Neutral Citation Number: [2019] EWFC 56

Case No: 2019/0062 (BV18D00335)

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/09/2019

Appeal before:

MR JUSTICE MOSTYN

- -

Between :

AR	**Appellant**
- and -	
ML	**Respondent**

- -
- -

Matthew Richardson (instructed by **Foreman Laws LLP**) for the **Appellant**
Pegah Sharghy (instructed by **Gordons Partnership LLP**) for the **Respondent**

Hearing date: 20 September 2019

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Approved 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.

.....

MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the child and members of the family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Mostyn:

1. In this judgment I shall refer to the appellant as "the husband" and to the respondent as "the wife".

2. This is my judgment on the appeal by the husband against the order made by Deputy District Judge Brenda Morris on 8 April 2019. That order provided, so far as material, as follows:

> "Upon hearing closing submissions from counsel for each party and the court delivering its judgment which has yet to be perfected into an order.
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> And upon the applicant [wife], after the delivery of judgment making an oral application (i) for permission to introduce further evidence relating to housing needs, namely further property particulars; and (ii) for an adjournment of this final hearing to a future date; and (iii) for the judgment delivered today not to be perfected into a final order, and the respondent opposing the applications
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> And upon the court delivering an oral judgment in relation to the above applications
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> …
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> IT IS ORDERED THAT
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> 1. This case shall be adjourned to 3 May 2019… for finalising judgment and reconsideration of suitable housing fund for the applicant and the child of the family. …
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> 2. Permission to the applicant to file and serve by 4 PM on 15 April 2019 a concise statement as to her position on suitable housing together with property particulars in support (limited to 5).
>
> 3. Permission to the respondent, if so advised, to file and serve by 4 PM on 25 April 2019 a concise statement in reply and adduce property particulars (limited to 5) …"

3. The husband's notice of appeal was issued on 16 April 2019. This being an appeal from a Deputy District Judge at the Central Family Court, it was to be heard by a circuit judge, unless a Designated Family Judge or a judge of High Court level allocated it to a judge of High Court level considering that the appeal would raise an important point of principle or practice: see the table in FPR PD 30A para 2.1, at row 2. For reasons which are not known to me the notice of appeal was placed before Mr Justice Moor rather than a circuit judge. In an order wrongly headed "In the High Court of Justice, Family Division", made on 30 April 2019 he directed that the application for permission be listed before a judge of the High Court with the appeal to follow if permission were granted. I can only assume that Mr Justice Moor

departed from the normal route of appeal (i.e. to a circuit judge) because he considered that this case raised an important point of principle or practice. However, what is clear is that, notwithstanding the misleading heading of his order, this appeal is to be disposed of by a High Court judge sitting in the Family Court and not in the High Court: *ibid*.

4. The significance of this is that the provisions of FPR 30.12A and PD 30B, which stipulate that certain appeals are to be held in public, do not apply to this appeal. These provisions only apply to appeals which are heard in the High Court: see FPR PD 30B para 1.2. For appeals heard in the Family Court, whether by a circuit judge, or a High Court judge, the normal provision in FPR 27.10 for the hearing to be in private applies. On 20 June 2019 Mr Justice Williams directed in this case (in an order again wrongly headed "In the High Court of Justice, Family Division") that "unless the judge conducting the hearing orders otherwise, the hearing shall be open court, subject to any reporting restrictions that the judge shall impose." However, I could see no good reason why the normal rule should not apply in this case. Had this appeal been heard by a circuit judge there is no question but that it would have been heard in private and I could see no good reason to depart from that position simply because I, sitting in the Family Court, was to hear it. I therefore directed that the matter be heard in private. This judgment will be published in anonymous terms, and revelation of the identities of the parties or the child of the family will be a contempt of court.

5. I now turn to the substance of the appeal.

6. As is apparent from the terms of the order I have set out above, the judge acceded to an application made on behalf of the wife pursuant to the Supreme Court decision *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] UKSC 8, [2013] 1 WLR 634. The facts of that case are set out in the headnote which I quote as follows:

> "In care proceedings brought by a local authority in respect of two children after one of them had been found to have numerous non-accidental injuries, the judge held a fact-finding hearing to determine, inter alia, the identity of the perpetrator or perpetrators. Each parent accused the other of being the sole perpetrator. The judge gave an oral judgment, later transcribed under the heading "Preliminary outline judgment", which concluded that the father was the perpetrator and an order was drawn up to that effect. Before that order was formally sealed the judge gave a second "perfected judgment" holding that after further consideration of the evidence she was unable to find to the requisite standard which of the parents had injured the child and that it could have been either of them."

