

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2023] SC ABE 34

ABE-F514-21

JUDGMENT OF SHERIFF PHILIP MANN

in the cause

LM

Pursuer

against

AM

Defender

ABERDEEN, 16 OCTOBER 2023

The sheriff, having resumed consideration of the cause:

Finds in fact as follows:

1. The pursuer is LM. The defender is AM. They were married on 10 April 2010.
2. The pursuer is habitually resident in Scotland. He has been so resident for more than 12 months immediately preceding the raising of this action. He has been resident within the sheriffdom of Grampian, Highland and Islands for a period exceeding 40 days immediately preceding the raising of this action. This court has jurisdiction.
3. After their marriage the parties lived together until on or about 6 April 2019. They have not lived together nor had marital relations since that date. There is no prospect of a reconciliation.
4. There is one child of the marriage under the age of 16 years, namely TM.

5 The child resides principally with the defender and exercises regular and extensive contact, including residential contact, with the pursuer.

6. The matrimonial assets and their values as at the relevant date (with the exception of the heritable properties which are shown at agreed figures as at a date closer to the current date) are represented by the following table. Where no value is ascribed to an asset no evidence (or no satisfactory evidence) was led as to its value):

	LM	AM	Joint
Assets			
The Matrimonial Home (as at 18 October 2022)			270,000.00
Flat, Nottingham (as at 14.11.2022)			110,000.00
Pursuer's Santander Bank Account	33.66		
Pursuer's Halifax Current Account	359.17		
Pursuer's Halifax Savings Account	18.71		
140 Eon Shares	1,436.05		
Pursuer's Eon Pension with Fidelity International	9,529.52		
Pursuer's Fidelity Pension	10,725.93		
Pursuer's Total Pension	100,799.27		
BNP Paribas Shares	2,107.29		
O AM S Limited (the holding company) (including subsidiary company)	35,721.00		
O SA	2,472.00		
Director's loan due by O AM S Limited	25,880.00		
Defender's DNV Pension with Scottish Widows		18,949.76	
Defender's DNV Pension Plan with Aviva		28,970.07	
Defender's LR EMEA Pension Plan with Standard Life		34,598.74	
Defender's Nationwide Building Society Current Account		40.51	
Defender's Nationwide Building Society Savings Account		2.71	
Defender's Lloyds TSB Current Account		655.56	
Defender's Abbey/Santander Current Account		208.00	
Defender's Abbey/Santander ISA		37.27	
Defender's Nissan Juke Car			
Defender's Barclays Credit Card		3.00	
Defender's Bank of Scotland Credit Card		7.19	
Defender's Nationwide Building Society Credit Card		0.44	
	<u>£189,082.60</u>	<u>£83,473.25</u>	<u>£380,000.00</u>

7. The value of the matrimonial debts as at the relevant date (with the exception of the mortgages which are shown at agreed figures as at a date closer to the current date) is represented by the following table:

	Pursuer	Defender	Joint
Pursuer's HSBC Credit Card	5,752.02		
Pursuer's Tesco Credit Card	7,877.45		
Pursuer's Halifax Credit Card	6,571.52		
Pursuer's Marks and Spencer Credit Card	3,624.22		
Pursuer's Virgin Money Credit Card	2,591.27		
Pursuer's HSBC Account	1,724.46		
Pursuer's Lloyds Bank Credit Card	3,492.10		
Pursuer's Loan with Shawbrook Bank	8,534.34		
Pursuer's Loan with Halifax PLC	12,563.73		
Joint Mortgage with Santander UK plc (as at 12 April 2023)			184,524.22
Joint Mortgage with HSBC (as at 1 April 2023)			49,417.12
Defender's Nationwide Building Society Loan		6,103.90	
	<u>£52,731.11</u>	<u>£6,103.90</u>	<u>£233,941.34</u>

8. The net value of the matrimonial assets to be divided between the parties is £359,779.50. Leaving the net value of the matrimonial home out of account, the net value of matrimonial assets to be divided between the parties is £274,303.72, whereof the pursuer has retained £136,351.49, the defender has retained £77,369.35 and the parties, jointly, have retained £60,582.88 (being the net value of Flat, Nottingham).

