Neutral Citation Number: [2018] EWHC 3692 (Fam)

Case No: 2017/0167

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM HHJ O'DWYER (BV16D06235)
SITTING AT THE CENTRAL FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2018

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

H	**Appellant**
- and -	
T	**Respondent**

- -
- -

Ms Jane Campbell (instructed on a direct access basis) for the **Appellant**
Ms Amy Kisser (instructed by **Keystone Law**) for the **Respondent**

Hearing dates: 8 March 2018 and 17 May 2018

- -

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 MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter I am concerned with an appeal against an order of His Honour Judge O'Dwyer, dated 10 October 2017 and made following two judgments handed down on 24 May 2017 and 29 August 2017 at the conclusion of financial remedy proceedings.

2. The appellant is H, who I shall hereafter refer to as 'the husband' for the sake of clarity. The respondent is T who, again for the sake of clarity, I shall hereafter refer to as 'the wife'.

3. The Appellant's Notice, and accompanying Grounds of Appeal, were issued on 29 October 2017. On 18 December 2017, Roberts J gave the husband permission to appeal limited to his first ground of appeal. That ground of appeal is expressed as follows:

> "The learned Judge was wrong when he failed to make adequate capital provision for the husband when he awarded the wife at least 68% of the capital assets in circumstances where (1) the wife could re-house at a level the learned Judge found was appropriate without making any, or any significant, departure from equality; and/or (2) the husband was also ordered to pay considerable child maintenance and school fees."

4. In determining this appeal, I have had the benefit of reading the appeal bundle and comprehensive Skeleton Arguments from Ms Jane Campbell of counsel on behalf of the appellant husband and Ms Amy Kisser of counsel on behalf of the respondent wife. In addition, both counsel enlarged their respective arguments by way of oral submissions.

5. It is important to note at the outset that, following the circulation of my draft judgment to counsel and solicitors, but *before* that judgment had been handed down, Ms Kisser invited the court to reconsider the conclusions expressed in that draft judgment given what she contended was a significant material omission in the figures that underpinned those conclusions. In light of the contents of Ms Kisser's further representations, I acceded to her request that I reconsider the decision articulated in the draft judgment, namely allowing the husband's appeal to the extent of varying the lump sum order made by the learned Judge. In consequence, I invited further written submissions from Ms Campbell in response to Ms Kisser's invitation, and written submissions from Ms Kisser in reply. Given the potential impact on the conclusions set out in my draft judgment of Ms Kisser making good her contention that there was significant omission in the figures underpinning those conclusions, I also made provision for a further short hearing should either party wish to supplement their respective written submissions. The parties took advantage of that listing.

THE BACKGROUND AND JUDGMENT

6. The husband is 48 years old. The wife is 43 years old. The parties married on 6 July 2002 following a period of co-habitation that commenced at some point in 1999. They separated in September 2015. Accordingly, this marriage lasted some 16 years.

The divorce petition was issued on 26 February 2016 and Decree Nisi was pronounced on 2 August 2016. Decree Absolute was made on 20 September 2016. The wife issued her application for financial remedy on 4 May 2016. On 24 May 2017, following a two-day final hearing the learned Judge gave his judgment, from which judgment the following matters of background and conclusions relevant to this appeal can be extracted.

7. The parties have three children, aged 13, 10 and 6. The children share their time more or less equally between the parents, pursuant to an order made in proceedings under the Children Act 1989. The learned Judge considered that there was no reason, in respect of the children, to distinguish between the respective care responsibilities of the parents. This conclusion later featured prominently in his assessment of the parties' respective housing needs. At the conclusion of the final hearing the learned Judge was informed that the CMS had confirmed the maximum assessment of £11,930.88 per annum. The children are all educated privately and the learned Judge found that, given the disparity of income as between the husband and wife, there was no reason why the school fees of approximately £66,000 per year should not be paid by the husband, as should the costs of the nanny of £42,300 per annum. In addition, the learned Judge made a top-up maintenance order of £24,000 per annum. These figures that are to be borne by the husband have featured prominently in the husband's argument that the judge was wrong in this case to depart from equality to the extent that he did in this case.

8. As to the position in respect of income, both parties are solicitors. The husband is an equity partner with a large US law firm. The wife is an in-house lawyer at managing director level with a large investment Bank.

9. As at the final hearing, the learned Judge found that husband had net earnings of £605,000 per annum, consisting of monthly drawings, profit shares paid five times per annum and interest on his capital account. The husband contended that his partnership status would change on or around his 55th birthday and that, thereafter, his income would not be as high. This contention was grounded in the husband's evidence that partners at his US law firm do not generally continue to work for that firm after the age of 55, that there are only three partners at the London office aged 55 or over and that, once retired from his US law firm, the husband will have a 'run off' period where his earnings will be significantly reduced. The learned judge proceeded on the basis that, going forward, the husband would have available to him a minimum income figure of £605,000 per annum net.

10. The learned Judge found that the wife had net earnings of £171,000 per annum, comprising a basic income and performance cash bonuses and deferred restricted stock unit bonuses. Ms Kisser tells this court that the husband contended at the final hearing that the wife's restricted stock units that had not yet vested should be treated as income rather than capital, which contention the learned Judge accepted. Whilst, ultimately Ms Campbell did not demur strongly in respect of that assertion at the appeal hearing, in her additional written submissions Ms Campbell sought to argue that the restricted stock units were a resource available to the wife over the timescale in which it was envisaged she would be buying a new home. It is however clear, as Ms Campbell acknowledges in her additional written submissions, that counsel for the husband at the final hearing indeed conceded that the unvested restricted stock units should be treated as future income rather than capital. The learned Judge found that

the wife's income would not drop below the figure of £171,000 per annum net moving forward. Whilst in her additional written submissions Ms Campbell appeared suggest that this court should treat the wife's income as some £200,000 per annum net, this court proceeds on the basis of the learned Judge's findings as to income, Ms Campbell having indicated to Roberts J at the permission stage that she did not seek to go behind those findings. The learned Judge expressed himself to have taken a minimum income figure for both parties "because this is a needs case and I am anxious to secure that any arrangement I come to is a robust resolution."

11. At the commencement of the final hearing, the learned Judge had the benefit of an agreed Schedule of Assets, which agreed Schedule is contained in the appeal bundle. From that agreed Schedule can be derived the following summary of the matrimonial assets, as so characterised at the commencement of the hearing, bearing in mind, once again, that the husband contended during the course of the final hearing that the wife's unvested restricted stock units of £80,600 should be treated as income rather than capital and the learned Judge accepted that contention:

Asset	Wife	Husband	Total
FMH	714,469	7,217	721,686
Foreign Property A	133,429	1,348	134,777
Foreign Property B	0	64,964	64,964
Accounts	59,432	29,008	88,440
Money Owed	0	63,238	63,238
Liabilities	(144,773)	(209,177)	(353,950)
Business Assets	80,600	(71,102)	9,498
Pensions	616,546	495,536	1,112,082
TOTAL ASSETS	**1,459,703**	**381,031**	**1,840,734**

12. I pause to note that, as against this asset figure, by the time this matter reached final hearing these highly litigious parties had managed to accrue some £550,000 in legal costs, *excluding* the cost of proceedings under the Children Act 1989 and the husband's application for an order permitting him to buy the wife out of the former matrimonial home, which application I shall come to later.

13. Whilst I observed during the course of the hearing that, in circumstances where both parties are adults, there is an argument that it is a matter for them if they wish to inflict on themselves such grievous financial self-harm, the ratio of capital to legal costs in this case is alarming and strongly to be deprecated. It is further clear from the papers that these two adults continue to bicker and squabble over aspects of their financial arrangements and arrangements in respect of their children. I hope that it is not lost on either party that the alarming amounts of money that they have now spent on their ongoing internecine financial warfare is money that will not now be available for the comfort and security of themselves or their three precious children.

14. Within the context of the contents of the agreed Schedule of Assets provided to the court at the final hearing, the learned Judge set out in his judgment the following conclusions in respect of the matrimonial assets.