7. The Supreme Court held (again quoting from the headnote) that:

> "The power of a judge to reverse his decision at any time before his order was drawn up and perfected by being sealed by the court was not limited to exceptional circumstances; that the overriding objective in the exercise of the power was to deal with the case in question justly; that relevant factors to consider

> would include, on the one hand, a party having already acted upon the decision to his detriment and, on the other, the existence of a mistake by the court, a failure to draw the court's attention to a plainly relevant fact or point of law, or the discovery of new facts after judgment had been given; that justice might require the revisiting of a decision for no more reason than the judge having had a carefully considered change of mind, since every case would depend upon its particular circumstances; that the need for the power to be exercised judicially and not capriciously required that consideration be given to offering the parties the opportunity of addressing the judge on whether he should change his decision, and the longer the interval since the first decision the more likely it was that it would not be fair to do otherwise; that it followed that, in the absence of evidence of any party having irretrievably changed their position as a result of the judge's first decision, and since the child's placement had yet to be decided, the judge had been entitled to change her mind and so avoid having to decide a future placement upon what she believed to be a false basis; that, moreover, since the judge had been in possession of all the evidence and full submissions as to its relevance, there had been no need for her to give the parties an opportunity to address her before announcing that change of mind; and that, accordingly, her second judgment was valid."

8. In her judgment Lady Hale described the exercise of the power in question as an exercise of discretion. In my respectful opinion to make the binary choice whether or not to accede to an application to revisit the judgment is not really an exercise of discretion in the sense of making a choice from a range of options none of which can be said to be wrong. Rather, as I have argued before, it is the formation of a value judgment. Put shortly, an evaluation has to be made as to whether there is good reason to depart from the principle of finality which is inherent in the delivery of any judgment.

9. The principle of finality is of great antiquity. It has its origin in Roman law and has been said to be as old as the law itself. Law students used to be introduced to it in its Latin expression: *interest reipublicae ut sit finis litium*. It has recently been considered by the Supreme Court in its decision of *Takhar v Gracefield Developments Ltd & Ors* [2019] UKSC 13, [2019] 2 WLR 984. At [68] Lord Briggs (who was in the minority) stated that:

> "This appeal turns on the outcome of a bare-knuckle fight between two important and long-established principles of public policy. The first is that fraud unravels all. The second is that there must come an end to litigation."

10. The majority decided that there was no requirement to show that, where no allegation of fraud had been raised at the original trial of a claim, it was necessary for a party wishing to bring a second action to show that the evidence on which the allegation of fraud was based could not have been secured through the use of reasonable diligence before the original trial: see the judgment of Lord Kerr at [54].

11. However, it is implicit from the judgments that, fraud aside, the principle of finality will generally hold sway. Thus at [44] Lord Kerr cited Lord Wilberforce in *The Ampthill Peerage* [1977] AC 547, 569 where he said:

> "… any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution ... and having reached that solution it closes the book ... in the interest of peace, certainty and security it prevents further inquiry ... there are cases where the certainty of justice prevails over the possibility of truth ... and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud."

12. In the field of financial remedies the recognised exceptions to the principle of finality are set out in FPR PD 9A para 13.5, which provides:

> "An application to set aside a financial remedy order should only be made where no error of the court is alleged. If an error of the court is alleged, an application for permission to appeal under Part 30 should be considered. The grounds on which a financial remedy order may be set aside are and will remain a matter for decisions by judges. The grounds include (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis on which the order was made."

13. Plainly, the principle of finality does not apply with nearly so much rigour where the judgment in question is challenged before the order giving effect to it has been perfected. The power in question is, of course, closely allied to the procedure for asking a judge to clarify and correct a draft judgment. FPR PD 30A para 4.6 provides:

> "Where a party's advocate considers that there is a material omission from a judgment of the lower court … the advocate should before the drawing of the order give the lower court which made the decision the opportunity of considering whether there is an omission and should not immediately use the omission as grounds for an application to appeal."

