Neutral Citation Number: [2025] EWCA Civ 641

Case No: CA-2023-001909

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM CENTRAL FAMILY COURT**
**HER HONOUR JUDGE VINCENT**
**BV17D25712**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 May 2025

**Before:**

**LORD JUSTICE MOYLAN**
**LORD JUSTICE POPPLEWELL**
and
**SIR CHRISTOPHER FLOYD**

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**Between:**

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| **FISAYO OLAOLUWA AWOLOWO** | **Appellant** |
| **- and -** | |
| **(1) OLUSEQUN SAMUEL AWOLOWO** | **Respondents** |
| **(2) LINKSERVE VENTURES TRANSNATIONAL LIMITED** | |

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**Jacqueline Perry KC and Benedict Scantlebury** (instructed by **Raphael Law Solicitors**) for the **Appellant**
**Paul Infield** (instructed by **A. Donamart Solicitors**) for the **First Respondent**
**Sam Stein KC and Jack Holborn** (instructed by **Judith Maurice Solicitors**) for the **Second Respondent**

Hearing date: 4 December 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 16 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## Lord Justice Moylan:

1. The wife (as I will call her) appeals from the decision of Her Honour Judge Vincent, sitting as a Deputy High Court judge, ("the judge") on 14 September 2023 by which she determined that the husband owed the Intervenor, Linkserve Ventures Transnational Limited, £1.6 million and dismissed the wife's application under s.37 of the Matrimonial Causes Act 1973 ("the MCA 1973") (deemed as being an application under s.23 of the Matrimonial and Family Proceedings Act 1984 ("the MFPA 1984")). The latter application sought an order setting aside certain transactions related to the alleged debt as dispositions intended to defeat the wife's application for financial relief under the MFPA 1984 ("the wife's set aside application")."

2. The Intervenor is a Nigerian company and, as set out in the judgment below, is "the husband's brother's company". As referred to below, it has appeared in the documents as Linkserve *Ventures* Transnational Limited ("LVT Ltd/the Intervenor"), as Linkserves Ventures Transnational Limited and as Linkserve Transnational Limited ("LT Ltd"). The first is that used in the proceedings under the MFPA 1984 and is the version which also appears in the Loan Agreement relied on by the husband and the Intervenor. The middle version of the name is that which appears in documents apparently from the Nigerian Corporate Affairs Commission produced by the husband's brother. The last of these is the name used in proceedings in Nigeria and proceedings in the High Court here. All three have been treated as the same company although I am not aware of any formal explanation for the different names being used other than, perhaps, to ascribe responsibility for the "error" to lawyers.

3. The wife's case on this appeal is that the judge's factual conclusion is vitiated by a number of material flaws and that she was wrong to dismiss the wife's set aside application.

4. The wife is represented on this appeal by Ms Perry KC and Mr Scantlebury (who did not appear below). The husband is represented by Mr Infield and the Intervenor is represented by Mr Stein KC and Mr Holborn.

5. When I gave permission to appeal from the judge's decision, my order included the following:

> "Although phrased as a sham, the issue was whether there was a debt which should be taken into account when determining the financial claims between the husband and the wife. It is not clear whether the parties and the court have taken into account the effect of *Harman v Glencross* [1986] Fam 81, [1986] 2 WLR 637; *Austin-Fell v Austin-Fell* [1990] Fam 172, [1990] 3 WLR 33; and *Kremen v Agrest* [2013] EWCA Civ 41, [2013] 2 FLR 187. As the application for a charging order was made after the date of the wife's financial application it would seem, as set out in *Rayden on Divorce* at [23.270]–[23.280], that the "court will have to balance the claims of the debtor's creditor and the debtor's spouse". It would appear from the preamble that this is what Master Eastman intended to effect by his order of 28 November 2022 but he then made a final charging order."

6. For the reasons set out below, I have concluded that the judge's decision cannot stand and must be set aside with the matter being remitted for rehearing before a Family Division Judge nominated by the President of the Family Division. In addition, the proceedings will need to be transferred to the High Court so that, if required, the court can deal with the wife's application to set aside the registration of a Nigerian judgment and a charging order against the family home as referred to below. The court will also have to redetermine, if necessary, the wife's set aside application.

*Background*

7. The wife and the husband, who are both Nigerian nationals, were married in Nigeria in 2004. They have four children. The family moved to live in England in 2009.

8. In December 2009, the husband purchased a property in London, 49 Sherwood Road, as the family home ("the family home"). The purchase price was £1.35 million and the property was acquired, without a mortgage, in the husband's sole name.

9. In July 2010, another property was purchased in London for £816,500. Again, the property was acquired without a mortgage. The judgment recorded that this property was purchased by the husband's business, De Skyline Hotel Limited, with the intention of developing it into a hotel "similar to one of the hotels [the husband] operated in Nigeria". The property comprised two parts, one of which was called the Dower House and the other was called the Orchard. The Land Registry documents in the Supplemental Bundle show that the Orchard was in fact purchased in the husband's sole name and remained in his name as at 28 January 2019. The documents for the Dower House, issued on 11 December 2019, would suggest that this property was also acquired in the husband's sole name and was transferred into the name of De Skyline Hotel Ltd (an English company) on 24 October 2016.

10. De Skyline Hotel Ltd ("DSH England") was incorporated in England on 12 August 2010, in other words *after* the purchase of the Dower House and the Orchard. The information obtained by the wife from Companies House states that the last accounts for the company were those up to 31 August 2018. The husband is the only listed director. A winding up order was made on 17 September 2019 and the company was dissolved on 23 June 2021.

11. The husband and wife separated in February 2015. The wife registered her home rights under the Family Law Act 1996 ("FLA 1996") in November 2015.

12. The husband returned to live in Nigeria and commenced divorce proceedings there in February 2017.

13. The wife commenced divorce proceedings in England in August 2017. Following the grant of a decree nisi in the proceedings in Nigeria in September 2018, the wife agreed to withdraw her English Petition and made an application for financial relief under the MFPA 1984.

14. The Judge recorded that in his Form E dated 7 May 2019, filed for the purposes of the proceedings under the MFPA 1984, the husband "asserted that [the former matrimonial home] was worth £1.8 million but that £1.6 million of the equity was effectively held on trust for his brother's company, because he said, the loan of £1.6 million had been

used to fund the purchase of the property. This was the first that the wife or her representatives had heard of the loan".

15. It is also relevant to note that there are two companies called De Skyline (or DeSkyline) Hotel Ltd. There is an English company with this name as referred to above. This company's registered address was the family home until 22 September 2011, then an address in Hayes until 23 October 2017 when it changed to Brown House, 143 Pembury Avenue, Surrey. There is also a Nigerian company with the same name which is said to have its head office in Sango-Ota, Ogun State, Nigeria ("DSH Nigeria").

