Neutral Citation Number: [2024] EWHC 2296 (Fam)

Case No: FA-2024-000056

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE FAMILY COURT AT CARDIFF
HHJ Furness KC
NP20D04014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/09/2024

Before :

MS JUSTICE HENKE

- -

Between :

Philip John Mainwaring — **Appellant**

- and -

Susan Claire Bailey — **Respondent**

- -
- -

Dr Julian Sidoli (instructed by **Vale Solicitors**) for the **Appellant**
Roger Thomas (instructed by **Talbots Law**) for the **Respondent**

Hearing date: 28 August 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 5 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MS JUSTICE HENKE

Ms Justice Henke :

Introduction

1. The Appellant was the Applicant husband in financial remedy proceedings. The Respondent is his former wife.

2. The Appellant's application came before HHJ Furness KC. At the conclusion of a three-day hearing on 14 February 2024, HHJ Furness KC handed down a written judgment which concluded with the terms of the order he made. He made a clean break order which divided the available assets between the parties. The total assets available for distribution were in the region of £434,000. For the reasons he gave in his judgment, HHJ Furness KC awarded the Respondent £210,000 made up of £8,366 held by her solicitors on account; £36,000 from the sale of a property known as Amyas Close (as offered by the Appellant in submissions in the lower court) and £165,634 from the sale of Shamrock House after payment of a charge to SC, a third party who had secured judgment in a civil claim (referred to hereafter as "the civil claim/proceedings/judgment"). By the order, the Respondent was to transfer her interest in a property known as Laburnum Court and in a boat - *The Whatever* - to the Appellant. The net effect of the order was that the Appellant would receive about £154,732 after payment of his costs in the family and civil proceedings and after payment of arrears of council tax.

3. At the time of the hearing before HHJ Furness KC, the Appellant was nearly 60. The Respondent was 53 years of age. They had been in a relationship for 13-14 years and married on 17 August 2007. They have no children.

4. On 6 March 2024, the Appellant filed a Notice of Appeal by which he sought to set aside the order of HHJ Furness KC. The Appellant seeks a re-hearing of his application for financial remedy.

5. On 16 April 2024, Keehan J listed the Appellant's application for permission to appeal with appeal to follow if permission was granted. That rolled-up hearing was initially listed for hearing on 23 May 2024. That hearing date was vacated on the Appellant's application. The date given for the rolled-up hearing was thus altered to 21 June 2024 but that was vacated to allow the Appellant more time to obtain the transcripts he said he needed. The rolled-up hearing was re-listed 28 August 2024. The date was set to accommodate Counsel's availability and because of the need to enable the parties to get on with their lives. The appeal was becoming pressing as Keehan J had granted a stay of the sale of property, albeit only to the extent that the proceeds should not be distributed as per the order of 14 February 2024 pending the appeal hearing.

6. I took over the case on 25 July 2024 when I made directions order to enable the appeal hearing to proceed. In August, I made two further orders to enable the appeal hearing date to be kept. In particular, on 12 August 2024 I refused the Appellant's application for a further extension of time to file a transcript of a PTR hearing on 11 January 2024 but stated that the Appellant could renew the application orally before me at the appeal hearing if so advised. I gave my reasons for that decision in writing.

7. Throughout the application at first instance and this appeal, the Respondent has been represented by the same solicitors and Counsel. The Appellant chose to self-represent at first instance, having been unable to put his then solicitors in funds. As far as I am aware, throughout this appeal the Appellant has had solicitors on record who have acted for him from time to time although on other occasions he has chosen to act on his own behalf. The Appellant had Counsel to settle his Grounds of Appeal and Skeleton in Support and the same Counsel has appeared before me on this appeal.

8. In order to determine this application for permission to appeal with appeal to follow, should permission be granted, the Appellant has submitted a bundle which runs to 233 pages. On behalf of the Respondent, a bundle of a further 69 pages has been placed before me. I have also heard oral argument on behalf of both parties. I note that when the application came before Keehan J in April 2024, the Appellant's bundle in support ran to just under 60 pages. In addition, I have had the benefit of full argument on behalf of both the Appellant and the Respondent.

Preliminary Applications and This Hearing

9. In accordance with directions that had been given previously, the morning of 28 August 2024 was used for judicial reading. As directed oral argument began at 2pm that day. Two preliminary applications were made on behalf of the Appellant. Both were opposed on behalf of the Respondent.

10. The first application was an application to withdraw the first ground of appeal - perceived bias. The transcript of the PTR on 11 January 2024 had only been received that morning and the Respondent had not yet had sight of it. In the circumstances, Counsel for the Appellant had explored with the Appellant whether he wished to seek an adjournment so that he could rely upon it when furthering his argument in relation to perceived bias. I was told by Dr Sidoli that his client had had the opportunity to give him informed instructions and that he did not seek an adjournment for that purpose or any other. Indeed, on instruction the Appellant now sought to withdraw the first ground of his appeal. Given that was the Appellant's informed decision, I permitted the first ground of appeal to be withdrawn.

11. The second application was an application to admit fresh evidence. I was told that the evidence the Appellant sought to admit was relevant to the general argument that the outcome was unfair. The Respondent's submission was that, even if the documents were admitted, they would not make a difference to the outcome. I decided that I would admit the fresh evidence but made it very clear that, in argument on behalf of the Appellant, I expected to be taken to the fresh evidence and to hear submissions on the relevance of particular documents to the Appellant's Grounds of Appeal. Thus, at the end of Counsel for the Appellant's oral submissions, I queried why I had not been taken to any of the documents in question. I was concerned and so allowed a short adjournment to enable Counsel for the Appellant to take specific instructions on the fresh evidence and its asserted relevance. When he returned to court, Dr Sidoli duly made additional submission all of which were in relation to documents which were said to be relevant to HHJ Furness KC's decision in relation to the civil claim.

