



Case No: FA2023000171

[2024] EWHC 1489

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25/04/2024

**Before :**

**WILLIAMS J**

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**Between :**

**JL**  
**- and -**  
**NN**

**Applicant**

**Respondent**

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**Daniel Jeffrey 29 Bedford Row** (instructed by **Family Law Partners**) for the **Applicant**  
**Fiona Stewart QEB** (instructed by **Dawson Cornwell**) for the **Respondent**

Hearing date: Dec 13<sup>th</sup> 2023

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**Approved Judgment**

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WILLIAMS J

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 children and members of their 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.

**Williams J :**

1. This is my judgment in an appeal brought by the appellant wife, JL, in respect of the decision and order of Recorder Howling KC dated 7 July 2023. The appellant is represented by Daniel Jeffrey, Counsel, who appeared at first instance. The appeal is opposed by the respondent husband, NN, who is represented by Fiona Stewart, Counsel, who did not appear at first instance. Both counsel and legal teams have appeared pro bono on this appeal, and I am grateful to the legal teams for their assistance in the conduct of this appeal.
2. The appeal was lodged on 28 July 2023 within 21 days permitted by the rules. On 16 November 2023 Mr Justice Keehan gave directions as follows

*On the totality of the evidence, I have concluded that the appellant has an arguable case that the decision of Recorder Howling KC was wrong which may have a real prospect of success.*

*IT IS DIRECTED THAT*

*accordingly, this application for permission to appeal shall be listed for an oral hearing on notice to both parties with the appeal to follow if permission is granted.*

3. The case was listed for a one-day hearing on 13<sup>th</sup> December 2023 with judicial reading of one hour and judgment preparation time of one hour allowed. That time estimate proved inadequate, even allowing for a late start caused by the listing of other matters. I therefore commenced hearing submissions at 12.15 and concluded submissions at about 4.20pm and reserved judgment which regrettably has had to be completed amongst other commitments in order to get it completed before the end of term.
4. It was not entirely clear from the order whether Mr Justice Keehan had intended to grant permission but having had the advantage of reading the judgment and the appellant's and respondent's skeleton arguments it seemed clear to me at the commencement of the hearing that the appellant had satisfied the threshold for permission of having a real prospect of success, and so I confirmed at the commencement of the hearing that permission to appeal was granted and that the focus should be on whether the appellant could establish that the decision was wrong rather than on whether there was a real prospect of success. The respondent filed a Respondent's Notice on 5<sup>th</sup> December 2023 seeking to uphold the decision on the basis of different or additional reasons although these were not set out in the Respondent's Notice which rather simply cross-referred to the respondent's composite skeleton argument.
5. For the hearing I was provided with a modest Appeal Bundle of 110 pages of which the agreed note of judgment was 10 pages, the Appellant's Skeleton Argument of 10 pages and the Respondent's Skeleton of 14 pages plus supporting documents. I was also provided with an Authorities Bundle with 14 Authorities none of which appeared to be in dispute and belatedly an (unagreed) note of the evidence.

## Context

6. For the purposes of this appeal, I do not propose to set out at length the history of the case. The parties were agreed on very little but aspects of the judgment recording the history do not appear to be controversial. The following essential matters should suffice.
  - a. The respondent Husband, at the time of the final hearing was aged 43 and is an IT specialist. For several years he provided his skills through a limited company but on 5<sup>th</sup> June 2023 shortly before the final hearing he commenced work as a PAYE employee.
  - b. The appellant Wife is 38 and works for the NHS as a clinical trials specialist. She works part-time.
  - c. The parties resumed their relationship in 2015 (their previous three-year relationship had ended in 2012). A property in South Croydon ('BR') was purchased in late 2015 by H which they moved into in 2016 and commenced cohabitation.
  - d. A cultural wedding ceremony took place on 28 October 2017 and a civil wedding ceremony on 21 April 2018.
  - e. The parties' child, 'Y', was born on the 17<sup>th</sup> March 2019. The appellant was the primary carer, and says she was working part-time to facilitate this.
  - f. In 2020 BR was re-mortgaged and placed in joint names and a larger property ('WC') was purchased in H's sole name with a very substantial mortgage. WC required renovation.
  - g. On 4<sup>th</sup> November 2020 the appellant moved out of BR with Y (then aged 20 months) and returned to live with her parents with East London
  - h. In December the respondent moved out of BR and into WC but the appellant and child did not return to occupy BR but remained with her parents. In December 2021 the respondent rented out BR.
  - i. There have been protracted and heavily contested proceedings relating to child arrangements. In summer 2023 the child was living with the mother and spending time with the father at weekends and in the holidays. A final hearing is due to take place to consider further potential changes to the arrangements. The mother's application for child maintenance through the CMS has also been heavily litigated with a number of hearings, appeals and applications. Per the Wife, the position as at July 2023 appears to be the CMS had assessed the respondent to be in arrears of £4,284 for 2023 with the years 2022 and 2021 still to be assessed. The parties had (Ms Stewart thought the figures might be inaccurate) spent in the region of £221,000 in costs to the point of the FR hearing (W: £40k ChA + £26k FR; H £105k ChA + £51k FR).