9. The defender claims that in August 2019 the pursuer sped away in his car whilst she was holding the door handle of the car. She claims to have suffered injury as a result. She claims that her injury has caused her economic disadvantage in respect that it has hampered her ability to work and to advance in her career.

Finds in fact and law as follows:

1. The marriage between the parties has broken down irretrievably.
2. The net value of the matrimonial assets will be shared fairly between the parties if I

make the following orders:

(a) An order, in terms of section 14(2)(a) of the Family Law (Scotland) Act 1985, for the sale of the matrimonial home with an ancillary order, in terms of section 14(2)(k) of the 1985 Act, that the net free proceeds of sale be divided equally between the parties.

(b) An order, in terms of section 8(1)(aa) of the 1985 Act, for the transfer of the defender's interest in Flat, Nottingham to the pursuer together with an ancillary order, in terms of section 14(2)(k) of the 1985 Act, that the pursuer shall take over the relevant mortgage and so free and relieve the defender thereanent.

(c) An order, in terms of section 8(1)(a) of the 1985 Act, for payment of a capital sum by the pursuer to the defender in the amount of £59,782.51 payable no later than the date of settlement of the sale of the matrimonial home, together with an incidental order, in terms of section 14(2)(k), of the 1985 Act providing that the pursuer will be solely liable for payment of any private school fees relating to the education of the child of the marriage.

Finds in Law as follows:

1. The relevant date for the purposes of financial provision on divorce is generally 6 April 2019 but in respect of Flat, Nottingham the appropriate valuation date is 14 November 2022, being the date agreed between the parties.

2. The question of residence and contact in respect of the child of the marriage is regulated by an order of this court, in a separate process, dated 21 May 2021. No issue arises in this process in terms of section 12 of the Children (Scotland) Act 1995.

3. Any conduct of the pursuer in respect of the incident in August 2019 when, according to the defender, he sped away in his car whilst the defender was holding the door handle of the car falls to be left out of account by virtue of section 11(7) of the Family Law (Scotland) Act 1985 in determining the issue of financial provision on divorce.

Therefore,

Sustains the pursuer's first plea-in-law and Divorces the defender from the pursuer in terms of the pursuer's first crave; *ex proprio motu*, in terms of the pursuer's sixth crave, Orders that the matrimonial home be sold with the net free proceeds of sale being divided equally between the parties and that all in accordance with the terms of a further interlocutor to be pronounced hereafter; Sustains the pursuer's third plea-in-law and Orders, in terms, in part, of the pursuer's fourth crave that the defender transfer her right, title and interest in Flat, Nottingham to the pursuer and, *ex proprio motu*, Orders that the pursuer shall take over the mortgage relevant to said property thus freeing and relieving the defender thereanent and that all in accordance with the terms of a further interlocutor to be pronounced hereafter; Sustains the defender's fifth plea-in-law, in part, and Orders the pursuer to make payment to the defender of the sum of £59,782.51 no later than the date of settlement of the sale of the matrimonial home with interest thereon at the rate of 8 per centum per annum from today's date until payment and, *ex proprio motu*, Ordains that the pursuer shall be solely responsible for payment of all private school fees relating to the education of the child TM; Repels all of parties' remaining pleas-in-law and dismisses all of parties' remaining craves; Continues

the cause to a hearing on [] to determine the precise terms of the further interlocutor hereinbefore referred to; reserves, meantime, the question of expenses.

Sheriff Philip Mann

Note

The proof

[1] I heard evidence in this case over the course of 5 days. The pursuer was represented for 4 of those days by Mr Crosbie, Advocate who withdrew at the end of the fourth day. Thereafter, the pursuer was represented by Mr Wheat, solicitor. The defender represented herself throughout.

[2] The pursuer gave evidence and called his expert Mr Robb, Chartered accountant to give evidence as to the values of his companies O AM S Limited (the holding company) (including subsidiary company) and OSA. The defender gave evidence and called her expert Mr Rowand to give evidence as to the value of the pursuer's companies O AM S Limited (the holding company) (including subsidiary company). She also called Mrs Anna M and Mr Emanuel the chartered accountant who prepared the accounts for the pursuer's companies.

