Neutral Citation Number: [2020] EWHC 1026 (Fam)

Case No: BV18D20848

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/04/2020

Before :

MR NICHOLAS CUSWORTH QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between:

SHLOMO ZALMAN KLIERS	**Applicant**
- and -	
MIRIAM KLIERS	**Respondent**

- -

CHRISTOPER WOOD (instructed by **GN Law**) for the **Applicant**

JOSEPH RAINER (acting pro bono) for the **Respondent**

Hearing dates: 11th – 13th March and 7th April 2020

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Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR NICHOLAS CUSWORTH QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

This judgment was handed down in private on 7th April 2020. It consists of 72 paragraphs and has been signed and dated by the judge.

The judge hereby gives leave for it to be reported.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on 7 April 2020.

Mr CUSWORTH QC:

1. This is a husband's claim for a financial remedy, heard together with a wife's claim for an order for sale of the former family home to conclude TOLATA proceedings brought by her in the Chancery Division of the High Court.

2. In that Chancery application, brought by the wife to assert a beneficial interest in the property, Mr Murray Rosen QC sitting as a Deputy heard evidence from the wife, but not from the husband, who chose to take no part in those proceedings until the conclusion of the fact-finding exercise. He was not the only defendant. The other, a brother of the wife named Mordechai Schmerler ('Mordechai'), is the legal owner of the property, which is at 98 Kyverdale Avenue, London N16.

3. Mr Rosen QC gave his judgment on 30 April 2018. He found that Mordechai held the property on bare trust for the parties, which they held in proportion to their initial contributions to the purchase price in 2004 – which he declared to be 75% from the wife and 25% from the husband. I will deal with the substance of his judgment below.

4. To enable me to determine these applications, I have heard oral evidence over 3 days from both of the parties, as well as from the wife's now fiancée, Mr Peter Walters, and from Mr Irving Lichtman, Managing Director of Ezer Leyoldos Ltd., a Jewish charitable organisation which has provided a very significant amount of funding to assist the husband in both sets of proceedings, and to defray very significant indebtedness on behalf of both of them, in the circumstances which I will outline.

5. The evidence and submissions in the case concluded on 13 March 2020, since which time the restrictions caused by the Coronavirus pandemic have been introduced in England. Consequently, this judgment has been disseminated in writing, and formally handed down at a hearing conducted remotely by video-link.

Background

6. The parties had married on 30 May 1995, and separated on 24 December 2012. A Get was pronounced on 12 May 2013, after which long-drawn out proceedings in relation to the parties' children followed. Those children are Z (born in June 1996 and now

independent and married); N (born in January 1998, independent and married); T, born on 26 September 1999, so aged 20, and living with the father: she is engaged to be married this summer, when it is anticipated that she too will leave home; and finally M, who was born on 8 November 2007 and so is now 12. She too lives with her father in the former family home. Sadly none of the children are presently seeing their mother.

7. Throughout the marriage, and from birth, both parties had been members of the Slonim Community of the Jewish faith, who are an Hasidic group, based predominantly in this country in the Stamford Hill area of North London. The wife has now left the community, which has caused a significant rift between her and her children, as well as her former husband and the rest of their respective families. She has been interviewed in the press about her experiences before leaving the group, which has not been well received in the community.

8. The wife says that she was prevented from issuing divorce proceedings during this period by the husband's obfuscation over the production of the parties' marriage certificate. Eventually the husband himself petitioned for divorce on 22 July 2018, and Decree Nisi was pronounced on 3 December 2018. However, by then he had already long previously gone through a religious ceremony of (re)marriage in New York in May 2016, with his present wife Malka.

9. The wife was thus prevented on her case from making any financial application arising from their marriage before the husband had already and consciously taken on significant further obligation. Malka now lives with the husband, T and M in Kyverdale Avenue, together with her 2 children of a previous marriage, and the baby born to their union, J, some 8 months ago.

10. The wife is living with Mr Walters in York, in a modest rented cottage.

The Judgment of Mr Rosen QC

11. Although the husband chose not to be represented in the Chancery proceedings until after Mr Rosen had delivered his judgment, he was aware that those proceedings were continuing. He told me that he did not get involved as he did not believe that they had

anything to do with him. I cannot accept that explanation. The husband is an intelligent man, and must have been well aware of the significance at least of his wife's application. I find that he was aware of and played a part, together with others in the community, in the decision that only the wife's brother would have any involvement in the initial proceedings. As matters developed, Mordechai, who is a part-time teacher living in Israel with 6 children of his own, also played little part in the process. However, for reasons which will become clear, I take findings in the Chancery judgment as the starting point for the issues which I have now to decide.