- j. Each party had experienced ill-health in recent years. The Wife says she has suffered with symptoms which are likely to be long covid which she maintained had compromised her ability to return to full-time work. The Husband had had cancer which he was now (and remains) in remission from. He maintained he had decided to take up PAYE employment to achieve a better work-life balance.
7. In broad terms and in my words, the Wife's case before the Recorder seems to have been as below. I caveat this because it is not easy to extract from the judgment a definitive account of the way the case was finally put in opening and closing.
  - a. The Husband's recent PAYE employment was probably a sham or a device to present himself as having a far more limited earning capacity (£65k pa gross plus possible bonus) now and into the future than he had historically which had been found by Recorder Howling to be at around £120,000 gross or at worst £74k net per annum.
  - b. The Husband had failed to make full and frank disclosure of his finances, both income and capital, including the fact that he had paid £80k to his lawyers from an unevicenced source.
  - c. The evidence supported dishonesty by the Husband in his dealings with HMRC, making mortgage applications, forging W's signature on a document and in failing to provide full and frank disclosure.
  - d. The Wife was unable to increase her earning capacity significantly in the foreseeable future due to her health problems and her caring responsibilities and would continue to receive around £18k net (W maintained H did not pay any child maintenance over that period, H denies this and says he paid as per the assessment amount during that period). She would require around £3,000 pcm in global periodical payments from H in order to meet her and the child's needs including mortgage payments.
  - e. With PP's she had a mortgage capacity of £107-220K which with capital of £250k would enable her to purchase a suitable property for in the region of £370k.
  - f. Both properties would need to be sold to release equity to fund W and the child's housing need, to pay some debts and to release H from the monthly mortgage payments of £2,400pcm which were unsustainable on his claimed income and were due to rise substantially when the fixed rate deal ended in early 2024.
8. The Husband's case, again with the caveat I express above appears to have been as follows
  - a. W could and should return to work and become self-sufficient as this was a short marriage and she could adjust without the need for spousal periodical payments from H.

- b. She could return to full-time work and if she did so had an earning capacity of £40k gross, plus child maintenance, generating a mortgage capacity of at least £120k.
  - c. Her housing need was over-stated and she could re-house in shared ownership or in a property valued at £250k which could be achieved through her mortgage capacity of £120k and her receiving the net proceeds of BR (£78k) and a share of the equity of WC.
  - d. H's earning capacity was his current income of £65k gross pa. His net salary of around £4k pcm would all be consumed paying the mortgage of £2,400pcm, child support of £500pcm and debt repayments of £1,000 pcm to legal fees. He had no surplus income to pay spousal periodical payments. He might receive a bonus or might return to better paid work at some point, but this was not to be relied on.
  - e. H would remain in WC and wanted the opportunity to buy-out W's share. This seems to have emerged as an option late in the day and H proposed to borrow funds (£85k as it transpired) to do so.
9. In very summary terms the capital available to the parties was the net equity in the two properties. Although the Wife asserted WC was worth substantially more than the value attributed to it the valuations did not support this assertion and there was relatively little dispute over the equity or the hard loans. Pensions were negligible.
- a. BR: W: £74k - H: £65k [£78k was the figure the judge settled on]
  - b. WC: W: £154k – H: £138 [£154k was the figure the judge settled on]
- W: 228k – H: £203k
10. However, the parties had very substantial liabilities also in the form of hard and soft loans. It will be seen from earlier that the parties had spent (depending on whose figures are relied upon) either all or nearly all of the equity on legal fees. W's fees had largely been paid by a loan from her family £43k with some £17k outstanding and other loans/CC giving hard debts of £26k. H had borrowed £80k from family in addition to owing legal fees of around £47k together with an HMRC bill of £54k and credit cards etc which gave him a total of hard debt of around £140k. Thus, even allowing for the soft nature of the 'family' loans after providing for hard debts the clear capital was only in the £60-70k region.

### The Effect of the Judgment

11. The judgment and order very substantially adopted the Husband's approach. Taking the judgment in terms of its outcome the conclusion were, or must have been, as follows. I again caveat this because as I will turn to later, observations in the judgment or absence of clearly expressed findings or conclusions mean I have to infer what the conclusions were.

- a. The Wife could and should return to full-time work within a year and had a gross earning capacity of £40kpa.
  - b. The Husband could not and should not be expected to increase his earning capacity beyond the £65k gross specified in the June 2023 contract.
  - c. The Wife's interim housing need would be met by remaining with her parents. Her long-term housing need and that of the child would be met by a 2 bed property (shown by Rightmove searches) within a commutable distance of the child's school to a value of £250k. W would receive £77k from the sale of BR and H would pay W £85k (55% of the net equity in WC).
  - d. The Husband's housing need and to the extent that he needed a home to spend time with the child would be met by his remaining in the WC property at a value of £770,000.
  - e. All of the Husband's income would be deployed paying the mortgage on his home, child support and monthly debt payments for his legal fees.
  - f. As a consequence of the Husband's limited earning capacity and his outgoings he could not pay periodical payments to the Wife although the circumstances were such that she had a need for them (it's not clear why she did on his conclusions on her earning capacity as that assumed she could meet her expenses and would not need PPs to meet her needs; Ms Stewart observed that the Husband considered his conclusion on this point wrong and could have appealed but for pragmatic reasons elected not).
12. In terms of the division of the income and assets Ms Stewart set out in Tabular form the net effect of this (the Wife does not accept this is correct as she argues it does not take into account her legal fees as per her columns in the ES2 at final hearing but does take into account part of the Husband's. The Wife says her hard liabilities should be £25,402.)