Credibility and reliability

[3] I considered the pursuer to be neither wholly credible nor wholly reliable. In particular, I found him to be evasive, vague and unconvincing when being cross examined by the defender on matters relating to his companies O AM S Limited (the holding company) (including subsidiary company). On the evidence of the defender and her expert, Mr Rowand, I was satisfied that the pursuer had failed to provide information relevant to

the valuation of these companies which Mr Rowand had reasonably requested through the defender to enable him to provide a valuation.

[4] On the other hand, I found the defender to be wholly credible in her obvious desire to do her best to assist the court by giving truthful evidence. I did not regard her as being wholly reliable when it came to matters affecting the valuation of the pursuer's companies. She went into great detail on these matters and I found these passages in her evidence to be dense and difficult to follow.

[5] However, I was satisfied that Mr Rowand, whom, like the pursuer's expert Mr Robb, I found to be credible, made assumptions and inferences from the material before him, including that presented to him by the defender, which were entirely reasonable and understandable in the absence of disclosure by the pursuer of information reasonably requested of him. I was satisfied that Mr Rowand had not allowed himself to be deflected from his duty to the court by the defender's dogged and, at times, over-sceptical approach. For these reasons I preferred Mr Rowand's evidence of the valuation of the companies to that of Mr Robb and Mr Emanuel, who were dependent to a considerable extent on information provided by the pursuer. Part of that information consisted of unaudited management accounts which Mr Rowand criticised as lacking a balance sheet. Whilst that, in itself, might not be thought to be significant it was something that added to the sense of unease that I felt with regard to the valuations relied upon by the pursuer.

[6] I did not find the evidence of Mrs Anna M to be of assistance in regard to any of the matters in dispute between the parties. No other issues of credibility and reliability arose.

Decree of divorce

[7] I am satisfied on the basis of the evidence of both parties and the affidavit of the pursuer's sister that the parties have been separated for a period in excess of 2 years, that there is no prospect of a reconciliation and that the marriage between the parties has broken down irretrievably. I have, therefore, granted decree of divorce.

The matters in contention

*The valuation of the defender's companies O AM S Limited (the holding company)
(including subsidiary company)*

[8] For the reasons set out in paragraph [5] above, I accepted Mr Rowand's valuation in the sum of £35,721. There was no dispute between the parties as to the valuation of OSA in the sum of £2,472.

The Director's Loan

[9] The holding and subsidiary Companies having been valued on an assets basis, which was agreed between the experts as being the correct method of valuation, it follows that the company was in a position to repay the director's loan to the pursuer. I have included that loan in my calculations at a figure of £25,880.

The matrimonial home

[10] The pursuer maintains that special circumstances exist in terms of section 10(6)(b) of the 1985 Act justifying unequal sharing, in his favour, of the net value of the matrimonial home. Although his pleadings are not entirely clear, I read his averments in article 4(a) of condescendence as maintaining that a sum of £29,334 put towards the purchase of the

matrimonial home in the joint names of the parties can be traced back to the sale proceeds of a property at Portlethen - a property owned by him prior to the marriage of the parties – which were used to fund the purchase of another property in the joint name of the parties, that property being then sold with the proceeds being reinvested in the matrimonial home. However, that position is not borne out by the evidence. As can be seen from production 5/5/2 and as acknowledged by the pursuer in cross examination, the sum of £29,334 was, in fact, his deposit upon his purchase of the property at Portlethen. From that same production it is clear that the pursuer paid a total of £185,000 in respect of that property and paid a sum of £1,820 in respect of stamp duty. It is within judicial knowledge that the rate of stamp duty at that time on a purchase at that level was 1%, which means that the pursuer paid £182,000 for the heritage and a further £3,000 for non-heritable assets.

Production 6/24/1 indicates that the pursuer sold the Portlethen property for a price of £164,500, making a loss of £17,500. On the face of it, only £11,834 of the pursuer's initial deposit of £29,334 survived his ownership of the property. But it did not survive even to that extent because production 5/5/3 vouches that the amount required to redeem the pursuer's mortgage on the property was £161,485.20 meaning that the pursuer's remaining equity in the property was £3,014.80. Be that as it may, the evidence was that the other property was purchased by the parties in their joint names, prior to their marriage, for a sum of £189,950 with the assistance of a mortgage in the sum of £162,495 meaning that their deposit was £27,455. There was clear evidence that the defender transferred a sum of £11,892 into the pursuer's bank account at the time of that purchase. I accepted the defender's evidence that this was intended as a contribution by her, being all she could afford at the time, towards that deposit. I further accepted the defender's evidence that she made further payments in respect of the mortgage repayments to make up the shortfall in