12. Mr Rosen found , amongst other things, as follows:

    a. At the time of the purchase of the property the wife gave evidence that she had provided £103,800 toward the purchase price, her husband £32,900.

    b. The husband was largely unemployed as a student in Israel and London, whilst she was the principal homemaker, as well as working in a series of jobs to make a financial contribution to the family.

    c. The parties' fathers, and their community leaders, set out to structure the purchase of their family home in a 'particular and unfortunate manner'. The parties would not otherwise have been in a position to buy the property which cost £418,000 in 2004.

    d. The property was bought, as indicated, in the name of the wife's brother Mordechai, subject to an interest only mortgage with Bank of Scotland for £300,000. Mordechai provided no funds for the purchase, and made a false declaration at the time that the property was being purchased for his sole occupation.

    e. The parties entered into a purported tenancy agreement with Mordechai, in order to obtain housing benefit. They made payments to Mordechai to cover the mortgage interest, but received a significant amount in housing benefit at the same time from the local authority – the London Borough of Hackney.

f. Mordechai was at all times a bare trustee, acting as nominee for the parties in their purchase of the property, and his taking on the mortgage as a nominee did not fall to be treated as a contribution to the purchase price. The family and community leaders upon whose directions and requests the parties relied and obeyed had an agreement that the property would be the parties' family home for which they would make all the necessary payments.

g. The parties' respective contributions were the best evidence of their common intention. The way matters proceeded was very heavily reliant on the wife to put everything into the purchase as both breadwinner and homemaker.

h. Some of the moneys were provided by community loans or other joint payments; and the parties made joint payments to Mordechai to cover the mortgage, but those factors did not outweigh the court's inferences about the division of interests.

i. The purpose of putting the property into Mordechai's name, and the creation of the tenancy, were to obtain funds from the mortgage, from housing benefit from the London Borough of Hackney, and from the Department of Work and Pensions.

j. The court had to consider the question of illegality of its own motion and volition; and that a plan of this nature is common practice amongst respected religious and community leaders is a cause of very great concern.

k. This arrangement resulted from the exercise of undue influence on the wife; being the pressure exerted on her by her father and others, which purported to have the backing of religious leadership; pressure exercised by dominant males within the community.

l. This is not a case where the parties involved were on anything like an equal basis when formulating or implementing the plan. The wife's interests were being put at risk, although she had concerns both about her and the family's wellbeing and about illegality.

m. The public policy against fraud is strong; but did not militate against the wife's remedy in this case as regards to declaration. The illegal activities had to be undone and remedied, which was assisted by the grant of declaratory relief.

n. The orders and judgments of the court would be referred to the tax authorities.

The Current Position

13. After that judgment was handed down, the husband decided that he would re-engage with the process, and sought to have the wife's application for possession and for a sale of the property transferred to the Family Division, where he had now launched an application for a financial remedy after issuing a civil divorce petition. That he had made such an application at all, 5 years after obtaining a Get, and 2 after going through a religious remarriage is striking.

14. On 4 December 2018, the application for transfer came before Master Teverson in the Chancery Division, who had already once rejected such an application, against which decision the husband had unsuccessfully appealed.

15. This time he did make on order permitting transfer, and it is clear from his judgment which I have seen, that he did so specifically because the husband had undertaken to and, both on that day and soon afterwards, had been able to produce significant funds from within his Community, with which both the debts to the London Borough of Hackney ('Hackney') and to HMRC could be repaid. And whilst the payments were expressed as loans, and were being made available expressly for the purpose of preventing a sale of the family home, he made it clear that the funds must be offered unconditionally, regardless of whether the property was eventually ordered sold.

16. This has led the wife to suggest that these payments must now be seen as gifts, not in any circumstances repayable to those who provided the funds; despite sympathy for the wife's position, I cannot accept that. The emails produced by Mr Lichtman evidencing the various payments that made up the provision (totalling over £320,000) all express the payments to be loans, and that they were such has always been the husband's case. Whether and if so when they might be repaid by Mr Kliers is another matter.

17. I also have to take into account the timing of these payments. Before Mr Rosen QC, there was no question but that HMRC and Hackney would be repaid the funds owing to them. The wife's claim then for her share in the equity to be paid to her can only have extended to the net equity after those debts were repaid (subject to the question of her responsibility for that part of the debt arising after her departure from the family home, which I will deal with below). Now she argues that she should be entitled to benefit from the repayment of the debts by the charity, in that I should ignore them for the purposes of calculating the parties' respective entitlements in the equity. Given that I have found that those payments were long-term loans, it would not be appropriate to disregard them; but that does not mean that they are not still available to the husband for the foreseeable future.

