Spain with her children. They decided to set up home together in this country. The father ended his service with the police and set up his own gardening business through which he sub-contracts his services to the local forestry sector. The mother is involved in the world of horse racing and is employed as a bloodstock adviser by a company based in Ireland. That company, of which the father maintains she is both a director and shareholder, is said to be the owner of a number of racehorses worth £15 million. It appears to be part of an offshore corporate structure which is owned by another company which we will refer to as "Company1". Company1, in turn, is an asset of one of the family trusts of which the mother is a discretionary beneficiary. It is not clear at this stage whether the racehorses are owned by the Irish company or by Company1 but it matters not for present purposes.

10. I am cautious at this stage about embarking upon any attempt to provide further, far less definitive, detail about either the trust structure or the corporate holdings which lie beneath that structure because the financial proceedings which have generated this early round of disclosure have not yet progressed beyond an exchange of Forms E. The directions put in place by Her Honour Judge Ellis in January this year in respect of questionnaires and further disclosure have been stayed pending the outcome of this proposed appeal.

11. It is sufficient for the purposes of the present application to provide the following details extracted from the mother's Form E, the documents which accompanied it, and the information provided by the father who appears to have been involved to some extent with his former partner's financial affairs. By way of caveat, it is right to record, as he himself accepts, that much of what he has said he knows about her financial circumstances comes from third party anecdotal evidence including information published in newspapers and on the internet.

12. The mother is a member of a French family which has in the past enjoyed access to significant wealth. That wealth appears to have been created by the mother's grandfather who died over two decades ago. His son, the mother's father, died over a decade ago. The mother's earlier adult life appears to have been somewhat peripatetic. She held three passports/nationalities. She has since acquired British citizenship. Her tax residency status changed with effect from November 2022 since which time she has paid tax on income generated in this jurisdiction. Her tax affairs are not straightforward although she has produced with her Form E copies of tax returns submitted to all tax authorities. She maintains that her sole source of earned income in this jurisdiction is her annual salary of £100,000 gross, or just over £67,000 net per annum. From that income she claims to be meeting all the family's expenses without

any contribution from the father. Both children are being privately educated and it appears that their school fees are now in arrears.

13. It is clear from an analysis of the mother's bank accounts that she has in the past received credits in the form of international transfers from entities associated with her wider family's wealth. In March 2021 she was paid a sum of USD 300,000 from one of the family trusts set up by her late grandfather. That came from an inter vivos trust set up by her grandfather for the benefit of his wife, the mother's grandmother. When she died, the mother received her share as the remainderman of that trust.

14. There are three further family trusts of which the mother is a potential beneficiary. There does not appear to be any dispute about the fact that, through various offshore corporate structures and SPVs, the trusts own assets worth many millions of Euros/US dollars. The father's evidence makes reference to internet material suggesting that the mother's late father was worth US$10 billion when he died over 15 years ago. She is said to have a beneficial interest in what may or may not be a trust property abroad comprising a large farm set in thousands of acres of land. There is reference to another property abroad which is let commercially for US$77,000 per week. One of the trusts is said to own a rare and valuable art collection.

15. All of this is no more than unevidenced speculation as things stand because what is reasonably clear from the evidence provided by the mother, and confirmed by European lawyers, is that the trusts and the value held within them are currently illiquid. Despite the passage of time since the deaths of the mother's late father and grandfather, their estates have yet to be administered. They are effectively moribund as a result of ongoing litigation instigated by the French Government which is claiming significant sums in respect of unpaid taxes. According to the mother's evidence there is an unresolved challenge to the ownership of assets currently held by the trustees which a European government claims to form part of the two individual family members' estates. The litigation has been ongoing for over 20 years and there is apparently no immediate resolution in sight. Worldwide freezing injunctions are now in place, and have been for some time, which prevent any dispositions or dealings with what the family regards as trust assets. The mother accepts that there are trust assets in various countries. In order to maintain their financial viability, she contends that the underlying assets have had to be exploited commercially in order to control mounting losses. The companies operating these enterprises have from time to time looked to the family members to provide funding to contain ongoing losses whilst the litigation runs its course in the European courts. It is the mother's case that she has had to make loans to the companies owned by the family trusts for the last ten years in order to enable them to continue operating. To do this, she contends that she has sold the property she owned jointly with the deceased father of one of her elder children and has raised further sums by selling valuable jewellery which she inherited from her late grandmother[1]. In addition, it appears to be accepted that, with the

[1] Information referenced in one of the lengthy annexes to her Form E.

father's agreement, the mortgage secured on their family home was increased at some point by £250,000. He says this loan was used to provide additional cashflow funding for these companies[2] whereas it appears from submissions made by Ms Kavanagh during the hearing before Her Honour Judge Ellis that only part of those funds went to the companies, the balance being used to meet the family's day to day living expenses.

16. Whilst these transactions will no doubt have been recorded as loans due to the mother in the various trust or underlying company accounts (none of which I have seen), they do not provide her with any prospect of significant financial liquidity in the foreseeable future. It is also important, in my judgment, to distinguish between the existence of what she accepts to be loans made to "prop up"[3] the companies (in the repayment of which she has a direct interest) and her status as one of several potential discretionary beneficiaries who may or may not benefit from the final resolution of ongoing litigation in the European courts. The mother accepts that monies lent to the companies have been repaid from time to time as and when there has been sufficient liquidity in the companies to redeem the loans. She has used these funds as the means by which she has supported her own and the family's domestic economy over the years of the relationship. On her case there is no more than £68,000 to come back.

17. The position is further complicated by the fact that, in relation to her late father's estate, there is an outstanding claim advanced by his surviving widow (the mother's stepmother) who is asserting that she should receive the entirety of her late husband's estate. The European lawyers who are dealing with the ongoing litigation in that country are unable to provide any realistic time estimate as to when any of these matters may be resolved and there is no reasonable estimate at this stage as to the extent to which this mother may receive financial benefit in the future from either of those two estates.

18. That financial landscape provides the context for the father's claims in his Schedule 1 application that (i) there is a vast disparity between the parties in terms of their present and future financial resources, and (ii) the mother is likely to be in a position to meet not only his financial needs in the wider sense of the substantive claim but also his immediate needs in the context of his claim for a legal services funding order. All of this information was available to Her Honour Judge Ellis at the hearing in April this year because I have extracted it from the disclosure which was included in the court bundle and the submissions made by counsel from the foot of that disclosure as recorded in the transcript.

