Neutral Citation Number: [2023] EWHC 1900 (Fam)

Case No: FA-2023-000124

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date (finalised): 10/08/2023

Before:

The Honourable Mr Justice Mostyn

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Between :

Michael James Augousti	**Applicant**
- and -	
Amrit Kaur Matharu	**Respondent**

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- -

Nicholas Wilkinson (instructed by **Payne Hicks Beach LLP**) for the **Applicant**
Lucy Stone KC (instructed by **Farrer & Co**) for the **Respondent**
By written submissions only

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Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has accepted that there are good reasons to redact certain information in it for the reasons given in paras 68 - 93 below. Pursuant to s. 11 of the Contempt of Court Act 1981 it will be a contempt of court were any report of this judgment to reveal directly or by innuendo the redacted information. This reporting restriction order will last until 1 January 2025 unless extended by an order of a High Court judge in the meantime.

Mr Justice Mostyn:

24 July 2023

1. In this judgment I shall refer to the applicant as 'the husband' and to the respondent as 'the wife'.

2. I am taking the step of giving my decision on this application for permission to appeal in a formal judgment as I consider that there are a number of points where my opinion may be of use in later cases.

3. I therefore give permission for this judgment to be cited in later cases as an authority pursuant to the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001.

4. The husband has advanced no fewer than 21 grounds of appeal (and has made an application to adduce fresh evidence under FPR 30.12(2)(b)) in respect of an extremely careful, and impeccably reasoned, judgment by HHJ Evans-Gordon dated 21 April 2023. I will set out all of the grounds below, but I make the initial observation that grounds of appeal, whether drafted by professional representatives or by litigants in person must be few, short and clear. The experience of the High Court, since the majority of family appeals were devolved to it, has been to struggle in case after case with diffuse, unstructured streams of consciousness purporting to represent grounds of appeal. A ground of appeal need do no more than to identify succinctly why it is said that in a given respect the judge was wrong. It does not need to give copious particulars as to why the judge was wrong, let alone to give the drafter's opinion about the alleged wrongness.

5. The proposed appeal raises the following issues:

   i) What test should the court apply, in exercising the overriding objective, on an application by a party to introduce further evidence after the case has concluded and judgment has been reserved?

   ii) What is the scope and extent of the court's discretion when exercising the needs principle?

   iii) What is the test to be applied on an application by a party to adduce fresh evidence in an appeal under FPR 30.12(2)(b)?

   iv) What degree of likelihood is needed to satisfy the criterion of "a real prospect of success" of a proposed appeal? How improbable does the success of an appeal have to be to satisfy the criterion that "the proposed appeal is totally without merit"?

6. I can take the background to this case from the note filed in the proposed appeal by Ms Stone KC on behalf of the wife.

7. The parties are each aged 33. Their relationship endured for between 5-7 years. They share care of their two children, now aged 7 and 3. The wife works full-time for the Bank of England earning £56,000 gross p.a.; the husband currently works part-time as a wine-waiter earning £800 pm. The only asset of substance in the case is a 3% shareholding held by the wife in a company whose main business (which started about

40 years ago) is hotels, owned principally by her father and uncle. The wife's shareholding, given to her prior to the parties' relationship, was agreed to be non-matrimonial. Since the separation the husband has accumulated huge personal and corporate liabilities and his business has gone into, and remains in, insolvent administration.

8. In her judgment the judge stated:

> "I heard the evidence in December 2022 but there was insufficient time for final submissions and judgment. Neither party complied with my directions for the filing of written submissions with the result that I did not have the last of them until 21 January 2023 and had lost the time I had allocated for writing this judgment. There was then a dispute about whether the contents of the submissions on behalf of the husband constituted fresh evidence. This in turn resulted in an application to adduce fresh evidence which the wife, of course, opposed. The application was heard on 7 March 2023. Inevitably, there was then a significant delay in producing a judgment caused partly by my judicial commitments in another court. I regret the delay on my part.
>
> If only the story ended there. On 12 April 2023, the day before my draft judgment was going out, the husband issued a further application for permission to adduce further fresh evidence and seeking a stay on judgment for 2 months to allow for, potentially, even further evidence. This was followed rapidly by the wife lodging a witness statement in response."

9. At trial, the husband sought just over [REDACTED] of capital plus indemnities in relation to (a) the insolvent administration of his companies and (b) to cover any action taken [REDACTED] to recover sums advanced to the husband for use in those companies. Those liabilities were originally estimated at [REDACTED] although the husband later sought to cap the indemnities [REDACTED].

The judgment dated 21 April 2023

10. The judge made the following key findings in relation to the wife's shareholding:

    i) The shares could not be sold or charged without the consent of the wife's father and uncle. While the wife's shareholding was valued by the SJE at £20.9m on a pure pro rata basis, as a 3% shareholder (and not a director) the wife's position was not that of a quasi-partner. Therefore, her shares could not be valued on a pro rata basis. A 75% discount was appropriate. However, it was "unlikely in the extreme that the wife's family would agree to a sale at that, or any significant, level of discount".

    ii) The judge accepted the wife's evidence that the family would not be buying out her shares.

iii) The judge recorded that the wife had received dividends in only 3 years during a period of 13 years of ownership. The judge rejected the husband's case that the court should extrapolate from these receipts and find that the wife would be "entitled" to dividends of £876,500 p.a gross going forward. The judge held that "there is no evidence that ... the Grange group will pay out substantial dividends in the near future, although it is always a possibility".

iv) It was therefore a case in which there was virtually no liquidity.