18. The amounts which were to be repaid from the loan proceeds fall into 3 categories:

    a. £129,123.62 in housing benefit claimed for the period before the parties' separation in the name of the wife from Hackney.

    b. £91,721.14 in housing benefit claimed by the husband for the period after the parties' separation, also to Hackney. Both of these sums were in fact repaid by the husband's solicitors on 4th March 2020.

    c. The husband's solicitors retain £96,188, towards £97,300 which is owing to HMRC in relation to overpaid tax credits dating back to the time of the marriage.

19. Furthermore, each party owes some arrears of Council Tax; £7,767.76 in the husband's case, and £3,720.73 in the wife's. This is because they were not entitled to claim Council Tax benefit which they had received. The husband is apparently appealing his liability for this sum, with the assistance of Mr Lichtman.

20. In addition, there remains secured on the family home the Bank of Scotland mortgage in the sum of £300,399, which it is clear was improperly obtained in the first place, and without which the property could not have been purchased. Mr Rainer for the wife urges the property should now be sold, and one of the reasons why he seeks such an order for sale is to put an end to the situation whereby the husband and his current family,

including M and for the moment T, continue to enjoy the benefit of the property obtained, and retained, by such an improper device.

21. The wife told me that she has provided the mortgagees, Bank of Scotland, with the details of the judgment of Mr Rosen QC, but that they have not responded to her communication, nor evinced any inclination to recover their loan by compelling a sale of the house absent its repayment. I do not know why that is. It is clear, with the passage of nearly 16 years since the properties' purchase, that they have continued to receive regular payments of mortgage interest – although the husband ascribes those payment to Mordechai, there is no evidence that they come from him, but it is equally clear that they are being met – and the bank also have very comfortable security for their loan. Even in the currently uncertain market position, there is no reason for them necessarily to take precipitate action.

22. I do not take the illegality of the parties' actions in obtaining the mortgage by fraud lightly. I also bear in mind that, in the action before Mr Rosen QC, it had been counsel ostensibly instructed by Mordechai, opposing the wife's application for declarations as to her beneficial ownership, who argued that the illegality of the parties' actions should be a reason why she should not be entitled to those declarations.

23. Although the husband denies any involvement in Mordechai's position in the Chancery Division, it is beyond doubt that the arguments put were put for his benefit and so on his behalf, as the occupier of the property. Absent those declarations, the liabilities to HMRC and to Hackney would not have arisen, and his occupation of the property would not have been imperilled. Mordechai provided no money for the purchase, has never lived there, and has no evident means of making mortgage interest payments. It is therefore inconceivable that they were put entirely without the husband's knowledge. I am satisfied on balance that those arguments were put, at least, with the tacit approval of the husband.

24. Where Mr Rosen dealt with illegality in his judgment, he did so in the context of the arguments being advanced as a reason why the declarations sought should not be made, and he rightly rejected them and made the declarations at the wife's instance. Now it is she who argues that, by reason of the illegality, an order for sale must now be made.

Mr Rainer for the wife cites *Patel v Mirza* [2016] UKSC 42; in which Lord Toulson at [109] concluded that:

> '…it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed.'

25. In this case, there can have been no question but that the illegally obtained benefits received from Hackney, and from HMRC, had to be repaid. But for the confirmed prospect of their repayment, it is clear that Master Teverson would not have acceded to the husband's application to transfer the wife's application to the Family Division, where the notoriously broad discretion accorded to its judges would enable him to argue that an order for sale should be avoided. The fraudulently claimed benefits were owed, and the public bodies that had been defrauded had no prospect of being repaid absent the intervention of the community, or a sale of the home.

26. However, I consider that the mortgagees stand in a somewhat different position. It is right that the mortgage was improperly obtained, but since being informed by the wife of the deception, they have taken no steps to call in their loan. They have good security for it, and they are receiving their interest payments regularly from a source undisclosed but plainly on the husband's behalf. Mr Rainer points out that on the husband's own evidence, he cannot afford to make those payments; and equally that there is no evidence that Mordechai can contribute. Indeed, given Mordechai's lack of beneficial interest as now determined, there is no reason why he should.

27. I will deal with the husband's personal financial situation below. However, as the Bank's debt is secured, and recoverable in the event of default, I do not find that there is a public policy consideration still extant here of such significance as would compel me to order a sale of the property, on the single ground that the original mortgage loan was applied for under a false declaration, and absent any further exacerbating factors.

