Case No: BV18D20378

IN THE FAMILY COURT AT OXFORD
IN THE MATTER OF AN APPEAL

Date: 21 July 2021

Before:
Her Honour Judge Vincent

Between:

AD

Appellant

and

BD

Respondent

Hearing date: 17th May 2021

Duncan Brooks instructed by Goodman Ray LLP, solicitors for the Appellant husband
Rachel Gillman instructed by the Family Law Company, solicitors for the Respondent wife

JUDGMENT

Introduction

1. The parties were in a relationship from 2000, married in March 2004, separated in July 2018 and divorced in 2019 (decree nisi [x] February 2019, decree absolute [x] October 2020).
2. The wife is fifty two, the husband forty-eight.
3. The wife previously worked as a [professional]. She was made redundant following the birth of her second child and the parties agreed thereafter that she would work in the home, caring for the parties' four children, while the husband pursued his career as a [self-employed professional]. Thus both of them contributed fully to the marriage and to the welfare of their family.
4. The children are C, sixteen, D, fifteen, E, thirteen and F, ten. D is living with his father, the other three children are living with their mother. There are ongoing Children Act 1989 proceedings.
5. The final hearing of the wife's application for financial remedies was heard before the District Judge on 19 and 20 November 2020. The draft judgment was sent out on 12 January 2021 and formally handed down at a hearing on 5 March 2021.

The order of 5 March 2021

6. The judge found the parties' assets to be as follows:

Assets	**Value**
Net equity in property A, [place name redacted]	842,388
Net equity in property B, London	560,167
Subtotal liquid assets	**1,402,555**
H's debts	-238,140
W's debts	-110,000
Subtotal liabilities	**-348,140**
Total liquid capital	1,054,415
W's pension	260,909
H's pension	156,240
Total pensions	**417,149**
Total assets	**1,471,564**

7. Both [Property A] and [Property B] are former matrimonial homes. [Property B, London] was purchased around the time of the marriage. When the parties moved to [Property A] they rented out [Property B].
8. By the time judgment was handed down in March 2021, a sale of [Property A] had been agreed subject to contract for £1,375,000. [Property B] is on the market. It is still occupied by tenants who are due to move out in August, by which time it is hoped that a sale will have gone through[1].

[1] In email correspondence following sending out of the draft judgment the Appellant informed the Court that the tenants had recently given notice that they would vacate the property on [x] June 2021.

9. The order provides:

   (i) The wife to receive £952,555 of the combined proceeds of sale of the properties (68%);

   (ii) The husband to receive £450,000 from the combined proceeds of sale (32%);

   (iii) Any additional capital raised from the sale of the property after that to be split 50/50;

   (iv) The parties to discharge their debts from their respective shares of the proceeds of sale;

   (v) Until sale, the husband to have the benefit of the rental income from [property B] but also the responsibility for the mortgage and all other outgoings related to it;

   (vi) The husband to pay to the wife periodical payments initially in the sum of £3,000 per month and once a child support assessment has been concluded, spousal maintenance in the sum of £1,860 a month until September 2022 and thereafter £860 a month. The spousal maintenance is to be paid until the husband's retirement age, the applicant's remarriage or death of either party.

   (vii) The parties are to keep their pensions.

10. The judge found that the husband had liabilities of £238,140 and the wife had liabilities of £110,000. There is nothing in the judgment about whether these were 'soft' or 'hard' loans, or what the terms of repayment were. However, the judge found that both parties should discharge their debts before purchasing a new property. That left the wife with a housing fund of £842,555, the husband's fund was reduced to £211,860. The judge determined that the husband should use a mortgage capacity of £350,000 in order to meet his housing need, which was assessed at £550,000.

11. The net effect of the final order is as follows:

		W	**H**
Property A, [place name redacted]	*First £952,555 to W, surplus equal*	842,388	
Property B, London	*As above*	110,167	450,000
Subtotal liquid assets		**952,555**	**450,000**
H's debts	*H retains*		-238,140
W's debts	*W retains*	-110,000	
Subtotal liabilities		**-110,000**	**-238,140**
Total liquid capital		**842,555**	**211,860**
		80%	**20%**
W's pension	*W retains*	260,909	
H's pension	*H retains*		156,240
Total pensions		**260,909**	**156,240**
Total assets		**1,103,464**	**368,100**
		75%	**25%**

12. The wife's earning capacity was assessed at between £12,000 and £15,000. She was diagnosed with breast cancer in 2012 for which she was treated with surgery, chemotherapy and radiotherapy. She had to undergo further extensive treatment between 2017 and 2019 when there was a recurrence of the cancer. Unsurprisingly she continues to be significantly impacted by the physical and emotional consequences of her illness and treatment and will continue to be so. In practical terms she continues to be under regular review and to receive treatment from clinicians and her energy levels are not what they were, impacting her capacity to work and all aspects of her life. She has not worked for some time and is not likely to be able to return to [her previous profession]. The judge found that she was unlikely to have the opportunity to start work in a new field until at least September 2021, when the parties' youngest child will start secondary school.

13. The judge found that the husband's likely net income was £6,900 a month. She found that he had capacity to borrow up to £350,000 on a mortgage over a period of 18 years or so at a cost of £1900 a month. She found that this was affordable, together with global maintenance payments initially of £3,000 but reducing from September 2022. The child maintenance payments will continue thereafter but will step down as each of the children turns twenty, although it is likely that the children would continue to need some form of financial support thereafter, particularly if they go to university.