15. With respect to the former matrimonial home, the learned Judge noted that, in circumstances where that property had attributed to it a value of £1.512M, with a current mortgage of £730,823, a potential penalty clause for early redemption of £14,616 and sales costs estimated at £45,375 on the basis of 3%, an equal division of the equity in the former matrimonial home would entitle each party to £360,483.

16. With respect to Foreign Property A, the learned Judge noted that the property had an agreed value attributed to it of £240,000 and, with a mortgage of £98,000 and costs of sale of £7,000, a net equity of £134,000. Whilst this property was held under a deed of trust, given the concession by both parties that the property was a matrimonial asset, the learned Judge noted that Foreign Property A fell to be divided equally, subject to need.

17. Foreign Property A was at the centre of the argument between the parties at the final hearing and it has continued to be so during the arguments on appeal. The learned Judge notes in his judgment that the wife wished to retain this property, arguing that retaining the Foreign Property A was important to ensure that her strong connection with the country in which that property is situated, and the connection of the children to that country, was maintained. In contradistinction to this position, the learned Judge also noted that, in circumstances where the evidence before the court suggested that the wife would have a greater mortgage capacity in this jurisdiction were Foreign Property A to be sold, the husband had argued that the sale of Foreign Property A should be ordered and the proceeds divided equally between the parties.

18. With respect to Foreign Property B, the learned Judge noted that the value of the property was £230,000 and that, with a mortgage of £133,507 and sale costs of £6,900 and a potential capital gains tax liability of £24,697, the net equity would be £64,964. There was a dispute between the parties as to whether the property constituted a matrimonial asset. The learned Judge noted that the property was held in the sole name of the husband, that the husband acquired it prior to the parties' relationship commencing, that it was a property in which the husband's mother had resided for some 16 or 17 years and that there was no intention that the property be sold. Within this context, the learned Judge concluded that, whilst on a sharing basis there was a case for treating only, say, 25% of the value of the property as a matrimonial asset, in circumstances where the case was "*overwhelmingly one of need*", it was not necessary to undertake a detailed analysis of the extent to which Foreign Property B should be regarded as a matrimonial asset or not.

19. The learned Judge then went on to state his conclusions in respect of the husband's equity partnership with his US law firm as follows, including dealing with certain partnership loans given on advantageous terms with respect to tax relief. Within this context, the learned Judge noted that "I accept entirely that the situation in respect of [the husband's] capital interest and loan is not one that in current liquidity troubles the court. It is noted, but that is part of his engagement with his company currently." The learned Judge further noted that the husband was in the process of drawing down further funds from his partnership loan facility in the sum of £88,000 to enable him to repay some of his immediate liabilities.

20. Finally, with respect to the parties' pension provision, the learned judge noted that the husband had a pension fund with a capital value of £495,536 and the wife had a pension fund with a capital value of £616,546.

21. Ms Kisser submitted that, within the foregoing context, by the conclusion of the evidence the position with respect to the agreed Schedule of Assets had altered by reason not only of, as I have noted, the husband submitting that the wife's unvested restricted stock units be considered as income, which contention the learned Judge accepted, but also because the husband was in the process of drawing down further funds from his partnership loan facility in the sum of some £88,000 to enable him to repay some of his immediate liabilities. In the circumstances, Ms Kisser submitted that the assets that fell to be dealt with by way of a disposition were as follows, at the conclusion of the evidence, a position which, at the substantive appeal hearing, Ms Campbell did not, ultimately, seek to demur:

Asset	Wife	Husband	Total
FMH	714,469	7,217	721,686
Foreign Property A	133,429	1,348	134,777
Foreign Property B	0	64,964	64,964
Accounts	59,432	29,008	88,440
Money Owed	0	63,238	63,238
Liabilities	(144,773)	(209,177)	(353,950)
Loan Drawdown	0	88,256	88,256
Business Assets	0	(159,358)	(159,358)
Pensions	616,546	495,536	1,112,082
TOTAL ASSETS	**1,379,103**	**381,031**	**1,760,134**

22. Within this context, and having reached his conclusions as to the position in respect of the care of the children, the parties' respective incomes, the matrimonial assets and the parties' respective pension provision, the learned Judge considered the parties' respective needs. The learned Judge's primary finding in this regard was that, in circumstances where both parties would each retain obligations for caring for the children, both parties had a need for sufficient monies to produce a deposit on, and to enable them to afford a mortgage in respect of a property with a purchase price of £1.25M. Within this context, the learned Judge stated his primary conclusion in respect of need as "Both [the husband] and [the wife] require sufficient monies to produce deposits on properties to enable them to afford a mortgage." In his judgment, the learned Judge does not deal expressly with purchase costs. I will return to this issue in more detail shortly, forming as it does the basis of Ms Kisser's submission that there was significant omission in the figures underpinning the draft judgment circulated to the parties.

23. With regard to the parties' respective mortgage capacities, the learned Judge recorded that the evidence indicated that the wife had a mortgage capacity of some £770,000 if she retained Foreign Property A and some £1M if she sold that property, noting however, that the wife in evidence contended she could in fact raise a mortgage of £850,000 whilst retaining Foreign Property A. The learned Judge also recorded the wife's evidence that she would be able to raise a mortgage of £100,000 against Foreign Property A, given the greater flexibility and lower interest rates for mortgages in that jurisdiction. With respect to the husband's mortgage capacity, the judgment suggests that the evidence before the court was that the husband could raise a mortgage of £1M.

24. Having determined that "the case really comes down to one of liquidity at this point", and that the parties "have proportionately more by way of income and less by way of capital than one would have hoped for", in the foregoing circumstances the learned Judge expressed himself as favouring a "capital distribution *slightly* in favour of [the wife]" (emphasis added). With respect to the reasoning underpinning his decision as to the distribution of capital, and with respect to the wife, the learned Judge began as follows:

> "[26] Looking, therefore, at the capital situation whilst looking at the parties' liabilities as to costs, looking at [the wife's] capital position first, she would receive £360,000 on a 50/50 distribution for the former matrimonial home. She has £59,434 available to her from bank accounts, but she has debts of £144,773 on a net basis. Therefore, she would have only available to her some £275,000 upon the sale of the house and the payment off of all her debts. However, in terms of liquidity there is some amelioration. There has been much dispute about what should happen to [Foreign Property A]. It is sought on behalf of [the husband] that that property should be sold, that the proceeds divided equally between himself and [the wife] and the liabilities under that should not impinge on [the wife's] mortgageability. The mortgage experts that I have seen say that her mortgage potential was only some £770,000-odd if she retained [Foreign Property A], but if it was to be sold she might have a potential of over £1 million.
>
> [27] [The wife] anxiously seeks to preserve [Foreign Property A]. She says in evidence, and I have no reason to doubt her evidence as it is given by a solicitor on oath in this court, that she can raise another £100,000 from [Foreign Property A] that can go to meet the payment down of some of her debts. She tells me that the mortgage facilities in [the country in question] are more flexible, they can be achieved at a low rate and she would hope to be able to discharge the bulk of her outstanding legal debts from them. If that is the case and she was able to raise another £100,000 from that property, she would have liquid capital available to her of £375,000."

25. Accordingly, the learned Judge determined that the wife should receive half of the net proceeds of the former matrimonial home in the sum of £360,000 and should retain the contents of her bank accounts in the sum of £59,434. As can be seen, the learned Judge then noted that, having regard to her debts of £144,773, this would still leave the wife with only £275,000 after the sale of the former matrimonial home and "the payment off of all her debts", this being an insufficient deposit to purchase a property for £1.25M having regard to her mortgage capacity. Within this context, the learned Judge thereafter concluded that there "in terms of liquidity, there is some amelioration" in the form of Foreign Property A, which the learned Judge accepted could be used to raise an additional £100,000. Further, and within this context, the learned Judge observed that this would allow the wife to get to almost £375,000 by way of a deposit on a new home, after the payment of her debts.

