Neutral Citation Number: [2024] EWFC 107

Case No: FD22P00457

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2024

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

J	**Applicant**
- and -	
E	**Respondent**

- -
- -

Mr Edward Devereux KC and Ms Suzanne Syme (instructed by **Field Seymour Parkes**) for the **Applicant**
Ms Marisa Allman (instructed by **Slater Heelis**) for the **Respondent**

Hearing dates: 3 May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 24 May 2024 by circulation to the parties or their representatives by e-mail.

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MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. I am once again concerned with proceedings with respect to A, a girl born in 2021 and now aged 3 years old. A's mother is E (hereafter 'the mother'). The mother is represented by Ms Marisa Allman of counsel. The mother was born in Zambia. A's father, J (hereafter 'the father'), is a British Citizen. The father is represented by Mr Devereux of King's Counsel and Ms Suzanne Syme of counsel.

2. The father's application before the court is dated 23 June 2022, and was issued on 6 July 2022. Whilst that application sought the return of A to the jurisdiction of England and Wales, when this matter came before the Court of Appeal, that court concluded that the father also sought by his application orders relating to care and contact within the scope of section 1(1)(d) of the Family Law Act 1986 and, very probably, section 1(1)(a) of the 1986 Act. The father now pursues child arrangements orders in respect of A. The mother now applies for permission to remove A permanently from the jurisdiction of England and Wales to the jurisdiction of Zambia and for financial provision for A under Schedule 1 of the Children Act 1989.

3. The father's original application dated 23 June 2022 was heard by Arbuthnot J in November 2022. Arbuthnot J handed down judgment on 23 December 2022 by which she dismissed the father's application for the return of A from the jurisdiction of Zambia to the jurisdiction of England and Wales. On 12 June 2023, the Court of Appeal allowed the father's appeal and remitted the question of habitual residence to the High Court for re-hearing in circumstances where the Court of Appeal considered further oral evidence on that issue may be merited and therefore was not in a position to render its own decision on that disputed question. On 8 February 2024 I determined that A was habitually resident in this jurisdiction at date of the father's application and that the jurisdiction of England and Wales was the appropriate forum for determining the dispute as to A's welfare (see *J v E (Habitual Residence)* [2024] EWHC 196 (Fam)). I further concluded that it was in A's best interests to be returned to this jurisdiction whilst the issues with respect to her welfare were determined and ordered the mother to return A. The mother has now done so.

4. Within the foregoing context, the case now comes before the court for determination of a number of interlocutory issues:

   i) The mother's application in the proceedings under Schedule 1 of the Children Act 1989 for a costs allowance from the father to fund for her legal fees in the litigation concerning A.

   ii) Whether and the extent to which the case management timetable put in place by the court on 11 March 2024 in respect of the applications made by the mother and the father should now be amended.

   iii) The father's application that the mother pay his costs, since the decision of the Court of Appeal and to date, in respect of his successful application for the return of A from the jurisdiction of Zambia.

BACKGROUND

5. The background to this matter is set out in extensive detail in my previous judgment and it is not necessary to repeat it here. As I have noted, the mother has now returned A to this jurisdiction pursuant to the order of this court. Pursuant to an agreement reached between the parties prior to that step being taken, she and A are currently residing in the former family home. The father currently resides in a houseboat.

6. As noted in my previous judgment, in November 2019 the father purchased a substantial property in England for £1.85M. The mother describes the parties as having decided to purchase a property in England as their family home. The mother and father renovated the property to a high standard. Following the birth of A, the father added the mother's name to the title to the property. The father now contends that the transfer from his sole name into the parties' joint names was to provide the mother and A with the security of a home, not to provide the mother with an equal beneficial interest in the property. As such, it would now appear that there is dispute as to the beneficial ownership of the property, albeit it is not clear at present what the father says is the extent of the mother's beneficial interest, if not reflected by the legal title.

7. On 11 March 2024, the court directed the mother to issue an application under the Trusts of Land and Appointment of Trustees Act 1996. Ms Allman now submits that such an application is unnecessary in circumstances where the court can determine the dispute as to beneficial interest within the context of the proceedings under Schedule 1 of the Children Act 1989 (a point which Mr Devereux and Ms Syme appeared to concede on behalf of the father) and that, in any event, it is the father who disputes the beneficial interest not the mother.

8. The mother originally ascribed a value to the former family home of £2.25M but has now revised that figure. In the circumstances, Mr Devereux and Ms Syme submit the court should direct a valuation exercise in respect of the property. For this hearing, the father and the mother have prepared a Form ES2 detailing the other assets that will fall for consideration in the proceedings under Schedule 1 of the Children Act 1989. The total non-pension assets are some £10.1M on the mother's case and £9.4M on the father's case. Of that sum, some £4.1M is in investments.

9. Within the foregoing context, it is also apparent that there is now a dispute between the parties concerning monies provided by the father to the mother with respect to her business interests in Zambia. As noted in my previous judgment, in November 2019 the mother registered a business in Zambia in the joint ownership of herself and the father, with her being the majority shareholder, and purchased a six acre plot of land. The mother later purchased an additional 1.5 acres of land. The mother's business plans in Zambia were financed by the sum of some £850,000 from the father, he says on the understanding that the business would "benefit our household income" (whilst no objection was taken to this formulation in the court's previous judgment, the mother now disputes the figure of £850,000). The father now contends that these monies were a loan, in the sum of £852,680, made over the course of ten payments between 2019 and 2021 to enable the mother to invest in her business ventures in Zambia. The father seeks the repayment of that alleged loan, asserting that the mother unilaterally spent a significant proportion of these funds to meet her own personal expenses.

10. A further issue with respect to the parties' assets has arisen in respect of a Bentley motor vehicle. As can be seen from the court's previous judgment, reference was made to that vehicle as belonging to the mother, the judgment noting the existence of "the mother's Bentley, worth some £150,000". This reference in the judgment was made in the context of a statement by the father dated 16 August 2022, in which at paragraph [39] the father stated that "[E]'s car, a Bentley Bentayga worth approximately £150,000 was also left in the garage and no arrangements have been made to sell the car". The father now appears to contest the ownership of the Bentley, although again his case as to the ownership of the car is not entirely clear.