19. In terms of provision to meet the short-term need in relation to his costs, it was accepted for the purposes of the hearing before Her Honour Judge Ellis that the wider backdrop of family wealth which informs the ongoing European litigation was not something which the Family Court could take into account. Counsel for the father,

[2] [561] (transcript of hearing on 28 April 2023)
[3] [386]

Ms Wiltshire on that occasion, made that realistic, but important, concession from the outset. Having outlined her client's case and the financial predicament in which he found himself, she said this to the judge:-

> "The court then has to look at what the mother has available to her. I am very careful not to fall into the trap of saying that, because she has an inheritance due of some billions of dollars, therefore she must have money available to her now. I appreciate that would be a flawed argument that I cannot follow. I have to at this stage be able to point to monies that she has available to her which can be made available to my client in terms of meeting fees. And what I do from that is I say that, firstly, she has got her income. It appears to be much lower at the moment than it has been in recent times, but, in any event, it is topped up by additional payments."[4]

20. Those "additional payments" were identified by Ms Wiltshire from the mother's bank statements as payments from Company1 and another entity called Company2 in the total sum of £110,000 paid over 12 months in 2021/2022. She referred to the sum of £68,000 which remained due and owing from one of the entities.

21. However, the prime focus or target of the father's case in relation to potential liquidity in terms of provision for his ongoing legal costs was the expected repayment of a short-term loan of £145,000 which the mother had lent to one of his friends, PP, in 2016 for the purposes of acquiring some land. In her witness statement, the mother explains that repayment of this debt was long overdue and attracting interest. The court was shown two emails during the hearing in April which confirmed that PP was in a position to make repayment of that loan but needed the mother's bank details to make the payment. The mother's case is that PP's willingness to discharge that debt in the period immediately before the April hearing was no coincidence. She believed that the father and PP had colluded to delay repayment so that funds would become available to meet her former partner's legal costs as his application was about to be determined.

22. It was the mother's case at the hearing in April 2023 that, even if they materialised, those funds would be required to settle the children's overdue school fees and to reduce the outstanding balance on an American Express account so as to permit her to continue using the account. She had charged some of her legal bills to that account with the result that she exceeded the credit limit and/or failed to meet the minimum repayments and the facility had been withdrawn. The balance due was approximately £70,000. Any balance remaining would be needed to meet future school fees and address the deficit between her income and outgoings. At this point I pause to note that it was suggested during submissions that the mother's net income from her employment had not been used in the past to meet the mortgage interest payments on the family home. The father's case appeared to be that these payments had been met

[4] [561] (transcript of hearing on 28 April 2023)

from a separate account set up in Switzerland for this specific purpose[5]. The mother confirmed in one of the annexes to her Form E that the two accounts she maintained in Switzerland were closed when she changed her residency status at the end of 2022. However, Ms Kavanagh confirmed to the court that her client was indeed funding ongoing interest payments from her current resources, the initial mortgage interest due to the Bank having been funded 12 months in advance from the Swiss accounts as a single lump sum payment[6].

The law

23. The law in relation to appeals is set out in Part 30 FPR 2010. The court will only grant permission to appeal where either:

    (a) the court considers that the appeal would have a real prospect of success (r.30.3(7)(a)); or

    (b) there is some other compelling reason why the appeal should be heard (r.30.3(7)(b)).

24. In this context a 'real prospect of success' means one which is realistic.

25. Where an appeal involves a challenge to findings of fact made by the trial judge, the court should be slow to interfere and should only do so where the decision is wrong in that the conclusion reached is demonstrably contrary to the weight of the evidence before the court at the time of the decision or where the decision-making process is plainly defective: see *AA v NA (appeal: fact-finding)*[2010] EWHC 1282 (Fam), [2010] 2 FLR 1173.

26. In the event that permission to appeal is granted, the appeal court has all the powers of the lower court: FPR r.30.11(1). It can affirm, set aside or vary any order or judgment made or given by the lower court. It can order a rehearing. In terms of approach the appeal court does not hear evidence and does not exercise a discretion afresh but must consider whether the court that heard or read the evidence in the court below erred in principle or was otherwise wrong. FPR r. 30.12(1) provides that every appeal is limited to a review of the decision of the lower court unless there is before the court an application for permission to adduce fresh evidence. There is no such application in this case.

27. If permission to appeal is granted, the appeal court will allow an appeal where the decision of the lower court was either wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court: FPR r. 30.12(3)(a) and (b). In reaching its conclusions an appeal court is entitled to draw any inference of fact which it considers to be justified on the evidence: FPR r.30.12(4). In the context of the appeal hearing, assuming permission to appeal is granted, a party is not entitled to

[5] [563] (transcript of the hearing on 28 April 2023)
[6] [569]

rely on a matter which is not contained in the appeal notice unless the court gives permission: FPR r.30.12(5).

28. Thus, an appeal will succeed where the decision of the judge at first instance:

    a. is wrong as a result of –

        i. an error of law;

        ii. the absence of sufficient material to enable the judge to make findings of fact or assessments of witnesses as they appear in the judgment;

        iii. where a discretion arises, the order made was outside the ambit of judicial discretion;

        iv. a failure in the discretionary exercise to take into account something that is relevant, or to exclude from account something that is irrelevant; or

    b. the decision is tainted by a procedural or other irregularity that renders it unjust[7].

The judge's reasoning

29. As the judge made clear from the outset of her judgment, it was being delivered on an extempore basis "under extreme time pressure" at the conclusion of a two-hour hearing for the purposes of which the court had been provided with a great deal of information. Having identified what was then being sought by the father (a lump sum of £125,000 in respect of his legal costs in both sets of proceedings under the 1989 Act), the judge made it clear that she had read everything in the bundle which she considered necessary for the purposes of the hearing. She was, of course, familiar with the case having conducted previous case management hearings in relation to both applications.

30. Having set out the background facts, the judge turned to the parties' financial positions. She identified the mother's annual income from her current employment to be £100,000 per annum gross (£67,000 net). She noted that from that sum she was discharging significant outgoings, including monthly mortgage interest payments of £5,350. She was supporting a household of five without financial contribution from the father for the two younger children and, with school fees outstanding. She had a significant monthly deficit. The judge found that, whilst this deficit had been funded by use of her credit card and monies repaid to her by "family companies", this was no longer sustainable because "no further monies will be received by her".

[7] See *Re W (Permission to Appeal)* [2007] EWCA Civ 786, [2008] 1 FLR 406

31. The judge went on to deal with the background of significant family wealth on the mother's side which she aptly described as "the elephant in the room". She recorded the father's counsel's concession that the court could not for these purposes take into account any inheritance prospects which the mother might have in the future. Instead, the father relied on the likely availability of the sum of £145,000 which PP was due to repay to the mother with interest.