26. In these circumstances, the learned Judge concluded that the wife's case that she should keep Foreign Property A was consonant both with her identified need (in that it would allow her to raise £100,000 by way of mortgage or sale towards the required deposit on a new home worth £1.25M) and with the learned Judge's view that fairness

demanded she should have some additional capital, the learned Judge expressly recognising in his Judgment that the distribution he proposed would leave the wife with an additional £34,770 of equity in Foreign Property A. He stated his conclusions in this regard as follows:

> "[28] I have considered carefully the dispute in relation to [Foreign Property A]. I have come to the conclusion, on the basis of need, and on the basis of the fairness between the parties, that the need for [the wife] to have some additional capital and for her to retain the property are consonant. It provides a capital resource for her if she is able to manage the financial situation to retain it, then that will be all well and good. Thus, looking at the wife's situation, and including the £100,000 immediate liquidity from [Foreign Property A], she would have that total I have identified, £375,000, to go towards the purchase of a property. She has told me she would be able to raise a mortgage of £850,000, even returning (*sic*) the [Foreign Property A], and with the costs of some £4,000 per month. Thus, the monies available to her would be a total of £1.225M."

27. As can be seen, the learned Judge's conclusions once again factored in the wife's ability to raise £100,000 from Foreign Property A when determining that the wife would, on his calculations thus far, have available to her almost £1.225M against a need of £1.25M.

28. Within this context, the learned Judge concluded his analysis by determining that the husband should pay to the wife a lump sum of £65,000. He explained his reasons for making a lump sum order as follows at [29], following his conclusion that the wife's case that she should keep Foreign Property A was consonant both with her identified needs and with the learned Judge's view that fairness demanded she should have some additional capital:

> "[29] I note, however, that she will retain, in addition, in [Foreign Property A], an additional £34,770. I also note that she has told me that there is flexibility in the payment down of the credit cards so in terms of managing her finances she would seem to have sufficient to obtain what she would need to obtain in a housing fund of £1.225 million and is short in liquid funds of £101,000. It is my intention that there should be a limited lump sum payment by the husband to the wife upon the sale of the former matrimonial home of a further sum of £65,000. It is entirely a matter for [the wife] thereafter as to whether she seeks to retain [Foreign Property A] or sell it. Her additional monies are made up of that £65,000, plus the £34,770 in [Foreign Property A] that she retains. I have no doubt, in fact, that she is likely to increase her mortgage to enable her to maintain [Foreign Property A], but identify that as a question of her choice rather than being identified as a need."

29. In the draft judgment, I at this stage raised a concern that the learned Judge's arithmetical reasoning for making an additional lump sum order in the sum of £65,000 was not altogether clear. The learned Judge concluded that the wife had sufficient funds, including £100,000 raised from Foreign Property A, to obtain a housing fund of £1.225M. The learned Judge thereafter concluded that the wife "is short in liquid funds of £101,000" and stated his intention to make a lump sum order against the

husband in the sum of £65,000. However, on the basis of the learned Judge's calculations up to that point, which calculations included £100,000 from Foreign Property A, and having regard to her identified need for a property worth £1.25M, the wife appeared short of liquid funds by some £25,339 with respect to her housing need. On this basis, I concluded in the draft judgment that the learned Judge's lump sum order resulted in an award that exceeded the wife's identified housing need.

30. Having circulated the draft judgment to the parties, Ms Kisser invited me to reconsider this conclusion in light of the fact that she submits that it did not factor in a figure for purchase costs of some £76,000 and, therefore, that the learned Judge's reasoning, in fact, produced a figure exactly matching the housing *fund* required arising out of the wife's housing need.

31. As I have noted, the learned Judge does not deal anywhere in his judgment with purchase costs, whether of £76,000 or otherwise. In the circumstances, it is not clear on the face of the judgment that these costs formed part of the learned Judge's calculations. However, Ms Kisser relies on the following points to demonstrate that in reaching the figures he did, and in particular in deciding to make a lump sum order in the sum of £65,000, the learned judge factored in sale costs of some £76,000:

    i) The contents of the transcript of the hearing on 24 May 2017, in which Ms Kisser is seen to indicate to the learned Judge that the stamp duty on a property worth £1.25M is £68,750 and that assumed sale costs of 0.5% amount to £6,250.

    ii) The arithmetic set out in the learned Judge's judgment of 24 May 2017;

    iii) The contents of the transcript of the hearing on 29 August 2017, during which Ms Kisser is seen to refer on a number of occasions to costs of purchase of £76,000

32. Within this context, in her additional written submissions Ms Kisser submits that, whilst the figure for purchase costs does not appear expressly in the learned Judge's judgment, it was, in fact, factored into the learned Judge's calculations in the following way:

NEEDS	
Property Purchase Price	1,250,000
Stamp Duty	68,750
Purchase Costs (at 0.5%)	6,250
Mortgage Valuation	1,000
TOTAL NEED	**1,326,000**
CAPITAL	
50% of FMH	360,000
Bank Accounts	59,434
Liabilities	(144,733)
Re-mortgage of Foreign Property A	100,000
Mortgage	850,000
TOTAL CAPITAL	**1,225,000**

TOTAL SHORTFALL	**101,000**
To be met by:	
Remaining Equity in Foreign Property A	34,770
Lump Sum order	65,000
TOTAL	**99,770**

33. On this basis, as I have observed, Ms Kisser contended that the learned Judge's award provided for the wife's identified housing need exactly. In her additional written submissions made in response to Ms Kisser's request that the court reconsider its conclusions in light of the above, Ms Campbell was equivocal as to whether the husband accepted that the learned Judge factored purchase costs of £76,000 into his judgment. Ms Campbell made the point that it is not possible from the judgment to see that the learned Judge had explicitly in mind purchase costs when reaching his conclusions regarding the appropriate division of assets, Ms Campbell noting that the figures in the judgment do not add up precisely to reveal the purchase costs figure, and that it is necessary to look to the transcripts and the learned Judge's August judgment to see explicitly the learned Judge's treatment of such costs. However, at the further short hearing listed by the court to permit the parties to make any supplementary oral submissions they wished, Ms Campbell conceded that the learned Judge's judgment did indeed factor in purchase costs of some £76,000.

34. Within this context, although the learned Judge's judgment is opaque with respect to the question of purchase costs, it is clear from examining the wider material to which Ms Kisser has drawn the court's attention that they formed part of the learned Judge's calculations. That conclusion is reinforced by the fact that, whilst the figures in judgment for the residual equity in Foreign Property A of £34,770, and the lump sum of £65,000 mentioned in Paragraph 29 of the judgment, do not add up precisely to the shortfall of £101,000 identified by the learned Judge in that paragraph, the shortfall figure identified by the learned Judge does bring the capital award to the wife to £1.326M, and thus matches the figure needed to purchase a property worth £1.25M with purchase costs of £76,000. Within this context, I am satisfied that in reaching my original conclusion that the capital award made by the learned Judge to the wife exceeded the wife's need, I omitted to factor in the purchase costs.

35. Against the outcome for the wife, the learned Judge determined that the husband should retain half the proceeds of the former matrimonial home in the sum of £360,000, his bank accounts of £29,008 and his monies owed of £63,238. Whilst he does not mention it specifically, it is implicit in the decision that the husband would also retain Foreign Property B. Within this context, the learned Judge determined that, after the discharge of debts, this outcome would leave him with capital of £243,000, which he could supplement with the further partnership loan of £88,000 to bring him to a capital position of £331,000, enabling the husband also to put down a deposit on a property worth £1.25M on the basis of evidence that the husband could raise a mortgage of £1M. Whilst the learned Judge noted that the sum of £331,000 would be immediately reduced by the lump sum payment to the wife of £65,000, as set out in the passage of his judgment that I recite at Paragraph 33 below, the learned Judge considered that this was an outcome justified by the wife's need, and in circumstances where the husband could make up that deficit from his superior earnings by the time his then current tenancy ended and, thus, by the time he came to put down the required deposit against a property valued at £1.25M.