11. The parties have agreed interim financial arrangements whereby the father pays the outgoings for the former family home and, in addition, pays the mother £1,500 per calendar month by way of child maintenance for A.

12. The father works full-time and receives his remuneration by way of annual salary. In addition, the father receives a modest income from dividends from his foreign investments. The father states his net income as £189,999 per annum or £15,584 per month and contends that he has income needs of £11,978 per calendar month or £143,736 per annum including the £1,500pcm child maintenance payments made by the father but not the outgoings on the former family home. The mother states that she is at present not in employment and that her income is limited to the £1,500 per calendar month in agreed child maintenance paid to her by the father. The father contends that the mother has income from other sources and has raised questions in his questionnaire as to a number of payments into the mother's bank account between April 2023 and April 2024 amounting to some £38,777. The father seeks a finding in relation to the mother's earning capacity

13. Within the foregoing context, in addition to her application for permission to remove A from this jurisdiction to the jurisdiction of Zambia permanently, the mother now applies for financial provision for the benefit of A, pursuant to Schedule 1 to the Children Act 1989. The mother's application was initially, and erroneously, issued under the fast track procedure by a Form A1 dated 7 March 2024. That application sought a periodical payments order. The mother has now issued a further application dated 1 May 2024 seeking a lump sum order and a settlement or a transfer of property for the benefit of A. The father contends that the mother's applications were issued without prior formal notice to the father or any attempt to compromise the outstanding issues without litigation.

14. On 11 March 2024, this court gave case management directions with respect to the father's application for child arrangements orders with respect to A, the mother's application for permission to remove A from the jurisdiction and the mother's application for financial provision for the benefit of A. The court gave those case management directions within a timetable that, with respect to the welfare applications, listed a pre-trial review on 4 June 2024, a fact-finding hearing on 11 June 2024 with a time estimate of four days and a welfare hearing 15 July 2024 with a time estimate of three days. With respect to the Schedule 1 and Trusts of Land and Appointment of Trustees Act applications, the court timetabled those applications to final hearing on 18 July 2024 with a time estimate of two days.

15. The need for a finding of fact hearing in this case arises in circumstances where the mother alleges that that during a contact visit on 14 September 2022 in Zambia, the

father sexually assaulted A as detailed in my previous judgment. The father emphatically denies sexually abusing A. In that context, at the hearing on 11 March 2024, the court made a series of respectful requests to various authorities in Zambia for disclosure of material relevant to the fact finding exercise this court is now required to undertake. Whilst the court had directed that service of the requests be effected through the Foreign Process Section, the FPS has subsequently indicated that it cannot assist and, therefore, the requests need to be served by an independent agent. The father has identified an independent agent and is willing to pay for the costs of this. The father has issued a C2 application dated 19 April 2024, and issued on 23 April 2024, seeking an amendment of the directions to this end. The parties have now agreed revised requests to be served by agents, seeking information by 10 June 2024. This situation will inevitably result in the current case management timetable slipping.

16. The subsequent police investigation in Zambia, and the evidence produced by that investigation, is detailed in my previous judgment, along with concerns regarding the conduct of that investigation, both parents now alleging potential corruption of the investigation at the hands of the other. The father contends that the police service in Zambia is endemically corrupt, points to the fact that the allegations of sexual abuse have been made by a parent seeking not to return to this jurisdiction with A and who has sought to obstruct his contact and any involvement in decisions concerning A and, through his lawyers in Zambia, has alleged that the mother has used named officers in the Zambian police service as a means of framing the father in order to succeed in the proceedings commenced by the father in this jurisdiction. For her part, the mother seeks for the requests this court has made to the authorities in Zambia for documentation to be served on officials she names to combat a contended for risk that the agents instructed by the father will somehow improperly influence matters in that jurisdiction.

17. The mother now also seeks additional case management directions in respect of a number of matters not raised at the hearing on 11 March 2024. Bluntly, the reason for this appears to be that the matters should have been raised on instruction by alternate counsel instructed at the last hearing but were not. Whilst the solicitor for the mother sought to ascribe this to the fact that she had not been permitted to attend remotely at the hearing on 11 March 2024, it was not clear why counsel instructed on the last occasion had not been sufficiently briefed ahead of that hearing to raise the matters that Ms Allman now raises at this hearing. By those additional directions, the mother now seeks to re-formulate the case management timetable established at the hearing on 11 March 2024 to allow for the determination, as a preliminary issue, of the question of beneficial interest in the family home and the nature of the disputed sum of £850,000 provided to the mother by the father, so as to provide the parties with an opportunity to undertake an FDR / early neutral evaluation of the financial dispute or to otherwise negotiate in that regard.

18. Within the foregoing context, the mother now also applies for a costs allowance to meet her legal fees. No schedule of assets was provided by the mother in support of the application (although, as I have noted, the parents provided forms ES2). Likewise, no proposed costs budget was provided by the mother in support of the application for a costs allowance. During the hearing, Ms Allman relied on certain correspondence from the mother's solicitors to the mother (which expressly states it is

not correspondence that is the subject of legal professional privilege) as setting out the sums the mother now seeks by way of a costs allowance. These costs appear to encompass both the welfare and the financial proceedings. In addition, by a Form H dated 3 May 2024, which appears to relate only to the Schedule 1 proceedings, the costs incurred to date are said to be £6,239, with anticipated costs up to and including FDR of £7,440. It is not clear how these latter sums relate to the sums set out in correspondence.

19. In the circumstances, and doing the best I can, the mother appears to seek £90,030 by way of a costs allowance comprising:

    i) Future solicitors costs of £22,230 inclusive of VAT.

    ii) Future costs of counsel of £67,800 inclusive of VAT.

20. The application made by the mother in respect of her legal fees also appears also to encompass costs already incurred. With respect to the Children Act proceedings, the position appears to be that but mother's costs incurred to date are £69,732. This includes the costs of the first instance hearing before Mrs Justice Arbuthnot, the appeal, and the rehearing before this court. Of that sum, £20,257 remains owing, namely £9,007 to solicitors and £11,250 to counsel. The correspondence relied on by Ms Allman to set out the sums the mother seeks by way of a costs allowance also mentions a sum due to her solicitors for Work in Progress of £8,608 including VAT. It is not clear whether his is a sum additional to the £9,007 currently owed to the mother's solicitors. However, the total figure set out in Ms Allman's position statement to be covered by a costs allowance dealing with the mother's currently outstanding and anticipated future costs is £113,352.