32. In terms of the mother's position, the judge recorded the submissions she had heard from Ms Kavanagh in relation to the dubious merits of the father's substantive Schedule 1 application in circumstances where he already had a 50% interest in a mortgage free property which he co-owned with his former wife. The judge recorded the mother's counsel's challenge to the father's evidence in relation to his inability to raise funding for his legal costs through a commercial loan or on credit card. She referred to the likely absence of further payments in the mother's hands from "associated family companies to whom she had lent money" save for the sum of £68,000 which remained outstanding from one of the entities.

33. The judge next turned to the law and the legal principles engaged in the application before her. She correctly identified that the application was brought not under s.22ZA of the Matrimonial Causes Act 1973 but as a claim for a lump sum under the 1989 Act to meet ongoing legal costs. She correctly identified that, despite the separate statutory jurisdictions, the principles expressed in *Currey v Currey (No 2)* [2006] EWCA Civ 1338, [2007] 1 FLR 946 and *Rubin v Rubin* [2014] EWHC 611 (Fam), [2014] 2 FLR 1018 applied to this case. Whilst she did not cite the full case references in her judgment, it was clear she was familiar with both authorities, the relevant parts of which were addressed in counsel's opening written submissions.

34. In para 19 of her judgment, the judge said this:

> "Simply because of shortage of time, I am not going to run through here what is contained in the written notes about those principles. I say "simply because of a shortage of time", but the other reason, of course, is that there is no dispute between the parties about the legal principles, as I would of course give a determination on any disputed legal matter".

35. From that point, there was no further reference to, or analysis of, the law. The judge proceeded to announce her decision. In this context she identified five issues which she needed to determine:-

    (i) whether the father had a good claim in this case;

    (ii) whether he needed legal assistance in order to achieve equality of arms in terms of representation;

    (iii) whether he was in a financial position to meet that legal assistance himself;

(iv) if not, whether the mother was in a financial position to meet that funding;

(v) if so, what would be the correct provision to make in terms of her contribution to his legal costs.

36. In relation to the first question, the judge found, rightly in my view, that in relation to the Children Act proceedings brought under s.8 of the 1989 Act, there was a legitimate and genuine issue between the parties. She expressed concerns about the merits of the father's financial claims brought under Schedule 1 of that Act and queried whether he would have launched these claims without the background of the mother's family wealth. She was clearly troubled by the fact that the ongoing litigation between the trustees of both estates and the European revenue authorities introduced substantial elements of illiquidity which made it difficult to predict what order might be made in the father's favour.

37. The judge accepted that access to legal advice was plainly necessary to ensure that the parties had equality of arms in this litigation. She acknowledged the complexities flowing from "international issues and complex trust considerations" and expressed her view that "legal representation is desirable if not necessary" in these circumstances.

38. Turning to answer the third issue, the judge found that the father had failed to satisfy her that he had exhausted all routes of securing litigation funding through his own efforts. She found that there were deficiencies in his financial disclosure in three material respects:-

(i) the first was misleading information in relation to his income in that the information presented to the court reflected only the two lowest payslips which were not representative of the position gong forward;

(ii) the second was his failure to provide adequate information about his borrowing capacity. Whilst she acknowledged that he had produced evidence of having been refused a litigation loan, there was no information about the basis for that refusal and the extent to which the potential lender was informed about his income, property interests and the lump sum which would be forthcoming from his police pension in 2024;

(iii) the third lay in his failure to demonstrate that he could not fund legal costs through a credit card. In circumstances where the mother had funded part of her own costs through an American Express card, this should have been an option available to the father in view of his declared income.

39. In relation to the mother's ability to make a financial contribution towards his ongoing legal costs, the judge found there was no "hard evidence" before the court that she was in a position to pay. She found that the mother was in a "vulnerable position" financially as the mother of the family's two young children. Her need to

preserve her income to meet the family's needs was such that she had no surplus capacity to make a contribution. Whilst there may be "resources available to her" and/or third parties who were prepared to advance monies to her given the background of significant family wealth, these were not resources against which the court was able to make orders.

40. In relation to the debt owed by PP, the judge expressed concerns that it might never be repaid in view of the friendship which existed between PP and the father. However, even if repayment was made, the judge found that the mother would need those funds to repay her debts, clear the school fees and meet her own legal costs. She found it would be "entirely wrong" to make the order sought by the father in terms of funding his future costs without leaving the mother in a similar position to fund the costs which she was yet to incur (para 29). In these circumstances, it was unnecessary for the court to consider the quantum of any award because it had determined not to grant the relief sought.

41. Having completed the delivery of her judgment, aside from clarifying that the debt due from PP was £145,000, neither counsel sought to correct or clarify any aspect of the judgment.

42. There was then an application for costs made by Ms Kavanagh on behalf of the mother which the judge rejected on the basis that she was satisfied that the father did not have the funds to pay the mother's costs and he needed to prioritise the payment of future legal costs because "it benefits both parties for him to be legally represented".

The father's appeal

43. The father seeks to challenge the judge's decision on two separate grounds. Both allege that she fell into error in relation to the law and the facts. For the purposes of this judgment, I propose to extract the essence of those grounds and the submissions which support them rather than reproducing the grounds verbatim.

Ground 1

44. Ms Dunseath submits that the direction which the judge gave herself that she was not in a position to determine the factual issues in dispute between the parties at the hearing in April 2023 ignored the guidance set out in *Rubin v Rubin*. She had a discretion to make robust assumptions as to the mother's ability to pay. In circumstances where there were deficiencies in the mother's financial disclosure to date, the judge should have scrutinised the evidence with a view to making such assumptions which were open to her on the facts.

Ground 2

45. Under her second ground of appeal, Ms Dunseath submits that the judge applied the wrong law in reaching her conclusion that the father had failed to prove that he had exhausted all alternative avenues of funding his legal costs.

    (i) In relation to her finding that he had attempted to mislead the court in relation to his income by relying on figures for the two lowest paid months, the judge failed to take into account that this evidence was provided in a witness statement sworn in March 2023 at which point these were the only available pay slips from his newly created gardening business. In addition, she failed to refer in her judgment to the pay slip which he had subsequently produced for March 2023. That had been included in the supplemental bundle which was before the court and revealed higher figures.

    (ii) The judge fell into error in finding that the father had not adduced any sufficient evidence in relation to his ability to obtain credit by opening an account with a credit card provider. Given the budget which he had presented to the court with his legal costs funding application and the existing liabilities he was carrying, this was never likely to be a viable alternative route to funding legal costs and the judge failed to make a robust assumption to this effect. Further, there was insufficient evidence before the court for the judge's assumption that the mother had funded part of her legal costs on her credit card. Her bank statements disclosed that her costs had been paid from her bank account until the month before the hearing in April 2023.