### Capital

	H	W	
Assets	£153,691	£77,862	Bank accounts, investments and property net equity
Business interests	£0	£0	
Hard Liabilities	-£140,229	-£8,370	
Lump sum	-£85,000	£85,000	
<b>Net liquid</b>	<b>-£71,538</b>	<b>£154,492</b>	
Pension	£13,051	£21,233	
<b>Net Total</b>	<b>-£58,487</b>	<b>£175,725</b>	

*Excluding H's debts, if H continued to service his hard debts monthly, this equated to W receiving 70% of the liquid assets. If the default order for sale*

*was effected, H would receive c.£68,000 with which to pay HMRC and other parts of other hard debts. H would still therefore be left with hard debt.*

*Income*

	H	W	
Net salary	£3,900	£2,600	Using W's earning capacity of £40,000 gross, £31,223 net.
State benefits	£0	£104	
Child maintenance	-£500	£500	
<b>Net income</b>	<b>£3,400</b>	<b>£3,204</b>	

13. What this does not also depict is that H would be left with an Asset (WC) valued at £770k and liabilities of £886k (£586k [mortgage] + £140k [hard debt] + £85k [lump sum – soft?] + 75k [family loan – soft? or hidden asset]) –to be serviced with that net salary of £3,900. It also does not depict that W obtaining housing was contingent on her (a) securing full-time work, (b) property prices or interest rates not moving adversely against her in the year until she secured that earning capacity and (c) her income and child care position then being sufficient to allow her to purchase a property, commute with the child to school, pay child care costs and meet the other expenses associated with that package.

The Grounds of Appeal

14. Initially the Appellant identified 5 Grounds of Appeal. She later added a Sixth. The Grounds and the essential points in support of them are as follows

Ground 1: The judge should not have ordered that the Respondent could retain the FMH.

- a. The judge prioritised the Husband staying in the FMH over the Wife receiving spousal maintenance despite stating that this was a case where spousal maintenance was appropriate and the judge would have made an order for spousal maintenance if H could afford it. In a needs case – providing securely for the Wife and child's welfare need was the first consideration and first call upon the parties' resources. Retaining WC meant £2,400 of H's net income of £3,900 was taken up on mortgage payments and in evidence H said when his mortgage deal ended in early 2024 that his mortgage payments were likely to double or treble (#31) which meant retaining it beyond then was on H's case (and the judge's conclusion on his earning capacity) unsustainable. There was no analysis of why it was financially sound for H to remain when the judge

had characterised the case as being largely about debt. The judge did not undertake any analysis of H's income and outgoings – had he done so it would have been obviously unaffordable. The Judge should have prioritised freeing up some of H's net income to support the Wife in the form of periodical payments. H could still have been housed in a much lower cost property which would have met his needs, freed up income and not left such a significant disparity between his housing and the wife and child's. There is no analysis of why it is financially sound for H to remain. (Judge said it is about debt.)

Ground 2: The judge did not adequately meet the needs of the Wife

15. The judge's evaluation and calculation in relation to meeting the Wife's housing need was flawed. A series of errors in the judge's approach led to a flawed conclusion.
- a. The expert evidence was that her mortgage capacity was nil without periodical payments. The judge then assumed she could secure a mortgage of £120k based on presumed earnings using standardized mortgage capacity assumptions.
  - b. The conclusion that the Wife would be able to maximise her earning capacity within 12 months is erroneous; the GP evidence relating to her health was contrary to this and he did not take account of the impact on her of caring for the child, moving to a new area to secure housing and the overall financial viability for her of securing a property.
  - c. The judge himself says at paragraph 43 that her ability to secure an earning capacity of £40k is uncertain but his conclusion on her housing herself and the child is dependent on her securing it.
  - d. He alighted on £160k as what lump sum was needed (from her calculations) but that was dependent on her getting Periodical Payments.
  - e. He didn't compare like for like as between the Wife and the Husband. He maximized the assumptions for her and minimized them for him.
  - f. The net amount to purchase a property was at the bottom end of what can be achieved, requiring the Wife and child to relocate to another area and commute to school, and in comparison to what H was left with was inappropriate.
  - g. The judge's figures for Wife's housing need came from a Right Move search conducted by the court not from property particulars submitted and the judge attached undue weight to that figure.
  - h. The result of this analysis was that H, the party without care of the child, was instantly housed, beyond his needs, whilst W was left with no chance of getting into accommodation for at least (if the judge's assessment of her health proved correct) for 12 months.



Ground 3: The Judge allowed H to bring in £85,000 of new funds in closing submissions

16. H's counsel identified that he could borrow £85,000 from friends and family in closing submissions. The judge failed to consider how this altered the factual matrix and what other options were available as a result of this. The judge failed to give the Wife a proper opportunity to explore the consequences of this late disclosure of a financial resource which was of greater significance given the Husband had belatedly disclosed he had borrowed (on his case) at least £75k from family to pay legal fees. On W's case the Husband had drawn this from undisclosed assets and the emergence of a further £85k in resources raised further questions. At the very least the use to which this 'resource' could have been put should have been more fully explored.

Ground 4 & Ground 5: The judge failed to attribute the correct earning capacity to H

17. Despite finding that H made £74,000/annum net a year during the marriage, the judge accepted that H's earning capacity was now c £48,000/annum net (based on a job H had started only a month before the hearing). This was based on H's argument that having had a cancerous lump removed in 2021, he had changed his outlook on life. H admitted in cross examination that if he needed more money, he would get another job that paid more. The judge asked himself if H had the capacity to earn more and found that H could. However, having found that, the judge then ruled that H shouldn't have to. S.25 (2)(a) requires the court to consider whether it was reasonable to expect H to increase his earning capacity. The evidence suggested that H could and should do so. The court should not have contemplated the Husband taking his foot off the pedal in this way and should have ascribed an earning capacity to him closer to that which he earned during the marriage - £74k net per annum.