12. Within this rolled-up hearing, I have given the Appellant every opportunity to place before this court all the arguments he wishes to make. I have read both the "*Continuation*" skeleton argument and a position statement he prepared himself, despite both being outwith the terms of directions I have given to enable this appeal to be heard.

13. This appeal was heard in public. At the beginning of the hearing, I reminded the parties of FPR r.30.12A and PD30B, paragraph 2.3. I enquired whether either party sought to limit publication in this case for any reason. Neither did.

My Decision

14. Having read and listened to everything that has been placed before me, I have decided to dismiss the appeal. My reasons for doing so are set out in this judgment which is to be read as a whole.

The Law

15. I have reminded myself that the role of the appellate court and its approach to applications for permission to appeal are determined by the provisions of the Family Procedure Rules 2010 and by case law.

16. The test for granting permission is set out in FPR rule 30.3(7) which provides that permission will be granted where:

    (a) there is a real (realistic as opposed to fanciful) prospect of success; or

    (b) there is some other compelling reason to hear the appeal.

17. This is not a case where there is a compelling case to hear the appeal.

18. FPR r.30.12(3) provides that an appeal may be allowed where the decision was wrong or unjust for procedural irregularity.

19. It is my task to decide the application for permission to appeal with appeal to follow, if granted, by applying the principles set out in the classic speech of Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360 which includes the following:

> *"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."*

20. In relation to appeals against findings of fact, in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at paragraphs 114-115 Lewison LJ stated:

> *"114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC1; Piglowska v Piglowski [1999] 1 WLR 1360; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23, [2007] 1 WLR 1325; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33, [2013] 1 WLR 1911, and most recently and comprehensively, McGraddie v McGraddie [2013] UKSC 58, [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include:*
>
> > *i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
> >
> > *ii) The trial is not a dress rehearsal. It is the first and last night of the show.*
> >
> > *iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.*
> >
> > *iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
> >
> > *v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
> >
> > *vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.*
>
> *115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is*

> *sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see Customs and Excise Commissioners v A [2002] EWCA Civ 1039, [2003] Fam 55; Bekoe v Broomes [2005] UKPC 39; Argos Ltd v Office of Fair Trading [2006] EWCA Civ 1318; [2006] UKCLR 1135*."

21. Further, in *Volpi and another v Volpi* [2022] EWCA Civ 464, Lewsion LJ at paragraph 2 stated:

> "*2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:*
>
> *i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.*
>
> *ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.*
>
> *iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.*
>
> *iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.*
>
> *v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.*
>
> *vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract*."

22. The overriding objective in FPR rule 1.1 applies as much to the appeal process as to other applications under the FPR and I must therefore seek to determine this application justly but also proportionately.

23. Under FPR rule 30.3(5A), if I consider the application to be totally without merit, I can make an order that the person seeking permission may not request a reconsideration of the decision at an oral hearing. In deciding whether or not to exercise this power, I must have regard to the Court of Appeal decision in *R (Wasif) v Secretary of State for the Home Department* [2016] 1 WLR 2793. Underhill LJ made a series of observations at [17] as to the correct approach to the "totally without merit" test and said:

> *"(2) We repeat what Maurice Kay LJ said in para 15 of his judgment in the Grace case [2014]1 WLR 3432, as quoted above: "no judge will certify an application as [TWM] unless he is confident after careful consideration that the case truly is bound to fail. He or she will no doubt have in mind the seriousness of the issue and the consequences of his decision in the particular case."*

24. The test for permission to appeal was clarified fairly recently by the Court of Appeal in *Re R (A Child)* [2019] EWCA Civ 895 where Peter Jackson LJ said:

> "*The test for the grant of permission to appeal on an application to the Court of Appeal or to the High Court or Family Court under the first limb of the relevant sub-rule is that the appeal would have a real prospect of success". The case of Tanfern v Cameron MacDonald [2000] 1 WLR 1311 confirms that "the prospect of success must be realistic rather than fanciful*."

25. There is a presumption that an appellate court will determine an appeal on the basis of the evidence that was before the lower court. Fresh evidence will not be admitted without an order to that effect. Fresh evidence may be evidence of events since the decision under appeal or evidence relating to matters before the hearing that is subject to an appeal, but which was not available at the hearing in the lower court. There is no specific requirement to be satisfied in respect of an application to admit fresh evidence. The former requirements which were laid down in *Ladd v Marshall* (1954) FLR Rep 422 are relevant as matters which should be considered by the appellate court when deciding whether to allow an appellant to rely on fresh evidence. These factors are:

    (a) The evidence could not have been obtained with reasonable diligence at trial;

    (b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and

    (c) The evidence must be such as would presumably be believed, or in other words, it must be apparently credible though it need not be incontrovertible.

    These propositions do not apply to cases where the evidence to be admitted relates to matters which have occurred after trial or where there was no trial on the facts.

The Appellant's Case

26. The Grounds of Appeal were settled by Counsel who appeared before me on behalf of the Appellant. They were as follows:

Ground 1: Perceived Bias. The Learned Judge had given the Appellant, who was at the time of the first instance hearing a litigant in person, a perception of bias. Accordingly, the Appellant had asked HHJ Furness KC to recuse himself. HHJ Furness KC had refused that application.

Ground 2: Misunderstanding of the civil judgment.

Ground 3: Unreasonable outcome. The outcome arrived at by the Learned Judge was one that no reasonable tribunal would have reached.