    (iii) In relation to commercial litigation funding, the judge fell into error in rejecting the evidence from Warner Austin Mortgage Services Ltd (15 March 2023) and two separate commercial providers each of which had indicated that they were not prepared to assist with litigation funding. This evidence should have been considered against the totality of the evidence before the court including an email from his solicitors to the commercial funder setting out the father's financial circumstances.

    (iv) In relation to his unencumbered 50% interest in the property occupied by his former wife and their two children, the court was wrong to reject his evidence that a lender would not regard that interest as sufficient security for a litigation loan.

The law: *Currey v Currey (No 2)* and *Rubin v Rubin*

46. Because there is no specific reference in the judgment under challenge to the legal guidance provided in these two cases, I set out the principles below.

47. In *Currey v Currey*, Wilson LJ explained that an applicant seeking to engage the costs allowance jurisdiction was not required to demonstrate that he or she had no assets and could give no security for borrowings. To adopt such a literal interpretation construed through the forensic lens of "exceptionality" would obstruct judges in the proper exercise of their jurisdiction to make costs allowances in appropriate circumstances (para 19). His Lordship explained the approach which the court should adopt in this way:-

> "20. In my view the initial, overarching enquiry is into whether the applicant for a costs allowance can demonstrate that she cannot *reasonably* procure legal advice and representation by any other means. Thus, to the extent that she has assets, the applicant has to demonstrate that they cannot reasonably be deployed, whether directly or as the means of raising a loan, in funding legal services. Furthermore ….. she also has to demonstrate that she cannot reasonably procure legal services by the offer of a charge upon ultimate capital recovery. I would add, fourthly, that the court also needs to be satisfied that there is no such public funding available to the applicant as would furnish her with legal advice and representation at a level of expertise apt to the proceedings …."

48. Whilst Wilson LJ referred in his guidance to a female claimant, it is worth noting that the applicant in *Currey v Currey* was in fact a husband rather than a wife. The court must always ensure that it is scrupulous to deal with all claims for costs allowances fairly and on their merits regardless of which party in the relationship is making the claim.

49. The clear guidance provided in the later case of *Rubin* by Mostyn J was given in the context of an application pursuant to s. 22ZA of the Matrimonial Causes Act 1973. However, there is no issue but that it applies to applications made under the Schedule 1 jurisdiction where litigation is ongoing between unmarried parents. The relevant principles are set out in para 13. Insofar as they are relevant to the current appeal, I set them out below.

> "[13] …..
>
> (i) When considering the overall merits of the application for a LSPO, the court is required to have regard to all matters mentioned in s 22ZB(1)-(3).
>
> (ii) Without derogating from that requirement, the ability of the respondent to pay should be judged by reference to the principles summarised in *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263, at para [124](iv) and (v), where it was stated:

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

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

(iii) Where the claim for substantive relief appears doubtful, whether by virtue of a challenge to the jurisdiction, or otherwise having regard to its subject matter, the court should judge the application with caution. The more doubtful it is, the more cautious it should be.

(iv) The court cannot make an order unless it is satisfied that without the payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings. Therefore, the exercise essentially looks to the future. It is important that the jurisdiction is not used to outflank or supplant the powers and principles governing an award of costs in CPRF Part 44. It is not a surrogate inter partes costs jurisdiction. Thus a LSPO should only be awarded to cover historic unpaid costs where the court is satisfied that without such a payment the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings.

(v) In determining whether the applicant can reasonably obtain funding from another source the court would be unlikely to expect her to sell or charge her home or to deplete a modest fund of savings. This aspect is however highly fact-specific. If the home is of such a value that it appears likely that it will be sold at the conclusion of the proceedings then it may well be reasonable to expect the applicant to charge her interest in it.

(vi) Evidence of refusals by two commercial lenders f repute will normally dispose of any issue under s 22ZA(4)(a) whether a litigation loan is or is not available.

(vii) In determining under s 22ZA(4)(b) whether a Sears Tooth arrangement can be entered into, a statement of refusal by the applicant's solicitors should normally answer the question.

(viii) If a litigation loan is offered at a very high rate of interest it would be unlikely to be reasonable to expect the applicant to take it unless the respondent offered an undertaking to meet that interest, if the court later considered it just so to order.

(ix) The order should normally contain an undertaking by the applicant that she will repay to the respondent such part of the amount ordered if, and to the extent that, the court is of the opinion, when considering costs at the conclusion of the proceedings, that she should do so. If such an undertaking is refused the court will want to think twice before making the order.

(x) The court should make it clear in its ruling or judgment which of the legal services mentioned in s 22ZA(10) the payment is for; it is not however necessary to spell this out in the order. A LSPO may be made for the purposes, in particular, of advice and assistance in the form of representation and any form of dispute resolution, including mediation. Thus the power may be exercised before any financial remedy proceedings have been commenced in order to finance any form of alternative dispute resolution, which plainly would include arbitration proceedings.

(xi) Generally speaking, the court should not fund the applicant beyond the [financial] dispute resolution (FDR), but the court should readily grant a hearing date for further funding to be fixed shortly after the FDR. This is a better course than ordering a sum for the whole proceedings of which part is deferred under s 22ZA(7). The court will be better placed to assess accurately the true costs of taking the matter to trial after a failed FDR when the final hearing is relatively imminent, and the issues to be tried are more clearly defined.

……."

50. It is clear from these authorities that the court is obliged to consider carefully the reasonableness of the steps taken, or to be taken, by an applicant in the position of this father. The jurisdiction conferred upon the court in these circumstances is both wide and flexible depending on the circumstances of the individual parties before it but findings in relation to whether or not the evidential burden has been met need to be anchored to a measured and objective analysis of reasonableness.

51. Standing back and looking at the potential merits of the substantive claim under Schedule 1 of the 1989 Act, it seems to me that this father's claim, if judged to have merit, was always likely to be considered in the context of his needs as a parent to two

children[8]. The fact that the parties chose to live together rather than to marry, a choice they were perfectly entitled to make, has eliminated any claim based on sharing whatever the extent of the mother's financial resources. It is not at all clear whether they built up any assets together during the course of their relationship given that the family home, whilst in joint names, appears to have been funded entirely by the mother and funds raised on a mortgage. She had been living in a house in Europe which I am told was worth in excess of £1 million but that property was sold in part to provide liquidity for the family companies which were exposed to the financial consequences of the raft of freezing injunctions made in the European litigation. This case has unusual features in that the father can point to a distant horizon where there exists the possibility that the mother may one day come into very substantial wealth. That is by no means a given and, in this context, I bear well in mind that she appears to be but one in a class of discretionary beneficiaries with no absolute entitlement to whatever value may be reflected in the underlying trust assets at the conclusion of the ongoing litigation in Europe. I know not what her status is in terms of any specific Will trusts set up by her father or paternal grandfather.