36. It is apparent from the final paragraph of the judgment that, in circumstances where the parties had agreed an equal division of the pensions, the learned Judge did not consider it necessary to make any further adjustments by reason of the parties' respective pension provision. Accordingly, there was a pension sharing order in the husband's favour to achieve equality of capital value.

37. The learned Judge's reasoning for reaching his decision as to the distribution of the matrimonial assets as described in the foregoing paragraphs does not emerge with crystal clarity from the judgment. Indeed, having described his decision and the effect of it, the learned Judge moved, without more, to consider the question of periodical payments. In the circumstances, whilst of course allowing for the exigencies of *ex tempore* judgments, there are two particular issues with the judgment.

38. First, given the paucity of reasoning in the judgment, it remains unclear from the judgment what, precisely, the learned Judge's justification was for preferring, as the learned Judge described it, a "capital distribution slightly in favour of [the wife]". I do note that at paragraph [28] of his judgment, the learned judge states that the wife needed additional capital to meet need and "on the basis of fairness". Further, immediately after noting that the lump sum payment of £65,000 to the wife would reduce the capital available to the husband by that amount, the learned Judge went on to state as follows:

> "However, the disparity between [the husband's] income and the wife's income is something I could not ignore. Looking at [the husband's] net income and using the figures that I have identified of £605,000 per year, identifying that he will have paid school fees, including the reasonable extras and the school clubs and the nanny, so that there is some £110,000-odd coming out with some additional expenses to meet each parent's need and the £24,000 a year, I have no doubt that he has ability to make up by way of capital result the deficit to enable him to put down the deposit he requires to do against the purchase of a £1.25 million property before the end of March next year. By that means he will be in a position at the end of his current tenancy, which is in salubrious accommodation in the appropriate area, to be able to purchase for himself, if he so chooses, a property at £1.25 (*sic*) or, indeed, such other property as he wishes to. He will have a large and substantially unfettered income in order to do so."

39. Finally, in the short judgment delivered on 29 August 2017, in response to the application by the husband for an order permitting him to buy the wife out of her share of the former matrimonial home, the learned Judge also made the following observations:

> "[11] ... I was concerned that [the wife] should have, by provision, greater than one half of the net assets of the family sufficient to enable her to house herself ..."
>
> [12] Looking at the final financial situation then, I am satisfied that the order that I made was an appropriate order. Taking account of [the husband's] ability to purchase, I identified that if he wished to make such proposals, they could be listened to. I have listened to them. I am satisfied that they represent, in terms of the sums to be paid to [the wife], the sums

> that were appropriately paid out for the settlement. They still leave [the husband] in deficit in terms of a fifty/fifty split. I am quite satisfied that was an appropriate method to arrive at in the judgment in May and that it remains fair at this point given [the wife's] additional needs and the much greater income of [the husband] over [the wife] going forward."

40. I pause at this point to note also the learned Judge's judgment of 29 August 2017 also sets out the basis for his treatment of the loan due to the husband from his sister as follows:

> "I should say this, in terms of the judgment that I gave, Mr Collins [counsel for the husband in the court below] was critical that I had included in [the husband's] account sums owed by his sister to him. Those were included in the schedule. I have no reason not to include them and I am satisfied that it was appropriate to do as a potential source. Given [the husband's] income, those matters can be adequately covered from outgoing income surplus going forward."

41. In the circumstances, it would appear that the learned Judge's reasoning for preferring an overall capital distribution that he characterised as being slightly in favour of the wife was based on (a) the extent of the wife's housing need and (b) the disparity in income between the husband and the wife. However, and as noted by Roberts J during the permission hearing, it remains difficult to identify with further specificity, the factors and the reasoning underpinning the learned Judge's conclusion that a departure from equality to the extent endorsed by the learned Judge was appropriate in this case.

42. Second, and in any event, at no point in his judgment does the learned Judge step back and evaluate the overall effect of his analysis in terms of the percentage distribution of the matrimonial assets, in order to satisfy himself, and to demonstrate, that his decision did in fact represent his stated intention of making a "capital distribution *slightly* in favour of [the wife]". Whilst it is very important to bear in mind that this was plainly a case of need, the learned Judge does not consider expressly the relationship between the disposition he had settled on and the principle of equality.

43. At the conclusion of the judgment, the husband applied for permission to appeal the capital disposition, which permission the learned Judge refused. Immediately following the handing down of judgment, the husband also made a further application for an order permitting him to buy the wife out of her share of the former matrimonial home. By a "Supplemental Note" dated 25 May 2017, counsel then acting on behalf of the husband made clear that the husband did not seek to challenge or re-evaluate the learned Judge's conclusions in respect of need, but rather to set up a more efficient means of achieving parity of property provision as between the parties.

44. As I have noted, the husband's application was heard by the learned Judge on 29 August 2017. The wife conceded the husband's application for transfer of the former matrimonial home but sought an increased lump sum payment to reflect the savings that the husband would make through not incurring stamp duty and purchase costs on a new property and / or not incurring sales costs on the former matrimonial home. The learned Judge rejected the wife's arguments in this regard and granted the husband's application for an order permitting him to buy the wife out of her share of the former

matrimonial home upon payment to her of a lump sum of £425,843 (this being half of the net proceeds of the former matrimonial home in the sum of some £360,000 plus the lump sum payment of £65,000).

45. Within this context, on 10 October 2017 the learned Judge approved a final order giving effect to his decisions of 24 May and 29 August 2017 as I have set out above.

46. Notwithstanding that the husband had applied for, and succeeded in securing, an order to buy the wife out of her share of the former matrimonial home upon payment to her of a lump sum of £425,843, which application was made expressly on the basis that the husband did not seek to challenge the learned Judge's determination of need, but rather sought to set up a more efficient means of achieving parity of property provision as between the parties, upon the final order being perfected, the husband issued his Appellant's Notice on 29 October 2017. Upon this court enquiring of Ms Campbell why the husband had sought to appeal at *that* stage, having applied in May 2017 to implement the decision of the learned Judge by alternate means and having been successful in this aim, Ms Campbell submitted that the husband had been engaged in a "staged" attack on the learned Judge's decision, the first stage of which was the application for permission to buy the wife out of the former matrimonial home.

47. Whilst the husband's grounds of appeal dealt with both capital and periodical payments, on 18 December 2017, as I have noted, Roberts J gave permission to appeal in relation to the first ground of appeal only relating to the capital disposition. Thus, this Court is concerned with only the following ground of appeal:

> "The learned Judge was wrong when he failed to make adequate capital provision for the husband when he awarded the wife at least 68% of the capital assets in circumstances where (1) the wife could re-house at a level the learned Judge found was appropriate without making any, or any significant, departure from equality; and/or (2) the husband was also ordered to pay considerable child maintenance and school fees."

48. Within the foregoing context, the issues on this appeal can, accordingly, be neatly defined as (a) what was the division of the parties' matrimonial assets arrived at by His Honour Judge O'Dwyer and (b) was the departure from equality represented by the learned Judge's division of those matrimonial assets wrong in the circumstances of this particular case?

SUBMISSIONS

The Husband

49. On behalf of the husband, Ms Campbell conceded in her skeleton argument that, in circumstances where one party is a considerably higher earner than the other, it was open to the learned Judge to make a "modest" departure from equality, noting that the learned Judge himself described the departure from equality he arrived at as "slight". Ms Campbell submits however that the magnitude of the departure from equality arrived at by the learned Judge was simply wrong in circumstances where the wife could re-house at a level the learned Judge found was appropriate without making any, or any significant, departure from equality and having regard to the level of

burden placed on the husband by the court in respect of child maintenance and school fees.