27. The Grounds of Appeal were supported by a skeleton argument dated 5 March 2024. The argument followed the Grounds of Appeal and expanded upon them. The arguments can be summarised as follows:

(a) Perceived Bias. Examples leading to a perception of bias are said to include:

i. Statements made at the PTR by HHJ Furness KC that the Appellant would be paying interest on the property in any event.

ii. Seeking to go behind the civil judgment in favour of the Respondent without due explanation.

iii. Repeatedly blaming the Appellant for his desire to retain the boat (one of the marital assets) and seemingly punishing the Appellant for doing so in the outcome.

iv. Criticising the Appellant for failing to provide evidence of his mortgage raising capacity but not making the same requirement of the Respondent and gave her enough capital to buy a home outright, and

v. Failed to give weight to the Respondent's lifestyle and relationship.

(b) Misunderstood/misused the civil judgment. It is said that the learned Judge went beyond the bounds of his discretion when he laid the blame of the civil case solely at the door of the Appellant. Further, it is argued that he ignored what was termed a "*clear finding*" that the Appellant was jointly liable for the debt on the principal sum and that the interest of £34,917.19 was the Respondent's sole responsibility. In addition, the Appellant relied upon paragraph 111 of the judgment of HHJ Furness KC wherein he stated:

> *"The discrepancy in their end position is largely due to the costs of the civil claim which the husband had incurred in seeking and failing to establish that the loan from SC was a gift and was to [the Respondent] alone even though he accepted that the monies were used for joint benefit."*

It is said that that paragraph demonstrates that the learned Judge took an irrelevant matter into account.

(c) Unreasonable outcome. It is argued that the Appellant, at almost 60 years of age and in poor health, is unable to re-house himself whereas the Respondent, who is 53 years of age, is said to have 15 years of working life ahead of her. It is submitted on behalf of the Appellant that the Respondent has been over-compensated. There was, it is said, no reason in this case to depart from equality. The Appellant was awarded a net sum of about £155,000 and the Respondent £210,000. From the award, the Respondent could purchase a home for herself outright; the Appellant could not. The learned Judge was wrong in using the agreed valuation of £88,000 for the boat and ought to have taken judicial notice of depreciation given that agreement had been reached at an FDR two years previously. Had the pot been properly calculated and divided between the two parties equally, both would have been able to rehouse themselves.

28. Recently, the Appellant has filed his own document which he has entitled "*Continuation of Skeleton Argument on behalf of Appellant*". The document sets out the Appellant's perception of the PTR before HHJ Furness KC as being unfair. He was self-representing, and he did not have the Respondent's Note for the PTR until the morning of the hearing. Nevertheless, the Appellant tells this court in his "*Continuation Skeleton Argument*" that *"A full response was made by the Appellant to the obvious errors and misleading information contained within the documents*". In relation to the Grounds of Appeal, the Appellant within this document reiterates the submissions made on his behalf by Counsel, albeit in more florid terms. I have read the document carefully. I note that he has made a number of additional points which I summarise in the next paragraph.

29. Within his document, the Appellant complains that, whereas he has had no recognition for the costs he has paid to maintain the marital assets since separation, the Respondent has had her costs taken into account when the balance sheet has been calculated by the learned judge. He alleges the judge ignored a ringfence agreement in relation to the property Amyas Close and that this property was wrongly re-entered into the balance sheet. It is further alleged that during the sale process of that property, after the hearing before HHJ Furness KC, the Respondent's conduct caused the Appellant to incur unreasonable costs. The court had before it at first instance details of properties which it was asserted would meet the Respondent's housing needs but the court at first instance did not ask the Appellant for similar documents. Within this document, the Appellant also asserts that the way the learned judge treated the civil claim is contrary to how the Claimant's (SC's) litigation team are treating the claim. The Appellant makes the further point that, in his view, the overall award was unfair as he received three assets, all of which came with costs of maintenance and required expenditure, whereas the Respondent received a fixed lump sum.

30. In addition to his own *Continuation Skeleton Argument*, the Appellant also filed what he termed a Position Statement. It is dated 13 August 2024. Much of it is emotive. It is written from the perspective of a man who considers himself hard done by and who blames the judgment of HHJ Furness KC for his misfortune. At paragraph 7 he sets out

the substance of his grievances. Having read the document, I take the view that most of his arguments in this document repeat the arguments he has made in the original skeleton argument and the continuation document. However, I note from this document that the Appellant now seeks to bring to this court's attention that the Respondent is cohabitating and that, he says, affects her needs for rehousing. The Respondent rejects the Appellant's assertion. The Appellant also places before this court the continuing costs that are being incurred as a result of the civil claim, and that his legal costs for the financial remedy proceedings are in the region of £45,000.

The Judgment

31. Given the criticisms that are made of HHJ Furness KC's reasoning, I have analysed the judgment given with care. I have read it critically in the light of the submissions made to me in writing and those made in oral argument.

32. The judgment begins by setting out the basic facts. This was a relationship of 13-14 years. There are no children of the relationship.

33. The Appellant had made an application for financial remedies in October 2020. In the second section of the judgment, HHJ Furness KC charted the litigation history of that application. Pertinently, given the focus of this appeal, at paragraph 10 HHJ Furness KC records what had happened at the FDR on 2 February 2022 as follows:

> "*No agreement was reached. The boat 'Whatever' was valued for final hearing at £88,000 (Euros 100,000). [The Respondent] agreed not to deal with the net proceeds of sale of properties without the express written consent of the [Appellant], he agreed to pay all outgoings including the mortgages on the property at Shamrock House and 14 Amyas Close.*"

34. The judgment records that the family finance proceedings were adjourned until after the civil case had concluded. The family finance application returned before HHJ Furness KC on 11 January 2024 when at a lengthy hearing he gave directions for the final hearing of the Appellant's application. At paragraphs 16 and 17 of the judgment, HHJ Furness KC records what happened at the January 2024 hearing. The Appellant made an application by C2 on 7 February 2024 for the learned judge to recuse himself for perceived bias. That application was dealt with by HHJ Furness KC at the start of the 14 February 2024. He refused the application, stating in his final judgment:

> "*The hearing on 11 January had taken more than twice the time estimate of the parties because I allowed the [Appellant] to address me on almost every line of the proposed order and in a number of respects I made orders which were contended for by the [Appellant] and opposed on behalf of the [Respondent].*"

35. The next section of the judgment sets out the proposals the Appellant and the Respondent made at first instance by way of open proposals including one which the Appellant had filed on the morning of the hearing. At first instance the Respondent sought £238,764, which she said represented 55% of the net assets, to meet her housing needs. The Appellant proposed that the Respondent should receive £169,468.