52. I accept that the process of financial disclosure was at a very early stage in April this year when the father's application was before the court. As counsel for the father submitted to the judge at the conclusion of the hearing, much of what she had heard by way of submissions from Ms Kavanagh was new information in relation to the repayment of loans by the companies or entities which were related in some way to the overarching trust structure[9].

53. In her submissions to this court in support of the appeal, Ms Dunseath has referred to several substantial credits appearing on the mother's bank statements. I am not persuaded, as Ms Dunseath submits, that this evidence, without more, would have entitled the court below to make robust assumptions as to the mother's ability to make a call for funds from these various international entities whenever she required extra financial support. In my judgement, that would not have been a finding open to the judge without more. I am also persuaded that Ms Kavanagh is right when she challenges the reach of the submissions which Ms Dunseath makes on behalf of the father for the purposes of this appeal. It is quite clear from the transcript of the proceedings below that, in terms of the resources available to meet his claim, his focus was squarely on what was expected to be the imminent repayment of PP's debt. It was from that sum of £145,000 that he sought an award of £125,000.

54. In her support of the judge's findings and her decision to dismiss the father's application, Ms Kavanagh by implication accepts that criticism can be made of the apparent failure of the judge to reflect in the delivery of her judgment both reference to the substance of the law and her application of that law to the evidence before her.

[8] [115] The father has accepted in a witness statement dated 23 March 2023 that a successful outcome in the Sch 1 proceedings will be confined to whatever the court determines in relation to his own and the children's needs for housing and income.
[9] [577]

She urges me nonetheless to look beyond the judgment into the detail of the transcript of the hearing. She points to the questions which the judge asked which she relies on as a clear demonstration that she had taken an active role in interrogating the cases which were then being advanced by each of the parties. She reminds me that the judge did not seek to penetrate the issues which arose in relation to the offshore structures or the ongoing litigation in relation to the trusts because she was told by the father's counsel that this was territory into which she should not stray. I agree that no criticism can be made of the judge in this respect.

55. What does concern me are the judge's findings in relation to the father's failure to displace the evidential burden placed upon him in relation to his inability to fund his own legal representation. I accept that this was an extempore judgment delivered under significant time constraints at the end of a two-hour hearing. I accept, too, that the judge referred in para 18 of her judgment to both *Currey* and *Rubin* and the applicability of the principles established in those cases to the decision she had to reach. She was clear in her approach that this was a case where the father's access to legal advice was *necessary* in this case to establish equality of arms and ensure an Art 6 compliant hearing of the issues. In relation to the Schedule 1 application, whilst she clearly did not regard it as having merit in the sense that it appeared to be informed by an element of financial opportunism (para 21), she nevertheless accepted that, if it proceeded, it would be "complicated litigation, involving international issues and complex trust considerations".

56. In terms of the judge's findings in relation to the provision by the father of inadequate disclosure, there is no reference in the judgment to the information provided in the father's Form E and/or the run of bank statements he provided showing the extent of his self-employed income over the seven months since he had set up his gardening business in September 2022. The transcript of the hearing, as reflected in the judgment of the court below, suggests that his annual income was accepted to be c. £48,000. The judge made no reference in her judgment to the manner in which his CIS deductions (some 20% of his income being retained under the scheme)[10] were reconciled at the end of the tax year. I accept that the transcript of the hearing, as opposed to the judgment, reveals an exchange between the judge and his counsel about this aspect of his cashflow. She was thus aware of the position. The budget he submitted with his Form E (£2,964 per month) made no allowance for either rent or mortgage costs. Those costs may have been subsidised at the time of the hearing in April this year as a result of his ability to stay either with his mother at her home in Bristol or with his former wife and children at their former family home. However, once appropriate allowance is made for either rent or mortgage costs, it is difficult to see how he would have been in a position to fund his ongoing legal costs at an appropriate level out of net income receipts.

[10] The father's company was registered as a subcontractor and as such he was required to pay tax deductions at the lower rate of 20% as opposed to the 30% payable in the case of an unregistered subcontractor. For these reasons tax deductions would not necessarily be reflected in monthly pay slips.

57. Further, had the judge had sufficient time to remind herself of the specific guidance set out in *Rubin*, or perhaps more pertinently if she had been reminded of it by counsel, it is difficult to see how she could properly have reached a conclusion that this father, on his income, should have made further enquiries about funding his legal costs through a credit card. In terms of his capacity to borrow, the judge pointed to both his pension lump sum and his joint interest in the property in which his former wife and children were living. The pension was not available to him and judicial experience in this field leads me to doubt that any commercial lender could have been persuaded to look to any lump sum commutation as a future resource which provided adequate security for a six-figure litigation loan. Similarly, para 13(v) of the specific guidance in *Rubin* suggests that the father would not have been required to charge his 50% interest had this property been his own home. In circumstances where it was providing the roof over the heads of his former wife and children, I can foresee formidable complications in any attempt by him to offer his interest as security for a loan without the express consent, informed by legal advice, of his former wife. In these circumstances, and in terms of his immediate need for litigation funding, I do not consider it reasonable to require him to take further steps to release capital from this asset, at least not at this point in the litigation.

58. In relation to the material which was before the court from various commercial litigation funders, the judge was unduly cautious, in my judgment, in her approach to this evidence. I have seen two letters sent to the father's solicitors by Ampla Finance and Level (both well-known commercial litigation funders). It is clear from the letter which was sent by Michelmores that, in relation to Ampla Finance, the letter had been sent following a telephone call made on 8 December 2022 during which the father's solicitor raised an enquiry about whether their client was likely to be eligible for a loan. The letter itself contains a fairly detailed exposition about the father's financial circumstances[11]. Full details were provided in relation to the two properties in which the father has an interest including the nature of his interest, the value of each property and the available equity. There was a breakdown of the costs which had been incurred to date and an estimate of what was likely to be spent on costs up to and including a final hearing. As is clear from subsequent correspondence which is in the appeal bundle, Ampla declined to assist on the basis that the father's financial profile did not match its lending criteria. Both Level and Warner Austin declined to offer support. As the responses make clear, whist the father's circumstances had been considered, he failed to meet their affordability criteria on the basis of both insufficient security and his relatively recent self-employment status. The letter from Warner Austin was obtained just weeks before the April hearing. The judge found that she could not place much weight or reliance on this evidence because it was unclear what information had been provided to the lenders. I have in the agreed appeal bundle copies of the letters from the father's solicitors which accompanied the enquiries. There is nothing in those letters which contradicts the financial disclosure provided in the father's Form E. There is also the letter from his solicitors dated 27

[11] [163]

January 2023 confirming that they were not prepared to enter into a *Sears Tooth* arrangement[12]. In my judgement, in line with the *Rubin* guidance which requires evidence of an unwillingness to assist from at least two litigation providers, there was little more the father could have been expected to do to satisfy the evidential burden placed upon him. Any commercial lender undertaking due diligence in relation to a litigation loan would have been aware that these were not matrimonial claims which were likely to result in an allocation of capital through lump sums or property adjustment orders. They must be taken to know, in accordance with the advice which I am sure will have been given to the father already, that even on a best case scenario any capital which is made available to meet his housing needs whilst the children are minors is likely to be impressed with some form of trust under the terms of which the capital will revert to the mother when that home is no longer required for the children. Other than in relation to any sums made available to clear debt, he is very unlikely to receive outright capital at the conclusion of the Schedule 1 litigation and I consider this another factor which makes it unreasonable to expect him to pursue commercial litigation funding. In my view, the judge was wrong to reject this evidence which clearly influenced her overall conclusion that "there has been inadequate information about his capacity to borrow".