50. The figures in Ms Campbell's Skeleton Argument were somewhat difficult to follow and, it transpired, contained certain errors. However, in a set of Schedules prepared for the substantive appeal hearing, Ms Campbell submitted that the proper analysis of the capital division arrived at by the learned Judge shows that the capital division he ordered in fact amounted to 76% to the wife and, in these circumstances, departed excessively from equality, leaving the wife with more than was necessary to meet her housing need as identified by the learned Judge. Ms Campbell also emphasised the existence of what she termed a surplus to the wife in her additional submissions. It is of note that the figure of 76% is significantly higher than the figure of "at least 68%" contended for in the first ground of appeal. Ms Campbell arrives at the figure of 76% as follows:

Asset	Wife	Husband	Total
FMH	425,843	295,843	721,686
Foreign Property A	134,777	0	134,777
Foreign Property B	0	64,964	64,964
Accounts	59,432	29,008	88,440
Monies Owed	0	63,238	63,238
Liabilities	(144,773)	(209,177)	(353,950)
Business Assets	80,600	(71,102)	9,498
Total	**555,879**	**172,774**	**728,653**
NET EFFECT	**76%**	**24%**	**100%**

51. These figures *include* the wife's deferred restricted stock unit bonuses and *exclude* the husband's partnership loan drawdown. If the wife's deferred restricted stock unit bonuses are excluded and the husband's partnership loan drawdown is included, as contended for by Ms Kisser on behalf of the wife on the basis of the final position arrived at before the learned Judge at the conclusion of the evidence, Ms Campbell seeks to demonstrate by way of her revised Schedules that the division was 73% to the wife:

Asset	Wife	Husband	Total
FMH	425,843	295,843	721,686
Foreign Property A	134,777	0	134,777
Foreign Property B	0	64,964	64,964
Accounts	59,432	29,008	88,440
Monies Owed	0	63,238	63,238
Liabilities	(144,773)	(209,177)	(353,950)
Loan Drawdown	0	88,256	88,256
Business Assets	0	(159,358)	(159,358)
Total	**475,279**	**172,779**	**648,058**
NET EFFECT	**73%**	**27%**	**100%**

52. It will be noted that Ms Campbell's figures exclude the parties' pension provision. With respect to the wife's figures for the capital division ordered by the learned

Judge, Ms Campbell submits that the wife arrives at her very different figures by (a) excluding the liability of £159,538 from the calculation with respect to the division of the liquid assets and (b) including the parties' respective pension provision in the overall division calculation. This approach, Ms Campbell submits, is unprincipled in circumstances where (a) the wife's calculation for the division of the liquid assets includes the partnership loan drawdown of some £88,000, which drawdown results in the increased liability of £159,358 and (b) the pension provision is an illiquid asset of a different character and, therefore, in a different category from the other capital assets. At the further short hearing to deal with Ms Kisser's request that the court reconsider its conclusions in the circumstances I have described, Ms Campbell made clear that she was not seeking to suggest that the pension assets do not fall to be considered where determining the division arrived at by the learned Judge. I will address this point in further detail below.

53. Ms Campbell submits that, in any event, even if one takes Ms Kisser's overall figure for capital division to the wife, on the facts of this case the division arrived at by the learned Judge departed excessively from equality in circumstances where the wife could re-house at a level the learned Judge found was appropriate without making any, or any significant, departure from equality and having regard to the level of burden placed on the husband by the court in respect of child maintenance and school fees.

54. Within this context, and the context of the learned Judge's reasoning for the capital division he arrived at being unclear, Ms Campbell attacked that capital division on two particular bases.

55. First, Ms Campbell submitted that, in so far as the justification for the division was the disparity in the parties' earning capacity, that division failed to reflect the fact that, pursuant to the learned Judge's order, the husband was left with considerable child maintenance obligations and responsibility for all school fees and certain other expenses, whereas, by contrast, the wife's contribution to the children's maintenance is limited to day to day expenses save for the costs of tuition and speech therapy. Within this context, Ms Campbell submits that the learned Judge failed to take proper account of the fact that the wife's income remained largely unimpeded and that the husband was, in effect, underwriting the costs that the wife incurred in supporting her own career or, to put it another way, providing her with a significant indemnity in relation to the costs of generating her own income. Ms Campbell further pointed to the evidence that the husband's high earning capacity is time limited, in contrast to the position of the wife, and to the husband's contention (not made at first instance) that the wife's earning capacity would increase over time. Ms Campbell also relied on the fact that a portion of the husband's capital, namely Foreign Property B, is illiquid in character. In her additional written and oral submissions for the further short hearing, Ms Campbell re-emphasised these points, submitting that the husband is required to underwrite completely the wife's earning capacity in circumstances where the husband's own high earning capacity is strictly time limited and pointing to a number of additional items of expenditure the husband has agreed to meet.

56. Second, Ms Campbell argued that, in so far as the justification for the division was to ensure that the wife could meet her identified housing need, on the figures before the court the wife could re-house at a level the learned Judge found was appropriate without making any, or any significant, departure from equality. Within this context,

Ms Campbell argued in particular that the learned Judge fell into error in not ordering the sale of Foreign Property A in circumstances where the effect of transferring Foreign Property A to the wife was to reduce her mortgage capacity from £1M to £770,000, thereby inflating her need for capital provision.

57. In the circumstances, Ms Campbell submitted that had the learned Judge ordered the sale of Foreign Property A (any argument that by retaining Foreign Property A the wife and children kept their link to the country in question being, on Ms Campbell's submission, unfounded) the learned Judge would have been able to make a fairer capital distribution as the wife would have had a greater mortgage capacity in this jurisdiction. Ms Campbell reminds this court that the husband was entitled to a share in Foreign Property A as matrimonial property.

58. At the further short hearing to deal with Ms Kisser's request that the court reconsider its conclusions in the circumstances I have described, Ms Campbell sought to re-emphasis this latter point in both her additional written submissions and her supplementary oral submissions. Conceding that, in circumstances where the learned Judge's award to the wife met her housing need as he assessed it to be, Ms Campbell however, re-emphasised her submission that the manner in which the learned Judge structured the award to the wife took the division of capital far outside that which was reasonable, in circumstances where the structure of the award made to meet the wife's housing need reduced the funds the wife was able to contribute by way of a mortgage.

59. In these circumstances, Ms Campbell submits that the learned Judge went outwith the reasonable bounds of his discretion and was wrong to arrive at a division that represented, she submitted, such a significant departure from equality in a needs case, particularly where the learned Judge failed to justify his departure from equality with any, or any adequate, reasoning. With respect to this latter point, Ms Campbell submitted that the learned Judge provided no real analysis or explanation for his decision. For example, Ms Campbell points to the fact that the learned Judge makes no mention of how he dealt with the wife's deferred restricted stock unit bonuses, albeit that Ms Campbell latterly conceded, as had the husband's then counsel had at the final hearing, that it would have been fair to treat them as income. Ms Campbell also submitted that the learned Judge did not make clear how he treated Foreign Property B, and the fact it was an illiquid asset, nor the loan due to the husband from his sister.

60. In the circumstances, relying on *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186, Ms Campbell submits that there was no good reason for departing from equality, whether by reference to the disparity in the parties' income or by reference to the wife's ability to raise a mortgage to meet her housing need. Within this context, Ms Campbell submits that had the learned Judge, as he was required to do, stood back and measured the views he had arrived at having undertaken the statutory exercise against the yardstick of equality, it would have been apparent to him that the order he proposed to make was unfair to the husband and was not in any way "slight", the fact that the learned Judge believed it was so demonstrating, submitted Ms Campbell, how inadequately reasoned his decision was.

The Wife

61. Responding to the appeal on behalf of the wife, Ms Kisser submits that the learned Judge's decision was within the ambit of the discretion afforded to him. In this context, Ms Kisser draws the attention of this court to the well-known decisions of *Piglowska v Piglowska* [1999] 2 FLR 763 and *N v N (Financial Orders: Appellate Role)* [2012] 1 FR 622. Within this context, Ms Kisser also draws the court's attention to the decision of Moor J in *WD v HD* [2017] 1 FLR 160.