*Documents*

16. I propose at this stage of my judgment to refer to some of the relevant documents in this case.

17. The Intervenor and the husband rely on a "Loan Agreement" between "Linkserve Ventures Transnational Limited" with an address in Lagos as the "Lender" and "De Skyline Hotel Limited and Otunba Olusegun Awolowo of 143 Pembury Avenue, Worcester Park, Surrey" as the "Borrower". It is not clear why an address in England was given for De Skyline Hotel Ltd when, as referred to below, the agreement is said to have been made with DSH Nigeria. Further, this address only became the registered address of DSH England on 23 October 2017 (which is after the purported date of the Loan Agreement: see below). It is also not clear why this address was given for the husband when it was not his address. Mr Stein told us that the oral evidence of the husband's brother and the husband was to the effect that they were both in Nigeria when the agreement was made and that this was the address of a friend or contact of the husband's. This would still not explain why this was given as the address for the Nigerian company (when it was not its address) nor why the husband's actual address was not used.

18. The Loan Agreement is "made the … day of August 2009" (the date is left blank) and bears a stamp dated, in manuscript, 6/8/09, "DULY STAMPED Commissioner of Stamp Duty Lagos State Government". The Agreement is signed on behalf of LVT Ltd by a "Director" and on behalf of "DeSkyline Hotel Limited" also by a "Director". The Agreement is *not* signed by or on behalf of the husband.

19. The Agreement records that LVT Ltd "agrees to lend the Borrower [defined as both De Skyline Hotel Limited and the husband] from the month of AUGUST 2009 (the 'Loan date') the principal sum of" £1.6 million; that "The loan shall bear no interest"; that the lender "shall continue to advance and credit the account of the Borrower with funds until the agreed figure … is achieved"; that the "Borrowers shall use the funds for the purposes of their Entrepreneurial pursuit in the United Kingdom"; and the "Borrowers shall commence the payment of this loan within one year of commencement of business by the DE SKYLINE HOTEL (LONDON). The payment shall be by installments (sic)".

20. It is notable, for what was said to be a commercial arrangement that, in particular, the loan was denominated in pounds sterling but lent in Nigerian naira, that no interest was payable and that there was no repayment schedule. These elements are strong pointers against this being a commercial arrangement.

21. The husband's brother produced a document headed "Corporate Affairs Commission" and entitled "Certificate of Incorporation" which states that a company called Linkserves Dynamic Solutions Limited was incorporated on 23 January 2007 and changed its name to Linkserves Ventures Transnational Limited by Special Resolution on 18 August 2009. Another document, a "Letter of Good Standing" dated 27 June 2022, again headed "Corporate Affairs Commission", refers to Linkserves Ventures Transnational Limited as having been registered in Nigeria on 23 January 2007 with annual returns "filed up to 2021". The company registration number on both documents is "679039". Assuming LVT Ltd is the same as Linkserves Ventures Transnational Limited, these documents show that LVT Ltd did not exist under that name as at the date of the Loan Agreement (6 August 2009). It is also relevant to note that no annual returns have been disclosed.

22. Another document which has been relied on by LVT Ltd is a written "Charge of Whole" dated 20 May 2019 by which the husband purported to grant a charge over the family home in favour of that company. It is signed on behalf of the company, it would appear, by the husband's brother (or possibly his wife) with the witness having an address in Dundalk, Ireland.

23. The wife (and possibly also the husband) produced one statement from a bank account in the husband's sole name with Barclays (Knightsbridge Branch) in England. It covers the period 11 September 2009 to 7 December 2009. The opening balance was £335,492 and the closing balance was £141,409 with a maximum balance of £557,825. There are a number of receipts of varying amounts totalling approximately £360,000. On 30 November 2009 a transfer was made to solicitors in the sum of £557,000.

24. There are also five pages of bank statements covering various periods between 7 July 2014 and 28 August 2015 from a bank account with Access Private Bank in England in the name of "Deskyline Hotel Ltd, 49 Sherwood Road". The opening balance on 1 July 2014 is just over £1.3 million with a maximum balance of £1.767 million on 6 July 2015. These statements do not feature in the judgment at all despite them showing that an account in the name of De Skyline Ltd had very substantial funds available to it during this period which would seem wholly to contradict the husband's and the Intervenor's case as to the company's financial circumstances. We were told during the hearing by Mr Stein that this was a DSH Nigeria account and "was a loan". This would equally not be consistent with the picture painted by the husband as to the "modest" financial circumstances of this company as accepted by the judge, at [78(i)].

25. There is a "Loan Agreement" between DSH Nigeria and the husband dated 3 February 2010. Under it, DSH Nigeria agreed to lend the husband £800,000. The loan was subject to interest of 21% per year. The style and format of this agreement is almost identical to the LVT Ltd Loan Agreement although the latter was said to have been drawn up by the Intervenor's lawyers. As the judge noted, the 2010 Agreement is "suspiciously identical in format, font, paragraph numbering and content" to the earlier Loan Agreement.

26. The wife also relied on an undated document headed "Statement of Property Onwed (sic) by Mr Segun Awolowo" which gave a total value for the five properties listed in the document of Naira 1.255 billion. This would have translated to nearly £6 million in 2009 and £2.5 million in 2020. The husband said that this document was a forgery,

a claim which the judge rejected. The judge then gave it no weight although it appears there was no other attempt by the husband to deal with its contents.

27. It can be seen from the above that a notable feature of this case is that the relevant companies have not disclosed *any* financial documents including company accounts, which clearly existed, and which would be expected to be corroborative of a loan. This applies in particular to LVT Ltd and DSH Nigeria.

*Proceedings in Nigeria*

28. On 6 March 2018, LT Ltd (Claimant) issued proceedings against Deskyline Hotel Limited (First Defendant) and the husband (Second Defendant) in the High Court in Nigeria. In the Writ, the date of the Loan Agreement was given as 6 *June* 2009. In the Statement of Claim, it was asserted that the First Defendant company was registered in Nigeria and "carries on Hospitality business"; that "the first and second defendant are the customers of the Claimant and by virtue of a Loan agreement dated the *16th* August 2009, the Claimant advanced a facility of £1.6 million (one million six hundred thousand British Pounds Sterling) to the first and second defendant" (emphasis added). Later, in the "claim" section of the Statement of Claim, the date for the Agreement is again given as 6 *June* 2009. I have emphasised the dates because they do not accord with the date stamp of 6 August 2009 on the Loan Agreement relied on by the husband and the Intervenor. The company debtor is said to be DSH Nigeria with an address in Nigeria which is obviously not the address given in the Loan Agreement (143 Pembury Avenue).

29. The Statement of Claim also contended that the second defendant had requested the loan "sometime in the month of July 2009" and the "purpose for the loan was to channel same for the building project/business of Desyline (sic) Hotel in the United Kingdom". It was further averred that "the first and second defendant rather than use the facility for the purpose it was granted which is the business of Deskyline Hotel used the funds to acquire" 49 Sherwood Street; and that the defendants "have failed neglected and refused to make payment of either the principal sum or the interest" (there was no interest payable under the Loan Agreement).

30. A witness statement was filed in support of the claim by the "accounting officer of the Claimant" with an address in Nigeria. In this it was asserted that the first defendant (Deskyline Hotel Ltd) was a Nigerian registered company. It was also said that the "Claimant has written a letter of demand to [the defendants] demanding for the immediate repayment of the loan which the first and second defendant failed to pay".