11. On two occasions, namely 1 February 2023 and 12 April 2023, immediately prior to the date on which judgment was due to be handed down, the husband applied to introduce what he said was new evidence, back-tracking on the extent of his and his companies' liabilities. As a result, on each occasion judgment was delayed. On 7 March 2023 the judge admitted and considered the evidence on the first application. She found that it made no difference to her judgment. On the second occasion, she read the evidence *de bene esse* but excluded it as being "of no assistance", being "entirely speculative and based on wishful thinking" and refused his application for an adjournment, as "this case .. has dragged on for long enough" and "there is no certainty that the position will be any clearer in two months' time" and further that "there is a need for finality". The court found that "any significant award made to the husband is likely to go to his creditors" and that "no reasonable person would think that [the wife underwriting the husband's debts] was fair in circumstances where all the debt was acquired post-separation as a result of wholly imprudent business decisions taken by the husband alone". She found that the husband will be "less likely to be made bankrupt if he has no capital funds". Moreover, the wife did not have the funds to pay a significant capital sum to the husband.

12. As for needs, the judge recorded that the parties had never owned their own home. They had lived first in one of the wife's father's company's hotels; and subsequently in a series of small, rented dwellings, albeit in expensive areas, funded from their earnings. The judge explained painstakingly why an order requiring a property to be purchased for the husband's occupation with the children during their minority was the appropriate solution. The judge also justified with the utmost care the appropriate level of housing.

13. The judge required the wife to fund the husband's share of childcare for three years to enable him to work. She found that the husband "simply has to work". She found that the level of maintenance awarded was all that the wife could afford. She discharged the arrears under the LASPO and MPS orders finding that "the wife simply does not have the resources to pay them".

14. The judge found that "eye-watering" sums of costs had been expended. Her order recorded costs incurred to date of £974,707 (£342,086 by the husband and £632,621 by the wife). She held that this sum would have housed one party, if not both of them.

15. The judge adjourned arguments about costs.

The Grounds of Appeal

16. These are dated 22 May 2023 and are as follows:

"Capital

1. The Judge was wrong to order that only £75,000 should be paid to H outright in a case where W's shares had been valued by the SJE at £20m+.

2. The Judge's finding that "any significant award made to him is likely to go to his creditors" and that "it would be fruitless to award the husband a significant capital sum" was based on H's case as to his potential liabilities in a worst-case scenario at the start of the final hearing in December 2022 and was wrong in light of the updating evidence provided by the time of judgment 4 months later in April 2023, including his reasoned case that the figure would be "closer to £0".

3. The Judge was wrong not to stay the proceedings to delay the handing down of judgment and/or was wrong not to adjourn H's capital claims to reflect the fact that (a) value has been identified but immediate access to that value has been questioned (e.g. *Joy v Joy-Morancho and Others (No 3)* [2016] 1 FLR 815; at 175 and *Quan v Bray and Others* [2019] 1 FLR 1114 at [51]; and (b) the court had concerns as to possible bankruptcy.

4. The Judge was wrong not to make provision for H's liabilities (subject to arguments about costs).

5. The Judge was wrong not to make provision for a car for H and the children.

6. The Judge was wrong not to order a pension share.

Housing

7. The Judge was wrong to make an order that could house H and the children in a property owned by W's family who are not parties to the litigation and with whom H has no current legal relationship.

8. The assessment of H's housing needs with the children was outside of the bracket of reasonable outcomes in the case when properties had been enjoyed at £2.5m+ during the marriage and purchases considered at over £13m, both as a freestanding issue and after the Judge had established that W had access to resources in order to fund a £750,000 property and adopted the Schedule 1 type provision of housing [REDACTED].

9. The Judge was wrong to structure the award so that H was treated like a Schedule 1 father, despite the 7 year matrimonial partnership and 2 children; and insufficient weight, if any, was placed on the fact the parties had been married and that the marriage was not short in length.

Income

10. A maintenance award of only £1,000 pm was ordered on the basis that it was all that W could afford, despite: i. the SJE's evidence being that the business could pay out dividends at 50% of the 2020 dividend (50% of £1,153,152 = £576,576 pa) from the £420m capital in the business; ii. dividends of £1.78m had been declared in the most recent 4 years between 2017 and 2020 at £445,000 gross pa (£300,000 in 2017, £330,000 in 2018 and £1,150,000 in 2020); and iii. further payments were received from the family, in addition to the dividends, such as £194,250 into the joint account in 2019 [330], £2m from W's father in 2021 and a further c.£1.3m for legal fees.

11. The Judge was wrong not to make a school fees order.

Income needs

12. Insufficient weight, if any, was placed on H's stated income needs with the children and undue weight was placed on the court's incorrect assessment of what was affordable for W.

13. If there was doubt as to the likelihood of any dividends being paid in the future, the Judge was wrong not to make an order that attached to any dividends that were received by W.

Clean break

14. Even if the Judge was right that £1,000 pm was all that could be afforded by W at the current time, future dividends were envisaged by the Judge and W, dividends had been paid to W at the rate of £445,000 gross between 2017 and 2020 and H should at least have been provided with the opportunity to make a variation application upon payment of such a dividend.

Access to resources

In terms of W's access to resources (and case in general) the Judge failed to look beyond W's stated presentation, to the reality of the situation supported by the body of evidence:

15. In stating that the "real and major question is whether any family member will buy the wife's shares to allow her to meet an award to the husband", the Judge placed insufficient weight,

> if any, on the other routes to resources available to W; and no proper analysis of those other routes to resources was provided.
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> 16. When assessing W's access to resources, the Judge was wrong to place no, or insufficient weight, on the evidence that W was told by the company representative that she could expect c.£24m.
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> 17. The Judge applied the wrong burden of proof when considering W's access to resources.
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> **MPS / LSO Arrears**
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> 18. The Judge was wrong to discharge the MPS / LSPO Arrears.
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> **Non-Disclosure**
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> 19. The Judge was wrong to find that W had not been guilty of extensive non-disclosure and that, in any event, there was no evidence that the alleged non-disclosure had any impact on the court's ability to assess her resources.
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> **New Statement**
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> 20. The Judge was wrong not to admit H's 4 page witness statement dated 11th April 2023 into evidence.
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> 21. Such an order would not have been made had the genders been reversed and the Judge was wrong to make the order that she did.