21. If the court does not make an order providing for a costs allowance, the mother's solicitors and counsel have state that they are not willing to continue to act for the mother. Ms Allman confirmed, that the mother's solicitors are, however, stopping short of refusing to act unless historic costs are also paid. Ms Allman contends however, that it "it is not fair or reasonable to expect solicitors and counsel to provide unsecured continuing credit"

22. With respect to the opportunities open to the mother to secure legal funding from alternative sources, Ms Allman contends that mother is not in the position unilaterally to sell her car as ownership is now disputed by the father. Likewise, Ms Allman contends that the mother is not able to borrow against her beneficial interest in former family home in circumstances where the extent of that beneficial interest now appears to be disputed by the father. Ms Allman notes in this context that were it not for the father's challenges to the mother's entitlements to these assets, which he placed in her name, neither the application for financial provision nor the application for legal costs funding would be required. The mother further contends that she is not able to borrow against her assets in Zambia. She has been refused, she contends, assistance by litigation funding lenders. In the circumstances, Ms Allman submits that the mother's only route to securing a legal funding order from the father is to make an application for a costs allowance.

23. Whilst the father contends that the mother has not established that she is unable to obtain legal funding from third party sources, during the hearing the father did not

appear to dispute the principle of an order making provision for legal funding for the mother.

24. The father has made an open offer in respect of legal funding. At the time of the hearing, that offer proposed that the Bentley be sold and the proceeds be divided equally. The mother contended that this offer is not adequate because it does not enable the mother's current outstanding and anticipated future costs to be met. A further, and slightly revised open offer was made on 10 May 2024 on the basis that the vehicle would be sold, with the proceeds being divided equally between the parties and the father agreeing to loan his half share of the net proceeds of sale to the mother the basis that the father's half share is repaid to him by the mother upon a financial settlement being ordered by the court pursuant to the mother's Schedule 1 application.

25. Finally, at this hearing the father applies for his costs of the Children Act proceedings in relation to the proceedings subsequent to the Court of Appeal hearing to date in the sum of £98,387.07. Through Mr Devereux and Ms Syme, the father argues that, exceptionally, a costs order should be made against the mother in circumstances where, it is asserted, the mother took an unreasonable stance before this court at the re-hearing in contesting each of the issues of habitual residence, forum and return, when the only reasonable arguments open to her were in relation to return, thereby delaying proceedings and increasing costs. The father prays in aid of that submission the fact that when the matter was before the Court of Appeal Moylan LJ observed that:

> "Having regard to the circumstances of this case and bearing in mind the matters referred to by Lord Wilson in *Re B*, it seems to me that, on paper, the case that [A] was habitually resident in England and Wales at the date of the application is a strong one".

26. The father further contends, again in support of the primary submission, that he is entitled to his costs in circumstances where he succeeded in his application in its entirety, the mother's evidence as to purpose of her trip to Zambia was rejected by the court and the mother has means to pay at the conclusion of the financial proceedings.

27. The mother opposes the making of a costs order. The mother submits that not all of the costs incurred by the father since the Court of Appeal hearing are solely referable to the issues of jurisdiction and forum. More fundamentally, the mother in any event prays in aid the strong public policy against making costs orders in children cases and submits that, in circumstances where the Court of Appeal determined that the question of habitual residence, and therefore the question of jurisdiction, required a re-hearing in circumstances where further oral evidence was required, it cannot possibly be said that the mother acted unreasonably in pursuing the issue of habitual residence, and therefore jurisdiction, such that the exceptional course of making a costs order in children proceedings is not justified in this case.

LAW

Legal Funding

28. The application pursued by the mother is not an application for a Legal Services Payment Order within the meaning of s.22ZA of the Matrimonial Causes Act 1973, but rather an application for a common law remedy of a costs allowance. The approach to costs allowances remains that set out *Currey v Currey (No2)* [2007] 1 FLR 946 and *Rubin v Rubin* [2014] 2 FLR 1018. There is a close parallel between common law jurisdiction and the statutory jurisdiction under s. 22ZB of the Matrimonial Causes Act 1973.

29. With respect to the principles to be applied in the determination of the application, Mostyn J held in *Rubin v Rubin* that the principles set out by him in that case concerning applications for a legal services payment orders within the meaning of s.22ZA of the Matrimonial Causes Act 1973 should apply equally to Schedule 1 applications, a view endorsed by Mr Justice Cobb in the case of *BC v DE (Proceedings under Children Act 1989: Legal Costs Funding)* [2017] 1 FLR 1521. In this context, and in summary, the applicant for a costs allowance must demonstrate that she cannot reasonably procure legal advice and representation at the appropriate level of expertise by any means other than utilising a costs allowance. If that is demonstrated to be the case to the satisfaction of the court, then in determining whether to accede to a costs allowance, the court will consider all the relevant circumstances, including the reasonableness of the applicant's stance in the proceedings, and the merits of the claim (see *G v G (Child Maintenance: Interim Costs Provision)* [2010] 2 FLR 1264). The circumstances will include the obvious advantages flowing from competent representation and equality of arms, which will be of benefit, ultimately, to the child (see *M-T v T* [2007] 2 FLR 925). Where appropriate, the court may take the other party's costs as a benchmark, allowing for the extra costs for the party seeking a costs allowance in making the application (see *PG v TW (No 1) (Child: Financial Provision: Legal Funding)* [2014] 1 FLR 508).

30. In *Rubin v Rubin*, Mostyn J held that funding 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. In *DH v RH (LSPO and MPS Applications)* [2023] EWFC 111 this court took the view that Holman J was correct in stating in *LKH v QA AL Z (Interim Maintenance and Costs Funding)* [2018] EWHC 1214 (Fam) that LSPOs encompassing historic costs should only be made sparingly and only on proper evidence that the applicant's lawyers will refuse to act unless the historic costs are paid notwithstanding the grant of an LSPO. However, both *LKH v QA AL Z (Interim Maintenance and Costs Funding)* and *DH v RH (LSPO and MPS Applications)*, concerned applications for a legal services payment order in financial remedy proceedings. In the context of an application for a costs allowances in proceedings under the Children Act 1989, whilst a costs allowance application for historic costs relating to concluded proceedings may be rejected, an application for costs reasonably, legitimately and already incurred within ongoing proceedings has in the past been accepted (see *BC v DE (Proceedings under Children Act 1989: Legal Costs Funding)*).