14. This provision reflects a long line of authority which includes well-known cases such as *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409, *Re B (appeal: lack of reasons)* [2003] EWCA Civ 881, [2003] 2 FLR 1035, *Re T (Contact: Alienation: Permission to Appeal)* [2002] EWCA Civ 1736, [2003] 1 FLR 531 and *In re A (children) (judgment: adequacy of reasoning) (Practice Note)* [2011] EWCA Civ 1205, [2012] 1 WLR 595. In the latter case Munby LJ stated at [16]:

> "It is the responsibility of the advocate, whether or not invited to do so by the judge, to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process."

Under this procedure material omissions and perceived deficiencies would normally extend no further than an obvious numerical error (for an example of which see *H v T (Judicial Change of Mind)* [2018] EWHC 3692 (Fam)), or an accidental failure to take on into account some evidence before the court which showed the existence of a material fact. There is no example in the reported cases, however, of the material omission in question being evidence which was not placed before the judge, but which could have been.

15. It is instructive to look at the kinds of cases where a successful challenge has been made under the *re L* jurisdiction. As explained above *re L* involved a bona fide change of mind as to the identity of the perpetrator of a non-accidental injury. In her judgment at [24] Lady Hale approved examples given by Neuburger J in an earlier decision, *In re Blenheim Leisure (Restaurants) Ltd (No 3)* The Times, 9 November 1999, namely a plain mistake by the court; the parties' failure to draw to the court's attention a plainly relevant fact or point of law; and the discovery of new facts after judgment was given. In the earlier decision of *Paulin v Paulin* [2009] EWCA Civ 221; [2010] 1 WLR 1057, itself a financial remedy case, Wilson LJ at 30(g) stated:

> "It is therefore instructive to notice examples of the application to particular facts of the jurisdiction to reverse a decision prior to the sealing of the order. An early example is *Miller's Case* (1876) 3 Ch. D 166: the court's attention had not been drawn to one of a company's articles of association, which compelled a conclusion opposite to that which had been reached. Another example is *Millensted v. Grosvenor House (Park Lane) Ltd* [1937] 1 KB 717: for the negligence of the hotel in upsetting a jug of hot water over her, the judge awarded damages of £50 to the claimant but on the following day, without further argument on that point, he informed the parties that his award had been excessive and would be only £35. A third example is *In re Harrison's Share under a Settlement*, cited above: ten days after the judge had approved proposed variations of trusts the House of Lords held in other proceedings that a judge had no jurisdiction to do so in such circumstances. A fourth example is *Dietz v. Lennig Chemicals Ltd* [1969] 1 AC 170: shortly after the date of a master's approval of a settlement of the claims of a purported widow and child it was learnt that three weeks prior to that date the widow had remarried."

16. It can be seen that up to and including the decision of the Supreme Court there has never been a case where a successful challenge to a delivered judgment has been achieved on the basis of fresh evidence which could have been made available to the court first time round.

17. Such a challenge was however attempted in a patent case namely *Vringo Infrastructure Inc v ZTE (UK) Ltd* [2015] EWHC 214 (Pat). There Birss J was faced with an application made some weeks after the handing down of his judgment to reopen the trial; to amend the pleadings to plead new prior art against the validity of the patent; and then to have a further trial about that new prior art. Birss J had *re L* at the forefront of his mind. At [16] and [17] he stated:

> "16. There are two major differences between the circumstances of *In re L* and this case. First, as counsel pointed out, *In re L* was a case concerning the care of children. That is true but it is clear that the Supreme Court were considering the legal principles from the point of view of civil and family law in general and not just in children cases.
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> 17. The second difference is important. *In re L* was concerned with a judge changing her mind. It was not a case, like this one, about an application by the losing party to raise a new, hitherto un-pleaded issue, call more evidence and have a new point decided. This case is not one in which I am being invited to change my mind about a point I have decided based only on what I heard at the time. Nevertheless, it seems to me that this difference does not mean that the general principle articulated by the Supreme Court is inapplicable. By that I mean that the overall guiding principle here is the overriding objective to deal with cases justly, or, in terms of the CPR Part 1 as it is today, to deal with cases justly and at proportionate cost. It must be applied in different factual circumstances and the fact that this application involves amended pleadings and new evidence is an element, no doubt an important one, in the relevant circumstances."