17. These grounds can be organised into the following groups:

    i) appeals against case-management decisions: (Grounds 3 (first part), 20 and 21);

    ii) appeals against findings of fact: (Grounds 2, 10, 15, 16, 17, 19);

    iii) appeals against discretionary/evaluative decisions: (Grounds 1, 4, 5, 6, 7, 8, 9, 12); and

    iv) appeals against procedural decisions: (Grounds 3 (second part), 11, 13, 14, 18).

Appellate criteria: general

18. In *Re B (a Child)* [2013] UKSC 33, [2013] 1 WLR 1911 the Supreme Court set out the differing standards to be applied depending on whether the appeal asserts (i) an error of fact; or (ii) a faulty evaluation of the relevant facts and matters, or (iii) a miscarried exercise of discretion. In *R (On the Application Of) Wales & West Utilities Ltd v Competition And Markets Authority* [2022] EWHC 2940 (Admin) I sought to summarise the standards:

> "39. An appeal against a finding of primary fact can only succeed where the finding had no evidence to support it; or was based on a misunderstanding of the evidence; or was one no reasonable judge could have reached: see Lord Neuberger PSC at [53].
>
> 40. The primary facts in question can be either concrete or abstract (i.e. the state of mind of a party or other relevant actor). However, proof of a state of mind is not capable of objective verification in the same way as a concrete fact. It involves subjective judgment by the fact-finder. The process is more akin to the evaluation of primary facts, to which I next turn.
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> 41. An appeal against an evaluation of primary facts as found or undisputed can succeed only for the same reasons although applied perhaps with "somewhat less force": Lord Neuberger at [57] - [58], citing Lord Hoffmann in *Biogen Inc v Medeva plc* [1997] RPC 1, at [54]. A "degree of reticence" on whether to interfere with the evaluation is warranted: Lord Kerr JSC at [110].
>
> 42. An appeal against an exercise of discretion will succeed if the decision-maker has failed to take into account relevant matters; or had regard to irrelevant factors; or reached a decision that is plainly irrational. Otherwise, the review by an appellate court is "at its most benign". Even if the appeal court disagrees with the discretionary decision it cannot interfere: Lord Kerr JSC at [112].
>
> 43. Thus, there is a high degree of equivalence between an appeal against an exercise of discretion and a *Wednesbury* challenge to a regulatory decision. …"

Appellate criteria: case management decisions

19. The first part of Ground 3 ("The Judge was wrong not to stay the proceedings to delay the handing down of judgment") and Grounds 20 and 21 are case-management decisions. They were made on 21 April 2023 when the judgment was handed down. For such decisions there is a 7 day period for filing an appeal notice: FPR 30.4(3)(a) and 30.5(4A). That time period expired on 28 April 2023. The husband is therefore out of time as regards these grounds, his appeal notice being dated 26 May 2023.

20. Further, the appellate standard is heightened on an appeal against a case-management decision. In *Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA Civ 5, Sir James Munby P reviewed the case law and stated at [35] that in the case of appeals from case management decisions the circumstances in which the Court of Appeal can interfere are limited. It can do so only if satisfied that the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge. This is very close to a *Wednesbury* standard of review.

21. The *dicta* in *Re TG* were approved by the Court of Appeal in *Re H-L (A Child)* [2013] EWCA Civ 655, itself followed in *Lindner v Rawlins* [2015] EWCA Civ 61.

Permission to appeal ('PTA')

22. In *Re R (A Child)* [2019] 2 FLR 1033 at [31], Peter Jackson LJ confirmed that the correct test to be applied on applications for PTA based on rule 30.3(7)(a) is "a real prospect of success", which means that:

> "…there must be a realistic, as opposed to fanciful, prospect of success. There is no requirement that success should be probable, or more likely than not."

23. This decision tells us that the degree of likelihood of success on the appeal does not need to be as high as 51%, but it does not tell us what the minimum degree of likelihood is to justify the grant of permission to appeal. Obviously, the degree of likelihood is likely to be fact-sensitive. That said, it would no doubt be possible to undertake some empirical analysis to gain a well-informed feel for the minimum degree of likelihood.

24. A "real prospect of success" is the same test for an interlocutory injunction: see *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. In *AO v LA* [2023] EWHC 83 (Fam) at [28] I suggested a degree of likelihood of at least 25% would normally be needed to satisfy the "real prospect of success" test for the grant of an interlocutory injunction, and I cannot see why the same metric should not apply to the identical PTA test.

Totally without merit ("TWM")

25. If the Court decides, without having held a hearing, that PTA should be refused, the applicant may normally request that the decision be reconsidered at a hearing (FPR 30.3(5)). However, if the Court refuses PTA and considers that the proposed appeal is totally without merit it may order under FPR 30.3(5A) that the applicant cannot request such a reconsideration at a hearing. The TWM order can extend to the PTA application as a whole or to individual Grounds. It is a mistake to think that such an order involves making some kind of adverse moral judgment about the appeal. It means only that if the appeal court is pretty sure that the appeal will fail, then it can so order.

The proposed appeals against the case-management decisions, and the FPR 30.12(2)(b) application

26. The proposed appeals and the FPR 30.12(2)(b) application all relate to the same point. They all maintain that the judge should not have handed down judgment on 21 April 2023 but should have admitted the further evidence in the husband's witness statement of 12 April 2023 and allowed further argument.