31. Finally in relation to costs allowances, in circumstances where the principles to be applied to legal services payment orders under Section 22ZA of the Matrimonial Causes Act 1973 are applicable to costs allowances, it would appear tolerably clear that, in making a costs allowance to a party, the court can maintain a high degree of

control over the type of legal services, the period over which they are provided and the purpose for which they are provided under the costs allowance; can direct that the amount awarded by way of a costs allowance may be paid in instalments secured to the satisfaction of the court; and can vary the costs allowance consequent on a material change of circumstances after the order was made. In this context, Mostyn J's injunction for the court to make clear in its ruling or judgment which of the legal services the payment is for is also of application in relation to an application for a costs allowance.

Costs

32. The exclusion of CPR 44.2(2) by FPR 2010 r.28.2 exempts all family proceedings covered by the FPR 2010 from the general rule that the unsuccessful party should pay the costs of the successful party. Orders for costs in children proceedings will generally be rare. In *Re T (Care Proceedings: Serious Allegations not Proved)* [2012] UKSC 36 Lord Philips, delivering the judgment of the court, noted *obiter* that in family proceedings there are usually special considerations that militate against the approach that is appropriate in other kinds of adversarial civil litigation, particularly where the interests of a child are at stake, that explain why it is common in family proceedings, and usual in proceedings involving a child, for no order to be made in relation to costs.

33. Such considerations include that orders for costs between the parties will diminish the funds available to meet the needs of the family and that it is undesirable to award costs where this will exacerbate feelings between two parents, or more generally between relations, to the ultimate detriment of the child. In *Sutton London Borough Council v Davis (No 2)* [1994] 1 WLR 1317 at 1317 Wilson J (as he then was) said:

> "Where the debate surrounds the future of a child, the proceedings are partly inquisitorial and the aspiration is that in their outcome the child is the winner and indeed the only winner. The court does not wish the spectre of an order for costs to discourage those with a proper interest in the welfare of the child from participating in the debate. Nor does it wish to reduce the chance of their co-operation around the future life of the child by casting one as the successful party entitled to his costs and another as the unsuccessful party obliged to pay them…"

34. Unreasonable behaviour may lead to a costs order even though the proceedings in question concern children. For example, in *Timokhina v Tomohkin* [2019] EWCA Civ 1284, costs were order in circumstances where the mother attempted to bribe a police officer to bring a spurious case against the father to support her case. In *Re A and B (Parental Alienation No 3)* [2021] EWHC 2602 (Fam), costs were awarded where the mother's approach to the proceedings was found to be wholly unreasonable and a totally ill-judged litigation tactic. In *C v S* [2022] EWHC 800 (Fam), a costs order followed where a mother was found to have acted reprehensibly and unreasonably in fact-finding proceedings. In *The Mother v The Father* [2023] EWHC 2078 costs were awarded where an appeal had been brought with no proper basis.

35. However, even where the court considers that a party has taken an unreasonable stance in proceedings concerning children, it does not follow that an order for costs will inevitably be made. Such a conclusion simply enables the court to consider

making a costs order (see *The Mother v The Father* [2023] EWHC 2078. In *Re N (A child) v A and others* [2010] 1 FLR 454, Munby J (as he then was) summarised the position as follows:

> "A judge must be careful not to fall into the trap of simply assuming that because there has been unreasonable behaviour in the conduct of litigation an order is therefore to be made without more ado. Careful attention must be paid to all the circumstances of the case and to the factors which, on the authorities I have referred to, indicate that it is normally inappropriate to make such an order – factors which do not simply disappear or cease to have any weight merely because the litigation has been conducted unreasonably."

36. It is important to note that there may well be circumstances other than where there is reprehensible behaviour or unreasonable conduct of the proceedings which justify a costs order (see *Re S (A Child)* [2015] UKSC 20 at [31]).

DISCUSSION

37. Having considered the submissions of the parties, I am satisfied that it is appropriate in this case to make a costs allowance for the mother. I am further satisfied that it is not appropriate to make a costs order in favour of the father with respect to the costs of the Children Act proceedings in relation to the proceedings subsequent to the Court of Appeal. Finally, I am satisfied that a number of amendments are required to the case management timetable, which I deal with below. My reasons for so deciding are as follows.

Costs Allowance

38. Whilst the father contends that the mother has not established that she is unable to obtain legal funding from third party sources, I am satisfied that the mother has demonstrated to the satisfaction of the court that she cannot reasonably procure legal advice and representation at the appropriate level of expertise by any means other than utilising a costs allowance.

39. The mother is not in a position, unilaterally, to utilise the car to fund her legal costs in circumstance where the ownership is disputed by the father. The same conclusion pertains in relation to her beneficial interest in former family home (I further note that in *Rubin v Rubin* Mostyn J observed that, in determining whether an 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). It is clear that, whilst there is a dispute as to the mother's earning capacity, her income is not sufficient to fund her legal fees from that source. I am satisfied on the evidence currently before the court that the mother is equally not in a position to raise money from her assets in Zambia or from litigation lenders. In the circumstances, I conclude that the mother cannot in this case reasonably procure legal advice and representation at the appropriate level of expertise by any means other than utilising a costs allowance.

40. Beyond his contention that the mother has not established that she is unable to obtain legal funding from third party sources, the father did not *appear* to dispute the

principle of a costs allowance for the mother. Nor, by his open offer, does the father appear to dispute that the costs allowance should include a sum to permit the payment of the mother's outstanding incurred legal costs. There are, in any event, obvious advantages for A flowing from competent representation and equality of arms for the parents in this case, in particular in circumstances where the issues between the parties are not straightforward. The applications pursued by the mother are not, on their face, either unreasonable or meritless. The mother's costs to date are £69,732. The precise extent of the father's costs to date are not clear, but it is reasonable to assume that they exceed the sum spent to date by the mother in circumstances where the father's Form H for the financial proceedings shows costs incurred to date of £42,067.87 and he seeks a costs order for £98,387 with respect to the period from the Court of Appeal decision to 11 March 2023. The mother is likely to be in a position at the conclusion of the proceedings to allow her to re-pay the father the sum provided by way of a costs allowance.