Ground 6: Error of Law

18. In directing himself about the approach to allegations of fraud the Judge mis-directed himself saying

*'But fraud is a serious assertion, the test is the criminal one, beyond all reasonable doubt. I have considered this issue both on balance of probabilities and as far as the criminal test goes.'*

19. The Wife's case was that the Husband must have other sources of income and had the judge applied the correct test to the determination of whether the Husband was being dishonest he may well have come to a different conclusion. It is difficult to know precisely what impact this had on the judge's decision making – in cross examination of the Husband on issues relating to other income the judge interjected to emphasise fraud must be proved on a criminal standard. There was much evidence about the Husband's dishonesty, lack of frankness or unreliability including his forging the Wife's signature, submitting fraudulent HMRC returns, his business accounts being incorrect, false information being included on mortgage applications and lack of evidence as to the source of monies used to pay his legal fees (£75k+) and if the judge was applying the wrong test to assessing whether the Husband was dishonest this

would – as the fruit of poisoned tree – potentially bear upon other aspects of the judges evaluation.

### The Respondent's Case

20. On behalf of the Husband Ms Stewart made a robust defence of the Judgment and a vigorous attack on the factual assertions and the validity of the Grounds. In particular she reminded me that this was an ex-tempore judgment given at the conclusion of 2 days of evidence and submissions and that it was a classic example of such a judgment where an appellate court must accept a degree of imprecision of analysis or explanation unless it could be shown that the Judge was manifestly wrong. In particular she emphasised that this was a case where the parties had an equal need for housing, and that the judge's conclusions left both with housing but with the Wife with the lion's share of the available capital. She emphasised that the Appellant was not directly challenging any findings of fact, save the attribution of H's earning capacity and that the judge's conclusions on the facts were therefore undisturbed and that there was no basis for going behind them. Her essential points in support of her submission that none of the Grounds were established are as follows.

### Ground 1

21. It is false to compare the properties the judge left the Husband with and that which he expected the Wife would acquire as on a net asset basis the Wife would be in a financially stronger position. The judge correctly concluded that spousal maintenance was not payable on H's current salary and it would not have altered had WC been sold. The judge considered the parties' respective earning capacities and the judge should not have ordered periodical payments on that basis. It was not a binary choice of leaving the husband with WC or providing W with periodical payments. The judge was right to give the Husband the opportunity to buy out the Wife in accordance with authorities and to run the risks associated with doing so. That met his housing need which was correctly prioritised over periodical payments to the Wife and he could not have met his housing needs had it been sold. The approach to housing and periodical payments was consistent with the authorities on short marriages. As it happens H has now found a way to finance the house to remain there.

### Ground 2

22. The judge was entitled to conclude on the evidence that
- a. The W's housing needs could be met for £250,000 which was an appropriate value having regard to the shortness of the marriage.
  - b. W's earning capacity was £40,000 based on her evidence and the medical evidence.
  - c. H provided evidence her mortgage capacity was £120k.
  - d. W could clear her hard debts and still house at £250,000 with the combination of capital and mortgage capacity.

### Ground 3

23. The judge was correct to give the Husband the opportunity to buy out the Wife and the funds were not new funds. In his evidence the Husband said he would explore borrowing from friends or family to do so. There was no guarantee he could and it would have been wrong for the court to alter its approach to the other resources based on H's possible ability to borrow more.

#### Ground 4 & Ground 5

24. The judge made reasoned and careful findings of fact on the evidence he heard and was entitled to ascribe the earning capacity he did to the Husband. Even if the judge had ascribed a higher earning capacity to the Husband it would not have meant the court could order periodical payments as the Husband would not in fact have been receiving it. The judge identified that it was possible the Husband might earn more in future and made a nominal order which allowed the Wife to apply were the Husband to achieve higher earnings. This court is entitled to infer that the judge found that the Husband's decision to downshift was one which was going to endure into the future so as to dictate his future earning capacity.

#### Ground 6

25. Whilst the Judge may have considered the incorrect legal test, the Judge also specifically states that he considered the matter on the correct legal test, i.e. on the balance of probabilities [§39]. Notwithstanding that he considered this issue on the lower standard, the Judge was not satisfied that H had committed fraud as alleged by W in his tax returns. The judge did therefore consider the allegations with the correct test in mind. The judge referred to all these matters relating to credibility and reached conclusions he was entitled to.

#### The Judgment

26. No transcript of the judgment is available but an agreed Note has been provided. It seems clear that the judgment was given under some pressure of time at the conclusion of a 2 day hearing. It was delivered very soon – if not immediately- after closing submissions had been heard. The judgment follows a fairly familiar structure. At paragraph 7 the judge identifies 5 key issues; what constitutes a matrimonial asset, what are the earning capacities of the parties; whether litigation conduct is relevant; the ultimate division of the assets and whether it is a clean break case or not. Whilst it may be said that the meeting of the housing needs of the Wife and child and the husband are incorporated into 'ultimate division' the issue which seems most obvious from the documents are how the housing needs of the parties are to be met having regard to their respective earning capacities and the assets and the liabilities.
27. The majority of the judgment contains a consideration of the section 25 factors. The priority afforded to the welfare of the child and the need for accommodation receives a brief reference, but the majority of the judgment is taken up with consideration of the Husband's earning capacity. The Wife's earning capacity is dealt with briefly and the judge concludes that it is reasonable to assume that within a year she will return to