59. I am also persuaded that, in the light of her observations about the necessity of ensuring that the issues were litigated on a level playing field, the judge failed to provide adequate reasons for dismissing repayment of the debt from PP as a potential resource from which provision could be made, in whole or in part, for the father's legal costs. She dealt with this in para 29 of her judgment. She said that these funds would be required by the mother to meet her own debts and the children's school fees but did not explain how she had factored into that balance the father's inability to secure legal representation. What she did say was that it would be wrong to award him a sum of £125,000 from those funds if the mother was thereby unable to meet her own costs. Given that this potential resource was central to the father's case, I regard her lack of reasoning as an omission which casts doubt on the soundness of her decision to dismiss his application without making *any* financial provision for his legal costs. It is perhaps reflected in her observation in para 31 of her judgment that she considered the hearing to have been "a complete waste of the limited resources which were available" to the parties.

My decision

60. In all the circumstances, I am satisfied that this father cannot reasonably obtain legal advice and representation at an appropriate level of expertise by any other means than an order of the court. The judge's decision to dismiss his application was wrong in that she failed to give sufficient weight to the guidance provided in *Rubin* and, in particular, to consider sufficiently in the specific context of this case the reasonableness of requiring him to do more than he had done to cross the evidential

[12] [118]

threshold required to make the order which he sought. I further consider that she was wrong to ignore the availability of the potential resource of the funds which the mother was entitled to receive from PP in repayment of her loan. Whilst the judge found that these were resources which would be required to fund the mother's own expenses, including payment of her own legal costs, I consider that she failed sufficiently to balance the needs of the father against those of the mother. In circumstances where she had already found that it was necessary for him to receive appropriate legal advice given the issues engaged in both substantive applications, she was, in my judgement, wrong to ignore the debt repayment as a potential resource for meeting legal costs even in the absence of clarity in relation to the likely timing of receipt of those funds. For these reasons, I propose to grant permission to appeal and to allow the substantive appeal against the judge's decision to dismiss the father's application.

Next steps

61. I am asked to list the matter for a rehearing. I decline to take that course. To do so would be a disproportionate use of the court's time and the parties' resources. It would contravene the overriding objective set out in FPR 2010, r.1(1). There is a four-day fact finding hearing in the court's diary which is due to commence in September this year. In the light of the nature of the allegations made by the mother, the potential consequences of adverse findings for these children and this father are far-reaching and likely to impact on the family dynamic in a significant way. He is contesting the mother's allegations and I bear well in mind that, as yet, there have been no findings made against him. Because of amendments made to Part 4B of the Matrimonial and Family Proceedings Act 1984 by s. 65 of the Domestic Abuse Act 2021, he will be unable to cross-examine the mother if he remains a litigant in person. The Family Court has the power in certain circumstances to appoint a publicly funded Qualified Legal Representative ("QLR") but, at this stage, I know not whether the court at Gloucester will be in a position to secure the services of a QLR to assist in this respect. They are proving to be a scarce resource given the number of cases coming before the courts for fact-finding determinations.

62. I regard it as essential that the fact-finding hearing is effective in order that the court can proceed to the next stage and a welfare determination for these children. The outcome of the s.8 proceedings has the potential to inform to a greater or lesser extent the claim which the father is making for financial provision under Schedule 1 of the 1989 Act. For this reason, and the proximity of the fact-finding hearing, it is clearly appropriate to prioritise the provision of advice and representation in that set of proceedings over further investigation of the mother's financial disclosure in the Schedule 1 claim.

63. I agree with the judge below that the only likely source of funding for either party's ongoing legal costs is the sum of £145,000 which is due to be repaid to the mother by PP. There does not appear to be a dispute about the existence of that debt. In terms

of the timing of repayment, it appears that PP may now be in a position to discharge the debt. The position in relation to accrued interest is far less clear but it does not affect the decision which I have reached in relation to the appropriate outcome of this appeal. For these purposes I propose to exercise the powers conferred to me by virtue of FPR r.30.11(1) and make an order which makes provision for the payment of part, if not all, of the father's budgeted legal costs.

64. To the extent that the mother recovers any funds from PP as a result of repayment of the debt, I propose to direct that 50% of those funds should be paid directly to the father's solicitors on account of their ongoing costs. I am aware that the father already owes them c.£36,000.

65. I have been provided with a schedule of his costs in relation to the section 8 proceedings. Up to and including the hearing before Her Honour Judge Ellis on 30 January 2023, it appears that his solicitors had incurred costs of £36,232 including VAT in terms of the work they had undertaken which includes drafting his statement in response to the mother's schedule of allegations. Projected costs to the end of the fact-finding hearing are estimated to be a further £29,988 including counsel's brief fee and attendance by counsel and a solicitor throughout the four-day hearing. These figures reflect the claim for £71,430 which appear in Ms Kavanagh's note for the hearing in April 2023 (para 31) which then appeared to be the extent of the father's claim, albeit it that this figure had increased to £125,000 by the time the judge heard the case.

66. By her order dated March 2023, Her Honour Judge Ellis gave detailed directions as to the future conduct of the section 8 proceedings including the listing of the fact-finding hearing. By my order dated May 2023 in relation to directions on the appeal, I stayed para 17 of the judge's order. That stay will now be lifted. The father must serve on the mother's solicitors a response to her amended schedule of allegations. As to when that response must be served, it appears that work has already been undertaken in this respect and, subject to any further representations by counsel, I would expect that response to be filed within 14 days of my order. It appears that there is little left to do by way of preparation for the fact-finding hearing other than the filing of the mother's third-party witness statements, preparation of a witness template and filing the court bundle (paras 18, 20 and 22 of the order of 30 March 2023).