41. Taking into account all of these circumstances, I am satisfied that it is appropriate in this case to award a costs allowance to the mother of £113,352 including VAT to allow her to settle her outstanding incurred costs and to fund the services of solicitor and counsel to the conclusion of the proceedings.

42. As to how this sum is to be raised, the father's Form ES2 details total non-pension assets of some £10.1M on the mother's case and £9.4M on the father's case. Of that sum, some £4.1M is in investments. In the circumstances, it is clear on ES2 prepared by the father that he has financial resources in sufficiently liquid form to fund a costs allowance in favour of the mother, and to do so without recourse to the sale of assets the beneficial ownership of which is now the subject of dispute.

43. That said, following the hearing and just prior to this judgment being circulated in draft, the parties filed competing draft orders which appeared to suggest (in that each draft contained *exactly* the same recital) that the parties have compromised the mother's application for a costs allowance, at least to an extent, by way of agreeing the sale of the Bentley for a fair market value and in any event for not for less than £130,000 unless agreed otherwise by the parties in writing, the proceeds of the sale to be divided equally between the parties, the father agreeing to lend the mother his half share of the proceeds until the completion of the financial proceedings and the mother agreeing to use the moneys to purchase a car for up to £15,000 with the remainder being allocated to past and future legal costs. On this basis, both draft orders also invite the court to make no order on the mother's application for a costs allowance.

44. The foregoing solution will require the mother to be discharged from her undertaking at paragraph 3(ii) of the order dated 12 February 2024 that she will not sell or seek to dispose of the Bentley until such time as the dispute over its ownership is resolved in writing or by the English court and the competing draft orders each contain an undertaking to that effect. The competing draft orders also each contain an undertaking by the mother to repay to the father such part of the proportion of the proceeds of sale of the Bentley which have been loaned by the father to the mother and such proportion of the costs allowance if, and to the extent that, the court is of the opinion, when considering costs at the conclusion of the proceedings, that she ought to do so.

45. During the course of the hearing, the mother submitted that she should be provided with the opportunity to provide a further and revised costs budget consequent on any decision by the court to give further case management directions in this matter, the mother as I have noted submitting that the timetable put in place by the court on 11 March 2024 should be remodelled to provide for the determination as preliminary issues of the extent of the mother's beneficial interests in the former family home and the issue of whether the sum of £850,000 was a loan or a gift to the mother. In circumstances where the court has, for the reasons set out below, rejected that submission and retained the case overall management structure on which the costs set out in the correspondence relied on by Ms Allman have been estimated, I am satisfied that it is not necessary to make further provision in the order for a revised budget and for the costs allowance to be revisited thereafter. If the mother seeks to persuade the court to extend that sum in due course, she will need to issue an application to vary in due course.

46. Before leaving the subject of the costs allowance sought by the mother however, and in the foregoing context, the parties would do well to bear in mind that this is a case in which it is likely that mother will be in a position at the conclusion of the proceedings to repay to the father the sum provided by way of a costs allowance and in which, on the face of it, there are no complex liquidity issues to be contended with when funding any costs allowance. In such circumstances, it would be regrettable if any further issues in the interim as to variation of quantum or payment timetables had to be determined by the court.

Costs

47. The father rests his submission that the mother should pay his costs from the hearing before the Court of Appeal to date primarily on alleged unreasonableness on the part of the mother in the conduct of the litigation, relying on the additional matters prayed in aid by Mr Devereux and Ms Syme to reinforce that submission of unreasonableness.

48. Costs orders in proceedings concerning children are rare for the very well-established reasons articulated in the authorities set out above. Whilst orders for costs are not excluded in proceedings concerning children and whilst, depending on the facts of the case, such an order may be made in circumstances where a party has behaved unreasonably or reprehensibly during the course of such proceedings, this case does not come close to being in that category.

49. When deciding whether there has been unreasonable conduct, each case must turn on its own facts (see *Re W (A Child)* [2020] EWCA Civ 77 at [10]). The unreasonable conduct relied on must relate to the litigation and not the child's welfare (see *Re T (A Child)* [2005] EWCA Civ 311 at [36], citing *R v R (Costs: child case)* [1997] 2 FLR 95).

50. Whilst I acknowledge that Moylan LJ did make a passing observation in his judgment in the Court of Appeal that *on paper* the case that A was habitually resident in England and Wales at the date of the father's application was a strong one, Moylan LJ also concluded that the question of habitual residence required a re-hearing in circumstances where further oral evidence might be merited, as this court thereafter decided it was. In circumstances where a re-hearing had been directed by the Court of

Appeal on the basis that further oral evidence might be required, it cannot be said that the mother was unreasonable in seeking to re-run her case with respect to habitual residence in the context of the court hearing further oral evidence on that issue. Another court had previously determined that A was habitually resident in Zambia at the relevant date and, whilst this conclusion was overturned on appeal, the appeal was allowed on the basis of that the judge had applied the wrong legal test and the facts were not so clear cut as to permit the Court of Appeal to reach its own conclusion and negate the need for a re-hearing. The submission that the mother was unreasonable in such circumstances in seeking to contest the question of habitual residence is not sustainable.

51. By reason of Arbuthnot J's conclusion as to habitual residence at the first hearing, the question of forum had not been litigated between the parties prior to the hearing before this court. This court required the questions of habitual residence, forum and return to be considered at a single hearing. In the circumstances, once again I am not satisfied that it can be said that the mother acted unreasonably in seeking to argue the question of forum before the court, particularly in circumstances where the likelihood that this court would be required to hold a finding of fact hearing in respect of an event alleged to have occurred in Zambia rendered the question of forum arguable for obvious reasons. During the course of my previous judgment, I expressly observed at [102] that, in that context, the question of forum had no wholly satisfactory solution. In this context, I am satisfied that it again cannot be said that the mother was unreasonable in seeking to argue forum for the first time at the hearing before this court and that a submission to the contrary is unsustainable.