27. In para 25 of her judgment the judge said:

> "Ultimately, I decided to admit both party's additional witness statements lodged in February 2023 as a matter of proportionality. However, admission was on the basis that there would be no cross-examination and I would attribute such

> weight to those statements as I deemed appropriate. The parties agreed to this approach. As far as the April 2023 witness statements are concerned, I have read them. The wife's, of course, is only relevant if I allow the husband's. I refuse the husband permission to rely on his April 2023 witness statement. In my judgment, it is of no assistance. [REDACTED] The husband's fresh evidence is entirely speculative and based on wishful thinking. I have not found the husband's submissions on insolvency law terribly helpful and I address them in the course of the discussion and decision below."

28. The husband's fresh evidence did not contain any new information but rather constituted a plea that the handing down of the judgment be delayed. He stated:

> "Therefore I ask the Court to stay the handing down of Judgment for two months, until 9 June 2023. [REDACTED] That is in both parties' best interests and will provide further clarity for the court – not least as any agreement that can be reached will provide certainty and reduce the family's potential liabilities."

29. This statement was frankly a red herring. The husband's real complaint is that the judge did not make factual findings that reflected his evidence in the admitted statement dated 1 February 2023. I deal with this below.

30. However, I think it may be helpful if I were to express my clear opinion that the requirement of efficient conduct of financial remedy cases exists not merely to ensure a level playing field between the litigants in the individual case, but to ensure that judicial resources are fairly allocated across the board so that all litigants can have their cases heard without undue delay. The terms of FPR 1.1(2), which give effect to the overriding objective of dealing with cases justly, are extremely important. They require cases to be heard expeditiously; proportionately (as regards the nature, importance and complexity of the issues); on a level playing field; economically; and within an appropriate allotment of the court's time taking into account the need to allocate time to other cases. This means that where a time estimate has been provided, it is incumbent on the parties to strain every sinew to ensure that the case is concluded within that time estimate (which includes allowing time for the writing of the judgment) and that it does not spill over, as happened in this case, to a later date for submissions to be made and for the judgment be written.

31. Going part-heard is a bane with potentially damaging consequences on a number of fronts. One consequence may well be that another case will be thrown out of the list. Another is that parties, as here, often seem to think that the delay opens the door to the adducing of further evidence. A further downside is that the evidence about facts in issue begins to fade from the judicial memory. And obviously, circumstances can change during the interregnum.

32. What all this means is that at the pre-trial review there must be the most careful examination of the time estimate, and of the trial template, to ensure that going part-heard at trial is avoided at all costs. If it does happen, then there must be very strict terms applied to avoid the occurrence of the events that took place in this case. Here,

the husband seemed to think that the delay allowed the door to be opened for him to adduce new evidence to seek to reverse the direction in which he conceived the judicial wind was blowing.

33. In this case the husband had set out his stall that he faced enormous liabilities. He sought that the wife should indemnify him. He used the existence of those liabilities to support what was an exorbitant claim. Having seen the direction in which the judicial wind was blowing in December 2022 he sought to take advantage of the interregnum to adduce evidence to reverse it. This seems to me to be entirely unprincipled but nonetheless precisely the sort of practice to which insufficient attention to the fair allotment of time within the trial template gives rise.

34. In my judgment, where the court is not able to do more than to complete the evidence in the time allotted, and has to adjourn the case part-heard for final submissions and judgment, further evidence should only normally be permitted where it would pass the governing test where an application is made to revisit with fresh evidence a judgment which has not yet been made the subject of a perfected order: see *AR v ML* [2019] EWFC 56 at [21] and [22].

35. In my judgment, in a financial remedy case the test should be much the same whether an application is made to adduce fresh evidence (i) after the completion of the evidence-giving phase but before final submissions; or (ii) (as here) after final submissions while judgment is reserved; or (iii) after judgment has been given but before the order giving effect to it has been perfected; or (iv) pursuant to FPR 30.12(2)(b) on an appeal against the duly perfected judgment. And that test should be as set out in *Ladd v Marshall* [1954] 1 WLR 1489:

> "First, it must be shown that the evidence could not have been obtained without reasonable diligence for use at the trial. Secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive. Thirdly, the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible."

That well-known test should however be applied with progressively increasing rigour relative to the point in time when the application is made. Thus the test will be applied much more fiercely where the application is to adduce fresh evidence on an appeal than where the application is to adduce fresh evidence at a trial after the completion of the evidence-giving phase but before final submissions.

36. In my judgment the proposed appeal against the case management decisions of 21 April 2023 (i) not to stay the handing down of judgment for two months and (ii) not to admit the husband's statement of 12 April 2023 or the wife's statement in response, would be bound to fail even if the appeal notice had been filed within time. The judge decided that the evidence did not satisfy the second limb of *Ladd v Marshall* holding that if it were given it would not have an important influence on the result of the case. In my judgment, the judge was completely correct to reach that conclusion.

37. In my judgment the chances of the husband disturbing those decisions on appeal are zero or very close to zero.

38. For these reasons, an extension of time to seek PTA is refused. Had the application for PTA been made in time the application for permission to appeal these decisions would be refused and I order that the application is declared to be TWM. The husband's FPR 30.12(2)(b) application, which seeks to adduce into evidence his statement of 12 April 2023, is dismissed for the same reason, and likewise declared to be TWM.

The proposed appeals against findings of fact

39. The first ground is that the court should not have held that it was likely that any significant award would go to his creditors.