36. As is customary, the learned judge then set out the documents he had had before him and the evidence he had heard to enable him to make a decision, before turning to set out the law he would apply to the facts as he found them to be. The learned judge quite properly reminded himself of the provisions of s.25 and s.25A Matrimonial Causes Act 1973 before stating the following:

> "27. *I must bear in mind that the overall intention of the Court should be to achieve fairness between the parties. I bear in mind too that "in general it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal start on the road to independent living" per Baroness Hale at paragraph 144 of Miller v Miller, McFarlane v McFarlane [2006] 1 FLR 1186.*
>
> *28. There are three main distributive principles: sharing, needs and compensation, shaped by the overarching principle of fairness. Each party is entitled to an equal share of the assets of the partnership unless there is good reason to the contrary- this is the yardstick of equality which the courts have stressed must not be elevated to a rule. The rationale of White is 'fairness' not 'equality'.*
>
> *29. The burden of proof in civil or family cases lies upon the party making the assertion and that person must prove the assertion on the simple balance of probabilities.*"

I note that on appeal there is no criticism of the law the learned judge set out in his judgment.

37. Paragraphs 30-37 of the judgment deal with HHJ Furness KC's assessment of the Appellant and Respondent as witnesses. In relation to the Respondent, the learned Judge's assessment of her was that "*her evidence was careful and largely truthful though there may have been some areas where she could have tried harder to gain a recollection*". In relation to the Appellant, HHJ Furness KC made a number of findings about his evidence. They included that he was a man of "*fixed views*". The judgment records that the Appellant had alleged that the Respondent had sold properties at undervalue, only to be dismissive of that allegation when he was cross-examined on behalf of the Respondent. The learned judge records that the Appellant was "*wholly unperturbed by the fact that he had failed to file accounts for his businesses with the Courts, that payments could not therefore be traced or his income ascertained*". Later in the same segment of the judgment at paragraph 32, HHJ Furness KC states that "*I do not accept that any failure to produce documentation was anything other than deliberate*".

38. I note from paragraphs 33 and 34 of the judgment that, initially at first instance, the Appellant would not accept that the value of Amyas Close should be included on his side of the asset schedule. However, having reflected overnight, he then proceeded to accept that if the £36,000 he has agreed to pay the Respondent for the property is put on

the asset schedule, then he must put the equity of that property on his side of the balance sheet. I note that the Appellant alleges that HHJ Furness KC wrongly entered the property in the balance sheet and did not take account of what he terms the ring-fenced agreement in relation to Amyas Close. Plain reading of paragraphs 33-34 of the judgment demonstrates the contrary. The property at Amyas Close was entered into the balance sheet in accordance with the Appellant's evidence given before HHJ Furness KC on the second day.

39. The next passage of the judgment sets out the findings of fact that the learned Judge considered he needed to make together with his reasoning. Having read that part of the judgment, it is clear that the learned judge considered carefully the Appellant's assertion that the Respondent had sold properties at an undervalue before rejecting that assertion. I note that there is no appeal against his findings of fact in relation to that issue.

40. The Appellant seeks to appeal HHJ Furness KC's findings about the judgment debt in relation to a loan of €160,000 made by a third party named SC. It appears that, when the parties separated, SC became anxious about its repayment and issued civil proceedings. The Appellant intervened in that claim and opposed the application, asserting the loan was a gift to the Respondent alone. The judgment in relation to the civil claim was before the court at first instance as was the order made by the Recorder who heard the claim. The order arising from that claim stated that the Appellant agreed to vacate the former matrimonial home, Shamrock House, and market it for sale. Judgment was given in the sum of £178,057.19 which was calculated as the original loan of €160,000/£137,440; interest of £34,917.19; a further loan of £5,200 and administration charges of £500. The proceeds of sale of Shamrock House were to be applied as to the costs of sale and to redeem the mortgage, with the proceeds thereafter to be divided equally with the judgment sum paid from the Respondent's share.

41. Given the focus of the appeal before me I set out in full herein what HHJ Furness KC said in his judgment about the civil proceedings:

> "*51. The sale proceeds were to be applied to pay the costs of sale and to redeem the mortgage with the proceeds thereafter to be divided equally with the judgment sum to be paid from the wife's share.*
>
> *52. I indicate straightaway that although that sets out the distribution according to the civil claim it does not bind the matrimonial court as any money received by either party will be within the matrimonial pot and must be considered as being available for distribution as deemed appropriate by this Court. The key findings are that the loan was made to both parties and used for their joint benefit. There is no reason why the liability arising therefrom should be seen as anything other than joint.*
>
> *53. The husband argues that the judgment only dealt with the original loan and not the other amounts which contribute to the overall debt. He disputed that the additional £40,000 + should be his responsibility. In his evidence it was clear that he believed the civil court has determined that he is not responsible for any*

of these additional sums. I disagree that any such positive finding was made, the parameters of what the judge was asked to decide are set out in paragraph 12 of the judgment – he was asked to determine whether the E160,000 was a loan or a gift and, if a loan, whether it was to W alone or joint. He found it was a joint loan. He was not asked to determine responsibility for the other sums as W had agreed that judgment should be entered for those sums anyway. This is exactly in accord with what the husband's own solicitor indicated in his letter of the 25th January 2024 which H attached to his statement about these matters.