52. Within the foregoing context, whilst the court ultimately found against her and therefore the father was successful, I am satisfied that the mother's conduct in arguing the issues of habitual residence and forum were neither unreasonable or reprehensible on the facts of this case. In the circumstances, I am satisfied that there is no good reason in this case to depart from the general practice of making no order for costs in cases involving children and that the father's application for a costs order against the mother that she pay the costs of the Children Act proceedings in relation to the proceedings subsequent to the Court of Appeal hearing should be refused. There shall be no order as the father's costs of the proceedings to date following the judgment of the Court of Appeal dated 12 June 2023.

Case Management

53. On 11 March 2023 the court made a case management order. With respect to the welfare issues, in circumstances where the court invited the Zambian authorities to respond to its respectful request for documentation by 15 April 2024, the court directed the parties to compile in chronological order and in a separate bundle all of the documents received from the Zambian police, prosecutor's office, and courts (including those already in the possession of either party and any additional documents received pursuant to the court's requests for documentation) and all photographs and a list of all videos, each to be date- and time-stamped, taken on the days that the father had contact with A in Zambia in September 2022. In addition, the court directed that each party to prepare, by 4pm on Monday 25 March 2024, a schedule of allegations, setting out the findings that they seek against the other and to file and serve consecutive statements setting out their evidence in support of their own allegations, and their response to the allegations made against them.

54. With respect to the financial issues, the court directed that the parties shall file and serve Forms E1 by 4pm on Monday 8 April 2024, if so advised to exchange questionnaires in relation their Forms E1 by 4pm on Monday 22 April 2024, to serve their responses to questionnaires by 4pm on Monday 6 May 2024 and to file and serve consecutive statements with respect to the financial applications under Schedule 1 and the Trust of Land and Appointment of Trustees Act 1996.

55. Such is the apparent level of animosity between the parents in this case that the parties have not even been able to agree amendments to the current case management directions and timetable consequent upon the delay in receiving information from the jurisdiction of Zambia. Each blames the other for this state of affairs. In the circumstances, in addition to determining the mother's application for a costs allowance and the father's application for costs from the date of the hearing in the Court of Appeal, the court has been required to determine the minutiae of the case management issues that have arisen since the hearing on 11 March 2024. Subsequent to the hearing, the parties submitted two further documents setting out their competing case management proposals.

56. The case management order of 11 March 2024 has not been the subject of an appeal. In the circumstances, save in so far as the parties have applied to vary it, that order stands. The father's contends that all relevant issues were dealt with properly at the hearing on 11 March 2024, and that the case management directions now raised by the mother are not necessary and are likely an attempt to sabotage the timetable. However, in circumstances where the Foreign Process Section has indicated that it cannot assist with the service of the requests made by the court for documentation from certain Zambian agencies, and the parents now having agreed that task should be undertaken by agents in that jurisdiction, the consequent delay in obtaining that material, now due on 10 June 2024, inevitably means that a degree of re-timetabling in this case will be necessary.

57. With respect to the welfare issues before the court, given the difficulties in serving the requests made by the court to the Zambian authorities, it has not been possible for the parents to file and serve narrative statements setting out their cases. It is to be anticipated that, even with the court substituting a direction to provide for service by way of agents, there will be delay before a response is received (if any), after which time the parties will require time to consider the material and finalise their narrative statements. Within this context, Mr Devereux and Ms Syme ultimately accepted on behalf of the father that it is unrealistic to expect that the court could maintain the current dates set aside for the finding of fact hearing and that the court should consider the possibility of using the hearing in July, currently listed to determine the financial applications, for that purpose.

58. Within the foregoing context, the mother seeks case management directions on the following additional matters with respect to the welfare issues:

    i) In circumstances where this court is now considering making child arrangements orders, notwithstanding that these proceedings commenced by way of an application for a return order, the Court is required to ensure that Cafcass provide a Safeguarding Letter following the usual Cafcass safeguarding checks having been undertaken and provide Cafcass with the opportunity, as they would have at a first hearing dispute resolution

appointment, to comment on whether this is a case in which a report pursuant to s.7 of the Children Act 1989 is merited.

ii) A direction for further witness statements from the doctor who A initially saw at CFB in Zambia, from Dr Mwanza, and from Dr Ginwalla, witness statements from the maternal grandmother and the maternal aunt, witness statements from the DCIO for the department handling the allegations in Zambia, Officer Sylvia and the Social Workers instructed by the Zambian Police.

iii) A direction for the filing and serving of photographs of A's alleged injuries taken by any clinician which are held by the Zambian police, Zambian prosecution authority, the University Teaching Hospital, or the Pendleton Clinic, together with photographs taken by the mother.

iv) A specific direction (as distinct from waiting to see whether it is included in the material requested from the Zambian authorities) for the filing and serving of a report held by the police in Zambia in relation to the DNA sample analysed from the swab taken from A on 16 September 2022.

v) A direction for police disclosure from this jurisdiction in light of the father's allegations of domestic abuse (such allegations being partly conceded by the mother during the last hearing).

59. During the hearing, on behalf of the mother Ms Allman made clear that, subject to achieving a costs allowance, and depending on whether the directions for the filing and serving of photographs of A's alleged injuries and filing and serving of a report held by the police in Zambia in relation to the DNA sample analysed from the swab taken from A are complied with, the mother intends to make applications under FPR 2010 Part 25 for an expert paediatric overview based on photographs of A's alleged injuries and for and DNA testing of father for the purpose of comparison with the Zambian DNA report. Neither of those applications is currently before the court. During the course of the hearing, the court expressed caution regarding the efficacy of paediatric expert evidence on the physical signs of sexual abuse based solely on photographic evidence, including photographic evidence of alleged bruising and non-clinical photographic evidence. However, any application for expert evidence will fall to be considered if it is made.