31. "Terms of Settlement" were recorded as agreed in a written document, itself undated save for the year 2019, but bearing a court stamp apparently dated 13 February 2019. This latter is inconsistent with the document entitled 'Enrolment of Judgment' (see below) which states that the Terms of Settlement were not filed until 21 March 2019. One of the terms, although not reflected in the order which was made, was that interest should be paid at 21%. Another term was that "these terms of settlement shall be entered as a Judgment of this Honourable Court". This document was then filed with the court on 21 March 2019 with a hearing on 27 March 2019 at which the parties, represented by counsel, requested "the court to enter Judgment as agreed by them". An order, titled "Enrolment of Judgment", was duly made on 27 March 2019 and provided

that "Terms of settlement dated and filed on 21/3/2019 is (sic) hereby entered as Judgment in this suit".

32. The terms of settlement were in summary: that the Defendants agreed to pay the Claimant "the sum owed" of £1.6 million in "four equal instalments of £400,000"; the first payment was to be on or before 1 June 2019, with subsequent payments on or before 31 October 2019, 28 February 2020 and 30 June 2020. There is no indication in the document or the evidence how these payments were to be made.

33. It is important to note that the Nigerian court did not consider any of the underlying documents nor the validity of the debt nor make any factual or legal adjudication. I draw attention to this because, as referred to in more detail below, the judge wrongly considered that the Nigerian court had "judged [the debt] to be legitimate" and that judgment had been entered on the basis that the court had "accepted and approved" the documents "as valid evidence of a debt". All the Nigerian court did was to enter the terms of settlement as its judgment.

*Proceedings in England*

34. I set out details of the proceedings in England at some length because they show that, rather than following what should, in my view, have been a relatively straightforward procedural path, they followed an unduly complicated route in part because different courts suggested different routes but substantially because none of the parties seem to have drawn the court's attention to the line of authorities to which I have referred above (and see further below). As reflected in my order granting permission to appeal, these authorities make clear that the claims of a creditor do not take precedence over an application for financial relief or vice-versa. The court has to balance the competing claims in the manner referred to in those authorities.

35. LT Ltd applied in the High Court for the registration of the Nigerian judgment. On 30 April 2019, the Nigerian court's judgment of 27 March 2019 was registered for enforcement in England and Wales under the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933. The parties are LT Ltd as creditor and "DeSkyline Hotel Limited trading as Deskyline Hotel Limited" and the husband as debtors.

36. On 11 July 2019, the husband wrote to LT Ltd's English solicitors stating that there was no prospect of him being able "to honour my agreement" to pay the instalments of £400,000 and that "Therefore, I am happy for you to commence on enforcement on sale of the [family home] so that you can recover your money".

37. On 8 October 2019, LT Ltd applied for a charging order against the family home. The address for both debtors is given as 143 Pembury Avenue although, as referred to above, judgment had been obtained in Nigeria against DSH Nigeria and not DSH England. The application made express reference to the fact that the wife had registered her home rights under the FLA 1996 against the property.

38. On 9 October 2019 (or possibly 11 November when the order was sealed), an interim charging order was made in favour of LT Ltd against the family home in the sum of £1.6 million.

39. On 18 December 2019, after hearing from counsel for the wife and solicitor for LT Ltd, Master Eastman adjourned the application for a final charging order and directed that "No further application for the interim charging order to be made final may be made prior to the resolution of the Defendant Wife's claim under the MFPA 1984, currently listed for 8-10 June 2020". I would note that the terms of this order, in particular the latter direction, would be consistent with the decisions of *Harman v Glencross* [1986] Fam 81, *Austin-Fell v Austin-Fell* [1990] Fam 172 and *Kremen v Agrest* [2013] 2 FLR 187.

40. These cases establish that, as set out in *Kremen v Agrest* at [11], when "the available assets are insufficient to satisfy both the financial claims of one former spouse (usually the wife) and the debts of the other (usually the husband) a conflict arises between the interests of the claimant and those of the creditors". In those circumstances, at [13], a balance has to be struck between the interests of a judgment creditor and the interests of a wife. In my view, although it is not necessary to decide the question for the purposes of this appeal, the effect of these authorities is that the issue of whether a charging order should be made in favour of a creditor, and on what terms, is determined by the court when also determining the financial application (through the balancing exercise referred to) and not prior to that determination. They also support the conclusion that this balance has to be struck *before* a charging order is made or, at least, before it is made final.

41. On 27 May 2022, the wife applied to be joined to the proceedings in the High Court and for an order, inter alia, that the registration of the Nigerian judgment and the interim charging order be set aside.

42. On 28 November 2022, a further order was made by Master Eastman. It is stated in a recital:

> "And Upon the Court considering that the Proposed Intervenor [the wife] should apply for a transfer of her claim under [the MFPA 1984] … to the Family Division … as the more appropriate forum, so that, if the Claimant herein (LT Ltd) applies to enforce its charging order, the application by the Claimant and the Proposed Intervenor's claim may be heard together under [the MFPA 1984]."

The terms of this recital clearly envisaged that the balancing exercise referred to in the authorities above would be conducted when the wife's application under the MFPA 1984 was being determined. However, the order then went on to make the interim charging order final while at the same time adjourning the wife's application dated 27 May 2022.

43. It has not been necessary for us to interpret the effect of this order but it is difficult to see what the point would have been in adjourning the wife's application to set aside the registration of the Nigerian judgment and the charging order unless the court retained the power to make these orders at a later stage. It seems, also, clearly to have been envisaged that, despite the charging order being made final, the powers of the court determining the wife's financial application would not be constrained by this (hence the reference to "may be heard together"). This interpretation also accords with the

interpretation of the order as set out in a recital in the order made on 24 April 2023 (see paragraph 57 below).

44. It can be seen that the wife's application to set aside the registration of the Nigerian judgment and the charging order have not yet been determined, her application having been adjourned by the order of 28 November 2022. Further, no steps have been taken to ensure, as proposed in that order, that the *same* court hears the wife's financial application and any application to "enforce" the charging order or the wife's application to discharge/set aside the registration of the Nigerian judgment and the charging order. The latter application is not before this court but it is clearly in the interests of justice and in accordance with the overriding objective that it is transferred from the King's Bench Division and heard together with the wife's financial application in the Family Division.

*Wife's Financial Proceedings*

45. We have been provided with only a few of the documents relating to the wife's financial application.

46. On 2 October 2018, the wife applied for leave to apply for financial relief under the MFPA 1984. She was given leave by the order of District Judge Stone on 17 October 2018.

47. The husband filed a Form E in May 2019 in which, as referred to above, he stated that the former matrimonial home was, in part, effectively held on trust for his brother's company because of the loan which had been used to purchase the property.

48. On 11 November 2019, the wife made an application under s.37 of the MCA 1973. This should have been made under s. 23 of the MFPA 1984 and the court subsequently deemed it to be an application under this provision. As set out in the judgment, it sought an order setting aside "the loan agreement of August 2009 and subsequent orders made on 27 March 2019 [the Nigerian judgment] and 30 April 2019 [registration of the Nigerian judgment in England] affecting the [former matrimonial home] as reviewable dispositions intended to defeat the [wife's] claim for financial relief".