67. If PP fails to make any payment to the mother, then both parties are likely to find themselves in a similar predicament in terms of funding ongoing legal representation. To this extent, I accept that the order I am making is a contingent lump sum because it depends on funds materialising from a specific source. I am satisfied, as was the judge, that there is little prospect of the mother receiving funds from any other source between now and September over and above the salary she receives on a monthly basis. In my judgement this outcome is the only means, short of identifying counsel who may be prepared to conduct the case on a pro bono basis, of ensuring a fair hearing for both parties.

68. In terms of the stay imposed in relation to the directions given in January 2023 in relation to the Schedule 1 proceedings (paras 12 to 16), I propose to lift the stay and reallocate the timetabling of that application to the Family Court in Gloucester. The reality is that, absent access to the funds representing repayment of the loan from PP, both parties will need to consider their positions. I am aware that there is unlikely to be a sufficient surplus from the 50% share of those funds which I have allocated towards the father's legal costs to meet his costs in the financial claim. Whilst I have prioritised the need for representation at the fact-finding hearing, he will no doubt consider it equally important to pursue his investigations into the mother's financial circumstances in order to establish that she may indeed have access to financial resources which have yet to be disclosed. Given my findings in relation to her current liquidity, my order at the conclusion of this appeal is as far as the evidence will enable me to go even on the basis of robust assumptions.

69. In terms of the costs of the appeal, I did not hear submissions from either counsel. Costs would normally follow the event and I accept that the father has succeeded in his challenge to the dismissal of his original application. I am prepared to consider any written submissions which either counsel wishes to make but, given the circumstances, if a costs order is made against the mother, I would be highly likely to direct that it should not be enforced before the conclusion of proceedings without the permission of the court.

Postscript: post-judgment representations

70. My draft judgment was sent by my clerk to counsel in July 2023 subject to the usual request for any typing corrections or editorial comment prior to formal hand down. It produced a response from Ms Kavanagh via her solicitors in July 2023. That response consisted of a lengthy16-page note which purported to set out the consequences of my judgment in the light of the (as yet undisclosed) fact that *prior* to the issue of the father's notice of appeal in May and the hearing of the appeal in June 2023, PP had in fact paid to the mother's solicitors a sum of £190,916.66 representing repayment in full of the initial principal loan of £145,000 plus accrued interest. After discharging her outstanding costs of just under £26,000 and retaining a sum of c. £16,000 on account of the costs of the forthcoming fact-finding hearing, the balance of £149,000 was paid to the mother on May 2023. All of those funds have apparently been spent on reducing debt, ongoing living expenses including the mortgage on the family home, and meeting the children's educational costs.

71. There is no reference whatsoever to this development in Ms Kavanagh's skeleton prepared for the purpose of the appeal hearing in June. No mention was made of this receipt at all during the lengthy submissions which I heard from both counsel on that occasion. I am assuming for these purposes that Ms Dunseath was unaware of these developments at the time of the appeal hearing and there has been nothing in her subsequent correspondence with the court to suggest that I am wrong in making this assumption.

72. My response to this information was reflected in an email which my clerk sent to the parties' legal representatives on 24 July 2023. The relevant parts of that email are reproduced here.

> "(i) It is very regrettable that the court was not informed about the repayment of the £145,000 given that this was the resource which was the specific target of the original application for the legal costs funding order. This would not have required a separate application for permission to adduce fresh evidence. It was clearly relevant information in relation to the arguments on the appeal.
>
> (ii) In terms of the substantive order I had proposed to make, it is clear that it would have been framed as a contingent lump sum order. I identified the loan repayment as the only viable means of making provision for the father's legal costs. I said, *"I accept that the order I am making is a contingent lump sum because it depends on funds materialising from a specific source"*. I also made it plain in para 67 that if the loan was not repaid, both parties were likely to find themselves in a similar predicament in terms of funding ongoing legal representation (i.e. they were both likely to be without representation for the purposes of the forthcoming fact-finding hearing, a situation I was hoping to avoid).
>
> (iii) There is no doubt that the court has, and had, the power to vary any order made in the court below. I accept that a rehearing was the route which was being canvassed both by the parties and the court as proceedings commenced. Having had time to reflect on the next steps as I prepared my judgment, and because of my finding that the sum of £145,000 was the only available resource at this point in time from which the order could be made, I considered it wholly disproportionate and not in accordance with the overriding objective to require the parties to fund (from where ?) another expensive round of litigation in the Sch 1 proceedings when the issues and the evidence were unlikely to have changed. Of course at that stage I was wholly unaware that this potential resource no longer existed in that funds had been repaid and used to expunge existing debt. To this extent, I accept that the court proceeded on what was essentially a mistake of fact.

(iii) …. I am unlikely to change my fundamental findings in relation to the resources currently available to these parties. If the funds flowing from the repayment of the loan have been used in their entirety to discharge existing debt, that resource no longer exists. It is hard to see how the court might be justified in embarking upon an expensive trawl through how the funds were applied and/or whether the repayment of debt had affected the mother's ability to borrow to pay the father the half share I anticipated he should have."

73. Ms Dunseath's response on behalf of the father was sent to the court in August 2023. In her email to the court, she said this:

"In respect of the new evidence which the mother now provides my client is of course very surprised that in the knowledge that this matter was being appealed she asserts that she has spent the full c.£190,000 within a short period of it being repaid and without even notifying the court of this at the appeal hearing. Any assertion that this was not relevant being totally without merit.

My client cannot afford any further fees to be incurred in this matter and I am instructed to submit as follows:

1. The court determined this matter on the evidence put before it at the appeal hearing and the Court was aware of all pre-existing liabilities when making its decision and by implication must have determined that funds be made available for my client before any other liabilities were repaid.

2. The court's decision to make an order was well within the court's discretion under the rules.

3. The mother's new assertions post draft judgment appear to be an attempt to appeal via the back door.

On this basis the court is invited to finalise the judgment in this matter and allow for submissions on costs within 14 days."

74. In terms of the resources available to the mother to meet a legal services funding order, the prime focus or target of the father's application was the sum of £145,000 which she was due to receive from PP by way of repayment of the loan: see paragraph 53 of my judgment. *("It is quite clear from the transcript of the proceedings below that, in terms of the resources available to meet his claim, his focus was squarely on what was expected to be the imminent repayment of PP's debt. It was from that sum of £145,000 that he sought an award of £125,000.")* His counsel had also reminded the judge that she had her regular income topped up by 'additional payments'. Her Honour Judge Ellis found that the mother needed her income to support her household. That was a finding which was open to her and it is one with which I agreed in my judgment on this appeal.

75. Every appeal hearing is limited to a review of the decision of the lower court unless the court hearing the appeal considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a rehearing: FPR 2010 r.30.12(1)(b).