her share of the deposit. The pursuer thus failed to persuade me that there was any special circumstance that ought to have resulted in an unequal sharing, in his favour, of the net value of the matrimonial home. I preferred the defender's evidence on this point to the pursuer's evidence to the effect that these payments by the defender were intended to cover expenses other than the deposit. Even if that were the case, the pursuer must surely have benefited in some way and to a significant extent from the defender's payment into his bank account and on that basis I would have determined, employing the customary broad axe, that there exists no special circumstance which justifies unequal sharing of the net value of the matrimonial home in favour of the pursuer.

[11] The pursuer seeks a transfer of the matrimonial home to his name. This is partly on the basis that the defender is unable to continue to live there and that if it is transferred to him it can continue to be a familiar home for the parties' son, TM, when the pursuer is exercising residential contact with him. The defender, on record, also seeks a transfer of the matrimonial home to her but, in submissions, now seeks that it be sold on the basis that it is uncertain that she would be able to secure a mortgage to enable her to take it on. As I understood the evidence, the pursuer already has accommodation in the area where he exercises his residential contact with TM. He should have no need of the matrimonial home for that purpose. In any event, I am not certain that it would be of any comfort to TM that he will reside at the matrimonial home with the pursuer instead of with the defender.

[12] From the defender's point of view, the more capital she can muster to assist in the purchase of another property the better. I consider it to be likely, though by no means guaranteed, that a sale on the open market would achieve a price higher than the valuation agreed by the parties, which is now somewhat out of date having been carried out in October 2022.

[13] I have resolved that the fairest way to deal with the matrimonial home is to order that it be sold. There is nothing to stop either of the parties making a competitive bid for the property on the open market should they so wish. Neither of the parties' craves anticipates a sale of the property but I am satisfied that it is within my discretionary power so to order. In any event, the pursuer has a crave 6 which seeks the grant of "such other order as the court thinks fit" and the defender has a crave 3 "to grant such ancillary order as is expedient to give effect to the principles set out in section 9 or to any order made under section 8(2) both sections of the Family Law (Scotland) Act 1985". The defender's crave is an oblique reference to section 14(k) of the 1985 Act. Although an order for the sale of property can be a stand-alone incidental order in terms of section 14(a) of the Act I can see no reason why it cannot equally be expressed as an order ancillary to the order which I will be making in terms of section 8(2) – although that is not necessary given the terms of the pursuer's crave 6. Given that parties' craves do not anticipate the sale of the matrimonial home, I have put the case out for a hearing on the precise terms of the interlocutor required to express my intention and to secure an orderly sale.

The defender's claim under section 9(1)(c) of the 1985 Act

[14] The defender maintained that she was entitled to a capital payment to reflect the principle set out in section 9(1)(c) of the 1985 Act that the economic burden of caring for the parties' child, TM, after divorce should be shared fairly between the parties. However, the evidence led in respect of the various factors to which the court is to have regard as set out in section 11(3) of the Act was scant.

[15] There was evidence that the pursuer was particularly insistent that TM be privately educated and that the defender has gone along with this because she feels that she has no

option. It is within judicial knowledge that a perfectly satisfactory education is available for TM within the state system and that such an education need not be a barrier to high achievement in life. I have resolved that, in fairness, the pursuer ought to be responsible for the whole cost of TM's private school fees and I have made an ancillary order in terms of section 14(2)(k) of the 1985 Act to that effect.

[16] The defender was concerned that if the pursuer were to pay the whole of TM's private school fees this would give the pursuer the ability to do as he pleases in regard to TM's education. That is not the case. All that I am dealing with is the liability for the fees. That in no way relieves either of the parties of their obligations in terms of the Children (Scotland) Act 1995. In particular, section 6 of the Act which imposes an obligation on parents to consult with one another and with the child before reaching any major decision which involves the fulfilling of a parental obligation or the exercising of a parental right is unaffected.