49. LVT Ltd (not LT Ltd) was given permission to intervene on 12 December 2019.

50. The wife filed Points of Claim dated 30 January 2020. In these it was alleged that the loan document was a sham and that, if it was not a sham, it was created with the intention of defeating the wife's claim for financial relief and should be set aside under the MFPA 1984. It was also alleged that "other documents", which would seem to refer to the settlement and court order in Nigeria, were shams.

51. The husband filed a defence in response in which he asserted that the loan, and the other documents on which he relied, were genuine. He also asserted that the wife had been aware of the loan "from its inception".

52. In its defence, LVT Ltd asserted that the loan was genuine and that, if the wife sought to challenge the Nigerian court's order, she should apply to set it aside in Nigeria. It was further averred that the registration in England of the Nigerian judgment "has never been set aside", with the effect that "the said judgement remains valid", and that a

County Court did not have "jurisdiction to set aside a valid Judgement of the Nigerian High Court".

53. The final hearing of the wife's financial application was listed for hearing in August 2021. It was adjourned because, it appears, the court accepted the Intervenor's case that the final hearing could not be effective because the Family Court did not have jurisdiction to set aside the orders made in the High Court which included the interim charging order. These needed to be set aside before any final financial orders could be made. The order, dated 31 August 2021, adjourned the wife's application under the MFPA 1984 "until such time as the Wife lodges her application to set aside the judgment entered by the QBD of the High Court on the 14th May 2019". If the wife did not make such an application, her financial application was to be listed for a final hearing.

54. The wife made an application on 22 May 2022 to set aside the registration of the Nigerian judgment and the interim charging order (see paragraph 41 above). This application led to the order made by Master Eastman on 28 November 2022. The wife then, pursuant to the terms of the recital in that order (see paragraph 42 above), applied for her financial application to be transferred to the Family Division. In a statement filed in support of the transfer application, in addition to there being "many complicating factors", reference was made to the order of 31 August 2021 and the wife's application having been adjourned because the Family Court "did not have jurisdiction to remove [the interim charging order] and therefore the final hearing could not proceed on that date"; and to the terms of the recital in the order of 28 November 2022 to the effect that, "in the court's view, … the outstanding matters relating to the charging order and the wife's application for financial relief should be heard together in the Family Division".

55. It appears from the order of 24 April 2023 (see next paragraph) that the Family Court at Barnet subsequently made two inconsistent orders, one transferring the wife's application to the High Court and the other transferring it to the Central Family Court. The latter was the one which was implemented and the matter came before Recorder Nice on 24 April 2023.

56. Recorder Nice was clearly, and rightly, concerned about the procedural history and consulted Peel J as National Lead Judge of the Financial Remedies Court. As a result of that the matter was not transferred to the High Court but was ordered to be listed before a judge authorised to sit as a Deputy High Court Judge. The order further provided that the "preliminary issue relating to the Intervenor shall be adjudicated upon on the first day of the hearing". Clearly that issue could be appropriately determined by a DHCJ. However, this did not address the difficulty of determining the wife's financial application in isolation, having regard to the existence of the charging order and the outstanding application to set it aside.

57. I have referred above to a recital in the order made by Recorder Nice which considered the effect of the order made by Master Eastman on 28 November 2022. The recital noted that, when making this order, Master Eastman "apparently did so on the basis that, if this court concludes that the loan is a sham, and that the Nigerian judgment was therefore obtained fraudulently, the issue of registration can be addressed thereafter; hence he adjourned the set aside application".

58. The wife's financial application then came before the judge in September 2023.

*Judgment*

59. The judge noted that, "at the outset of the hearing, there remained some confusion as to my task". She decided that Master Eastman "was plainly not suggesting that transfer to a judge of the Family Division (or a Circuit Judge with a s.9 ticket) opened up the possibility of a Family Court judge making orders to set aside the judgments made in the King's Bench Division". As referred to above, it is difficult to see why Master Eastman would have adjourned the wife's set aside application and suggested the transfer of her financial application to the Family Division so that the wife's and the Intervenor's claims "may be heard together under the" MFPA 1984, if he did not have in mind this eventuality.

60. This is because the reference to what "may be heard together" was clearly to the competing claims of the creditor and the wife. The mechanics by which this would happen were not spelt out but the transfer of the wife's financial application to the Family Division would have enabled the subsequent transfer of the proceedings in the KBD (including the wife's undetermined application to set aside the charging order and the registration of the Nigerian judgment) to the Family Division and it may well be that this is what Master Eastman had in mind.

61. The judge also considered that, if the alleged debt was valid, it "must be accounted for" and "the family home would require to be sold and the liability met from the proceeds". This obiter comment is not further explained and is difficult to reconcile with *Harman v Glencross* and the other authorities referred to above.

62. The issue determined by the judge was "whether or not the loan agreement is a sham arrangement created after the breakdown of the marriage for the purpose of defeating the claim for financial remedy". I would note that another way of describing the preliminary issue would be, instead of being whether the loan agreement was a sham, simply to determine whether any such debt existed. It was, after all, for the husband and the company to prove the existence of the debt.

63. The judge went on to say that, depending on the court's finding, "consideration will need to be given to the steps that could or should be applied for, whether in the Family Court pursuant to section 23 or otherwise, the King's Bench Division of the High Court, and/or in Nigeria, to unpick the orders which have been made consequent upon that agreement".

64. The judge heard oral evidence from the wife, the husband and the brother, the latter two remotely from Nigeria.

65. In setting out the law, the judge quoted at length from *Bhura v Bhura (No 2)* [2015] 1 FLR 153 on the issue of "sham transactions" including what Mostyn J said at [9(vii)], namely that:

> "(vii) Because a degree of dishonesty is involved in a sham there is a very strong presumption that parties intend to be bound by the provisions of agreements into which they enter, and intend the agreements they enter into to take effect. However, this does

> not elevate the standard of proof, which is set at the balance of probability. *Nonetheless the test is a stiff one and there is a requirement of very clear evidence given the seriousness of the allegation*." (judge's emphasis)

As this matter will have to be reheard, I would just add a note of caution about the words emphasised by the judge. In my view, *if* the issue is proof of a sham rather than simply proof of a debt, a better guide to the approach the court should take is that set out, for example, in the judgment of Sir Geoffrey Vos C (as he then was) in *Bank St Petersburg PJSC and another v Arkhangelsky and others* [2020] 4 WLR 55 when dealing with the standard of proof:

> "[44] It does not seem to me that the law is now much in doubt. It is encapsulated in the following passages from Baroness Hale of Richmond's judgment in *In re B* [*In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2009] AC 11) which, though stated to be applicable to care proceedings are, I think, of more general application in civil proceedings:
>
> > '64. … Lord Nicholls's nuanced explanation [in *In re H*] left room for the nostrum, 'the more serious the allegation, the more cogent the evidence needed to prove it' to take hold and be repeated time and time again in fact-finding hearings in care proceedings …'
> >
> > '70. My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.'
> >
> > '72. As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.'"

And in Males LJ's judgment:

> "[117] In general it is legitimate and conventional, and a fair starting point, that fraud and dishonesty are inherently improbable, such that cogent evidence is required for their proof. But that is because, other things being equal, people do not usually act dishonestly, and it can be no more than a starting point. Ultimately, the only question is whether it has been proved that the occurrence of the fact in issue, in this case dishonesty in the realisation of the assets, was more probable than not."