62. Ms Kisser submits that the husband is seeking simply to have another bite of the cherry in the context of him being dissatisfied with the decision the learned Judge reached, which decision Ms Kisser submits was neither wrong nor unjust because of a serious procedural or other irregularity in the proceedings.

63. As I have noted at a number of points, Ms Kisser submitted that by the conclusion of the evidence the position with respect to the agreed schedule of assets had altered by reason of the husband being in the process of drawing down further funds from his partnership loan facility in the sum of £88,000 to enable him to repay some of his immediate liabilities, and the husband that the wife's restricted stock units be considered as income, which contention the learned Judge accepted. In this context, Ms Kisser submits that on a proper analysis, the division of assets arrived by the learned Judge was as follows, setting the figures out in the same format as deployed by Ms Kisser in her comprehensive Skeleton Argument:

Asset	Wife	Husband	Total
FMH	425,843	295,843	721,686
Foreign Property A	134,777	0	134,777
Foreign Property B	0	64,964	64,964
Accounts	59,432	29,008	88,440
Monies Owed	0	63,238	63,238
Liabilities	(144,773)	(209,177)	(353,950)
Loan Drawdown	0	88,256	88,256
Total Liquid Assets	**475,827**	**332,124**	**807,410**
Percentage Division	**59%**	**41%**	**100%**
Business Assets	0	(159,358)	(159,358)
Pensions	556,041	556,041	1,112,082
Total Assets	**1,031,328**	**728,807**	**1,760,134**
NET EFFECT	**59%**	**41%**	**100%**

64. As I have also already noted, it can be seen that in arriving at her figures, and notwithstanding that the liquid assets set out by Ms Kisser *include* the partnership loan drawdown, which drawdown results in the increased liability of £159,358 under business assets, Ms Kisser *excludes* the resulting increased liability of £159,358 from the calculation with respect to the division of the liquid assets (submitting that this was the position before the learned Judge). However, if one includes the liability of £159,358 when calculating the division of the liquid assets, then the percentage division is as demonstrated by Ms Campbell in the schedule I have reproduced at

paragraph 34, namely 73% in favour of the wife. It is only when pensions are added in that one gets to the division in favour of the wife as contended for by Ms Kisser. During her oral submissions, Ms Kisser asserted that, in calculating the capital division arrived at by the learned Judge, the pensions must be included (particularly where what Ms Kisser characterised as the "illiquid loan" of £159,358 is also included).

65. Within this context, in a stalwart defence of the learned Judge's judgment, Ms Kisser submits that, in accordance with the foregoing table, the net effect of the learned Judge's judgment was an overall division of assets of 59% to the wife and 41% to the husband. Ms Kisser further submits that, in circumstances where the husband was thereafter successful in persuading the court to allow him to keep the former matrimonial home, and successful in resisting the wife's submission that an increased lump sum payment should be made to reflect the savings that the husband would thereby make through not incurring stamp duty and purchase costs on a new property, the division arrived at was, in the end, some 57% to the wife and 43% to the husband (figures which, Ms Kissers submits in passing, would not have justified even permission to appeal had they been brought to the attention of Roberts J). Ms Kisser contends that the learned Judge was justified in departing from equality in this way in circumstances where, having carried out a careful evaluation of both parties' housing needs (which Ms Kisser reminds the court is an evaluation that is not disputed on appeal), the learned Judge was faced with parties with a relatively limited capital base but a proportionately large income base and a husband with an income of three and a half times that of the wife. In the circumstances, Ms Kisser submits that the learned Judge cannot be said to have been wrong in departing from equality when seeking to meet the respective housing needs of each party, one party having a considerably lower income than the other. Within this context, Ms Kisser further submits that none of the criticisms levelled at the judgment by the husband stand up to scrutiny.

66. With respect to the husband's submission that the learned Judge failed to have regard to the fact that the husband was left with considerable child maintenance obligations and responsibility for all school fees whereas, by contrast, the wife's contribution to the children's maintenance is limited, Ms Kisser submitted that this argument is entirely misplaced in the context of the husband's income of £605,000 per annum net, of which the husband will retain a surplus of some £210,000 per annum net. Ms Kisser further submitted that the wife will receive only £24,000 per annum in child maintenance from the husband's income of £605,000 per annum and that, whilst she does obtain some benefit in terms of her ability to generate income from the husband meeting other childcare costs, the husband also derives a benefit in return by reason of there being no need for spousal maintenance.

67. With respect to the husband's submission that the learned Judge fell into error in not ordering the sale of Foreign Property A in circumstances where the effect of transferring Foreign Property A to the wife was to reduce her mortgage capacity, Ms Kisser submits that the learned Judge makes perfectly clear in his judgment that he was simply giving the wife the opportunity to retain Foreign Property A if she could "make it work" by funding a mortgage on Foreign Property A in addition to her mortgage on a family home as an alternative to selling Foreign Property A. Within this context, Ms Kisser submits that the learned Judge included in his calculations *all*

of the equity of Foreign Property A, leaving the wife to decide how to utilise that asset, by way of sale or re-mortgage, to meet her housing need in this country.

68. With respect to the husband's contention that the learned Judge did not make clear how he treated Foreign Property B, and the fact it was an illiquid asset, nor the loan due to the husband from his sister, Ms Kisser submits that the learned Judge made clear that the husband would retain Foreign Property B, that it would considered as part of the overall capital division but that the equity in the property would not be treated as available to meet the husband's housing needs. With respect to the loan, Ms Kisser submits that the learned Judge clearly had regard to it and anticipated that any shortfall in repayment could be met by surplus income going forward, pointing to the passage in the judgment that I have quoted above.

69. Finally, with respect to the submission of the husband that the learned Judge did not stand back and measure the views he had arrived at having undertaken the statutory exercise against the yardstick of equality, Ms Kisser submits that it is plain from the judgment that the learned Judge "started by looking at what 50/50 would look like" by beginning with a 50/50 division of the net equity of the former matrimonial home, only later deciding that an equal division will not meet the wife's needs or reflect the disparity of the parties' income.

70. In the circumstances, Ms Kisser submits that the learned Judge had an entirely reasoned basis for departing from equality to the extent that he did in the circumstances of this case of need, that departure being justified on the basis of the parties' respective needs and the disparity of income as between the parties, namely that the departure was required to meet the wife's housing need in circumstances where the husband, with his significantly superior income was in a position to recover the additional lump sum required to fund the award to the wife in a relatively short period of time, and in any event by the time he would be required to purchase a property of his own. Within this context, Ms Kisser submits that the division he arrived at was not outwith the ambit of learned Judge's discretion and that the decision of the learned Judge was entirely fair and not impeachable having regard to the latitude an appellate court should accord a first instance judgment.

71. In response to Ms Campbell's additional submissions at the further short hearing, Ms Kisser emphasised that, with respect to the husband's submission that the manner in which the learned Judge had structured the award to meet the wife's housing need reduced the funds the wife was able to contribute by way of a mortgage, there is no principle that the court must require a party to utilise their maximum mortgage capacity. Ms Kisser further re-emphasised that the learned Judge had heard evidence and made findings regarding the wider importance to the wife and children of being able to retain Foreign Property A if she could arrange her affairs to enable her to do so, given the link the property allowed her and the children to retain with the country in question. Within this context, Ms Kisser reiterated her submission that the findings of the learned Judge that underpinned his structuring of the award to the wife were reasonable and should not be disturbed by this court, in particular where this court has not had the benefit of hearing the evidence that underpinned those findings.

LAW

72. Pursuant to FPR r 30.12(3) this court may allow an appeal where it considers that the decision of the court below was wrong or unjust because of serious procedural irregularity or other irregularity in the proceedings before the lower court.

73. In establishing the division of assets that forms the subject of this appeal, at the substantive hearing there was a dispute between the parties as to the approach the court should take to that task. The husband did not accept that the parties' pension assets should be included when establishing the overall division of matrimonial assets that the learned Judge arrived at in this case. The wife contended that, in establishing the division reached at first instance, all of the matrimonial assets, including the pension assets, must be included. As I have noted, at the short additional hearing, Ms Campbell made clear that she was not seeking to suggest that the pension assets do not fall to be considered when determining the division arrived at by the learned Judge.