18. Birss J then undertook an exegesis of the relevant authorities. He referred, among many others, to the decision of Neuberger J in *Charlesworth v. Relay Roads* [2000] RPC 9, [2000] 1 WLR 230 where he said:

> "While I think that these three factors [in *Ladd v Marshall* [1954] 1 WLR 1489] should be in the forefront of the mind of the court when considering an application to admit new evidence after judgment has been handed down, but before the order has been drawn up, I am inclined to the view that the court must be somewhat more flexible and not to proceed on the strict basis that each of these three conditions always has to be satisfied before fresh evidence can be admitted before judgment."

Those three factors are very well-known and are as follows:

> "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."

19. This led Birss J to conclude at [38]:

> "I can summarise the principles in this way. The court has a jurisdiction, at least before the order is drawn up, to entertain an application of this kind as in here. The principle to be applied generally is the overriding objective to deal with cases justly and at proportionate cost. This involves dealing with cases expeditiously and fairly and allocating an appropriate share of the court's resources to a dispute. In a case like this one, in which the application is to amend the statement of case, call fresh evidence and then have a further trial, the principles relevant to amending pleadings have a role to play but the *Ladd v. Marshall* factors are also likely to have real significance."

And at [40]:

> "As to *Ladd v. Marshall*, the trial judge is in some ways in a better position than the appellate court to assess the significance of a new point and new evidence. In any case, at this stage the *Ladd v. Marshall* factors should be applied more leniently to an applicant than they might be applied in an appellate court; but, all the same, the *Ladd v. Marshall* factors are clearly relevant because the application is an attempt to call new evidence after judgment. If those factors, even applied more leniently, are against the applicant, it is likely that powerful factors in the applicant's favour will be needed to justify the application."

20. On the facts Birss J concluded at [79] that the first factor was firmly against ZTE; the second factor was, at best for ZTE, evenly balanced; and the third factor was in ZTE's favour. The application was refused.

21. In my judgment it is right and proper that a due diligence requirement should be imposed in a financial remedy case where a *re L* application is made to revisit the judgment handed down on the basis of fresh evidence which was not placed before the court first time round. In two decisions of my own I have applied a due diligence requirement on set-aside applications, namely *GM v KZ (No 2)* [2018] EWFC 6, [2018] 2 FLR (where the application was to set aside an order for the return of children to this jurisdiction) and *Thum v Thum* [2019] EWFC 25 (where the application was to set aside a disclosure order).

22. To impose such a requirement is, in my judgment, consistent with, and gives effect to, the finality principle, which in the field of financial remedies is, in my judgment, of high importance. In *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5 at [114(ii)] Lewison LJ memorably stated: "The trial is not a dress rehearsal. It is the first and last night of the show." This maxim should apply strongly in a financial remedy case. They are disproportionately expensive and extraordinarily

stressful for the parties. To allow litigants to treat the trial as a dress rehearsal and to seek a further performance on the basis of new evidence which could, with due diligence, have been supplied first time round sends a terrible message to prospective litigants. The spectre of an appeal is bad enough, but at least that is the subject of the rigorous permission filter. The idea that there could be a re-run of the case at the suit of a disappointed litigant on the basis of evidence, yet to be obtained, but which could have been obtained, is appalling. Therefore, in my judgment there would need to be a very good reason before the value judgment was formed to allow a re-visitation of the judgment on this basis.

23. I now turn to the facts of this case.

24. The husband is 54, the wife is 47. They are both self-employed in the IT world and earn enough to support themselves. They married on 27 May 2011. The wife has a child from a previous relationship ("M"); he is now aged 12. He was treated as a child of the family. The marriage came to an end in October 2016 when the parties separated. The wife's claim for financial remedies was initiated in April 2018. Following an unsuccessful FDR on 1 November 2018 District Judge Gibson made a comprehensive directions order which included this provision:

> "Each party shall serve copy estate agents particulars of properties on which they wish to rely at the final hearing and that they consider to be suitable to meet their own and the child of the family's housing needs, and the housing needs of the other and the child of the family's, (limited to 5 of each) by 4 PM on 24 January 2019."

25. The final hearing was listed before Deputy District Judge Brenda Morris on 21 and 22 February 2019. The net assets were £908,000. In addition, the wife had a pension worth £66,000, giving an overall total of £974,000. The husband's open proposal was that the wife should receive net assets of £378,000. With her pension at £66,000 she would receive a total of £444,000, or 46% of the assets.