66. I would also just repeat the point I have made above about the true nature of the issue which has to be determined. I accept that it is necessarily part of the wife's case that the Loan Agreement is not genuine but it would seem to me that the real issue is whether the husband was lent any money by his brother's company. If the judge rehearing this case were to take the same view, the onus would be on the husband and the company to prove that such a debt existed.

67. When considering the wife's evidence, the judge said:

> "She said she believed he had no need to borrow, because he was a wealthy and influential man in Nigeria, and had run a successful business as a hotelier. I have not been shown evidence to assist me in making findings of his income, savings, assets or borrowing capacity in or around 2009."

There was some discussion about this passage during the course of the appeal hearing. Mr Stein submitted that this was a general observation about the absence of evidence. I do not agree. It was an observation made by the judge when considering the weight she could attach to the wife's evidence. The judge was explaining that she could not attach much weight to the wife's evidence because of the absence of documentary evidence produced by her. In taking the absence of such evidence as a factor *against* the wife, the judge failed to consider that such evidence would be primarily available to the husband and the fact that she had "not been shown" any such evidence was the principally the husband's responsibility and not the wife's.

68. In my view, that this was the judge's approach is confirmed by the next paragraph in which the judge again discounted the wife's evidence as to the amount of money being generated by the husband's hotels in Nigeria in part because the judge had been "given no evidence" about the running costs of the hotels. This, again, was evidence which would have been available to the husband so that, if its absence was to be taken into account, it should have counted against the husband, not the wife.

69. It is notable in this respect that nowhere in the judgment does the judge refer to the almost complete absence of any company documents disclosed or adduced in evidence by the husband or the Intervenor or, indeed, the lack of documentary disclosure more generally. This is particularly striking because it was the husband's brother's express case that this was a "commercial" arrangement. It would be expected, in particular, that a company would have a range of documents in respect of such an arrangement.

70. When dealing with the husband's brother's evidence, the judge said that she "did not find him a particularly helpful witness, and somewhat evasive". Against this she noted "no significant discrepancies between his oral evidence and his written statement, and his evidence was consistent with that given by his brother". The judge importantly also took into account that, at [74]:

> "The steps his company has taken to enforce payment of the loan *have been scrutinised* by the Court in Nigeria and the High Court in London, and *the debt judged to be legitimate*, (although it is right to note that the wife's allegation that the loan agreement is a sham was not raised in either proceedings)." (emphasis added)

As referred to above, it was not correct that any such steps had been "scrutinised" in Nigeria nor that the debt had been "judged to be legitimate". There was no such adjudication in Nigeria and the High Court here had simply registered the judgment. This error was compounded later in the judgment (see paragraph 75 below).

71. In her "Conclusions", at [76], the judge first referred to "[s]ome elements of the evidence [which] point towards the loan agreement being a fiction, created only after the husband and wife separated". I set these out in full:

> "(i) the husband did not tell the wife that he had borrowed money to buy the family home in London. The first time she became aware of the existence of the loan was when the husband filed his Form E in May 2019. This was long after the separation, and only came up once financial proceedings were underway;
>
> (ii) the husband's brother insists this was a commercial loan, but the terms of the loan brought no benefit to the intervenor company at all, not even charging interest. The loan was not secured against the property nor in any other way. The intervenor apparently took no steps to ensure that the loan had been used for its intended purpose of purchasing a hotel, and was relaxed to the point of inertia when no repayments were made. However, I bear in mind Mostyn J's words:
>
> '*The fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them*.'
>
> (iii) the loan agreement is asserted to have been drawn up by the intervenor company's lawyers, but is suspiciously identical in format, font, paragraph numbering and content, to another loan agreement purportedly between the husband's Nigerian Skyline and the husband personally, advancing £800,000 to enable purchase of the Dower House. This loan agreement also only came to light after the parties' separation, and during the lifetime of the application for financial remedies;

> (iv) there is a scent of collusion about the two sets of proceedings in Nigeria. As well as repayment of the debt, the intervenor's claim form in the Nigerian proceedings seeks repossession and sale of the property at 49 Sherwood Road as an alternative remedy. In his petition for divorce to the Nigerian Court, the husband sought an order that the wife and children be evicted from the property and rehoused in another one. It would seem that the husband and, through his company, his brother, shared the same objective. That objective is consistent with the husband's objective in the financial remedy proceedings, for the wife and children to be evicted from the property, so that it can be sold and the vast portion of the equity in the house effectively removed from the pot of marital assets;
>
> (v) if the loan agreement, subsequent settlement agreement and pleadings are truly commercial and legal documents, they contain a suspiciously high amount of typing errors in respect of dates, the name of the intervenor company which is alternatively named as Linkserve Ventures Transnational Ltd and at other times just Linkserve Transnational Ltd. The loan agreement dated 6 August 2009 itself is made between De Skyline Nigeria and Linkserve Ventures Transnational Limited. However, a document apparently from the Nigerian Corporate Affairs Commission, certifies that the company (incorporated in January 2007) was previously known as Linkserves Dynamic Solutions Limited, and only became known as Linkserves Ventures Transnational Limited by operation of special resolution on 18 August 2009, twelve days after the loan agreement was made. (As to this last point, the intervenor's witness said that the name change had happened sooner but it took Nigerian officials some time to catch up with it)."

The judge does not indicate whether she does or does not accept the explanation given for the Loan Agreement being with a company, LVT Ltd, which did not then exist under that name. It is not easy to understand the explanation that the name change "had happened sooner" when the document from the Commission states that it "was changed by Special Resolution" *on* 18 August 2009.

72. The judge then summarised that "All these matters, together with the way in which the husband and his brother gave evidence to the Court, have raised suspicion that the legal documents upon which they rely were created by them after the marriage broke down". She then added that the wife had to do more than "raise suspicion"; she had "to satisfy the court … that the husband and his brother have fabricated the loan agreement after the event".

73. The judge concluded, at [78], that, although the wife had "established reasonable grounds for suspicion", the wife had not established that the loan agreement was a sham. Her reasons were as follows which, I again, set out in full:

> "(i) I preferred the husband's evidence to the wife's about his financial situation at the time he moved to England. I do not

accept that his hotel business was as wildly successful as she suggested. I prefer his evidence that they lived in modest quarters at the back of the guesthouse and that she continued to work in the hotel after the marriage. I would be prepared to accept that he was able to draw funds from his business in order to purchase the Dower House and land for £800,000. But there is no evidence before the Court to enable me to find to the standard of a balance of probabilities that he did have access to the £1.35 million and associated costs required to purchase the family home in cash. It is for the wife to prove that the property was bought without recourse to a loan from the intervenor;

(ii) I accept the husband's evidence that he entered the UK on Tier 1 (entrepreneur) visa. In January 2009 this was a route available for migrants who wished to establish, join or take over one or more business in the UK. That is exactly what the husband's intention was. Having successfully run small hotels in Nigeria and a hotel/boarding house near Lagos airport, his intention was to expand the business by creating a similar type of hotel near Heathrow airport. I accept his evidence that the requirements that applied to him on a Tier 1 entrepreneur visa, were for him to have access to not less than £200,000, to be held in a regulated financial institution, and that it was disposable in the UK;