28. It also has to be born in mind, of course, that there is a minor child of the family whose welfare is the court's first consideration. In *Patel v Mirza* [above], Lord Toulson concluded, at [120]:

'In assessing whether the public interest would be harmed…, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant…'

29. Here, the 'claim' being made is for the court to exercise its discretion in favour of preserving a home in which that child is currently living. Whether I should accede to the husband's position about that is a question of balancing various considerations which I will identify below, under the aegis of s.25 of the Matrimonial Causes Act 1973. The fact of the illegality found by Mr Rosen remains a consideration in that exercise, but it is not the determinative one.

The Parties' respective positions

30. Undoubtedly, the parties' respective needs and obligations play a highly significant part amongst the relevant factors for the court to consider. In the wife's case, these are straightforward and relatively easy to quantify. She is currently living with Mr Walters in very modest rented accommodation in York, where property is much cheaper to buy or rent than in North London. She asserts a need to purchase a £400,000 property, on the basis that the sort of property that she currently occupies is really too small for the two of them, and I am sure that they would be more comfortable in a larger property.

31. I also bear in mind that both he and she have confirmed to me that Mr Walters has provided considerable financial assistance to the wife since her separation from her family. Since their relationship began in 2013 he has drawn down his NHS pension at a significant loss to provide a rental fund for them. He as well as she has also suffered considerable and quite unacceptable abuse and harassment from the Hasidic community. This has led to their rental in York, to avoid a repeat of the harassment previously suffered whilst they were based in London, where he continues to work. He is now 65 and due to retire in December 2020.

32. The wife herself was diagnosed with post-traumatic stress disorder ('PTSD') in December 2018, as a result of that campaign of harassment aimed against her by the community around her husband; of the ongoing litigation both in relation to financial

matters and no doubt more pertinently the children; and due to the eventual loss of her regular relationship with those children, who have remained within the community. In those circumstances I have no hesitation in finding that the future plans for her own life which she described to me are entirely reasonable. So too is the fact that, after redundancy from her last administrative job in November 2018, she has not been in employment. She now plans to embark on a training course for a qualification in Geology – which will last for 5 years to masters level before she could think about a job in that field. Before that she has reconciled to looking for another administrative job.

33. Mr Wood for the husband spent some time questioning the wife about whether her approach to retraining was not something of a luxury. Given her willingness to take an administrative post in the interim, and the contrasting attitude to income on the part of the husband, which I shall deal with below, I do not consider it to be so.

34. By contrast, the true scale and extent of the financial resources available to the husband remain completely unclear.

    a. In his recent Form E, the husband lists his necessary outgoings as £3,058.64pcm, excluding mortgage payments - £36,704pa.

    b. He is living in a house now valued at £1,130,000, into the purchase of which Mr Rosen QC found that he made a contribution of around £32,900 in 2004.

35. However:

    a. He claims always to have had a modest income – no more currently than £10,600 pa gross (£10,121 net) - working in assorted roles in a catering company. He offered no suggestion that this could be increased in any way.

    b. The mortgage interest on the £300,000 mortgage on his home is paid somehow – he claims not to know by whom. He said that he assumed that Mordechai was responsible, but I find that he knows that to be untrue.

c. His current wife Malka came to their marriage with 2 children, no income or apparent earning capacity, no capital and only intermittent and modest financial support for her children from their father in New York.

d. The husband and Malka have now undertaken the responsibility of another child together, so that they live in a household of 7 – soon reducing to 6 on T's marriage.

36. And yet, for the husband or on his behalf during these proceedings have been discharged the following:

a. The loan through Ezer Loyoldos for the discharge of the debts to Hackney Borough Council and HMRC, said by counsel and in the husband's Form E dated 5 March 2020, to be in the total amount of £375,000, although the evidence suggests 2 loans: £323,500 for the above debts, and £25,000 to enable the husband to pay some solicitors bills.

b. A sum of £71,725.15 paid to the husband's solicitors, which Mr Lichtman told me was owed in relation to the costs of the children's proceedings, and as such was a bill that the charity was prepared to discharge outright, and not seek to recover as a loan.

c. A sum of £100,000 paid toward the financial proceedings, to include some of the costs of the chancery proceedings, which may (but may not) include the above figure of £25,000, and which would be a loan rather than a donation as with costs relating to the children proceedings.

d. Further sums already paid toward the children proceedings and not recoverable in the sum of, at least, £400,000.

e. A further £20,000 or £30,000 to pay in relation to the financial proceedings, which Mr Lichtman said would be on a loan basis.

f. Mr Lichtman took no responsibility for the payment of Mordechai Schmerler's legal costs in the Chancery proceedings, which must therefore have been met elsewhere, principally for the husband's benefit.

g. Since the parties' separation, mortgage interest payments under the Bank of Scotland mortgage have been maintained.

h. An additional sum of £105,500 was spent on renovation works to Kyverdale Road

i. Ezer Leyoldos have also paid for extensive family therapy for the family, which has not been costed.