54. H's solicitor also underlines that W had agreed the interest even though the Recorder made a finding that interest had not been considered at the time the loan was made. Mr Thomas accepts that but says that means that interest would be chargeable from the due date of repayment which was the 5th July 2018 and has been calculated on that basis.

55. In my judgment in respect of the interest and the administrative charge there is a very clear argument that these arise from the original joint loan and must be seen as joint. The parties have had the benefit of the loan, if they had borrowed money from a Bank they would have had to pay interest, now the Court has determined based on the admission of the wife, that interest is payable on this loan. It was a joint loan and the interest is therefore a joint liability too. Both parties have benefitted from the loan in being able to make investments and the interest agreed by the wife was at a commercially appropriate rate for a private loan (bank rate plus 4%), particularly as it only began to run from a date in 2018 some 2 years after the original loan. I have no hesitation in coming to that determination.

56. The same applies to the administrative charge. SC sought to protect his interest by securing a charge. There were costs in doing so. Given it was H who was alleging that it was a gift rather than a loan, he can hardly complain about the necessity of doing that, the cost of SC doing so or indeed the need for that to be seen as a joint liability.

57. The third additional sum is an additional loan of £5,200. This was not considered within the judgment in the civil claim and therefore needs to be determined within these proceedings but perhaps with some acknowledgment that it is a loan from someone who has already loaned monies to the parties jointly.

58. W says that this money was used to carry out essential repairs on a property at 84, Maple Street under threat of prosecution. She said so in her Form E. There are documents in the bundle that confirm the threat of prosecution and the need to carry out work estimated at £5,600 + VAT [D251-255]. The husband says: "My position on the loan of £5,200.00, however, remains the same as my position on any essential costs spent on our assets. That is, that those costs are a cost from the estate and not solely for one person. Such costs include mortgage payments, service charges, council tax, berthing costs and essential works. In this case of the £5,200, I am happy for the costs outlined for this money to form part of our

> *financial resolution. As this loan has always formed part of the civil trial, it is only now that it is coming to the forefront of negotiations."*
>
> *59. Thus he agrees that this loan was used for an essential purpose and should be considered as a joint liability. He agreed this in oral evidence too.*
>
> *60. For the reasons stated I am satisfied that all the sums which constitute the judgment in the civil case should be seen as joint liabilities and treated accordingly when considering any distribution between the husband and wife.*
>
> *61. As will appear later in the judgment this argument is somewhat illusory anyway as if I determined that the £40,000 + of additional liability, or the interest in particular, it would alter the distribution so that 'needs' would come into play in any event.*"

42. HHJ Furness KC at paragraph 67 of his judgment then proceeded to apply each of the factors in s.25 Matrimonial Causes Act 1973 to the facts of the case as he found them to be. When looking at the income and earning capacity of the parties, the learned judge found that there was a disparity between the outgoings for which the Appellant sought recompense within the family finance application and his stated net profit and available income. Later in his judgment, when considering the value of cherished number plates in the Appellant's possession, he notes that the Appellant told the court he had sold them for £15,000 and retains one worth £750. However, "*there was no paper trail in respect of any sale or indication as to what happened to any sale proceeds*". When looking at the financial resources of the parties and the assets available for distribution, the learned judge specifically records that he will honour the agreement the parties had made in relation to the property Amyas Close in May 2023. That is the "ring-fenced" asset to which the Appellant referred in his *Continuation* Skeleton. In relation to the boat, HHJ Furness KC specifically recorded that the Respondent had proposed to sell it for €100,000/£88,000 but the Appellant had wanted to retain it. At the FDR, the Appellant had agreed the valuation of £88,000 for the purposes of these proceedings. When he did so the learned judge found that he "*knew at the time that this was a wasting asset, it remains so today. It was his choice to prevent the sale, he agreed the valuation at £88,000 a year ago and in my judgment, there is now no reason to revalue it and thereby penalise the [Respondent] for any diminution in value*".

43. Contrary to the written submission of the Appellant, the learned Judge specifically considered repayment to the Appellant of expenditure he had made on properties and the boat in paragraphs 77-83. He found that the Respondent should reimburse the Appellant for one half of specific payments which total £21,967 and allowed £9,600 in respect of mortgage payments made by the Appellant in relation to another asset, namely Laburnum Close, stating that expenditure on joint property was to be divided equally. However, in relation to the boat the learned Judge did not consider the Appellant should be recompensed for the costs of berthing and maintaining it. He rejected the claim for recompense because the Appellant had "*hung on to a wasting asset, despite an offer for sale which the [Respondent] had wanted to accept. He must bear the financial responsibility for that decision*".

44. In terms of each parties' needs, HHJ Furness KC accepted the reality that both parties needed their own home. He rejected the Appellant's submission that he would bring the boat to a local marina and live on it as fanciful. The Respondent had placed before the court estate agents' particulars of property she considered suitable for herself. The Appellant did not do so, but that was a matter of his choice for which the Learned Judge should not be criticised. In any event, I note that at paragraph 90 HHJ Furness KC made the unchallenged finding that both parties needed "*a small property and a modest income on which they can survive*".

45. In terms of the physical and mental disability of both parties, HHJ Furness KC factored into his decision making a late submission on behalf of the Appellant of a GP's letter indicating that the Appellant was suffering from anxiety and depression. However, the learned judge also recorded that at the hearing on 11 January 2024, the Appellant had agreed that he has no condition which renders him unfit for work (see paragraph 96 of the judgment).

46. Having considered all the factors under s.25 Matrimonial Causes Act 1973, at paragraph 99-105 of his judgment HHJ Furness KC then considered the effect of equal sharing under the sharing principle. An equal share of the assets would result in each party receiving £185,743 but that calculation had to be varied to take into account the May 2023 agreement in relation to the property Amyas Close. Once that was done a straightforward equal share would give the Appellant £207,789 and the Respondent £221,743. However, further adjustment was then needed to make allowance for the sums for which the judge found the Appellant and the Respondent should be recompensed as well as some joint liabilities. Having made those adjustments, strict equality would mean the Appellant would receive £219,837 and the Respondent £209,695.