(iii) It was asserted on behalf of the wife in her counsel's position statement that the husband entered the UK on a Tier 1 (investor) visa, which among other things required the investor to have (i) not less than £1 million in a regulated financial institution, disposable in the ; or (ii) £2 million in net personal assets and a loan disposable in the UK of not less than £1 million loaned from a financial institution regulated by the Financial Services Authority. The wife has not provided any evidence to support the assertion that the husband did enter on this visa, or that he was at any time able to satisfy those criteria. The husband was indeed entering the UK with the intention of setting up a business, consistent with the Entrepreneur visa, he was not intending to invest in other businesses, nor did he. In the circumstances, I reject the wife's claim that the husband must have had at least £2 million in cash in his bank account when he arrived in the UK;

(iv) I accept that the property was registered in the husband's sole name and no charge registered against it. This could be evidence that the loan was a sham, but it is also consistent with the evidence of the husband and the intervenor, that the husband had not been honest and straightforward with his brother about how he was going to use the funds. The loan agreement provides that the loan should be used to further the business, and repayments would start once the business was trading. It was not

intended as a mortgage. In the circumstances, it would not be expected for the intervenor to register a charge on the property when the expectation was that the loan would be repaid once the business started trading;

(v) I have only been shown one page of a bank statement from 2009. It is obviously only a snapshot, but it appears to be a contemporaneous document. Its validity has not been challenged. The statement shows the account in excess of £360,000 on 11 September 2009, and over the next couple of months, a further £333,000 coming into the account in five instalments from Yara Commodities. On 30 November 2009 a payment of £557,000 was made to Alexander Barnett. The husband gave evidence that this is the name of the solicitors' firm that did the conveyancing on the purchase of the family home (corroborated by correspondence within the bundle). The husband and his brother gave evidence that Yara Commodities was the foreign exchange service that was used in order to transfer the money from the intervenor's account to the husband's account. The amounts and timings of these transfers are consistent with the husband's account of receiving the monies in instalments, which in turn is consistent with the terms of the loan agreement which provides for payment to be made in a succession of instalments until the sum of £1.6 million was reached;

(vi) I recognise the possibility that Yara Commodities could have nothing to do with the intervenor company, and could be a foreign exchange service used by the husband to transfer his own funds from Nigeria to his English account. However, I was presented with no evidence to contradict the evidence of the husband and his brother that the payments shown on the statement were from the intervenor, and made pursuant to the loan agreement;

(vii) The applicant has raised suspicion as to the validity of the documents relied upon. I have only been shown photocopies. They are date stamped by the Nigerian Court. I am told that the Court service performs a notary service to certify commercial documents as genuine. It is of course possible that this is not the case, or that it is, and the documents have been back-dated and stamped using stamps obtained as part of a fraud. However, I have not been shown any evidence to support such an assertion, there is no expert evidence as to standard procedure for notarising contracts, as to the types of stamps used, nor any handwriting evidence in respect of signatures purporting to be those of the husband and the intervenor. *What I have been told is that these documents were accepted and approved by the High Court in Nigeria as valid evidence of a debt owed by the husband to the intervenor company, and judgment was entered on that*

> *basis. In the circumstances, I must be cautious to come to a conclusion that they are fakes, fabricated only in the aftermath of the husband and wife's separation*;
>
> (viii) The wife did not receive notice of the Nigerian divorce proceedings, nor of the intervenor's application in this jurisdiction for a charging order. She asserts this is further evidence of collusion on the part of the husband and the intervenor to go behind her back. The husband has been aware that she and the children have remained living in the former matrimonial home, so it is arguable that he could and should have arranged for service there. However, it is also of note that those proceedings were served on the wife at the address which is formally recorded on the title deeds for the property in order to register her home rights under the Family Law Act 1996." (emphasis added)

74. It is notable that the judge did not balance against these factors, the previous factors she had identified which supported the conclusion that the loan agreement was "a fiction".

75. Also, in the passage which I have highlighted, when considering "the validity of the documents relied upon" by the husband and the Intervenor, the judge took into account that the documents had been "accepted and approved by the High Court in Nigeria as valid evidence of a debt … and judgment was entered on that basis". This is not correct and is contrary to the documents from the Nigerian proceedings. As referred to above, on the joint request of the husband and the Intervenor, the Nigerian court simply entered the settlement agreement as a judgment. That court did not accept and approve the documents as valid evidence of a debt and did *not* enter judgment "on that basis".

*Submissions*

76. I have taken all the parties' respective submissions into account but I propose to summarise them briefly in this judgment in particular because some of the issues which were addressed in the submissions do not fall for determination. These include, in particular, in respect of the scope of s.23 of the MFPA 1984 which was not addressed in any detail in the judgment below, the judge having concluded that this would only become relevant if she found that the loan was not genuine. The parties made submissions to us as to which transactions, or dispositions, in the present case might fall within the scope of that provision. The potential candidates included the Loan Agreement, the settlement agreement in the Nigerian proceedings, the registration of the judgment and the charging order. Interesting though these submissions were, this issue, and other arguments advanced in respect of s.23, were not substantively addressed by the judge below (although she made an obiter observation as to whether "the loan or subsequent actions to enforce repayment could be said to amount to a reviewable disposition") and do not require determination for the purposes of this appeal. I do not, therefore, deal with them in this judgment.

77. The wife argued that the judge's decision was materially flawed in particular because:

(a) she failed properly to analyse the evidence and failed properly to take into account or explain her conclusions in respect of material factors such as the different dates given

for the Loan Agreement in the Intervenor's documents (for example, 6 June 2009 and 16 August 2009) and that the alleged Loan Agreement was with a company, LVT Ltd, which did not exist under that name at the date of that Agreement;

(b) she had misunderstood aspects of the case, notably in respect of the effect of the Nigerian judgment, and of the registration of the order in England, to which the judge had given significant weight and which she had treated "as effectively determinative of the genuineness of the alleged loan"; and

(c) she had failed to take into account the absence of documentary evidence to support the assertion that the Intervenor had lent £1.6 million to the husband and DSH. The lack of disclosure and absence of such documents should have led the judge to draw adverse inferences against the husband and the Intervenor or at least should have been taken into account as a factor against there being any such loan.

78. Ms Perry also submitted that, assuming the judge properly considered that the initial burden of proof lay on the wife, the judge should have decided that the "reasonable grounds of suspicion" established by the wife shifted the evidential burden onto the husband and the Intervenor. She relied on *Paulin v Paulin* [2010] 1 WLR 1057 and *Royal Mail Group Ltd v Efobi* [2021] ICR 1263.

79. Mr Infield submitted that the judgment was "careful and balanced" and took into account all the factors which could be said against the husband and the Intervenor. He relied on the principles set out in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 and *Volpi v Volpi* [2022] 4 WLR 48, at [2].