full earning capacity notwithstanding the medical and child-care issues. The Husband's earning capacity receives – understandably given the way the Wife put her case much more extensive treatment. At paragraph 29 the judge accepts the Husband's work-life balance explanation for becoming an employee. The judge says he will return to this again – I read this to mean in relation to his future earning capacity. Later he poses the questions whether it is reasonable for him to exercise the ability to increase his earning capacity – the Husband having said he would look for another job if he needed to increase his income to pay increased mortgage payments. The judge concludes his net income during the marriage was £74k pa. He rejects the Wife's arguments that there are hidden income streams, saying that he cannot determine where the £80k to pay the husbands costs came from and he rejects the Wife's case that the Husband has hidden bank accounts, another company or is continuing to work for his former client; this is where misdirection comes into play. By the time the judge reaches the end of his consideration of income, earning capacity, property and other financial resources he has not returned to his conclusion on the Husband's earning capacity going forward and whether it would be reasonable for him to increase it. Paragraph 40 does not address it amongst the other conclusions.

28. In the section on financial needs, obligations and responsibilities the judge confirms the priority to be given to housing the Wife and child and the housing need of the Husband but there is no explicit recognition that if the needs of both cannot be met, that it is those of the child and their primary carer which will be prioritised. The judge concludes that the Husband on his '*[income] at the moment is £65k*' cannot afford to pay periodical payments as he doesn't have the means on his outgoings 'at the moment'. When dealing with periodical payments the judge says '*... there is significant uncertainty going forward as to where W's income may go, I may be wrong about the 12month point it may take longer. It may well be H goes back into Project Management and suddenly finds himself earning types of figures he has been earning historically.*' On that basis the judge concludes the Wife should have an insurance policy in nominal periodical payments. The other aspects of s.25 are dealt with in appropriately brief terms.
29. The judge then returns to drawing the points together to '*...try and reach a solution that means we can rehouse both parties.* He refers to W's £60k of soft debt but does not make reference to soft debt for the Husband – on H's case he had a further £80k of soft debt – on the Wife's case he had hidden assets of £80k. In the context of a case with these figures £80k is a very material number. In a brief discussion the judge concludes the Wife can re-house for £250k which can be achieved as rehearsed above and that the Husband should be left with WC with sufficient equity that if he is forced to sell will leave him enough to pay off HMRC.

### **Appeals: the approach**

30. FPR 30.12(3) provides that an appeal may be allowed where the decision was wrong or unjust for procedural irregularity.
31. The test for granting permission [FPR 30.3(7)] is,
- i) there is a real (realistic as opposed to fanciful) prospect of success, and
  - ii) there is some other compelling reason to hear the appeal.

32. The court may conclude a decision is wrong or procedurally unjust where:
- a. an error of law has been made,
  - b. a conclusion on the facts which was not open to the judge on the evidence has been reached *Royal Bank of Scotland v Carlyle* [2015] UKSC 13, 2015 SC (UKSC) 93
  - c. the judge has clearly failed to give due weight to some very significant matter, or has clearly given undue weight to some matter, *B-v-B (Residence Orders: Reasons for Decision)* [1997] 2 FLR 602.
  - d. a process has been adopted which is procedurally irregular and unfair to an extent that it renders the decision unjust: (has there been an unseemly rush to judgment) *Re S-W (Care Proceedings: Case Management Hearing)* - [2015] 2 FLR 136
  - e. a discretion has been exercised in a way which was outside the parameters within which reasonable disagreement is possible; *G v G (Minors: Custody Appeal)* [1985] FLR 894,
33. The court must give a decision and explain the reasons for it so that the parties and the appeal judge may properly understand the basis of the decision. The trial court does not have to deal with every point raised and does not need to set out the law in detail provided it is evident from the decision that all relevant factors have been considered.
34. In *Re F (Children)* [2016] EWCA Civ 546 Munby P summarised an approach to appeals,
22. *Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in *SP v EB and KP* [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."*
  23. *The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in *Pigłowska v Pigłowski* [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):*

*"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this*

*case ... These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."*

*It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis".*

35. Lord Hoffmann also said in *Piglowska v Piglowski* [\[1999\] 1 WLR 1360](#), 1372:

*First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc v Medeva plc* [1997] RPC 1:*

*'The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'*

36. The application of the appeal courts task was further explained in *B-v-B (Residence Orders: Reasons for Decision)* [1997] 2 FLR 602. Holman J set out a useful summary of the circumstances in which an appeal court might intervene.

*'So the Court of Appeal may interfere with the decision of the judge if, but only if, he made an error of law, or the decision was plainly wrong, or if the judge failed to take into account relevant matters or inappropriately took into account irrelevant matters. ... clearly an appellate court is only able to assess whether or not the court below has failed to take into account relevant matters or has inappropriately taken into account irrelevant matters, if that court does set out its reasons with sufficient detail and clarity to make clear the facts upon which it relied and the matters it has taken into account in exercising its discretion and reaching its decision.'*

## Discussion

37. The task facing a judge of the FRC in a case such as this is not an easy one. A two day time estimate with a Bundle in excess of 2500 pages and allegations of non-disclosure and tight finances presents a significant challenge. Delivering an ex-

tempore judgment at the conclusion of 2 full days inevitably means that the judgment is likely to be less structured, less detailed in its survey of facts and arguments and less comprehensive in its evaluation of the relevant factors and the ways in which the permutations before the court are considered and either accepted or rejected. Clearly this case had been hotly fought and a host of issues put in play and so the judge's task was an unenviable one even for an experienced FRC judge. I am for those reasons, and more, generally conscious that it is not the role of the appellate court to substitute its own view for that reached by a judge after consideration of the oral evidence and to prefer one imperfect solution to another; nor should the court subject an extempore judgment to a detailed textual analysis so as to illustrate an error which might provide a basis for saying the judgment is wrong. The judge has seen the witnesses, read much evidence and his judgment must be accepted as having a surrounding and unexpressed penumbra. A judge such as Recorder Howling is entitled to a considerable margin of appreciation in such a judgment but ultimately must identify the issues, explain his reasons in sufficient detail for the parties and court to understand how he reached the decisions he did and must operate within the parameters set by the appellate authorities in directing himself appropriately, determining the issues necessary to reach a decision and in determining those issues weigh the relevant factors in a way which is justifiable and thus ultimately reaching a conclusion which was a permissible one.