37. The identified contributions to legal costs and to the discharge of debts and bills listed above alone come to at least £1,055,725.20, and very possibly considerably more. Further, the living costs currently required to maintain the father's household are likely to significantly outstrip his disclosed income. It is clear therefore that very significant resources have been and are continuing to be made available to the husband by his local Hasidic community. It may be that a significant element of this is remuneration for the husband, disguised as charity, as I will consider below. It is not clear whether the funds previously received have in some part been earned by him specifically, but not declared for tax avoidance reasons, or alternatively simply provided as genuine charity, and if both, in what proportions. Further, it is equally impossible now to identify with any certainty the extent to which any further capital funding, beyond the meeting of household outgoings, will be forthcoming and if so on what terms.

38. It remains the case that the husband's budget exceeds his disclosed net income by more than £26,500pa, before any mortgage interest payments are discharged. It must be assumed that those costs are being met for his family. When funds were needed in 2018 to avoid an immediate order for sale of the family home, over £300,000 was produced in about a week, from assorted members of the community.

39. It is the wife's case that the husband in fact earns significantly more than he admits. She puts his true income at over £100,000pa. She says that before their separation, much

of her income was not paid to her in her own right, but notionally as a charity donation to reduce the need for a significant sum to paid in tax, and to enable any benefit entitlements to be maximised. I have no reason to doubt the findings of Mr Rosen QC about the illegal benefit and mortgage applications which were made, nor that the husband bore the lion's share of responsibility as between these parties.

40. In relation to funds earned by the wife which were subsequently invested into the purchase of the family home, Mr Rosen QC found in his judgment at [104] that:

> '…Mordechai' s solicitor also drew repeated attention to the fact that some of the funds utilised for the purchase of the property were received by Mr and Mrs Kliers as purported charity when in fact it was some part of remuneration in particular, Mrs Kliers remuneration, which again it is said is a habit in this community to disguise this charity in order to avoid tax on such remuneration.

41. I can therefore find on the balance of probabilities that the husband in fact does generate more income for himself than that which he readily discloses to HMRC, and which he has set out in his Form E. What I am unable to determine on any basis is exactly what he does to generate any entitlement to substantial remuneration, nor what the scale of that entitlement might be.

42. It is also clear that whatever the scope of his contribution to the community, it is sufficient, on his own behalf and on behalf of his current household, to enable him to justify the very significant capital provision which they have historically made for him. However, because he continues steadfastly to deny earning any more, or having previously been aware that he had any interest in his own home, he has given me no window through which I can assess his evidence about the prospects of further provision being made for him through the community, to meet his needs, and the needs of T and M, and further the needs of his new wife and her children, the youngest of whom is also his.

43. Mr Lichtman was more willing to appear to offer help to the court. In his statement he had said:

> 'Ezer Leyoldos is a charity which amongst other things assists members of the Orthodox Jewish Community. Donations are received from members of the community and when a need arises

in the community assistance is given. We rarely turn anyone away. On occasions, when funding is required for a specific need individual benefactors are asked to assist and they will donate large sums. This has been the case with Mr Kliers although because of the purpose of the assistance, the money given to him is by way of a loan rather than a gift. There is no loan agreement. I told the benefactors that the money was required to assist Mr Kliers and his children to keep their home. On this basis various members of the community loaned him large sums. As the sums were so large, the money was loaned on the understanding that it would be repaid on Mr Kliers selling his home or re-mortgaging. In the community we operate on trust. There is no written agreements and no specific terms for repayment. The benefactors are all aware that the sum will be repaid at some point and the money is therefore a loan rather than a gift or general donation.'

44. He did not there make reference to the other sums already provided by the charity to Mr Kliers. In his evidence to me he confirmed the very significant payments already made toward legal fees in the children proceedings, which he said were by way of donation rather than loan, and also to the costs of the financial proceedings, which he said were also by way of loan which would also have to be repaid. He said that costs relating to children proceedings would usually be gifted by the charity, but not in relation to financial proceedings.

45. However, he also confirmed that there was no expectation that any of the loaned money would be called back within the next 6 to 8 years. He was less sure about any offer of long term rental assistance, as he wouldn't want to open himself to something 'with no limit'. He did not rule out absolutely the possibility though of any further help – clearly any further requests will be dealt with on their merits, but in circumstances where this family has already received a lot of assistance. If those funds were required to be returned in the timeframe proposed, Mr Kliers would still require a home for his current wife and baby daughter now aged just 8 months old, and so then no more than 9. It is therefore probable as I find that those loans would be extended to the date of J's majority in due course.