76. Because of the exigencies of listing on 12 June, I had another case in my list with which I dealt before hearing this appeal. That pressure on the lists meant that there was not the full day available to deal with both the permission application, argument on the substantive appeal and my decision n terms of outcome as I had anticipated when I made directions in relation to the proposed appeal in May this year. I accept that my initial approach in June had been to determine within the time available whether the father should have permission to appeal and, if so, whether the order made by the judge below should be set aside (see paragraph 10 of Ms Kavanagh's note). Having heard extensive argument from both counsel, there was insufficient time for me to deliver a ruling on either of those matters in June and I reserved judgment. Having carved out time over the course of a full weekend to prepare a detailed judgment, it became obvious that, given the scope of the father's claim and the limited availability of assets against which an order could be made, it would have been a wholly disproportionate exercise to remit the matter for rehearing before Her Honour Judge Ellis or another judge. The facts were straightforward. The court was not being asked to conduct a much wider and far-reaching enquiry into the mother's trust interests or the wider family wealth from which she might in future benefit. Rather, both courts had been asked to consider the likelihood of funds being made available to her in the immediate and foreseeable future. The outstanding loan from PP was the obvious target, or focus, of that liquidity.

77. Her Honour Judge Ellis determined that those funds should not be used, in whole or in part, to meet the father's claim for a legal services funding order. I disagreed with that determination for reasons I have explained in my appeal judgment. I do not repeat them here. On the basis of the facts which were before Her Honour Judge Ellis, and as they were represented to this court (by omission as it now transpires), I have allowed the appeal and made a contingent lump sum order by way of a contribution to his ongoing legal costs.

78. I do not accept Ms Kavanagh's submission that she was not "allowed" to make representations about "the actual factual matrix surrounding this debt": see paragraph 14 of her most recent Note. The existence of that debt was a central aspect of the evidence in the court below. It now appears clear from Ms Dunseath's response to Ms Kavanagh's most recent Note that the father's legal team was unaware prior to the appeal hearing in June that the mother had received almost £200,000 shortly after the hearing before Her Honour Judge Ellis in April 2023. The mother's solicitors were plainly aware of that fact because they had received the funds and applied them towards the mother's outstanding costs before remitting the balance to her. Ms Kavanagh accepts that she was aware as at June that this debt had been repaid.

Regardless of what she might or might not have said about the merits of whether 50% of those funds should have been considered as a resource from which an award should be made, it was, in my view, fundamental that this court was made aware of this change in the mother's circumstances. Given the manner in which the father had argued his case, it was directly relevant to the review of the lower court's decision which this court was being asked to undertake.

79. In paragraphs 15 to 20 of her Note, Ms Kavanagh sets out the basis upon which she would have sought to dissuade me from requiring the mother to pay to the father 50% of what was then anticipated to be a potential receipt of £145,000. There is nothing of substance in those submissions about which the court was not aware in June when the appeal was heard. Indeed, all of these matters, including the mother's indebtedness and the expenses of meeting her ongoing domestic economy, were matters which were fully ventilated in the judgments which Her Honour Judge Ellis and I have produced. My decision to deal with the substance of the appeal has not prejudiced the mother in any material respect in terms of any submissions she might have made in the context of this appeal or in the event of a rehearing. All the matters which Ms Kavanagh has set out in her Note were before both the lower court and the appeal court.

80. As I reflected and explained in my judgment, it would have been a completely unjustified, and unjustifiable, use of judicial and court resources, not to mention an appalling waste of these parties' limited financial resources, to send this matter back to the Family Court for a rehearing of the father's application. Such a course would have been wholly antithetical to the overriding objective set out in FPR 2010 r.1(1). That was the conclusion which I reached when I came to prepare my judgment. I have set out in what I hope are clear terms the reason why I reached that conclusion. The course I took thereafter is one which is squarely within the powers given to an appellate tribunal pursuant to FPR r. 30.11(1).

81. I said in my email to the parties' legal advisers in July 2023 that, to the extent that the court was not told about the repayment of the debt at the appeal hearing, both the court and those representing the appellant father proceeded on what was essentially a mistake of fact. On reflection I do not regard that 'mistake' as vitiating the fundamental basis of my decision in relation to this appeal. I was made aware of the mother's financial position which does not appear to have changed materially since the matter was before Her Honour Judge Ellis save that she has now reduced the level of her outstanding debts. It follows that I was well aware that 50% of anything she received from PP would not be available to meet ongoing costs and/or reduce debt. That was essentially the point upon which I disagreed with the discretion which the lower court had exercised in relation to the outcome of the father's substantive application. Whilst I did not in specific terms make provision for a payment of £125,000 towards the father's legal costs which is the sum he sought, I did make provision for a payment of 50% of £145,000 which was then agreed to be the

principal sum outstanding. At that stage, I had no information from which to calculate what might be due and payable in respect of contractual interest on the loan. I explained that I intended that 50% of that principal sum, if it became available, would be used to discharge the father's existing costs and keep his solicitors on board for the purposes of the forthcoming fact-finding hearing listed in-September this year.

My order in relation to legal services funding provision

82. For reasons which I understand, I have not yet been sent an order in relation to this appeal. Whilst I accept that there will no doubt need to be some recital(s) by way of preamble, the substance of the order which I propose to make at its conclusion is that:-

> "(i) To the extent that the respondent receives from [PP] repayment of the loan or any part thereof which is due and payable in the principal sum of £145,000, she shall pay to the appellant's solicitors, Michelmores LLP, by way of a legal services funding payment a sum equal to 50% of any sum or sums received.
>
> (ii) For these purposes the court has determined that she shall be entitled to retain for her own use and benefit the interest element of any repayment made or received on the basis that such payment represents the consideration due to the respondent for having been unable to use or deploy the sum of £145,000 (which represents the principal loan) throughout the loan period."

83. In relation to the outstanding costs of this appeal, I will deal with matters on the papers if that is what the parties wish. This court is not directly concerned with matters of enforcement. It may well be, as I anticipated when I made my original award on the basis of a contingent lump sum pursuant to Sch 1 of the Children Act 1989, that either or both these parties would be appearing as litigants in person for the purposes of the forthcoming fact-finding hearing. It will be for Her Honour Judge Ellis to case-manage that hearing in the context of the parallel 1989 Act proceedings which are ongoing in relation to the arrangements to be put in place for the children to spend time with their father. I am told that there is a pre-trial review now listed in August 2023 in the Family Court sitting in Gloucester for these purposes. There has been significant delay already for these children in determining their best interests in terms of their ongoing relationship with their father and whether that relationship is to be constrained by any protective orders which the court considers necessary.

84. This entire appeal has occupied, and generated, a wholly disproportionate amount of time and cost for both the court and the parties. All efforts must now be focused on resolving the outstanding issues to be determined at the forthcoming fact-finding hearing.

Order accordingly