[17] There was no evidence of child care costs, although there was evidence of the availability of child care vouchers. There was evidence that TM attended pre-school and post-school clubs and that the parties paid for this when they respectively had TM in their care but there was no evidence of the cost of that.

[18] The defender did give evidence of the need to acquire alternative accommodation but this was linked to her inability to buy out the pursuer's share of the matrimonial home rather than to the need to provide TM with suitable accommodation. In any event, she led no evidence as to the availability or likely cost of such suitable accommodation.

[19] There was evidence relating to the resources of the parties, namely their earning capacity. The parties are both high earners, each having employment with a salary of £70,000 per annum. I am satisfied that with that level of salary the defender ought to be able

to obtain suitable accommodation, either privately rented or bought with the assistance of a mortgage, once the matrimonial home is sold and she has received her share of the net free proceeds and the capital sum awarded in these proceedings.

[20] The defender has failed to prove that there will be an imbalance in the burden of caring for TM after the divorce that needs to be corrected.

The defender's claim in respect of aliment for TM

[21] The defender, in submissions, sought a payment to reflect what she claimed was the pursuer's failure to meet his alimentary obligations in respect of TM and for ongoing child support. However, she has no relevant crave or plea-in-law and no averments complying with ordinary cause rule 33.6. In particular, the defender has no averments, and there was no evidence, as to the grounds on which the court retains jurisdiction to make an order for aliment over and above that which is within the jurisdiction of the Secretary of State under the Child Support Act 1991. I have no jurisdiction to entertain this claim by the defender.

The defender's claim for economic disadvantage arising from an accident in August 2019

[22] The defender led evidence that in August 2019 she sustained an injury when the pursuer sped away in his car whilst she was holding the door handle of the car. She maintained that she has suffered economic disadvantage as a result of the effect which her injury had on her ability to perform her work and in her ability to progress in her career. The conduct of the pursuer upon which the defender relies is conduct of a type which falls to be excluded from consideration in these proceedings by virtue of section 11(7) of the 1985 Act, the Inner House of the Court of Session having held in the case of *McCallion v McCallion* 2021 Fam LR 30 that the conduct which the section allows to be taken into account

must relate to some sort of economic activity. I make no allowance in this case for the effects of that accident. That is not to say that the defender is without a remedy. It seems to me that if she is so inclined the defender could seek redress in an action of damages or reparation at common law independently of this process.

Economic advantage/disadvantage relating to the heritable properties

[23] The defender seeks a payment to reflect economic disadvantage on the basis that the jointly owned property at Flat, Nottingham has been let out by the pursuer without any accounting to her. The pursuer denies that the property has been let out and maintains that, rather, it has been occupied from time to time by his sister and her partner without payment. He seeks credit on the basis that the defender has received benefit by way of the increase in value of the flat without any contribution on her part. Likewise, he seeks credit for having continued to settle outgoings in respect of the matrimonial home despite the defender having had exclusive occupation of it.

[24] There was evidence, and the pursuer acknowledged, that he had received payments from his sister but he maintained that these related to financial transactions involving his wider family and had nothing to do with the Nottingham property. I simply did not believe the pursuer on this point. I am satisfied, on the balance of probabilities, that the pursuer has let out the property to his sister and that he has received payments of rent without accounting to the defender. On the other hand, the evidence was that the pursuer paid significantly more than the defender towards the combined mortgage payments for the matrimonial home and the Nottingham property. The evidence relating to ongoing costs in respect of the matrimonial home was vague and unsatisfactory. The defender has had the benefit of residing in the matrimonial home to the exclusion of the pursuer since the date of

separation whilst the pursuer has had the benefit of the rental payments to the exclusion of the defender. Employing, once again, the customary broad axe, I decline to make any allowance to either party under these heads.

Other matters

[25] The defender had a motor car at the relevant date. However, neither party led any evidence as to its value. Taking a broad brush approach and on the basis that the pursuer did not contend that it had any significant value as at the relevant date I have left this asset out of account in calculating financial provision.

[26] In addition to the matrimonial assets agreed in the joint minute between the parties the pursuer had a bank account with First National Bank whose value is not disputed at £28.30.