40. In his witness statement of 1 February 2023, the husband stated:

> "4. The administration process has progressed since the Final Hearing in December 2022 – more information has come to light and I can now confirm that the Potential Liability will be nothing like [REDACTED]. As explained to Ami's solicitors, I am able to cap the Potential Liability at [REDACTED], but remain hopeful that it was be significantly less than even that figure.
>
> 5. As I set out below [REDACTED] there is even a prospect of the Potential Liability never materialising at all. In that case, the contingent variable lump sum I seek would never be demanded from Ami.
>
> 6. My case is that the court should consider this Potential Liability to be between [REDACTED], while recognising the commercial reality that the Potential Liability might not crystallise for many years if at all."

41. In para 41 the judge stated:

> "The husband's primary need is for housing. However, in my judgment, any significant award made to him is likely to go to his creditors. In his oral evidence, the husband put his potential liability at [REDACTED] There is nothing to support this assertion. Further, he requires the administrator's cooperation and that is unlikely to be forthcoming, absent funding."

42. In his skeleton Mr Wilkinson argued:

> "The Judge was wrong to place little, if any, weight on H's evidence of what he had been told by the administrators about the likely liability, which was the best evidence available to the court, instead preferring her own speculative and general understanding (as also set out in W's statement, which was read but also not admitted) to what had actually been said by the administrators in this particular case.
>
> There is no petition for H's bankruptcy, no demand has ever been made against H personally and there is no evidence of any real

> prospect of it. In any event, as set out in H's written submissions, H would have strong defences to such a demand or petition, which would mean a petition would likely be dismissed or refused.
>
> The evidence simply does not support a finding that "any significant award made to him is likely to go to his creditors" and that "it would be fruitless to award the husband a significant capital sum". On the balance of probabilities, H will not go bankrupt and the Judge was wrong to find that the "vanishingly unlikely" risk of bankruptcy (per §30 of H's statement of 1st February 2023) was so great to leave him with no outright capital to meet his needs after a 7 year marriage with 2 children (whom he cares for more than 50% of the time).
>
> Given the recent developments, with [REDACTED]
>
> Similarly, the assessment that any "significant" award made to H is likely to go to H's creditors (§41), is entirely arbitrary and not supported by any explanation or evidence. If £75,000 would be safe, there is no proper explanation as to why £750,000 would not be safe, or any other figure above or in between."

43. I completely disagree with Mr Wilkinson's submissions. On the admitted evidence, including the husband's statement of 1 February 2023, it is my opinion that the judge's finding was inevitable; indeed it would have been perverse for any other finding to have been made. I would rate the chances of success of this ground as close to zero meaning that not only is PTA refused but that the ground is certified TWM.

44. The remaining Grounds in this group of appeals against factual findings are Ground 10 (that W's income was as she claimed); Grounds 15 – 17 (that the W's access to resources was no more extensive than she claimed; and Ground 19 (that W was not guilty of non-disclosure).

45. These were findings of primary fact. Therefore, the husband has to show that he has a realistic prospect of showing at the hearing of an appeal that for each of these findings there was either no evidence to support it; or it was based on a misunderstanding of the evidence; or it was one no reasonable judge could have reached.

46. The evidence considered by the judge was extensive and she examined it extremely carefully when reaching her findings. I cannot say that there is a realistic prospect, putting it non-numerically, of the husband succeeding on any of these grounds at the hearing of an appeal. On the contrary, I assess today that his chances of overturning any of these findings of primary fact are bordering on zero. Therefore, not only should PTA be refused, but these grounds should be declared to be TWM.

The proposed appeals against discretionary/evaluative decisions

47. In Grounds 1, 4 – 9 and 12 complaint is made of the judge's assessment of the husband's needs-based claim for capital and income. Fundamentally, Mr Wilkinson asserts that

the judge's decisions on the husband's needs claim were not only riddled with factual errors, but were also wrong in their evaluative or discretionary expressions.

48. In *FF v KF* [2017] EWHC 1093 (Fam) I stated:

> "18. So far as the "needs" principle is concerned there is an almost unbounded discretion. The main rule is that, save in a situation of real hardship, the "needs" must be causally related to the marriage. Like equity in the old days, the result seems to depend on the length of the judge's foot. It is worth recalling that Heather Mills-McCartney was awarded over £25m to meet her "needs" (*McCartney v McCartney* [2008] EWHC 401 (Fam)). Mrs Juffali was awarded £62m to meet her "needs" (*Juffali v Juffali* [2016] EWHC 1684 (Fam)). In the very recent case of *AAZ v BBZ* [2016] EWHC 3234 (Fam) the court assessed the applicant-wife's "needs" in the remarkable sum of £224m. Plainly "needs" does not mean needs. It is a term of art. Obviously, no-one actually <u>needs</u> £25m, or £62m, or £224m for accommodation and sustenance. The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise."

49. The problem with the "needs" principle is that it is not easy to identify the ethical, moral or logical basis for these huge awards.

50. In *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam) at para 25 I stated:

> "Although spousal maintenance (formerly known as alimony, but which now perhaps should now be known more accurately as ex-spousal maintenance) has been with us for generations it is a strange fact that there is not much discussion in the jurisprudence of the moral or ethical question of why after the dissolution of a marriage the law permits the imposition on a party of the obligation to pay spousal maintenance potentially until the death of the payee (even, in the case of a secured periodical payments order, after the death of the payer). While the marriage subsisted the common law imposed a duty on a husband to support his wife. In *Gurasz v Gurasz* [1970] P 11 Lord Denning MR said this was a feature of family life "elemental in our society". Thus in the absence of a power to dissolve a marriage the courts, both common law and Ecclesiastical, enforced that duty by making long term maintenance awards. Prior to the advent of judicial divorce in 1857 a divorce could only be obtained by a private Act of Parliament. The terms of such an Act would invariably require that the husband make some suitable, albeit moderate, provision for his former wife. So there was some kind of precedent for post-divorce alimony."