Authority

46. I am aware that cases where the assets are small and the balancing of comparative need is at the forefront of the court's mind do not very often come before judges in the Royal Courts of Justice, and in recent years their reporting has therefore been rare. It is therefore unusually necessary to go back for more than 20 years to find many of the

relevant authorities. Mr Wood for the husband referred me to *Scheeres v Scheeres* [1999] 1 FLR 241, where Thorpe LJ said, at p.243 G/H:

> "It is very important in these ancillary relief cases, where the court exercises a very broad discretion, that the judge should carry out the s.25 exercise rigorously, in an attempt to inject some sort of clear rationality and principle to what otherwise could be said to be palm tree adjudication".

This decision, and specifically the need for the exercise to be conducted rigorously, was cited with approval by the Privy Council in *Ramnarine v Ramnarine* [2014] 1 FLR 594, at [10].

47. In *XW v XH* [2019] EWCA Civ 2262, Moylan LJ more recently said, before citing the above passage:

> 83. Lord Hoffmann pointed out in *Piglowska v Piglowski* [1999] 1 WLR 1360 at p.1370 H that:
>
> "Section 25(2) of the Act of 1973, while listing the various matters to which particular regard should be had, does not rank them in any kind of hierarchy. Which of them will carry the most weight must depend on the particular facts of the case."
>
> This is the essence of what has been called the bespoke approach to the determination of financial claims. The tension that this creates, between the need for a sufficient degree of certainty and clarity in the exercise by the courts of their discretionary powers and the need for sufficient flexibility to meet the justice of the individual case, has been the subject of debate over the years. The breadth of the discretion also impacts on the well-established principle that a judgment must be sufficiently reasoned to explain the court's decision.

48. I also bear in mind that in *M v. B. (Ancillary Proceedings: Lump Sum)* [1998] 1 F.L.R. 53, 60 Thorpe L.J. said:

> "In all these cases it is one of the paramount considerations, in applying the section 25 criteria, to endeavour to stretch what is available to cover the need of each for a home, particularly where there are young children involved. Obviously the primary carer needs whatever is available to make the main home for the children, but it is of importance, albeit it is of lesser importance, that the other parent should have a home of his own where the children can enjoy their contact time with him. Of course there are cases where there is not enough to provide a home for either. Of course there are cases where there is only enough to provide one. But in any case where there is, by stretch and a degree of risk-taking, the possibility of a division to enable both to rehouse themselves, that is an exceptionally important consideration and one which will almost invariably have a decisive impact on outcome."

49. Equally, I remind myself that in *Piglowska v. Piglowski* [1999] UKHL 27; [1999] 1 WLR 1360 [cited above], Lord Hoffmann also made clear in relation to the dicta in *M v B* that:

> "This is a useful guideline to judges dealing with cases of a similar kind. But to cite the case as if it laid down some rule that both spouses invariably have a right to purchased accommodation is a misuse of authority. It is perhaps of some interest that Thorpe L.J., who would have refused leave to appeal in this case, must have taken the same view. Here the children were adult. There was no question of the husband needing a home to receive them. His needs related entirely to himself and his new Polish family."

So, every case will ultimately turn on its own specific facts.

50. **Evaluation.** In the above circumstances, the court has to decide how and when to distribute the equity in 98 Kyverdale Road between the parties, remembering specifically that first consideration has to be given to M's welfare, she being a child of the family still aged just 12. Her elder siblings have now either left and married, or in T's case are on the verge of doing so.

51. A further circumstance of the case is Mr Kliers' remarriage, his dependant wife Malka, her 2 children and the baby born to her and the husband in 2019. Clearly any court will be very slow to make any order which runs the risk of leaving the family unit which they form homeless, even in circumstances where the marriage, the creation of the new family, and the dependency were all established at a time when the question of the realisation of the wife's share in the property was still to be resolved, and could not be until divorce proceedings in this jurisdiction could be begun. Whilst a relevant circumstance, the new family are not the court's first consideration.

52. On the other hand, the wife herself is now engaged to be married, and she feels a very understandable moral obligation to repay some of the financial assistance which she has received from Mr Walters, who has supported her and provided a much needed shelter for her when the community in which she had grown up turned against her in a most regrettable and unattractive manner. Mr Walters is another circumstance, particularly given his financial support for the wife when none was available from the community or from her husband, but again he can be no more than that.