47. However, HHJ Furness KC at paragraph 106 then stood back and looked at whether such an order would meet the needs of each party and whether it constitutes a fair distribution. At paragraphs 107-109 the learned judge specifically looked at the Respondent's specific housing needs and the impact of the parties' respective liabilities on their overall circumstances. He factored into the calculation of the Respondent's net assets the costs of the civil claim for which she was responsible, which totalled £16,300. When considering the Appellant's net assets, he took into account civil costs of £47,000.

48. At paragraph 111 of his judgment HHJ Furness KC remarked that "*the discrepancy in their end position is largely due to the costs of the civil claim which the [Appellant] has incurred in seeking and failing to establish that the loan from SC was a gift and was to the [Respondent] alone even though he accepted that the monies were used for joint benefit*". He continued:

> "*112. Thus as it happens the application of the sharing principle provides a figure of £209,695 and applying the needs principle for the [Respondent] reaches a figure of £210,270.*

> *113. On either basis the [Appellant] will end up with assets of between £154,00 and £155,000 which will not enable him to purchase a property of the same value as the [Respondent] unless he can raise a small mortgage of about £27,000. He says that is impossible but there is no evidence from a broker about that (despite a court order) […] I am not convinced it would not be impossible for him to raise such a sum largely because I am not convinced that I have a full picture of his income. Anyway to some extent he is the author of his own misfortune as the decision to retain the boat has had a significant financial consequence which could have been avoided. He is determined to keep the boat and thus would not be able to be rehoused anyway.*"

49. The learned judge then proceeded to make the order and distribute the assets as I set out at the beginning of this judgment.

My Reasons

50. I have already recorded that the Appellant chose after receipt of the transcript of 11 January 2024 to withdraw the first ground of this appeal. I allowed him to do so. I have not seen the transcript of the hearing on 11 January 2024 and thus I do not comment on its content in this judgment. However, it seems to me the specific examples of perceived bias are interwoven with the second and third grounds of appeal upon which the Appellant relies. Thus, I have considered them as part of my overall consideration of this appeal.

51. I begin with Ground 2, namely the assertion that the learned Judge had misunderstood or misused the civil judgment when coming to the conclusions he did. Having read the judgment of HHJ Furness KC, I have formed the view that he neither misunderstood nor did he misuse the judgment in the civil claim. I take the view that HHJ Furness KC treated the civil claim correctly. I note that he had adjourned the family finance case until after the conclusion of the civil claim. He ordered that the judgment in the civil claim should be filed and form part of the bundle before him in the family finance proceedings. I note that at that time the Appellant had objected to the inclusion of the civil judgment [paragraph 15 of the judgment]. HHJ Furness KC had the civil judgment before him when making his findings. He also had before him the order made by the learned Recorder. From the manner in which he considered the issues relating to the civil claim, it is self-evident that he had read and understood both documents.

52. I too have the judgment the learned Recorder gave in the civil claim before me. I note from the judgment that the Respondent admitted the claim but that the Appellant asserted the monies had been a gift from SC, the Claimant, to the Respondent and not a loan to them. He therefore contested the claim.

53. At paragraph 27 of the judgment, the learned Recorder found in the civil claim:

    (a) The Euros 160,000 was advanced by the Claimant as a loan; and that

    (b) Whilst this was initially sent to the bank account of the First Defendant [the Respondent to this appeal] , this was clearly envisaged and understood to be a loan to both the First and Second Defendant [the Appellant], initially to assist with the planned purchase of a Portuguese property but then was used by them

subsequently for their joint benefit, indeed, part of it being used to acquire another property in the UK.

54. The learned Recorder then proceeded to state at paragraph 28 of his judgment that:

> "*As to the terms of the loan, I am not satisfied on the evidence that there was agreement reached other than the broad one that the Claimant would provide a loan to his friends on the understanding that it would be paid back in a reasonable timescale. I do not find on the balance of probabilities test there was any specific agreement on the precise date of repayment or any other terms including that of any applicable interests.*"

55. The Learned Recorder stated at the conclusion of his judgment:

> "*Therefore, in summary: I find that a loan was provided as opposed to a gift; and that this loan was both to the First and Second Defendants as opposed to just the First Defendant.*"

56. Under the terms of the Recorder's order:

(a) The Respondent was to repay the Claimant £178,057.19 by 4pm on 10 August 2023.

(b) The claim for an order for sale of the property (Shamrock House) was to be stayed generally.

(c) There shall be liberty to apply for all parties in relation to the preceding paragraph.

(d) The sale proceeds of the property shall be applied as follows:

(e) To pay the costs and expenses of effecting the sale of the property.

i. To redeem the first charge to the bank.

ii. The sale proceeds after the above deductions shall be divided equally between the Appellant and the Respondent.

(f) From the Respondent's share any sums due to the Claimant under the charge shall be paid and any remainder paid to her.

(g) Provision was made for costs against the Appellant and the Respondent.

57. I have set out above paragraphs 51-61 of HHJ Furness KC's judgment. Those are the paragraphs in which he made his findings about the civil loan, the interest payable thereon and any additional sums incurred as a result of the debt. He correctly identified that the learned Recorder made no finding in relation to interest payable on the loan (see paragraph 28 of the civil judgment). He correctly set out the Appellant's argument that the Respondent had agreed the interest albeit the Recorder had not made a finding on interest. He heard evidence on this point from the Appellant and the Respondent. Having done so, he came to his conclusion that the interest and charge must be joint for the reasons he gave at paragraphs 55-56 of his judgment set out above. In writing, it was

argued on the Appellant's behalf that the learned judge ignored a "*clear finding*" that the Appellant was jointly liable for the debt on the principal sum and that the interest of £34,917.19 was the Respondent's sole responsibility. In another document on behalf of the Appellant, it is asserted that the Recorder found that the contested loan was not interest bearing. Having read the order and judgment of the learned Recorder in the civil claim, I consider that HHJ Furness KC's understanding of the civil judgment was correct.