51. The moral or ethical issue arises equivalently where the award is singular but meets needs that arise long after the end of the marriage, whether for housing or income. Thus, the moral question arises where a Duxbury lump sum is awarded, for by its very nature, the award meets needs that arise decades into the future, at a time when the marriage has receded into the very depths of history. A Duxbury lump sum is calculated to fund expenditure for a period that corresponds to the recipient's life expectancy as stated in the life tables. In that period the recipient may remarry, or even die, but there is no claw-back for the payer in either such event.

52. The moral question strongly arises where capital is sought to buy a property outright to meet the recipient's housing need. When made, such an award *ex hypothesi* goes far further than meeting the recipient's immediate housing needs, when, for example, the children of the marriage still need accommodation. That is a classically legitimate need to which tthe other party ought to contribute. But an outright award invariably meets housing needs for periods long after the children are grown-up. Again, there is no claw-back when the recipient dies. She can leave the property, the cost of which was awarded to her to meet her lifetime needs, to whoever she wants in her will.

53. How can this be justified morally or ethically? In *SS v NS* at para 30 I cited Baroness Hale in *Miller* as follows:

> "In *Miller* Baroness Hale at para 138 explained that the most common rationale for imposing the obligation to maintain into the future is to meet needs which the relationship has generated. Obviously this is a very sound rationale and it is for this reason that the factors of duration of marriage and the birth of children are so important. It is hard to see how a relationship has generated needs in the case of a short childless marriage, although this is not impossible. But where it can be argued that the relationship has generated hard needs why should meeting them be for longer than, say, the Scottish limit? The answer is best given by Lord Hope at para 118 where he explains why the Scottish limit is so unfair: "the career break which results from concentrating on motherhood and the family in the middle years of their lives comes at a price which in most cases is irrecoverable". For many women the marriage is the defining economic event of their whole lives and the decisions made in it may well reverberate for many years after its ending."

54. Therefore, I can well accept that if the claimant can prove a substantial "relationship generated disadvantage", or if there are objectively strong reasons for the claimant not to be able to go out to work which are causally connected to the marriage, then proof of such facts could be a good reason for a needs award which covers periods long after the end of the marriage. In my respectful opinion, it is within consideration of the needs principle that "compensation" is best considered, that concept being synonymous with the idea of a relationship-generated-disadvantage. However, the impact of that factor has to be weighed against the obvious duty of the claimant for a needs award to take all reasonable steps to mitigate her dependency.

55. In *Radmacher v Granatino* [2010] UKSC 42 the Supreme Court upheld a Schedule-1-type award in favour of Mr Granatino, in circumstances where he had entered into a

formal agreement in Germany not to make a claim against Ms Radmacher. The logic was simple enough:

> "You have agreed not to make a claim, and so your award will be strictly limited to your needs in the period when your children are still at home with you and are costing you money."

56. But why does such reasoning not apply generally? Why does someone have to enter into a formal agreement to be confined to the logical limit of a needs award? These are questions that are going to have to be answered definitively. I suspect it will need legislation to provide a definitive answer which is not going to be subverted by the exercise of an "unbounded" judicial discretion.

57. In this case the judge made the needs award on the back of her key finding that any large amount of outright capital would be attached by the husband's creditors. The maintenance award was made on the back of a finding that the wife could afford to pay no more. I have already explained how these findings are impregnable. Accordingly, the husband has absolutely no prospect of impeaching them on the hearing of an appeal if permission is granted.

58. However, after a relatively short marriage, where the husband is still extremely young and is possessed of an abundant earning capacity, the needs award made by the judge would have been well justified as a matter of logic and equity even if all of the findings that the husband sought in relation to the wife's resources had been made in his favour. Put another way, had the findings been made as sought by the husband, it would not have been, in my opinion, an appealable exercise of discretion had the judge made exactly the same needs award.

59. But I do not need to go that far in making my decision. My decision is firmly based on the judge's findings that outright capital would be attached by creditors and that the wife is not in a position to pay greater sums by way of periodic maintenance. On those findings I am extremely confident that on any appeal the husband has virtually no chance of demonstrating that the court was wrong in making its assessment of his needs.

60. Therefore, my decision is that in relation to this group of grounds, PTA is to be refused and an order made declaring that the application is TWM.

The proposed appeals against procedural decisions

61. That leaves the remaining procedural decisions which are said to be wrong. They are Ground 11 (the decision not to make a school fees order); Ground 13 (the decision not to grant H a share of any future dividend receipt by W); Ground 14 (the decision not to allow H to apply for variation in the future); and Ground 18 (the decision to discharge arrears).

62. Although Grounds 11 and 18 are technically procedural decisions they are of the character of decisions made under the rubric of needs. For the same reasons that I have dismissed the husband's appeal against the needs assessment as being totally without merit, I reach the same decision in relation to these two grounds.

63. The decision not to grant the husband a formulaic share of any future dividend receipt by the wife was clearly correct from a number of viewpoints. It would have been perverse were the court to have acceded to the husband's suggestion. Here, too, the application for PTA must be dismissed and I must order that it be declared to be TWM.

64. Ground 14 complains that the judge was wrong to impose a clean break in this case thereby preventing the husband from litigating against the wife in the future other than for child support. Such an order was consistent with section 25A Matrimonial Causes Act 1973 and was in my opinion completely correct. Again, it would have been perverse had the judge made any other order when performing her duties under s.25A. It is inconceivable that it would ever be just for the husband, after having unilaterally inflicted financial catastrophe on himself after the separation, to be awarded financial relief for himself against the wife at some indeterminate point in the future. On this ground PTA is refused and the application declared to be TWM.

Result

65. An extension of time to file the appeal notice in respect of the case-management decisions covered by Grounds 3 (first part), 20 and 21 is refused.