38. I have read the Skeleton Arguments and listened to the oral arguments and reserved judgment in order to consider what has been said. I initially had hoped to give an extempore judgment but having heard the arguments considered it appropriate to reserve judgment.
39. Unfortunately, in this case for the reasons set out below I am satisfied that the judge did not reach a decision which met the criteria identified above. I suspect that the reason for this was ultimately simply pressure of time or more accurately the lack of sufficient time to undertake the critical analysis that was needed on the facts.
40. I have reached the conclusion that the decision was wrong because
  - a. The judge mis-directed himself as to the standard of proof to establish fraud and this appears likely to have tainted his evaluation of aspects of the evidence and the Husband's credibility which were of central importance in the case including whether the Husband had hidden assets and whether he was dishonest to an extent that he might be suppressing his income for tactical reasons. How the judge dealt with other issues relating to the Husband's credibility (including the non-finding on the £80k costs payment) support the conclusion that the judge's approach to issues of fraud or dishonesty was not based on the standard 'more likely than not' test.
  - b. He did not explicitly reach a conclusion on the Husband's future earning capacity and whether it was reasonable to expect him to increase it back to levels he had earned at throughout the marriage. This issue was central to the consideration of resources and how needs were to be met but was not answered. One must infer the judge concluded it was unreasonable for him to increase his earning capacity which was certainly a conclusion open to him, but which required explanation by reference to the evidence and which would

have sounded in his consideration of how the husband's future needs were to be met.

- c. Despite explicitly recognising the uncertainties surrounding the Wife's future earning capacity he fixed her for the purposes of determining her housing need was met, with a secure earning capacity of £40k pa within 12 months. The judge did not treat the Wife and the Husband in the same way but rather appears to have maximised the Wife's presumed capacity whilst minimising the Husband's when both – on his judgment – faced uncertainty. In particular given the absence of doubts about the Wife's credibility and very considerable doubts about the Husband's this lack of parity of reasoning is harder to justify.
- d. The judge decided that the Husband's housing need was appropriately met by remaining in WC valued at £770k whilst the Wife and child's was met at £250k but failed to give due weight to the fact (as it then was) that 60% of the Husband's income (assuming the judge fixed it at £65k gross) would be spent on mortgage payments and that his mortgage payments would on the Husband's own case exceed his net income when his mortgage deal came to an end. The judge did not appear to consider in detail either the Wife's financial needs other than housing and how they were met or the Husband's outgoings for the purposes of determining whether remaining in WC was viable or an appropriate use of resources or whether they would be better allocated to periodical payments to support the Wife and child's financial needs and to meeting the father's housing needs in a more modest property.

Ground 6: Error of Law/Mis-direction on standard of proof.

41. It is clear that the judge's self-direction is a mis-direction and thus an error of law. The only circumstances in which the criminal standard of proof is applicable in a financial remedy case would be in relation to 'committal'. Fraud or other dishonesty is subject to the same balance of probabilities standard as any other factual issue even if issues of fraud should not be pleaded without an evidential basis. In this case the evidence clearly provided a basis on which to pursue allegations of non-disclosure, dishonesty or possible suppression of income or financial resource. The issue the judge was considering at the relevant point in the judgment was the Wife's case that the Husband was not being honest about his actual income and that the new PAYE position with a 'friend' was part of a tactic to depress his income for the court proceedings. The Wife alleged that he had hidden bank accounts, was working for his previous employer or had another company. These were all part of the Wife's case that the Husband was painting a misleading or dishonest picture of his finances which was relevant both to the extent of his resources (the £75k + to pay his legal fees or the late emerging £85k to buy her out) and his future earnings. There was much evidence on which she was entitled to rely – not least the recording of the conversation in which the Husband said he would hide assets and his forging her signature. In the relevant passage the Judge does refer also to whether it is established on the balance of probabilities and Ms Stewart relies on that to submit the misdirection does not have any impact on the actual outcome because the judge also applied the correct test. That he says this is true but it begs the question of what he is thinking when referring to criminal standard and to what degree that may have influenced his thinking in other components, The judge refers to it also in para 30 in this way '*Can I fairly draw the inference that H has lied to the court and has lied to his wife and has committed*