60. With respect to the financial issues before the court, the father seeks directions for a valuation of the former family home, an extension for the filing and serving of the parties' their answers to questionnaire with documentary evidence in support where requested by no later than 4pm on 29 May 2024 and a direction that the parties are to exchange updating disclosure by no later than 4pm on 4 July 2024. The father contends that, in circumstances where the hearing currently listed to determine the financial and welfare matters is now required to deal with the fact finding hearing, the financial applications will need to be adjourned to a further final hearing thereafter. In contrast, the mother seeks the following directions from the court in relation to the financial proceedings:

i) The directions that the mother issue an application pursuant to the Trusts of Land and Appointment of Trustees Act 1996 be rescinded.

ii) A direction that the father plead his case with respect to the nature and extent of the mother's beneficial interest in the former family home and the Bentley motor vehicle, with points of claim and defence followed by statements and evidence on which each party seeks to rely.

iii) That the hearing currently listed in June as a finding of fact hearing be utilised to determine, as a preliminary issue, of the question of beneficial interest in the family home and the disputed sum of £850,000 provided to the mother by the father, so as to provide the parties with an opportunity to undertake an FDR / early neutral evaluation of the financial dispute or to otherwise negotiate in that regard.

iv) That the proceedings under Schedule 1 should thereafter be listed for an FDR / ENE.

v) That the welfare and financial applications under the Children Act 1989 should be listed for a consolidated final hearing.

61. It is well established that within financial remedy proceedings there can be a determination of beneficial ownership without the need for separate civil claim (see *Tebbutt v Haynes* [1981] 2 All ER 238 and *TL v ML* [2006] 1 FLR 1263). Whilst I have not heard full argument on the point, in circumstances where under Schedule 1 of the 1989 Act there is a requirement that the court know what is available to each of the parties before it can carry out a distributive exercise, and where paragraph 4 of Schedule 1 requires the court to have regard to the income, earning capacity, property and other financial resources which any parent of the child has or is likely to have in the foreseeable future, I accept that there is a sound basis for concluding that this court is able to determine the parents' respective beneficial interests in the family home as part of the proceedings under Schedule 1, rather than requiring a separate application under the 1996 Act.

62. Within the foregoing context, the key case management issue between the parties with respect to the financial proceedings was, ultimately, whether the hearing in June currently listed for a fact finding hearing should now be used to determine, as a preliminary issue, the questions of the mother's beneficial interest in the family home and the nature of the £850,000 provided to the mother by the father, so as to provide the parties with an opportunity to undertake an FDR / early neutral evaluation of the financial dispute.

63. The mother's submission in the latter regard might have been realistic had the parties been capable of agreeing the matters that this judgment has been required to deal with. However, in circumstances where the parties required the court to consider and determine each and every funding, costs and case management issue before the court, it is not realistic to think that a hearing of the disputed issues of beneficial interest in the former family home and gift versus loan with respect to the £850,000 can be prepared for final determination within a little over 14 days from the date on which this judgment is handed down, particularly in circumstances where the question of the nature of the £850,000 provided to the mother by the father has not yet been the subject of witness statements and may well require the disclosure and consideration of documentary evidence on that issue. In the circumstances, I am satisfied that the hearing listed on 11, 12, 13 and 14 June 2024 will have to be vacated and the finding

of fact hearing moved to the dates currently listed to deal with the financial and welfare matters. As such, I am further satisfied that the current timetable requires amendment.

64. Within this context, I am satisfied that the following case management directions should be made with respect to the welfare proceedings:

i) The requests for information directed to the various entities in Zambia shall be served on the relevant entities by an agent instructed and paid for by the father by 4pm on 24 May 2024. There is permission to disclose this paragraph of the order to the nominated agent.

ii) Cafcass shall undertake safeguarding checks in relation to the mother and the father. The Cafcass Letter to court shall be filed with the court by 4pm on 10 June 2024. The issue of whether a section 7 report is required and, if so, who shall undertake a section 7 report shall be considered following completion of the finding of fact hearing. The solicitors for the father are to serve the order on the relevant office of Cafcass in Reading.

iii) The parties shall file and serve any and all further evidence they seek to rely upon in respect of the finding of fact hearing by 4pm on 19 June 2024 setting out:

a) their evidence in support of their own allegations; and

b) their response to the allegations made against them.

In relation to the allegations against the father of sexual abuse of A in September 2022, the parties shall use those parts of their existing statements that address this issue. Parts of their existing statements used for this purpose shall not be modified in any way (save in relation to reference to exhibits) but the parties may add to that material by way of additional narrative if so advised. The parties' own statements shall be limited to 20 pages of A4, double spaced, in size 12 type, with no more than 40 pages of exhibits. Statements from other witnesses whom either the mother or the father wish to rely upon shall be limited to 8 pages of A4, double spaced, in font size 12, with no more than 10 pages of exhibits.

iv) There shall be permission to the parties, if so advised, by 4pm on 28 June 2024 to file and serve one further statement from themselves limited to responding to the other party's evidence. That statement shall be limited to 8 pages of A4, double spaced, in font size 12, with no more than 10 pages of exhibits.

v) The mother and the father shall provide to each other the list of all witnesses they wish to call to give evidence at the finding of fact hearing by 4pm on 1 July 2024. The relevance of each witness to the issues engaged will be considered at the hearing on 14 June 2024.

vi) The finding of fact hearing which was previously listed to be heard commencing on 11 June 2024 shall be vacated and shall now be heard commencing at 10.30am on 15 July 2024 (with a time estimate of 5 days).

vii) Both the mother and the father and any witnesses within the jurisdiction of England and Wales shall attend in person to give oral evidence at the finding of fact hearing. Other witnesses outside the jurisdiction of England and Wales may attend remotely by video conferencing facilities. The arrangements for video conferencing facilities and any interpreters required shall be organised by the party who wishes to call the particular witnesses who require to attend remotely or who require an interpreter.

viii) The parties shall file at court and serve on each other witness statements addressing their response to any findings made by the court at the finding of fact hearing and their welfare proposals in respect of the pending applications in light of those findings.

ix) A final welfare hearing in respect of the parties' child arrangements and relocation applications, time estimate 3 days, shall be listed on before Mr Justice MacDonald sitting at the Royal Courts of Justice, Strand, London WC2A 2LL.