66. The application for permission to appeal is:

    i) refused in respect of all Grounds (including Grounds 3 (first part), 20 and 21, had they been mounted within time) on the basis that none, whether taken individually or collectively, has a real prospect of success and there is no good reason for an appeal to be heard in respect of any of them, and;

    ii) declared to be totally without merit.

67. The application for leave to adduce fresh evidence under FPR 30.12(2)(b) is refused and is declared to be totally without merit.

LATER

10 August 2023

68. After this judgment was handed down, I received an application for a reporting restriction order ("RRO") from each party.

69. When Parliament enacted s. 12 of the Administration of Justice Act 1960 ("section 12") it prescribed which of those cases heard in private would be protected by statutory secrecy. In doing so it reflected the "foundational" decision of *Scott v Scott* [1913] AC 417.

70. In the field of financial remedies s. 12(1)(a)(iii) provides that only cases which are wholly or mainly about child maintenance have that protection. Even then, the protection is strictly limited - see *Re PP (A Child: Anonymisation)* [2023] EWHC 330 (Fam) at [8] – [9]. The narrowness of the protection in money cases reflects the open justice principle, which is a key (if not the key) ingredient of the constitutional and social imperative of the rule of law. It has been said that "the principle of open justice is one of the most precious in our law": *R(C) v Justice Secretary* [2016] UKSC 2; [2016] 1 WLR 44.

71. However, *Scott v Scott* confirmed that the common law allowed derogations from the open justice principle in individual cases. Thus, where it is necessary for the proper administration of justice, a hearing can be held in secret; or the parties may be anonymised; or specified information may be withheld from being reported; or parts of a judgment may be redacted, With the advent of the Human Rights Act 1989 assessment of the proper administration of justice has to be viewed through the lens of the Convention rights under Articles 6, 8 and 10 to a fair trial, a private life, and freedom of expression.

72. That common law power to derogate is given teeth by s.11 of the Contempt of Court Act 1981.

73. *Scott v Scott* expressly apprehended that commercial sensitivity may be a good reason to withhold information from being reported. That exception is reflected in CPR 39.2(3)(c) which states that the proper administration of justice may require secrecy where the case involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality. In *Lykiardopulo v Lykiardopulo* Thorpe LJ stated at [66]: "Insofar as anything in the judgment may be said to be commercially sensitive, then it can simply be redacted."

74. In my opinion the best summary of the principles applicable on an application for a RRO is that contained in Lord Neuberger MR's *Practice Guidance on Interim Non-Disclosure Orders* [2012] 1 WLR 1003. It states:

> "[9] Open justice is a fundamental principle …
>
> [10] Derogations from the general principle can only be justified in exceptional circumstances when they are strictly necessary … They are wholly exceptional …
>
> [12] … Anonymity will only be granted where it is strictly necessary, and then only to that extent.
>
> [13] The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence….
>
> [14] When considering the imposition of any derogation from open justice the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings"

75. The husband argues that some modest redactions are necessary to this judgment to protect confidential information which is highly sensitive. I am satisfied that his request for redactions meet the necessary standard, in that there is significant risk, if the redactions are not made, that serious damage may be done to the highly sensitive commercial steps which he is presently taking. I have therefore accepted his proposals for redaction.

76. My order is made under the common law but is given teeth by section 11 of the Contempt of Court act 1981. It will be a serious contempt of court if a report of this judgment directly or by innuendo exposes the redacted information.

77. This reporting restriction order will last until 1 January 2025 unless extended by an order of a High Court judge in the meantime. For the reasons given by me in *R (Marandi) v Westminster Magistrates' Court* [2023] EWHC 587 (Admin) at [78] all reporting restriction orders should have an end-date, save in very exceptional circumstances. I do not find any such exceptional circumstances here.

78. The wife is now representing herself. She seeks that the entire judgment should be suppressed because she believes that her elder child, aged 7, who is technologically adept, may read about it on the Internet and be distressed as a result.

79. The logical destination of her argument is that every financial remedy case where there are children who might be sufficiently mature to be able to read a judgment about their parents' financial remedy dispute, and who might be distressed as a result, should as a class be subjected to blanket secrecy.

80. This argument is completely misconceived. Many people who litigate about money in the civil courts have children who might well be distressed to read about their parent's litigation online. But that is not a reason for holding the cases in secret.

81. Yet, almost all financial remedy cases which do not have the protection of section 12 continue to be heard in secret, in the sense that their proceedings may not be reported; and have judgments almost invariably published anonymously endorsed with a fierce rubric threatening sanctions for contempt of court if the anonymity is breached. This is, as I have said repeatedly, obviously unlawful, but the practice continues unabated.

82. I have noted that in his otherwise outstanding recent decision of *Tsvetkov v Khayrova* [2023] EWFC 130 Peel J held that this practice was not merely lawful, but was almost mandatory because the decision of the Court of Appeal in *Lykiardopulo* v *Lykiardopulo* [2010] EWCA Civ 1315 was binding on him (and all other first instance judges). At [114] he stated:

> "However, I tentatively take the view that:
>
> i) As I understand it, in none of the cases before Mostyn J were these issues of principle argued. Insofar as there was any argument between the parties, it was brief and addressed the merits of anonymisation i.e the balance between Articles 8 and 10, rather than any, or any detailed, submissions about the principles underlying the practice of confidentiality and anonymity in financial remedy proceedings.
>
> ii) Mostyn J describes the decision in *Clibbery v Allen* as obiter, in that it concerned publication of proceedings under Part IV of the Family Law Act 1996. Nevertheless, the judgments of Dame Elizabeth Butler-Sloss P and Thorpe LJ comprehensively considered the broader issue of publicity in family proceedings

> including financial remedy proceedings. And *Lykiardopulo,* also heard in the Court of Appeal, was not obiter; the appeal concerned ancillary relief proceedings (as they were then termed) and the same conclusion was reached as to the non-reportability of financial remedy proceedings absent court order.
>
> iii) I repeat that I make no comment on whether Mostyn J is correct or not. But in the circumstances, my provisional view is that I should follow the decisions of the Court of Appeal. In my tentative opinion, it is for a higher court than mine to decide this issue, certainly unless and until I hear full and detailed argument which addresses the hugely important thesis of Mostyn J. I have had no meaningful submissions on this topic, either in this case or in any other case in front of me, since Mostyn J first set out his considered position."