80. He also submitted that the "main issue was, in effect, the provenance of the money for the purchase of the family home" and pointed to the absence of evidence from the wife to support her case that it came from the husband. In respect of the allegation that the loan agreement was a sham, he submitted that the burden of proof was throughout on the wife and did not "shift" to the other parties "just because *prima facie* evidence is produced".

81. As to the judge's reliance on the effect of the Nigerian proceedings and the judgment, Mr Infield somewhat boldly submitted that there "is no evidence that the learned judge relied at all on the Nigerian judgments". I have said, "somewhat boldly", because the judge expressly relied on them in paragraphs 74 and 78(vii) of her judgment as referred to above.

82. Mr Infield submitted that it "was not surprising" that there were very few contemporaneous documents given that it was 14 years since the loan agreement was made.

83. If the appeal were to be allowed, Mr Infield submitted that the matter should be remitted so that the court below could additionally address issues which are not before this court, namely the registration of the judgment and the charging order. Further, he submitted that this would enable the court below to "carry out the balancing act" as required by *Harman v Glencross* and the other cases referred to above.

84. The Intervenor's case, in summary, is that the appeal is "no more than an impermissible attempt to re-argue that judgment, based upon (1) a selective reading of the judgment

and/or (2) matters stated as 'facts' that are simply incorrect and not properly put by Appellant's counsel".

85. Mirroring the submission made by Mr Infield, it was submitted on behalf of the Intervenor that the "issue at the heart of the case is the source of the funds for the purchase of the" family home, namely had £1.6 million been provided by the Intervenor as a loan to the husband "and his company" or not? The judge had considered the evidence and had decided, for the reasons set out in her judgment, that the agreement was not a sham.

86. As for the judge's reliance on the effect of the Nigerian proceedings and judgment, Mr Stein submitted that the judge did not consider these were "determinative". She "did not rely upon any findings of liability in the Nigerian courts as proving the transaction was not a sham as there were none; it was expressly acknowledged that the proceedings in Nigeria were uncontested by R1 and no findings made, merely the entry of judgment under a settlement agreement". Mr Stein is right that the Nigerian court did not make any findings of liability (and did not judge the debt to be legitimate), but I would make a similar observation in respect of the tenor of his latter submission as in respect of the submission made by Mr Infield (see paragraph 81 above). This is because, in her analysis and reasoning, the judge clearly relied on her mistaken findings as to what had happened in Nigeria and its effect.

87. On the question of the evidential burden shifting and adverse inferences, Mr Stein accepted that, as reflected in *Paulin v Paulin*, there may be cases in which the evidence has reached a level of strength that it calls for explanation. He also accepted that the judge had not considered this issue. He submitted, however, that this evidential position had not been reached so that it had not been necessary for the judge to address this. As for adverse inferences, he relied on the reference in *Royal Mail Group Ltd v Efobi*, at [41], to adverse inferences being a matter of "common sense" and submitted that the judge "did, in fact properly consider relevant matters which the Appellant alleges were not considered".

*Determination*

88. I consider that, regrettably, the judge made a number of errors which vitiate her decision. I recognise, of course, the limited circumstances in which an appellate court can interfere with a trial judge's findings but, as explained below, it is clear to me that the judge's analysis was materially flawed and her finding, in effect, that the loan was genuine is unsustainable.

89. In *Volpi v Volpi*, Lewison LJ highlighted, at [65], matters which were often, wrongly, deployed in support of appeals from findings of fact and which he considered were being relied on in that case:

> "(i) It seeks to retry the case afresh.
>
> (ii) It rests on a selection of evidence rather than the whole of the evidence that the judge heard (what I have elsewhere called "island hopping").

> (iii) It seeks to persuade an appeal court to form its own evaluation of the reliability of witness evidence when that is the quintessential function of the trial judge who has seen and heard the witnesses.
>
> (iv) It seeks to persuade the appeal court to reattribute weight to the different strands of evidence.
>
> (v) It concentrates on particular verbal expressions that the judge used rather than engaging with the substance of his findings."

90. There are, however, clearly circumstances in which an appellate court is justified in overturning a trial judge's findings of fact. A summary of when this might be justified was set out by Lord Reed in *Henderson v. Foxworth Investments Ltd and another* [2014] 1 WLR 2600 when, at [67], he identified some identifiable errors:

> "… in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

91. I would also quote what Newey LJ said in *Rea v Rea and others* [2024] 26 ITELR 794 when, after quoting the above paragraph from *Henderson v Foxworth*, he said:

> "[42] The position is similar with evaluative assessments. An appellate Court will not interfere merely because it might have arrived at a different conclusion. It will do so only if it considers the decision under appeal to have been an unreasonable one or wrong as a result of some identifiable flaw in reasoning, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion' (see eg *R (R) v Chief Constable of Greater Manchester* [2018] 1 WLR 4079, para 64, and also *In re Sprintroom Ltd* [2019] 2 BCLC 617, paras 76 and 77)."

92. On adverse inferences, in *Royal Mail Group Ltd v Efobi* Lord Leggatt (with whom the rest of the court agreed) said:

> "[41] The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw,

> inferences from the facts of the case before them using their common sense without the need to consult law books when doing so."

93. I would also refer to what Arden LJ, as she then was, said in *Re Mumtaz Properties Ltd* [2011] EWCA Civ 610 about the absence of documents, at [14]:

> "In my judgment, *contemporaneous written documentation is of the very greatest importance in assessing credibility*. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. *It can also be significant if written documentation is absent*. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence." (emphasis added)

94. I have, of course, considered the judgment as a whole and have borne well in mind the advantages the judge had over this court and that the appeal could not succeed if it was based on the type of arguments referred to by Lewison LJ in *Volpi v Volpi*. I have, however, been persuaded that the judge's finding that the loan was genuine cannot stand, in particular, because a critical element of her analysis was wrong and because she failed to consider, and misunderstood, a highly relevant part of the evidential picture.

95. The critical element of the judge's analysis that was not supported by the evidence was her conclusion as to the nature and effect of both the Nigerian judgment and the registration of the judgment by the English court. Although early in her judgment, at [15], the judge recorded that the husband had not defended the claim in Nigeria and, "within a couple of weeks of the claim form", had "entered into a settlement agreement", the judge went on to state, as referred to above, that the courts in Nigeria and England had "judged" the debt "to be legitimate" and that the documents relied on by the husband and the Intervenor "were accepted and approved by the High Court in Nigeria as valid evidence of a debt owed by the husband to the intervenor company and judgment was entered on that basis".

96. Put simply, the judge's understanding of the effect of what had happened in Nigeria and London was wrong. The Nigerian court had not "scrutinised" the steps taken by the Intervenor; the Nigerian court had *not* "judged [the debt] to be legitimate"; the loan agreement and other "documents" had *not* been "accepted and approved by the High Court in Nigeria as valid evidence of a debt owed by the husband to the intervenor company"; and the judgment had *not* been "entered on that basis". As set out in that court's order of 27 March 2019, all it provided was that: "Terms of settlement dated and filed on 21/3/2019 is entered as Judgment in this suit". There was, I repeat, no adjudication in respect of the validity of the debt at all.

97. The judge was also wrong because the English court had not "judged" the debt to be "legitimate". The Nigerian judgment had simply been registered without any consideration of whether the underlying debt was legitimate.