74. With respect to this issue, I note a number of points. First, the Schedule of Assets routinely drafted for proceedings of this nature includes pension assets as well as non-pension assets. Second, the Form E that parties are required to complete for the purpose of setting out for the court the assets that form the subject matter of the financial remedy proceedings requires a grand total of all assets, including pension assets. Third, in applying the principle of equality as a starting point, that principle must be applied to all matrimonial assets. It would appear illogical in the circumstances, therefore, to exclude a defined species of assets when seeking to consider on appeal whether a departure from equality is justified in a given case. Against this, there is an argument that, when looking at pensions within the context of calculating the overall division reached at first instance, regard must be had to the fact that, depending on the particular circumstances of the case, pension assets may be illiquid and subject to taxation. Within this context, there is an argument that in determining the division reached at first instance pensions assets should be subject to a modest discount. However, I did not hear any detailed argument on this latter point. Further, in light of the fact that this is plainly a case of need, it is not necessary for me to reach a definitive conclusion on the precise method for calculating the division reached at first instance for the purposes of determining an appeal concerning that division. Within this context, I make some more general observations on this point below.

75. With respect to the second issue in this appeal, namely whether the departure from equality arrived at by the learned Judge was justified in the particular circumstances of this case, the principles are well settled.

76. The goal of Matrimonial Causes Act 1973 Part II is fairness, not mathematical equality. Within this context, as noted by Lord Nicholls in *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, each party to a marriage is entitled to a fair share of the available property, and the search is always for what are the requirements of fairness in the particular case. In the context of a case of need, which this case plainly is, in *Miller, McFarlane* Lord Nicholls observed as follows at [11]:

> "When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing

> and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter."

77. Lord Nicholls also made clear in *Miller, McFarlane* that the principle of fairness requires that, where a marriage partnership ends, each party to that marriage is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. In his judgment, Lord Nicholls emphasised the words "unless there is good reason to the contrary", the 'yardstick of equality' articulated in *White v White* [2001] 1 AC 596 being an aid not a rule, a cross-check, not a starting point or presumption.

78. Within this context, and in the context of this appeal, need, as assessed by the court having regard to the evidence before it, is capable of providing a good reason for departing from equality.

DISCUSSION

79. As I have noted, in the original draft of this judgment circulated to the parties I concluded that the learned Judge's award had exceeded the wife's identified housing need and that therefore he was, in the circumstances of the case, wrong to make the lump sum order that he did. However, for the reasons I have given, having circulated the draft judgment with the standard rubric requiring counsel to point out typographical corrections and other obvious errors, I am satisfied that the draft judgment contained such an obvious error, namely that the figures on which the decision expressed in the draft was based omitted to include purchase costs which, whilst not appearing in the learned Judge's judgment, were, I am now satisfied from other sources, included in his calculations.

80. In this case, the consequence of that omission being pointed up is to change my conclusion on the outcome of this appeal as expressed in the draft judgment. Whilst I had not formally handed down judgment, and, accordingly, having regard to the decision of the Supreme court in *L and B (Children)* [2013] UKSC 8, there was nothing to prevent this change of mind following careful reconsideration (the Supreme Court having in *Re L and B (Children)* [2013] at [27] to [29] expressly rejected the 'exceptional circumstances' test set out in earlier decisions of the Court of Appeal), I am conscious that judicial tergiversation is, rightly, not encouraged. Not least in this case because the husband will have considered himself successful by reference to the draft, only for the court to reach the opposite conclusion in the judgment handed down. Against this however, as pointed out by Lady Hale in *L and B (Children)*, a judge must have the courage and intellectual honesty to admit and correct an error or omission and, as Rimer LJ made clear in his dissenting judgment in *Re LB (Children)* [2012] EWCA Civ 984, in doing so is honouring his or her judicial oath. In the circumstances, whilst, as I can attest, it is an uncomfortable exercise for the judge, particularly where the error or omission acts to change the decision handed down in draft, and is disappointing for the litigant who believed they had been successful, a judge is duty bound to correct his or her omission or error. To do otherwise would not be just.

81. Within the forgoing context, and having considered carefully the helpful submissions made by Ms Campbell and Ms Kisser, I have ultimately decided that the learned Judge cannot be said to have been wrong in departing from equality to the extent that he did in this case. Within this context, I am satisfied that the husband's appeal should be dismissed. My reasons for so deciding are as follows.

82. Notwithstanding that this case is very clearly one of need, the parties spent a good part of the substantive appeal hearing making competing submissions about the precise extent of the division arrived at by the learned Judge at first instance. Ms Campbell arguing for a figure of 73/27% in favour of the wife, excluding pension provision. Ms Kisser argued in her Skeleton Argument for an overall figure of 59/41%, both excluding and including pension provision and (in circumstances where the husband was subsequently successful in persuading the court to allow him to keep the former matrimonial home, and successful in resisting the wife's submission that an increased lump sum payment should be made to reflect the savings that the husband would thereby make) ultimately 57/43% in favour of the wife.

83. In circumstances where this is plainly a case of need, it is not, as I have already noted, necessary for me to reach a definitive conclusion on the precise method for calculating the division reached at first instance for the purposes of determining an appeal concerning that division. However, I make the following general observations.

84. First, I am not able to accept Ms Campbell's initial submission that in arriving at a decision as to what division was reached at first instance, the parties' respective pension provision should be excluded in their entirety. As I have indicated, Ms Campbell stepped back from that submission at the further short hearing and, accordingly, the point largely falls away. As I have noted, there is an argument that, in determining the division reached at first instance, pensions assets should be subject to a modest discount but that is not a matter I need determine for the purposes of disposing of this appeal. Second, and whilst not a significant point in light of the foregoing conclusion, I am not able to accept Ms Kisser's calculation of a 59/41% split of the *liquid* capital assets. To include the additional drawdown from the partnership loan on one hand but exclude the concomitant liability on the other is not a proper approach.

85. It follows that I am satisfied that the division with which this court is concerned is one which takes account of the total capital assets of the parties, including their pension provision. On the figures before the court, this means that this court is concerned with the overall division contended for by Ms Kisser in her Skeleton Argument of 59/41% in favour of the wife. Were there to be a slight discount in the value of the pension assets for the purpose of calculating the capital division reached at first instance, the percentage in favour of the wife would increase slightly. At the short hearing, Ms Campbell acknowledged that in circumstances where the husband was successful in persuading the court to allow him to keep the former matrimonial home, and successful in resisting the wife's submission that an increased lump sum payment should be made to reflect the savings that the husband would thereby make, it is possible to arrive at a final figure of 57/43% in favour of the wife. I am satisfied that the division of the assets arrived at by the learned Judge cannot be said to be wrong having regard to the particular circumstances of this case.

86. The learned Judge identified the wife's housing need as £1.25M and that this required that she have available to her a housing fund of £1.326M. For the reasons I have set out above, contrary to the conclusion in the draft judgment that the learned Judge's award exceeded the wife's assessed housing need, the learned Judge's capital award to the wife in fact met this need precisely. Ms Campbell does not seek to dispute this.

87. I do have sympathy with Ms Campbell's submission that the learned Judge's reasoning underpinning the departure he arrived at in the foregoing circumstances is less than clear from the judgment. With respect to the question of disparity of income, whilst the learned Judge does identify "that [the husband] will have paid the school fees, including the reasonable extras and the school clubs and the nanny, so that there is some £110,000-odd coming out of his account", together with the top up maintenance of £24,000 per year, beyond looking at the impact of this on the husband's ability to raise a deposit following the payment of a lump sum of £65,000, the learned Judge gave no apparent consideration to how this situation affected the fairness of the capital division. Within this context, I accept Ms Campbell's submission that the learned Judge does not appear to consider, when concluding that the disparity in the parties' income justified a departure from equality, the extent to which the wife's income of £171,000 per annum will, by reason of the obligations placed on the husband by the court, remain largely unimpeded and the fact that the husband was, in effect, underwriting the costs that the wife incurred in supporting her own career. Or, to put it another way, providing the wife with a significant indemnity in relation to the costs of generating her own income. If the learned Judge did consider these factors, he did not reflect them in his judgment.