53. The court's decision also has to be made in the context of the judgment of Mr Rosen QC and the wife's application for an order for sale of the property. I have to start from the legal position of beneficial ownership as determined in the Chancery Division; but that determination can only be the beginning, and not the end of the story, once the factors in s.25 (1) and (2) of the Matrimonial Causes Act 1973 are considered.

54. I have not paid any regard to s.25(2)(g) of the 1973 Act – conduct which it would be inequitable for me to disregard. Whilst there are some trenchant comments made in Mr Rosen's judgment about the position of the community, and whilst I was quite satisfied that the husband was making no effort to provide me with a full and truthful picture of his circumstances or otherwise to assist the court other than as he saw to be in his own personal interests, the ultimate conflict here is between the parties' respective housing needs, and on the husband's side, I have to always bear in mind M's position. There is thus no room to adjust the outcome in any way to take account of any such behaviour as might have played a part had there been a more substantial asset base, or no relevant minor children of the marriage.

55. The husband is adamant that M's needs require his retention of the former family home. I do not accept that. No doubt any home move can be unwelcome for a child, but if presented positively to her by her father and step-mother, there is no reason why it should cause her any undue or harmful disquiet. Whether the husband will feel able to so present such a move is another matter; but that is not something that should prevent the court from making such an order if it otherwise considered it to be fair, in all the circumstances. The husband's own case is that in the event that he did have to move he would require the sum of £900,000 to rehouse himself appropriately, and in the area occupied nearly exclusively by his community. That he puts his case this highly can only be on the basis that he now has Malka and her 3 children to house as well. Were it not for his taking on that responsibility, his needs would be significantly less.

56. For her part, as indicated the wife looks for a sum of £400,000 to rehouse in York, in a more spacious property towards the outskirts of the city, but still within reasonable reach of the railway station from which she and Mr Walters will commute.

57. I also have to balance the fact that, whilst Mr Walters has no remaining capital, the husband may have the prospect of accessing the seemingly deep pockets of his community, whether through Ezer Leyoldos, or some other charity – Mr Schmerler's costs having come from another source in 2017/18. But in that regard, it is also true that the husband is already indebted to Ezer Leyoldos in relation to the 2018 loans and for his costs of these proceedings.

58. Of the 2018 debts, £106,085 relates to the period after the parties' separation, where the husband was claiming benefits to support himself and his current family. The balance of £230,144 comes from the marital period. I have to consider whether all of those debts should be treated as jointly to be deducted from the available assets, as the husband contends. I have already explained why they cannot be completely ignored as not being genuine loans, leaving all of the equity in the property both unencumbered and available to meet needs, which is the wife's case.

59. Accepting, as I do, Mr Rosen's findings, especially at [93] where he found that:

> 'this is not a case where the parties involved were on anything like an equal basis when it came to formulating documenting or implementing the plan. On the contrary, it was Mrs Kliers' interests which were being put at risk by the manner in which she was being required to proceed…',

I cannot adopt the husband's proposed course. To do so, and then to prioritise M's position in a way which allows the husband to continue to enjoy the benefit of those loans, together with all of the wife's interest in the property for a further 6 to 8 years, would be very unjust to her and would not meet her needs as I find them.

60. Those needs of the wife's cannot encompass an obligation to provide housing for life for Mr Walters, however desirable that might be, in a substantially larger home than on which she would need were she on her own. Similarly, whilst it is desirable for the husband to have a house large enough to accommodate his current wife and her children, welfare considerations do not preclude a move, and a move to a slightly more modest home is achievable, with or without additional assistance from the community.

61. I am satisfied that, even if no further assistance is forthcoming, the present level of benefit and forbearance will be available at least until M's majority, and as indicated on the balance of probabilities through that of J as well – so for the next 18 years.

62. As to apportionment of the debts to Hackney and HMRC, I have come to the view that it is fair in all the circumstances to treat those which accrued during the marriage as being joint debts that should be taken from the marital assets before division. When Mr Lichtman and Ezer Loyoldos intervened in December 2018, they did so specifically to preserve the property as a home for the husband and his current family. That money will also one day, a long time hence, be due back. However, I exclude from that the debt to Hackney which accrued post separation. There is no good reason why the wife should bear any of the burden of that debt.

63. The equity in the property I take to be £801,351, after taking a mortgage of £300,399 and sale costs at 2.5% from a gross value of £1,130,000. The debts to Hackney and HMRC from the time of the marriage (including council tax still in dispute) come to £230,144, leaving a net equity of £571,207. The balance of the loan from Ezer Loyoldos - £106,085 – I leave as the husband's responsibility to be left on his side of the eventual balance. I do not disregard the beneficial ownership in that equity as determined in the Chancery Division, but have to add to that a consideration of the s.25 factors.