98. These, therefore, comprise a "demonstrable misunderstanding of relevant evidence" as well as "critical" findings of fact which have no basis in the evidence. While I agree with Mr Infield and Mr Stein that this reliance may not have been determinative, these findings were clearly integral aspects of the judge's analysis which are sufficiently significant as to undermine the cogency of her conclusion and to render her decision unsustainable. This can be seen from the fact that she referred to the debt as having been "judged to be legitimate" by two courts and did so when assessing the credibility of the husband's brother's evidence, her acceptance of which formed a crucial part of her analysis. It can also be seen from the fact that she referred to the Nigerian court as having accepted the documents "as valid evidence of a debt" and entered judgment on this basis when considering whether the loan documents were genuine. The genuineness of those documents was a core feature of the case and the judge's inclusion of this factor as requiring her to "be cautious to come to a conclusion that they were fakes" undermines the cogency of her conclusion that they were not.

99. The second substantive error which vitiates the judge's conclusion is that she failed to consider, and misunderstood, a highly relevant part of the evidential picture. The judge seemed to consider that her analysis was limited to the oral and documentary evidence which had been given in the case and that the absence of further documentary evidence was a point against the wife and not the husband and the Intervenor.

100. In my view, this was a case as referred to by Arden LJ, in which the absence of documents was significant. It was a significant factor against the husband and the Intervenor which the judge failed to take into account at all. In respect of the Intervenor, there clearly would be company accounts and other documents which would be expected to be corroborative of a loan. The Intervenor produced no documents corroborative of the loan agreement or of the existence of the loan or which went to the company's financial circumstances at relevant and material dates, including 2009. Likewise, the judge failed to consider the almost complete absence of any documents from the husband or his companies (DSH Nigeria or DSH England) which, again, clearly would have existed. The only document produced by the husband of any attempt to obtain bank statements was an email exchange in respect of an account in Nigeria.

101. The absence of such evidence was a striking and clearly materially significant factor which required to be included in the judge's analysis of the evidence, including as to the credibility of the evidence given by the husband and his brother. If, as the husband's brother said, "the money loaned was made to De Skyline *in* Nigeria" (my emphasis), it would be expected that both companies would have documents evidencing the same.

102. The judge did not refer to this at all when considering *their* evidence and case. Rather, and with all due respect of the judge, she inverted the position and took the absence of such evidence against the wife (see paragraphs 67 and 68 above). This can also been seen from [78(i)] in which the judge again referred to the absence of evidence as to the financial circumstances of the husband and his companies in 2009/2010, when the judge was addressing the purchase of the Dower House and the Orchard for £800,000. The wife was clearly not in any position to disclose such evidence and its absence was a matter which was adverse to the Intervenor and the husband's case and not the wife's. I should also make clear that I reject Mr Stein's submission that the judge can be inferred to have taken the absence of evidence into account when she said that she had taken "all" the evidence into account.

103. As Sir Christopher Floyd observed during the course of the hearing, any balanced analysis of the evidence required the judge to take into account the almost complete absence of any documents (contemporary and otherwise) from the husband and the Intervenor in support of their case. The judge could not undertake the required balanced assessment without taking that into account.

104. In my view, the above errors are sufficient to undermine the cogency of the judgment such that it must be set aside.

105. I would, however, add that the judge also failed to take into account certain relevant evidence. She did not consider the Access Bank statements which required consideration having regard to the husband's case as to the financial circumstances of DSH Nigeria and DSH England. How was it consistent with his case that there was a bank account in the name of DSH with up to £1.7 million in 2015?

106. She also did not take into account clear inconsistencies in the husband's and the Intervenor's evidence on a core issue, namely how the money had been lent. The Intervenor's oral evidence, which the judge said "was consistent with his written response to the points of dispute", was that "the money loaned was made to De Skyline *in Nigeria*", judgment at [73] (emphasis added). However, the husband and his brother also gave evidence, in respect of the transfers in 2009 to the husband's Barclays account in England, that "Yara Commodities was the foreign exchange service that was used in order to transfer the money *from the intervenor's account* to the husband's account", judgment at [78(v)] (emphasis added). Rather than take this inconsistency into account, the judge compounded, what I consider to be an error, by concluding:

> "(vi) I recognise the possibility that Yara Commodities could have nothing to do with the intervenor company, and could be a foreign exchange service used by the husband to transfer his own funds from Nigeria to his English account. However, I was presented with no evidence to contradict the evidence of the husband and his brother that the payments shown on the statement were from the intervenor, and made pursuant to the loan agreement."

The judge appears to have overlooked the evidence that "the money loaned was made to De Skyline in Nigeria". Further, she has again taken the absence of documentary evidence as a point against the wife when she said that she had been "presented with no evidence to contradict the evidence of the husband and the brother". As referred to above, this was a factor against the husband and the Intervenor *not* the wife.

107. Additionally, if it were necessary to do so, in my view the evidence in this case did reach the threshold proposed by Mr Stein, namely it reached a level of strength that it called for explanation. I have referred to these aspects of the evidence during the course of the judgment and I do not propose to repeat them here. I would just point to: LVT Ltd not existing under that name at the date of the Loan Agreement; the address given for DSH Nigeria and the husband in the Agreement as an address in London in addition to the other questions about that address; the terms of the Agreement not being commercial; the husband not having signed the Agreement; the different dates given for the Agreement in the documents; the absence of any real documentary disclosure

by the husband and the Intervenor; and the points referred to by the judge in paragraph 76 (paragraph 71 above).

108. Finally, I noted above (paragraph 62) that another way of describing the preliminary issue would be, instead of being whether the loan agreement was a sham, simply to determine whether any such debt existed. This is, of course, relevant to the burden of proof, an issue which was addressed, albeit briefly, during the course of the hearing. Was it for the wife to prove that there was no such debt or was it for the Intervenor and the husband to prove that there was such a debt? If it was the latter, then (see paragraph 66 above) the burden of proof would be on the husband and the Intervenor. If, as in my view they are, Mr Infield and Mr Stein are correct in saying, respectively, that the "main issue was, in effect, the provenance of the money for the purchase of the family home" and the "issue at the heart of the case is the source of the funds for the purchase of the" family home, it was for the husband and the intervenor to prove the provenance/source and that it was a loan from the Intervenor. This will, therefore, be an additional matter which will need to be addressed at the rehearing below.

*Conclusion*

109. Ms Perry sought to persuade us that we could substitute our own decision for that of the judge. I do not consider that we are properly able to do so. In my view, the matter will have to be remitted for rehearing before a High Court Judge. This will also provide an opportunity, as suggested by Mr Infield, for the other issues to be addressed and determined including as to whether, if there is a loan as asserted by the husband and the Intervenor, the impact of this on the wife's financial application and, if there is no such loan, the process for setting aside the charging order and, if appropriate, registration of the Nigerian judgment. This will require the financial proceedings to be transferred to the High Court and, although they are not before us, the proceedings currently before the King's Bench Division will also need to be transferred to the Family Division so that all matters are before the same judge (see paragraph 44 above).

**Lord Justice Popplewell:**

110. I agree.

**Sir Christopher Floyd:**

111. I also agree.