26. The wife's proposal, which was firmly based on her asserted need for housing, was that she should receive £600,000 from which she would pay her debts of £63,000, giving her net assets of £537,000. This sum, she asserted, was what was necessary to rehouse her and the child reasonably, she maintaining that she needed £525,000 for this purpose. In addition, she would retain her pension of £66,000, giving her overall funds of £603,000 or 66% of the assets. Her claim was certainly ambitious.

27. Each party had produced estate agents' particulars in accordance with the order of District Judge Gibson. The husband's particulars were for properties with asking prices of £325,000, £350,000, £365,000, £369,950, and £340,000. The wife's particulars of properties with asking prices of £595,000, £600,000, £600,000, £599,995, and £585,000. It can be seen that the gap between the top of the husband's particulars (£369,950) and the bottom of the wife's particulars (£585,000), was £215,050, although the judge stated this to be £205,000. Moreover, the wife had adduced no particulars supporting her target figure for housing of £525,000.

28. The case did not conclude within the two-day time estimate. Only the parties' evidence was concluded in that timespan; and the case was adjourned to 8 April for final submissions and judgment.

29. The judge was not impressed by the inadequacies of the evidence about housing need for the wife. In her judgment she said this:

> "15. In cross-examination the wife said that from the sum of £600,000, which she seeks, she will pay her debts of approximately £63,000 and buy a mortgage-free property in Crouch End. However, she accepted that she has not found any properties in Crouch end for approximately £525,000 which is the sum she would have left.
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> 16. I have been addressed extensively on the issue of the property particulars put forward by each party. The facts are that I have no property particulars in Crouch End for any property less than £575,000 and I have no properties in any area in the range from £370,000-£575,000, that is a range of £205,000. To say that this is less than helpful for the court is an understatement.
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> …
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> 30. I find that neither party has a mortgage capacity at this moment and I do not find that the wife will definitely have a mortgage capacity in two years' time. Although I understand the reason why the wife wants to remain in Crouch End, her own evidence shows that it is not possible to do so in the properties she has put forward for on her case, after paying her debts, she will be left with less than £530,000 with which to pay all the costs of rehousing. She accepted that she has not been able to find any properties in Crouch End for approximately £525,000 and the husband said that there would be no properties for approximately £500,000. They would be significantly more than that.
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> 31 The wife has not presented any properties in any area other than Crouch End and I find this to be unhelpful to me and an indication that the wife has not looked at the financial realities of rehousing
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> …
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> 33. The stark reality of this case is that the wife cannot be rehoused in her ideal property which is two bedroomed accommodation in Crouch End with a garden. She will have to look in areas outside Crouch End … The wife's other alternative is to look for much smaller properties in Crouch End, if they exist. …

> 34. I find that the wife's proposals do not produce a fair outcome and that the husband's proposals do not meet the needs of the wife and M. This is a short 5½ year marriage where the husband made greater financial contributions but where neither party has mortgage potential now. This is not a compensation case; but this is a case where both parties should be rehoused now in mortgage-free accommodation and on the information available to me I am satisfied that the wife and M can be rehoused, reasonably, with a housing fund of £410,000."

30. Accordingly, the judge awarded the wife £475,000. After she discharged her debts, she would be left with approximately £412,000. She would retain her pension of £66,000. Thus, her total funds would amount to £478,000, or 49% of the total assets.

31. While it is true that there were no particulars showing what kind of property £410,000 would buy it is equally true that there were no particulars showing what kind of property could be bought for £525,000, the wife's target figure. Where there were particulars establishing a clear, if patchy, spectrum, it is a fallacy to say that there was no evidence to show what could be purchased in the no man's land between the top of the husband's bracket and the bottom of the wife's. Obviously, a process of inferential judgment based on the available material properly led the judge to conclude that the wife could properly rehouse herself with a housing fund of £410,000 in, or not far from, the area in which she wished to live.

32. However, following judgment it appears that this case went off the rails.

33. I have a transcript running to 44 pages of the discussions following judgment. Initially, Ms Sharghy intimated that there would be an appeal and, in such circumstances, she wished to adhere to PD 30A para 4.6 by seeking clarification of the wife's housing needs in terms of area and cost. This led the judge to say (at page 2 of the transcript):

> "You can also make a note that in fact the £370,000 property which the husband before we meet the needs of the wife and M in terms of size of the accommodation, where it is to the school, where it is to the Academy but I have accepted what she said about each specific property and therefore doing the best I can I have awarded her a slightly larger figure so that she would be able to find something which is "better" than the husband has put forward."