58. In oral argument much was made of paragraph 61 of HHJ Furness KC's judgment and the use of the word "illusory" therein. Having listened to the submissions made on behalf of both parties in relation to this paragraph, I consider that all the learned judge was doing in paragraph 61 was setting out that, if the interest on the loan and the additional liabilities were all the Respondent's responsibility, then they would have to be placed on the balance sheet as debts for which she was liable and that that would be have to be factored in when a needs argument came into play. HHJ Furness KC was simply explaining that, even if the Appellant's argument was accepted in relation to the interest on the loan and the additional sums, then it would be unlikely to affect the overall outcome as the wife's need for additional capital to meet her needs would be greater if the Appellant was correct in his assertions. The learned Judge's summation is, in my view, not open to criticism.

59. I have considered the fresh evidence before the court which the Appellant argues supports his case that the learned judge's findings of fact in relation to the question of interest on the loan were wrong. One of the items is a letter from his civil solicitors dated 25 January 2024. I have read it. That is the same letter HHJ Furness KC referred to in his judgment. He took it into account when making the findings that he did about the loan and the interest thereon. I have formed the view that, on the basis of all the evidence HHJ Furness KC had before him, which included that letter, he was entitled to make the findings of fact he did about the loan and the interest on it. However, it is part of my task to consider that conclusion in light of any fresh evidence. Within the fresh evidence to which I have been taken in argument, is an email exchange between the civil solicitors for the Appellant and the Respondent. The first in time contains the Appellant's understanding that interest on the debt was the Respondent's responsibility. The Respondent's solicitors appear to accept that proposition. I have asked myself rhetorically what weight I should give to that correspondence and how should I treat that evidence? On behalf of the Appellant, it is argued that the email exchange evidences that there is a body of legal opinion that does not agree with the learned judge's finding. If that is the purpose of submitting that email exchange, then I formally record that they are entitled to their view. However, their view is not binding on the lower court or this court. HHJ Furness KC had the benefit of considering not simply the civil judgment and order but the parties' evidence. He was entitled to make the findings he did on the evidence before him. I am reminded of what Lewison LJ stated in *Volpi* (above). I do not consider that HHJ Furness KC's findings in this regard were such "*that no reasonable judge could have reached*". It matters not that other lawyers, especially those who have not had the benefit of hearing the evidence HHJ Furness KC did, have a different view. The conclusion HHJ Furness KC reached was one he was entitled to reach and does not fall outside the band of reasonableness.

60. Contrary to that asserted on behalf of the Appellant, the learned Judge did not lay the blame of the civil case solely at the door of the Appellant nor did he seek to go behind the civil judgment. What HHJ Furness KC did was to make findings of fact as he was entitled to do on the evidence before him.

61. As a matter of fact, the Respondent had admitted that the monies from SC had been in the nature of a loan and had submitted to judgment. It was the Appellant who claimed the monies were a gift. It was that claim that caused the hearing of the civil claim. An order for costs was made against each party by the learned Recorder in the civil claim. The learned Recorder's order of August 2023 records that the Respondent was to be solely liable for the costs of the claim up to the date upon which the application was made namely 2 December 2022. Thereafter, the Appellant and the Respondent were to be equally responsible (50:50) for the Claimant's costs. That costs order still stands. It was rightly not disturbed or undermined by his judgment. The effect of the costs order was rightly factored into the decision-making of HHJ Furness KC.

62. I have been taken on behalf of the Appellant to paragraph 111 of the judgment of HHJ Furness KC:

> *"The discrepancy in their end position is largely due to the costs of the civil claim which the husband had incurred in seeking and failing to establish that the loan from SC was a gift and was to [the Respondent] alone even though he accepted that the monies were used for a joint purpose."*

That is not HHJ Furness KC punishing the Appellant. In that paragraph he is simply setting out the net effect of his order and how the disparity arises. Paragraph 111 has to be read in the context of the judgment as a whole and paragraph 106 of the judgment in particular.

63. I further take into account that on behalf of the Appellant no criticism was made of paragraph 52 of HHJ Furness KC's judgment (set out above).

64. For all the reasons I have given, I have decided Ground 2 of the Appeal is simply not made out.

65. Whilst I have allowed the Appellant to withdraw Ground 1, I have taken into consideration that the specific examples of alleged bias raised are matters of fact which the Appellant now perceives to have been unfairly determined against his interest. I consider it convenient to deal with those that have not already been dealt with as part of Ground 2 before turning to consider Ground 3.

66. The most obvious issue is in relation to the value used by HHJ Furness KC for the boat, *Whatever*. It is argued on behalf of the Appellant that the learned judge should have taken notice of the fact that it was a wasting asset and attributed to it a value less than that agreed between the parties at the FDR. However, the learned judge within his judgment set out the value he gave to it and why he determined it should be £88,000. He

came to that conclusion after hearing all the evidence for the reasons he gave. His reasoning cannot be faulted, and his finding stands (paragraphs 10, 74(d) and 113 of the judgement in the court below).