65. Further, having considered the respective submission, I am satisfied that the following additional case management directions should be made with respect to the financial proceedings:

i) The father shall pay to the mother a costs allowance of costs allowance to the mother of £113,352 including VAT to allow her to settle her outstanding incurred costs and to fund the services of solicitor and counsel to the conclusion of the proceedings.

ii) The financial proceedings (in case no. 1713-1351-6520-6848) should be consolidated with the welfare proceedings (in case number FD22P00457) and that there shall be no automatic directions made in the financial proceedings.

iii) The direction that the mother issue proceedings under the Trusts of Land and Administration of Trustees Act 1996 shall be rescinded.

iv) Both parties shall file and serve on the other party replies to the other's Questionnaire and request for further documents by 4pm on 24 May 2024.

v) The parties shall jointly instruct three estate agents to provide market appraisals in respect of the former family home. The following consequential provisions shall apply:

a) The identity of the three estate agents shall be selected by the father listing five estate agents by 4pm on 31 May 2024 and the mother selecting three from the list by 4pm on 7 June 2024.

b) The letters of instruction shall be drafted by the father and agreed with the mother and sent to the three estate agents by 4pm on 14 June 2024.

c) The mother shall facilitate the estate agents' access to the family home and liaise with them as necessary to arrange the inspections.

d) The appraisals shall be sent to the parties by 4.00pm on 28 June 2024;

e) The mean figure of the three appraisals obtained will be the value for the purposes of the financial proceedings. Where a range is given by one estate agent, the mid-point shall be used as the value when calculating the mean;

f) The costs charged by the estate agents, if any, for preparing the appraisals shall be met by the parties equally.

vi) The mother shall by 4pm on 11 June 2024 file and serve a statement in support of her substantive financial applications under Schedule 1 to the Children Act 1989 (including her case as to the £850,000 she states were gifted to her by the father and any documentary evidence relating to that issue), such statement to be limited to 15 pages of A4, double spaced, in font size 12.

vii) The father shall by 4pm on 25 June 2024 file and serve a statement in response to the mother's substantive financial applications under Schedule 1 to the Children Act 1989 a statement in response to the mother's substantive financial applications under Schedule 1 to the Children Act 1989 (including his case with respect to the beneficial interest in the former family home and as to the £850,000 the father says were loaned to the mother and any documentary evidence relating to those issues), such statement to be limited to 15 pages of A4, double spaced, in font size 12.

viii) The mother shall have permission by 4pm on 9 July 2024, if so advised, to file and serve a further statement in response to the father's statement (including her case as to the father's evidence in respect of his beneficial interest in the family home), such statement to be limited to 12 pages of A4, double spaced, in font size 12.

ix) Each party shall serve on the other party their updating financial disclosure by 4 pm on the day which is 28 days before the first day of the final hearing of the financial proceedings. Updating disclosure shall include the disclosure of the following documents:

a) copies of all bank and building society statements relating to accounts in the category required by paragraph 2.3 of Form E, covering the period from the last statement which has been disclosed to the date of updating disclosure, or covering the period from the opening of the account to the date of updating disclosure for any such accounts which have come into existence since Form E;

b) a copy of the most up to date statement or dividend counterfoil relating to investments in the category required by paragraph 2.4 of Form E, including in respect of any investments which have come into existence since Form E;

c) a copy of an up-to-date surrender value for policies in the category required by paragraph 2.5 of Form E, including in respect of any policies which have come into existence since Form E;

d) copies of documents evidencing the up-to-date amount due on liabilities in the category required by paragraph 2.9 or 2.10 of Form E, including in respect of any liabilities which have come into existence since Form E;

e) copies of any business accounts which have become available since Form E for businesses in the category required by paragraph 2.11 of Form E, including in respect of any businesses which have come into existence since Form E, identifying the expected share of business profits from these accounts;

f) copies of an up-to-date statement showing the Cash Equivalent of any pension rights (or value of any PPF rights) in the category required by paragraph 2.13 of Form E, including in respect of any pension rights or PPF rights which have come into existence since Form E;

g) copies of all P60s and P11Ds received since Form E, and all pay slips received since the last P60;

h) copies of all tax returns sent to HMRC and tax assessments since Form E; and

i) copies of all documents evidencing all income received since Form E in the nature of dividends, interest, rental income, state benefits or otherwise.

x) Ahead of the next hearing, each party shall send to the court and serve on the other party a costs estimate in Form H by no later than 4pm on 12 June 2024, stating (i) the costs that party has incurred up to the financial dispute resolution appointment and (ii) the further costs that party expects to incur after the financial dispute resolution hearing if settlement is not reached by 4pm on the day before the financial dispute resolution appointment.

xi) A final hearing in respect of the financial proceedings shall be listed before Mr Justice MacDonald sitting at the Royal Courts of Justice, Strand, London WC2A 2LL, in the same week as the final hearing in respect of the child arrangements and relocation applications, following on from those proceedings (with a time estimate of 2 days).

66. Finally, each of the welfare proceedings and the financial proceedings will benefit from a pre-hearing review at an appropriate point. Whilst various proposals were advanced with respect to dates already in the list, having regard to the timetable set out above, I am satisfied that in respect of the fact finding stage, this is likely to be most efficacious on or after 28 June 2024. In the financial proceedings and the final welfare hearing, this is likely be most effective after the receipt of the parties final welfare evidence and any s.7 report. In circumstances where there has even been a degree of disagreement over which date or dates should be utilised for further directions hearings, I will direct counsel to provide the court with their dates of availability for the pre-hearing reviews within 7 days and the court will then fix the dates.

CONCLUSION

67. In the foregoing circumstances, I grant the mother's application for a costs allowance. I refuse the father's application for an order for costs and make no order as the father's costs of the proceedings to date following the judgment of the Court of Appeal dated 12 June 2023. Otherwise, costs will be reserved. I will ask leading and junior counsel to draft an order for my approval incorporating the case management directions set out above.

68. During the period under which this judgment was in preparation both parties, through leading and junior counsel, emailed the court expressing concern that delay in determining the issues between the parties that are the subject of this judgment would have a detrimental effect on the case management timetable.

69. As can be seen, the parties in this case were incapable of agreeing a costs allowance of a little over £100,000 in case where the total non-pension assets amount to some £10M, including £4.1M in investments. The parties were further incapable of agreeing any amendments to the case management timetable consequent on the delay in the receipt of information requested from the jurisdiction of Zambia. The father insisted on pressing his disputed application for his costs ahead of the conclusion of those proceedings.

70. If parties are incapable of agreeing issues and instead require the court to determine those issues then, given the current pressure of work on the courts, there will in some cases necessarily be a short delay before the court renders its decision. The parties may wish to reflect on the fact that such delay would have been avoided had they each been capable of taking a reasonable approach to the contested issues of funding and case management that they instead chose to lay at the feet of the court.