64. **Outcome.** I have of course weighed all of the factors identified in s.25 of the Matrimonial Causes Act 1973, and given first consideration to M's welfare whilst still a minor. One important circumstances of this case is the judgment of Mr Rosen QC. In particular under s.25(2), I have weighed:

    a. Under s.25(2)(a) the parties' respective disclosed incomes and their earning capacity as discussed above, and the resources available to them in the future, which includes the prospects of future financial support support flowing to the husband from his community, and the availability to him of the continuing benefit of their previous loans and gifts.

    b. Under s.25(2)(b) the parties' respective needs, and especially their housing needs as discussed above, and their respective obligations to their children, in

particular M. It is very much to be hoped that her relationship with her mother can be restored as soon as possible, and that the father will seek to promote that outcome as being in her best interest.

c. I have taken into account under s.25(2)(e) the evidence I have heard about the wife's diagnosed PTSD, and the impact upon her that leaving the marriage, the community and for the moment her children must have had.

d. Under s.25(2)(f) I have considered both the wife's contributions in the marriage both as principal homemaker and breadwinner, and the husband's contributions in the future as primary carer for M.

e. I have not, as indicated, relied on any findings of conduct under s.25(2)(g), notwithstanding the various findings about the husband's approach to this litigation discussed above.

f. I have referred to above and considered the parties' respective ages and the standard of living in the marriage, which was significantly higher than the parties' respective incomes as disclosed would have allowed.

g. Nothing additionally arises under s,25(2)(h).

65. On balance, an unequal division in the wife's favour in the 75:25 proportions determined in the Chancery Division would not justly balance out the parties' respective past and future contributions, nor enable the husband with sufficient certainty to secure appropriate housing for M for the remainder of her childhood, even with the current level of contribution from the charity left in place.

66. Although this is not a case in which the sharing principle can have any determinative application, I have next considered the impact on each party's position of an equal division of the net equity in the family home after deducting what I have found above to be the jointly incurred debts, to HMRC and to Hackney. If the net equity were to be so equally divided after this marriage, each party would be left with £285,604, in

addition to the money to fund their respective CGT liabilities, but before the husband's post-2012 obligation to Hackney.

67. I acknowledge that, in the event of such a split, the wife would receive a total of £289,329, to include CGT, whereas the husband would have available to him for the time being £512,027 on the same basis; however, of that money he would eventually owe at least £457,508 to the charity, to include his costs of these proceedings. His outright receipt will therefore be just £54,519.

68. I find that the money loaned by the charity would not be withdrawn from his use whilst he has need of it as a part of his housing fund, which will be for many years – probably until at the earliest J's majority. Further, on the balance of probabilities, he will not have to sell the property now, unless the mortgagee (who should be served with this judgment) determines to take action, which appears currently unlikely. I find that the probable scenario is that, if the husband were to be faced with an order that the wife receive a lump sum to represent her interest in the property, that sum will be provided to the husband from within the community, and a forced sale will thus be avoided.

69. In the event that I am wrong about that, and the property is sold, then with a fund available of over £500,000, the husband can meet his and his family's housing needs, possibly by renting, in circumstances where I am satisfied that the income resources available to him have not been fully revealed to the court. He also may receive further capital assistance from the community following such a sale, whether by loan or gift.

70. For her part the wife has incurred costs of some £64,510 – around 50% of those incurred by the husband – which have for most part been met by Mr Walters. I am satisfied that she and he can buy somewhere suitable in York together with the sum that she will receive as a result of the court's order. Their financial position will be modest, but the balance between the parties seems in all the circumstances to be a fair one.

71. In those circumstances, I am satisfied that such an equal division on the figures as I have found them will be a fair outcome for both parties. Although the outcome therefore differs from that presaged in the judgment of Mr Rosen QC, I remind myself that he heard no submissions on behalf of the husband (because the husband chose tactically

not to make any), but also that the judge did not have M's welfare as his first consideration. As it is, I am leaving her primary carer with very little capital ostensibly is his own name, but reliant upon the goodwill of his community for future housing. As I have explained, I am satisfied that such goodwill will continue to be sufficiently forthcoming to ensure that M's welfare will be protected.

72. I will direct that the husband pay the wife a rounded lump sum of £290,000 within 3 months, the time expanded because of the current extraordinary conditions created by the Covid pandemic, in default of which payment the former matrimonial home will be sold and the wife's lump sum expressed as a percentage of gross sale price be paid to her from the net proceeds upon such sale. In the light of my discretionary determination under the Matrimonial Causes Act 1973, I will make no make no further order in the Chancery proceedings.

7th April 2020