*another effective fraud by failing to disclose the bank account? I can't see that I can.... Can I believe his oral evidence? There is nothing to say I shouldn't. I am uncomfortable on this point.... I don't think I have an evidential basis on which I can actually reach a conclusion.... So I am making no findings on what I have been asked to by Mr Jeffrey. He may say I am ducking the point, how on the balance of probabilities can I reach a conclusion? I can't".* It is not entirely clear whether the judge is saying he is unable to reach a conclusion at this point or whether he is saying the Wife has not proved her case - the overall sense of the paragraph is that the judge is left in a state of uncertainty and is unable to make a conclusion one way or the other. This is unsatisfactory when the sum involved is something like 25% of the total possible assets. If it was a family loan that had consequences as to how it impacted on the Husband's resources going forwards – if in fact it was from an undisclosed bank account it had profound implications for the Husband's credibility and the courts evaluation of financial resources that might be available to him to discharge debts or meet his housing needs. The Husband was under a duty to provide full and frank disclosure of his financial resources and if he had been loaned £80k by family/friends ought to have produced that evidence but he had not. The way the paragraph is expressed along with other observations in the judgment such as *'If one wished to be harsh it could be said to be a fraud on HMRC'* point to a judicial reticence to identify dishonesty save where the evidence forced that conclusion - which would be more consistent with an approach of being 'sure' rather than being the appropriate 'more probable than not' standard. In dealing with the Husband's credibility the judge seems to accept that all the concerns about his honesty (forgery, misleading HMRC (at best), misrepresenting his income to the WC mortgagor) were explained by naivety. This was a conclusion based on the Judge's evaluation of the Husband's demeanour in giving evidence. Although the judge directs himself correctly about being cautious about judging credibility based on demeanour in court, overall the conclusion the Husband is naive rather than dishonest can only come from his demeanour in court as the other documentary evidence strongly supports the argument the Husband was indeed dishonest and financially manipulative and the judge does not explain how it is that this documentary record of dishonesty (together with non-disclosure and alleged non-compliance with disclosure requests) is displaced to result in a finding of naivety. This also suggests a judicial reluctance to apply a more likely than not approach but a rather higher standard which ends up in this case with a conclusion of naivety not dishonesty generally, a non-finding on a significant resource and no finding of fraud based on the criminal and civil standard. Taken in its entirety I accept the Appellant's case that the mis-direction is such that it affects the confidence which one can place in the other components of the judgment. As with procedural irregularity cases where the court may not require a party to specifically identify the consequence of the procedural irregularity in rendering the decision unjust so in this case I am driven to the conclusion that the judge's approach to the evaluation of the Husband's evidence, its honesty and reliability was tainted by an approach that sought a higher quality of evidence or higher level of proof than the simple more likely than not standard.

#### Ground 1: retention of WC by the Respondent

42. There is some force in each of Ms Stewart's rebuttal of the Grounds taken point by point. That though is one of the dangers of a compartmentalised approach. The court must at the end of the process of looking at the s.25 criteria stand back and look at the

case in the round - in all the circumstances – to reach a conclusion. When one adds all the compartments together in this case and looks at the case as a whole, I am satisfied that the judge was in error. This is not a case where the judge preferred one imperfect solution over another but where it seems clear that in various respects the judge gave undue weight to some aspects and failed to give due weight to others which lead to an outcome that was ultimately wrong. A number of points coalesce to lead to that conclusion. Ms Stewart also submitted that much of the criticism of the judgment ought to have been subject to a request for clarification. I am satisfied that would not have been appropriate in the context of this case. The appeal goes to the heart of the Judge's approach and absent delivering a re-written judgment I do not think a request could have sensibly been made or met.

43. The fact that the Husband is left living in a property worth £770,000 whilst the Wife and child are allocated a property to be acquired (in a state of some uncertainty) valued at £250,000 is not of itself wrong and cannot be said to be outside the parameters within which reasonable disagreement is possible but it is nudging the envelope and certainly requires some fairly clear explanation and demonstration that it has arisen after a process in which the material issues have been evaluated appropriately and ascribed due weight. I do not think that the judgment fulfils this.
44. Whilst Ms Stewart is right that a party should be given the opportunity to buy out - this pre-supposes that buying out the other results in a housing need being met and does not adversely impact on the other parts of the evaluation. In this case the most pressing need other than housing was to reduce the debt burden to free up income to meet current needs. The most significant debt was the £577k the Husband had borrowed (on false income information) to buy WC and which was unsustainable on his own evidence and the judge's apparent conclusions as to his earning capacity. He was to pay £2,400pcm out of net income of £3,900pcm on mortgage payments – a staggering 60% of his net income and the remainder was ascribed to child support and legal fees payments. What was the Husband to live on?
45. The most immediate question that arises is that whilst this results in the Husband's housing need being met immediately and securely (in the short term), but on a wholly illusory basis as his earning capacity cannot sustain it, the wife and child's need is met on a speculative basis. Ms Stewart argues that if the Wife and child's needs had been met more securely by selling WC and freeing up a capacity to pay periodical payments such might not have been possible as the Husband's income would in any event be eaten up by debt and he would be left in an insecure position obtaining housing. However, had the judge asked this question of the two options the security of the Wife and child or the insecurity of the Husband it would be that which best promoted the welfare of the child as a first consideration would usually win out.
46. Ms Stewart might be right that on fuller analysis a judge might properly conclude the Husband remaining in WC was the least worst option all round and struck the right balance. But the difficulty with this is that the judge did not carry out any evaluation of the Husband's expenditure if he were to remain in WC or to move to another property; other than to say all his net income was taken up by mortgage, CS and debt payments such that he couldn't pay periodical payments. But how did that make it viable or economically sensible for the family for him to remain? Digging a little deeper would highly likely give rise to the conclusion, as Mr Jeffrey argued, that

retaining WC was simply not viable and this consideration could be given to the alternatives including whether that meant the Husband could be housed elsewhere with a far lower mortgage and whether this would have freed up income which could have supported the wife and child's transition into securer housing. This exercise was not undertaken. Given on the evidence before the court the Husband remaining in WC was impossible on his predicted income leaving him there is hard to understand. Logically it only makes sense to leave him in occupation if he has some expectation of being financially able to remain there and better off by doing so; neither was so unless in fact there was an expectation he had other resources likely to come to him to support that and if that was so why are they not a feature of the evaluation of H's earning capacity or other resources. Providing an opportunity for the Husband to remain in WC only makes any sense if in fact the Husband's earning capacity, or some other component is different to the evidence put before the court. As it happens the Husband now says that rather than his mortgage payment doubling or tripling in early 2024 it can remain the same which is good news but begs the question of what other alternatives in terms of mortgage would be available to him to re-house whilst freeing up his income to support W and the child in obtaining housing.