88. I further accept that the learned Judge also does not appear, on the face of the judgment, to have factored into his evaluation the fact that the structure of the disposition that he chose in order to permit the wife to meet her identified housing need, namely allowing the wife to retain Foreign Property A to borrow against (or sell *if* she was not able to manage that course of action financially), meant, that on the expert evidence before the court, the wife's mortgage capacity was significantly reduced, with a concomitant increase in her need for capital. This increase also fell to the husband to address from his share of the capital assets, resulting in an additional call on the husband's share of capital. Once again, if the learned Judge did consider these factors he did not reflect them in his judgment.

89. Against this however, as I have observed, a close reading of the judgment does make tolerably clear that the learned Judge's reasoning for preferring an overall capital distribution that he characterised as being "slightly" in favour of the wife was based, first, on the extent of the wife's housing need and, second, on the disparity in income between the husband and the wife. Further, whilst I accept that it is unclear from the learned Judge's judgment whether and to what extent the matters set out in the foregoing paragraphs, and prayed in aid by Ms Campbell, formed part of the consideration of the learned Judge, this court is in a position to consider whether those factors, namely the burden of the meeting the costs of the children placed upon the husband and the structure of the disposition arrived at by the learned Judge, render the conclusion reached by the learned Judge wrong for the reasons Ms Campbell has pressed upon this court.

90. Had this court's original conclusion that the learned Judge *exceeded* the wife's housing need been sound, then the matters prayed in aid by Ms Campbell would, as I

had originally concluded, have justified a modest variation in the lump sum order to ensure that the award met the wife's housing need and no more. In such circumstances, a division that exceeded the wife's identified housing need could not have been said to be fair where the capital division exceeded the wife's identified needs, where the obligations placed by the court on the husband with respect to the costs associated with the children's education and upbringing provided the wife with a very significant indemnity in relation to the costs of generating her own income, which the learned Judge found would not fall below £171,000 per annum net, and where the structure of the disposition chosen by the learned Judge to allow the wife to retain Foreign Property A decreased the wife's mortgage capacity and increased her need, which situation fell to be addressed from the husband's share of the matrimonial assets. Particularly in circumstances where the learned Judge's reasoning was less than full.

91. However, in circumstances where, as clarified by the additional written and oral submissions, the learned Judge's award *met* the wife's housing need as he assessed it to be, which assessment is not disputed by the appellant, I am not, on balance, satisfied that the matters prayed in aid by Ms Campbell demonstrate that the learned Judge's award was outwith the ambit his discretion.

92. As I have already observed, the learned Judge's capital division matched the wife's need as he assessed it to be, namely a housing fund of £1.326M, which assessment is not disputed by the husband. Whilst this resulted in a less than equal division of the assets, need, as assessed by the court having regard to the evidence before it, is capable of providing a good reason for departing from equality. Within this context, Ms Campbell sensibly conceded, both before Roberts J at the permission stage and before this court, that on the basis of need and in circumstances where one party is a considerably higher earner than the other, it was *open* to the learned Judge to depart from equality.

93. Within this context, the crux of the husband's case on appeal is that, where the burden of meeting the financial obligations with respect to the children was placed upon the husband, there was a means of meeting the wife's identified need for a housing fund of £1.326M that was fairer to the husband in those circumstances. Namely, by requiring the wife to contribute more to the purchase of a property in this country by ordering the sale of Foreign Property A, thereby allowing her to utilise her greater mortgage capacity in this jurisdiction and reducing the call on the husband's share of the matrimonial assets.

94. In the draft judgment, I made clear that I did not propose to disturb the learned Judge's conclusions with respect to the wife retaining Foreign Property A. It is the case that the wife had a higher mortgage capacity in this jurisdiction. However, it is also the case that the learned Judge had the benefit of hearing evidence regarding the strength of the wife's connections with the country in question, and her evidence regarding the desirability of retaining the same for herself and the children, which evidence I did not have the benefit of hearing. Having heard that evidence, the learned Judge drew the conclusion that Foreign Property A constituted an important link for the wife and the children to that country and, in circumstances where he accepted that the wife could raise a mortgage of £850,000 in England and an additional sum of £100,000 against Foreign Property A, grounded his conclusion that wife's case that she should keep Foreign Property A as a link for her and the children

to the country in question if she could manage that option financially (the learned Judge having factored all of the equity in Foreign Property A) was also consonant with her identified need. That conclusion was plainly open to the learned Judge on the evidence before him.

95. It is correct that the way in which the learned Judge chose to meet the wife's identified housing necessitated the making of a lump sum order in favour of the wife, and that ordering the sale of Foreign Property A, thereby allowing the wife to utilise her greater mortgage capacity in this jurisdiction, was an alternative route to meeting the wife's need. However, whilst another judge might have decided to take that route having regard to the burden placed on the husband with respect to the outgoings for the children, in light of the conclusions the learned Judge reached on the evidence regarding the importance of Foreign Property A for the wife and the children, the ability of the wife to raise a mortgage of £850,000 in England and an additional sum of £100,000 against Foreign Property A, and within the context of the husband's significantly greater earning capacity, I am not satisfied that it can be said that the learned Judge was *wrong* to adopt the course that he did in this case where his award met the wife's identified need precisely. Whilst the course adopted by the learned judge required the husband to fund a lump sum in the context of the burden placed upon him with respect to the outgoings on the children, as the learned Judge observed, the husband's significantly greater income allowed him to make up that lump sum by the time he came to purchase a property of his own, and to bear the costs of the outgoings with respect of the children whilst maintaining a large surplus income. On the evidence before him, these were conclusions that were open to the learned Judge.

96. Finally, whilst I accept that at no point in his judgment does the learned Judge step back and evaluate the overall effect of his analysis in terms of the percentage distribution of the matrimonial assets in order to satisfy himself, and to demonstrate, that his decision did in fact represent his stated intention of making a "capital distribution slightly in favour of [the wife]", as I have noted, in this needs case the division of assets arrived at by the learned Judge was 59/41% and (in circumstances where the husband was thereafter successful in persuading the court to allow him to keep the former matrimonial home, and successful in resisting the wife's submission that an increased lump sum payment should be made to reflect the savings that the husband would thereby make), ultimately, 57/43% in favour of the wife. Whilst one can debate whether this constitutes the "slight" departure which the learned Judge stated he was aiming for, the division arrived was one that was open to the learned Judge in circumstances where both parties had the same housing need and where one party earned at a considerably higher level than the other. I accept Ms Kisser's submission that such a division cannot be said to be *wrong* in the circumstances of this case.

CONCLUSION

97. Once again, had the learned Judge's award, as I initially concluded, *exceeded* the wife's housing need in this needs case, then the matters relied on by Ms Campbell would have some force for the reasons I have outlined. However, whilst I accept that the learned Judge's judgment does suffer somewhat from a paucity of reasoning, and that it remains debateable whether the learned Judge was justified in describing his departure from equality as "slight", in circumstances where it is clear, albeit not from the face of the judgment, that the learned Judge's disposition met the wife's housing

needs exactly, I am not satisfied that, the learned Judge having heard evidence and reached a conclusion on the importance of Foreign Property A to the wife and the children, and having regard to the disparity in the parties' income, it can be said that the manner in which the learned Judge chose to structure the disposition in order to meet the wife's identified housing need, nor the consequent division of assets, was wrong.

98. In the circumstances, and having had the helpful assistance of very full written and oral submissions from Ms Campbell and Ms Kisser, I am satisfied that I must dismiss the husband's appeal. I will invite the parties to prepare and submit a draft order for my approval.

99. That is my judgment.