83. I shall keep my response brief as I have expatiated on this subject at length already. But I would not want anyone to think that I have not received full argument on the issues. The issues were fully argued in *Gallagher v Gallagher (No.1) (Reporting Restrictions)* [2022] EWFC 52, [2022] 1 WLR 4370 and in *Re PP (A Child: Anonymisation).*

84. The question for the Court of Appeal in *Lykiardopulo* was whether Baron J was right to anonymise her judgment. The appeal was allowed, and the anonymity lifted.

85. In my opinion it cannot be said that the *ratio decidendi* of *Lykiardopulo* is that a financial remedy decision is "non-reportable absent a court order". In *Some Sunlight Seeps In* [2022] FRJ 79, Sir James Munby explained why at 93:

> "In the event, the Court of Appeal, having conducted the same balancing exercise, came to a different conclusion: there should be no anonymisation. In other words, the Court of Appeal was acknowledging the significance of the rule change in 2009 and identifying the essential task for the court as being – and this in a case where the issue was whether or not there should be anonymisation – to undertake the balancing exercise mandated by the Convention. The ratio of the decision was that both the first instance and appeal judgments would be published without anonymity, in particular because, having undertaken the balancing exercise, the husband had behaved badly. The general practice favouring anonymisation was not an essential reason for the decision; on the contrary that practice was of no relevance to the specific facts of that case which in the final analysis, were decisive. Those specific facts meant that anonymisation would not be applied.
>
> The irony of all this will not have escaped the reader. In both *Clibbery v Allan* and *Lykiardopulo v Lykiardopulo*, the decisions of the Court of Appeal most frequently cited in support of the conventional pieties, the actual ratio was that proposed prohibition of publication or anonymisation is to be resolved

> having regard to and balancing the interests of the parties and the public as protected by Articles 6, 8 and 10 of the Convention, considered in the particular circumstances of the case."

86. If Sir James and I are wrong about that, and the ratio of *Lykiardopulo* is that there is a "principle" that all financial remedy decisions are "non-reportable absent a court order" then that principle presumably derives from paras 30, 45 and 54(iii) in the judgment of Thorpe LJ and from paras 79 and 80 in the judgment of Stanley Burnton LJ.

87. It is elementary that the rule of *stare decisis* does not apply if the legislative framework in respect of which the supposedly binding earlier decision was made, has materially changed. In *Lykiardopulo* the proceedings before Baron J had been heard behind closed doors, before the momentous rule change of 27 April 2009 which allowed the press in. The new rules allowed journalists to report what they heard, unless a specific order were made either restricting that freedom or excluding them altogether from the proceedings (see my judgment in *Xanthopoulos v Rakshina* [2022] EWFC 30 at [113] – [116]). In *Lykiardopulo*, Thorpe LJ acknowledged at [28] the parties' expectations of complete secrecy based on the law and practice before February 2009, when the hearings before Baron J concluded. Given that two months later the law then changed so profoundly by allowing a section of the public (i.e. the press and latterly legal bloggers) access to the proceedings, it is impossible to see how any current binding principle can be deduced from the decision. The decision was made under a completely different legal regime as to who could attend hearings and what could be reported.

88. The second elementary feature of the rule of *stare decisis* is that the rule will not strictly apply where the supposedly binding decision of the higher court is much wider than was necessary for disposing of the matter before it. In *Lykiardopulo* it was not necessary, in order to make its decision for the Court of Appeal to promulgate the principle that all financial remedy judgments shall be anonymised unless a specific court order is made permitting full publication. On the contrary, all that was needed for the Court of Appeal to reach its decision, was for it to find (as it plainly did) that that husband had not provided clear and cogent evidence why, in the light of his conduct, the decision should be anonymised.

89. Accordingly, I do not accept that I have violated the rule of *stare decisis*. On the contrary, I have loyally followed the decision of the House of Lords in *Scott.*

90. In my opinion the decision in *Lykiardopulo* does not provides a lawful basis for a general practice that is inconsistent with both section 12 and the decision *in Scott.*

91. Above the entrance to the US Supreme Court are chiselled the words "Equal Justice Under Law", a principle which is fundamental for any democracy. I suggest that it is not equal justice to have a legal system which stipulates that almost all legal claims for monetary relief shall be heard in the civil courts completely publicly, while, exceptionally, almost all hearings of those claims where the parties happen to have been married to each other are shrouded in secrecy.

92. This is my very last judicial word on this subject. I leave it to others to resolve the controversy. However, I suggest that any initiative to have generalised anonymity in all financial remedy cases cannot be promulgated as "guidance" or by rule change. Section 76(2A) of the Courts Act 2003 provides:

> "Family Procedure Rules may, for the purposes of the law relating to contempt of court, authorise the publication in such circumstances as may be specified of information relating to family proceedings held in private."

93. Thus, the power of the Family Procedure Rule Committee to make rules is strictly confined to making something presently punishable as contempt not so punishable. The Rule Committee cannot make rules the other way round to make punishable as contempt something that is not presently so punishable. Such a change would have to be enacted by Parliament. In a modern democracy that is how it should be.