Calculation of financial provision

[27] I now turn to the calculation of financial provision, factoring in all of the foregoing and taking account of the matters agreed in the joint minute, to which no process number has been assigned but which was lodged on 10 May 2023. I also factor in that parties are agreed that the Nottingham property ought to be transferred to the pursuer. This will, of course, be on the basis that the pursuer will take over the relevant mortgage and so will free and relieve the defender of any liability thereanent. Further discussion will be required so as to determine the precise terms of the interlocutor required to achieve that result.

[28] Taking account of everything that I have discussed, leaving out of account the matrimonial home and factoring in the transfer of the Nottingham property I have

concluded that the defender is entitled to a capital sum of £59,782.51. This is set out in the following table:

	LM	AM	Joint
Assets			
Flat, Nottingham (as at 14.11.2022)			110,000.00
Pursuer's Santander Bank Account	33.66		
Pursuer's Halifax Current Account	359.17		
Pursuer's Halifax Savings Account	18.71		
140 Eon Shares	1,436.05		
Pursuer's Eon Pension with Fidelity International	9,529.52		
Pursuer's Fidelity Pension	10,725.93		
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O AM S Limited (the holding company) (including subsidiary company)	35,721.00		
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Defender's DNV Pension with Scottish Widows		18,949.76	
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Defender's LR EMEA Pension Plan with Standard Life		34,598.74	
Defender's Nationwide Building Society Current Account		40.51	
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Defender's Lloyds TSB Current Account		655.56	
Defender's Abbey/Santander Current Account		208.00	
Defender's Abbey/Santander ISA		37.27	
Defender's Nissan Juke Car			
Defender's Barclays Credit Card		3.00	
Defender's Bank of Scotland Credit Card		7.19	
Defender's Nationwide Building Society Credit Card		0.44	
	<u>£189,082.60</u>	<u>£83,473.25</u>	<u>£110,000.00</u>
Debts			
Pursuer's HSBC Credit Card	5,752.02		
Pursuer's Tesco Credit Card	7,877.45		
Pursuer's Halifax Credit Card	6,571.52		
Pursuer's Marks and Spencer Credit Card	3,624.22		

Pursuer's Virgin Money Credit Card	2,591.27		
Pursuer's HSBC Account	1,724.46		
Pursuer's Lloyds Bank Credit Card	3,492.10		
Pursuer's Loan with Shawbrook Bank	8,534.34		
Pursuer's Loan with Halifax PLC	12,563.73		
Joint Mortgage with HSBC (as at 1 April 2023)			49,417.12
Defender's Nationwide Building Society Loan		6,103.90	
	<u>£52,731.11</u>	<u>£6,103.90</u>	<u>£49,417.12</u>

Net Value			
Joint Assets			110,000.00
Joint Liabilities			-49,417.12
Pursuer's Assets	189,082.60		
Pursuer's Liabilities	-52,731.11		
Defender's Assets		83,473.25	
Defender's Liabilities		-6,103.90	
	<u>£136,351.49</u>	<u>£77,369.35</u>	<u>£60,582.88</u>

Total Net Assets 274,303.72

Equal Sharing £137,151.86 £137,151.86 £274,303.72

Net Assets in sole hands of Pursuer	136,351.49		
Flat, Nottingham to be transferred to Pursuer	110,000.00		246,351.49
Mortgage re Flat, Nottingham to be taken over by Pursuer			49,417.12
Total net assets in hands of Pursuer			<u>196,934.37</u>
Less due to Pursuer on equal sharing			59,782.51
			<u>£137,151.86</u>
Balancing Payment by Pursuer to Defender		59,782.51	
Net assets in sole hands of Defender		77,369.35	
Total in hands of Defender after balancing payment from Pursuer		<u>£137,151.86</u>	

[29] I consider it to be fair that payment of this should be effected, at the latest, on the date of settlement of the sale of the matrimonial home when the bulk, if not all, of that sum will be available to the pursuer from the net free proceeds of sale. I am satisfied that the

foregoing is reasonable having regard to the resources of the parties, each of them earning in the region of £70,000 per annum and the pursuer having, in addition, his interest in his companies.

Further procedure

[30] I have set the case down for a hearing to determine the precise terms of the interlocutor to effect the disposal of the matrimonial home and the Nottingham property. I have meantime reserved the question of expenses. I encourage parties to seek to agree expenses in advance of the hearing.