67. The learned judge did remark upon the lack of evidence as to mortgage raising capacity from a mortgage broker in relation to the Appellant and the Respondent. In that regard, it is self-evident from paragraph 113 of the judgment of HHJ Furness KC that he treated both parties equally. HHJ Furness KC accepted the Respondent's evidence on income. It was modest, about £1000 per month. Given her limited income, self-evidently her mortgage raising capacity was likely to be negligible and probably non-existent. The Appellant, however, was in a different position. In relation to the Appellant, the learned judge considered the Appellant's assertion that he could not raise a mortgage, but it is clear from his judgment that he was not convinced that that which the Appellant asserted was true. Reading the judgment as a whole, HHJ Furness KC was far from convinced that he had the full picture of the Appellant's income and capital. Paragraphs 31-32, 68-70 and 75-76 of the judgment at first instance set out the learned judge's findings that the Appellant had not made full and frank disclosure of his income or his capital and the court's view that that non-disclosure was deliberate. Based on those findings, the learned judge was entitled to infer that the Appellant was likely to have greater income than had been disclosed and to infer a modest mortgage raising capacity of about £27,000.

68. On the face of the papers before this court, the Appellant asserts that the learned Judge erred in that he failed to give weight to the Respondent's lifestyle and relationship. The allegation initially was non-specific. It is not supported by evidence. However, having read his position statement dated August 2024 it is apparent that the Appellant's case has evolved. He now alleges that the Respondent is cohabitating. I have studied the Appellant's position statement prepared in February 2024 for the hearing before HHJ Furness KC. I note that the Appellant did not raise cohabitation as an issue in that document and, accordingly, it appears not to have been raised before HHJ Furness KC. I note that Counsel on behalf of the Appellant has made no submission before me to suggest that it was, nor has he addressed me orally on the issue of cohabitation. I have reminded myself that this is an appeal hearing, not a re-hearing. I consider that the Appellant's bald assertion about co-habitation does not take this appeal any further. It was not an issue before the lower court and there is no fresh evidence to be admitted in relation to that issue before me which would substantiate the Appellant's assertion, let alone any consideration about how it would have impacted on the award.

69. I now turn to consider Ground 3. It is not made out. There can be no proper criticism of the way HHJ Furness KC calculated the "pot" for distribution. His findings in relation to the civil claim and the value of the boat were all within the ambit of findings that a reasonable judge could make on the evidence before him. There is no evidence before me that the learned judge treated the Appellant unfairly or unduly favoured the Respondent. The learned judge knew the task he had to perform and carried that task out properly. He correctly set out the law and he applied it to the facts as he found them to be. He specifically considered the effects of the equal sharing principle (see paragraphs 99-105) before standing back and looking at whether such an order would meet the

needs of each party and whether it would constitute a fair distribution of the assets that were available for distribution. He then provided his reasoning for the order he made. The judgment of HHJ Furness KC should be read as a whole. Within that judgment he clearly considers all the s.25 factors. When doing so, he took into account the Appellant's age and his ill health (see reference to the GP letter above). However, he also, as he was entitled to do, relied upon the Appellant's own case that his anxiety and depression did not affect his earning capacity (see paragraph 96 of the judgment). He considered both parties' income and capital resources. The learned Judge was not convinced that the Appellant had disclosed his true income and assets and made findings of fact to that effect. HHJ Furness KC was entitled to make those findings and to factor them into his decision-making. However, fairly, HHJ Furness KC gave the Appellant credit when settling the balance sheet for certain payments he had made since separation to preserve the assets now available for distribution. He looked at both parties' needs, including their housing needs, fairly (see paragraph 89 of his judgment). He acknowledged that there was a discrepancy in relation to outcome for the parties and that that was largely due to the costs the Appellant had incurred in contesting the civil claim. It had been the Appellant's choice to contest that claim. In the last two paragraphs of his judgment, HHJ Furness KC sets out correctly that the application of the sharing principle would provide a figure of £209,695 each and that a needs-based approach to the Respondent's case would result in a figure of £210,270. In paragraph 113, the learned judge considered the net effect on the Appellant of the award he intended to make: "*On either basis he will end up with assets of between £154,000 and £155,000 which will not enable him to purchase a property of the same value as the wife unless he can raise a small mortgage of about £27,000*". For the reasons he gave, the learned judge considered that it would not be impossible for the Appellant to raise a sum of £27,000 or thereabouts by way of small mortgage to supplement his capital. That sum together with the small mortgage would enable him to buy a similar home to that the Respondent would be able to purchase.

70. I consider that the outcome of the family finance application was fair and certainly cannot be said to be out with the ambit of HHJ Furness KC's discretion. HHJ Furness KC came to a decision which cannot be said to be wrong, and ground 3 must fail.

71. The hearing before me was a rolled-up hearing. Consequently, I have considered whether I should refuse to grant permission to appeal and simply certify this application for permission to appeal as being totally without merit. However, I am conscious that I heard full argument on behalf of both parties in relation to permission and in relation to the appeal, if permission were granted. In those circumstances, I have decided the better course is to dismiss the appeal.

72. As is customary, a draft of this judgment was sent to Counsel prior to publication of this judgment. The purpose of circulating the judgment is to enable correction of any typographical error or minor matter. In response to circulation, Counsel for the Respondent drew my attention to FPR 30.11(4) and (5). I have considered those rules. It is clear from the substance of my judgment above that having read all the papers and heard argument, I considered grounds 2 and 3 to be totally without merit. However, I permitted the Appellant to withdraw ground 1. Thus, my order should record that I

certify that grounds 2 and 3 were totally without merit. In the circumstances, I have considered whether it is appropriate in this case to make a civil restraint order. I have decided that it is not. In making this decision I have factored in that I permitted the Appellant to withdraw ground 1 for the reasons I have already given. I have also considered my conclusions in relation to grounds 2 and 3 as well as the fact that on the papers then before him, Keehan J set this appeal down for a rolled-up hearing.

73. Counsel for the Appellant is requested to draft an order reflecting my decision. That draft must be submitted within 48 hours of receipt of my judgment. If the parties cannot agree on the issues of costs, then I will receive at the same time as the draft order, written submissions solely related to the issue of costs. Such submissions shall be limited to four pages of A4 Times New Roman 12pt 1.5 line spacing.

74. That is my judgment.