## Ground 2

47. The judge's conclusion was that the housing needs of the Wife and child could be met was built on the platform of her earning capacity being £40,000 per annum within 12 months. It seems the judge did reach this conclusion – otherwise the order makes no sense but the judge at the same time explicitly referred to the fact that the Wife's ability to secure the £40,000 per annum was uncertain. Nor did the judge explicitly take into account that his housing solution required the mother and child to commute from Ilford to Wanstead and the impact that had on her finances, childcare and ability to resume full time work. Had there been great clarity about the Wife's ability to resume full-time work these other features might have been a matter which could be glossed over but in the context of all the other uncertainties the overall effect is to leave the Wife and child in a highly insecure position on housing.
48. Ms Stewart is right that in short marriage cases the authorities identify that the Wife suffering a degree of hardship is to be tolerated but that does not address the issue of housing the child and the Wife. The judge rightly identified that obtaining secure housing for the child and the Wife (as primary carer) was a priority but on his own evaluation of the evidence he seems to have based his decision on the Wife having an earning capacity of £40,000 within the year but also recognising there was a real risk that she might not.
49. Given there was no criticism of the Wife's honesty or credibility and the undoubted fact that she had care of the child for the majority of the time and had been working part time as part of her role as carer it is hard to understand how the judge came to the firm conclusion that not only was it reasonable to expect her to gain that capacity but that she would in a way that was certain enough to base the meeting of her housing need on it.
50. I am therefore driven to the conclusion that the judge placed undue weight on the Wife's ability to maximise her earning capacity within 12 months when the evidential base could not sustain that weight.

## Ground 4 and 5

51. The judge considered the historic earnings of H in quite some detail including bringing in (it seems) his own analysis of the impact of Brexit and the war in Ukraine on the likely earnings of those employed in the IT sector. All of this seems to have fed into consideration of likely earnings potential for the Husband in the future. However, it did not result in a conclusion that the Husband would not be able to earn in the future sums akin to those he had earned in the past but rather the judgment reaches no clear conclusion on this and moves onto consideration of the reasons for the Husband now being employed. The judge seems to have ultimately concluded that the Husband's decision to take employment at a gross salary of £65k per annum was based on achieving a better work/life balance than historically rather than it being the most he could earn. What the judge does not say - but it must be implicit in the ultimate outcome that this was a position that would endure for the foreseeable future and was a reasonable one.
52. Whilst the conclusion that the Husband's earning capacity going forwards was limited to £65k and that it was not reasonable to expect him to increase it is within the parameters of what the judge might reasonably have found, on the stark facts of this case it seems to me that it requires a clearer evaluation of the evidence of whether this was indeed likely to be the Husband's position for the foreseeable future and if so then a clear conclusion that it was not reasonable to expect the Husband to increase his earning capacity. Whilst the judge says he will return to it he does not do so. In some cases, it might be acceptable not to say so explicitly and for the appellate court to infer that was what the finding was and that it was a reasonable one. However, in this case it was a critical finding in that it set the Husband's net income at about £48k per annum compared to £74k per annum (historic marriage average) and was a hotly contested one and so required explicit determination – the absence of such a reasoned conclusion is an error. The point that Ms Stewart makes that a finding of a higher presumed earning capacity would not translate into the possibility of periodical payments is not sustainable; if the court imputes an earning capacity it will make orders on the basis of it being fulfilled. There is to some extent an interplay with Ground 6 here but this was a case where the Husband's honesty and reliability in relation to finances were front and centre and where there was much evidence (including the taped conversation in which he said he would hide his assets from W) which pointed strongly to the possibility that H might be seeking to depress his finances and in those circumstance it was imperative that the judge consider and evaluate that evidence and set out clearly his findings on it and the conclusions which flowed from it. As I say above a clear conclusion that his net income was only £3,900 pcm for the foreseeable future calls into question the decision to allow him the opportunity to buy out WC rather than sell it and refresh his financial arrangements.

## Conclusion

53. The Appellant invited me to substitute my own order for that of Recorder Howling. I do not consider that is a course which is properly open to me given the nature of my conclusions on the Appeal. The mis-direction as to the standard of proof does not necessarily mean that the Husband would be found to be dishonest and have hidden assets. The absence of a clear conclusion on the Husband's future earning capacity

and whether it is reasonable for him to increase does not mean it is inevitable that he will be ascribed a higher earning capacity. The lack of analysis of the alternatives which might have opened up if a sale of WC were more fully explored does not mean that periodical payments will emerge as the answer.

54. Although the parties have spent almost the entirety of their capital in costs – the Husband the lion’s share (which in itself might beg the question of whether he knew something the Wife didn’t in order to commit such sums)- I am afraid there is no alternative but to remit this case to be re-heard by an FRC judge to be identified by HHJ Hess.
55. The appeal is allowed.
56. That is my judgment.