34. As the exchanges continued the impromptu application made by Ms Sharghy segued into an application under *re L*. Thus, by page 11 of the transcript she was asking:

> "I do ask the court to consider a short adjournment for consideration of any property particulars in Crouch End that would meet the wife's proposal as they stand and for you to reconsider this needs argument and the disparity of the parties. That would be – that would assist you in making a safe and fair decision, it has huge consequences not just for my client but for M"

35. So, by page 18 of the transcript Ms Sharghy is recorded as saying, if the matter were to be adjourned for a few weeks:

> "You will have from each party five property particulars of available properties in Crouch End commensurate with either your proposed judgment figure of £410,000, or indeed in East Barnet, the husband wants to propose, and on the figures that the wife proposes of £525,000. Those would be the property figures the parties will have, then you will evidence as to both types of housing and determine which one is suitable and the reasons for that … it would be an update to your extempore judgment delivered this afternoon, it won't be a rehearsal of it, it would be the figures stated in your judgment today would be revised to X amount to the wife on the basis that the court having seen the evidence, this is the assessed needs, whether you confirm or change the figure depending on the evidence, that's what we propose, it is not necessary and there is not much the parties would say because all the arguments have been rehearsed in terms of location, logistics and fairness"

36. The exchanges went on for a further eight pages. Eventually the judge gave her second judgment, from which I quote this passage:

> "On balance I am just persuaded that I should allow the wife the opportunity to put before me evidence which should have been before me before now but that has to be on the basis that both parties are able to question the other party as to what they are saying and to make further submissions which will not only be about whether or not the wife can rehouse in Crouch End for a figure of less than £575,000 but also depending upon – if there is a lower figure for the housing in Crouch End, whether or not I were to accede to the wife's request for that sum of money, it would produce a fair outcome, because that is also what I have to look at. So the decision I make on this is that I am not going to seal the decision which I have made today and in fact will not say that that is now my final decision and I will allow further evidence, submissions on this matter which I agree with Mr Richardson has really been the crux of the matter for a very long period of time, but sympathetic as I am to the husband and I well understand what we now think is ostensibly more than frustration apart from anything else, I do have an overwhelming duty to do justice and in this case that means looking at this wife, this husband and this child"

37. And so, the judge made her decision which is recorded in the terms of her order which I have set out above.

38. I have to say, with all due respect, that the judge's decision was not based on the correct legal principles as set out above and, inasmuch as it was an exercise of "discretion", was plainly wrong. There was no good reason shown why the judge should depart from the terms of her judgment. There was no reference to the principle

of finality. There was no reference to the concept of due diligence. It was merely another example of counsel on behalf of a disappointed litigant seeking spuriously to try to get the judge to change her mind immediately after judgment has been delivered, to which the judge should not have succumbed. This syndrome is seemingly ineradicable. Francis Bacon condemned it long ago (*Essayes or Counsels, Civill and Morall: Of Judicature,* 1625) where he wrote in the 56th of the 58 essays: "let not counsel at the bar… wind himself into the handling of the cause anew after the judge hath declared his sentence". In *Re C (A Child)* [2014] 2 FLR1327 Aikens LJ at [36] condemned as "quite unjustified and inappropriate" an attempt by counsel to get the judge to change his judgment and order after he had delivered his judgment.

39. Therefore, I grant permission to appeal and allow the appeal. The order of 8 April 2019 will be set aside. I direct that Deputy District Judge Brenda Morris do now make an order that incorporates and reflects the terms of her original judgment. Although the 21 day time limit for the wife to appeal strictly speaking began upon the delivery of the original judgment on 8 April 2019 (see FPR 30.4(2)(b)), it would, in my judgment, be unjust to treat the wife as being out of time in circumstances where the judge plainly did not intend her original judgment to be treated as final and never incorporated it into an order. Therefore, the 21-day appeal period will commence on the date that this judgment of mine is handed down, 27 September 2019. In fairness, Mr Richardson on behalf of the husband did not seek to argue otherwise.

40. That concludes this judgment.