14. The husband's appeal is against both the capital division and the award of maintenance. There are four grounds of appeal:

    (i) The assessment of the parties' respective needs was unbalanced and unfair;

    (ii) The judge erred in finding that the husband had a mortgage capacity of £350,000;

    (iii) The division of capital was unfair and fell outside the reasonable bounds of the judge's discretion;

    (iv) The judge failed to have adequate regard to the clean break principle and ordered the payment of maintenance that was excessive in amount and duration.

The law

15. An appeal will be allowed if the Appellant can show that the decision of the Court below was wrong, or the decision was unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

16. Permission to appeal may only be given where (a) the Court considers the appeal would have a real prospect of success or (b) there is some other compelling reason why the appeal should be heard (rule 30.3(7) Family Procedure Rules 2010.)

17. The Appellate Court has not had the benefit of seeing the parties and hearing them give evidence as the judge of first instance has, and must be slow to interfere with findings of fact.

18. In Re T [2015] EWCA Civ 453, the Court of Appeal reminded itself of the margin of respect that should be given to a judge at first instance; an appeal is not a wholesale review of the case:

> ***[41]*** *Secondly, I have already described the approach of the judge and the experience of the judge. Where a judge correctly identifies the legal test, says he is applying it, and says he has the evidence which justifies that conclusion, and is able in the course of the judgment to refer to that evidence, this court should be slow to interfere and say he is wrong. There is no indication here that there was an error of principle in the judge's conclusion, and to my mind he should be given a substantial margin of respect by this court in having conducted the exercise that he said he had undertaken.*
>
> (per Lord Justice McFarlane at paragraph 41)

19. I have been referred to a number of cases, which I have read:

- *K v L* [2011] EWCA Civ 550, in which the wife's inherited wealth which had been ring-fenced during the marriage, was held to be non-matrimonial property not subject to the sharing principle;
- *WX v HX (NX and another intervening)(treatment of matrimonial and non-matrimonial property)* [2021] EWFC 14 Roberts J;
- *JL v SL (no 2)(Appeal: non-matrimonial property)* [2015] EWHC 360 (Fam) Mostyn J;
- *B v B* [2014] EWHC 4545 (Fam) Roberts J, concerning assessment of a husband's earning capacity and his ability to pay spousal maintenance;
- *A v L (Departure from equality: needs)* [2011] EWHC 3150 (Fam), Moor J, in justifying a departure from equality the needs of both parties must be considered. Disparity in earning capacity could justify departure but that must be considered in the context of the needs of both parties. In particular there has to be consideration of how such a departure could be justified if there was also a substantive periodical payments order;
- *CR v SR (Financial remedies: permission to appeal)* [2013] EWHC 1155 (Fam) Moylan J, where the court was making orders based on estimates of future income, there needed to be a reasonable degree of caution exercised to make sure that the order which was made was (i) affordable, and (ii) did not result in an imbalance or an undue imbalance between the parties' respective future financial positions;

- *Piglowska v Piglowski* [1999] 1 WLR 1360, citing M v B (ancillary proceedings: lump sum) [1998] 1 FLR 53, per Thorpe LJ:

> "In all these cases it is one of the paramount considerations, in applying the section 25 criteria, to endeavour to stretch what is available to cover the need of each for a home, particularly where there are young children involved. Obviously the primary carer needs whatever is available to make the main home for the children, but it is of importance, albeit it is of lesser importance, that the other parent should have a home of his own where the children can enjoy their contact time with him. Of course there are cases where there is not enough to provide a home for either. Of course there are cases where there is only enough to provide one. But in any case where there is, by stretch and a degree of risk-taking, the possibility of a division to enable both to rehouse themselves, that is an exceptionally important consideration and one which will almost invariably have a decisive impact on outcome."

20. *Piglowska* is also relied upon as authority for the test the appellate Court must apply when considering whether or not to allow an appeal. Lord Hoffman reflected upon previous case law:

> In *G. v. G. (Minors: Custody Appeal)* [1985] 1 W.L.R. 647, 651-652, this House, in the speech of Lord Fraser of Tullybelton, approved the following statement of principle by Asquith L.J. in *Bellenden (formerly Satterthwaite) v. Satterthwaite* [1948] 1 All E.R. 343, 345, which concerned an order for maintenance for a divorced wife:
>
> > "It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

Analysis

21. The judge worked carefully through the section 25 checklist, making findings along the way.

22. The values of each of the properties was calculated by taking the average of the figures contended for by the parties, who were not substantially apart.

23. The judge had the benefit of seeing each of the parties give evidence, and so far as the husband was concerned, evidence in the form of his accounts and [*name of individual redacted*]. There is no appeal against the judge's assessment of the wife's earning capacity. So far as the husband's earning capacity is concerned the judge noted that [*name redacted's*] prediction of future gross earnings in the region of £200,000 to £250,000 was perhaps optimistic when compared with the husband's accounts which showed that in previous years he had only twice exceeded turnover of £200,000. The judge's assessment of the husband's net income was cautious and conservative but justified on the evidence and plainly a finding available to the judge to make.

24. The findings in respect of the husband's mortgage capacity were based on quotes obtained by each of the parties and evidence given by the husband. There was no expert

report. The quotes reflected different propositions in terms of deposit, monthly payments, income projection, mortgage term, but were all broadly consistent. If the husband were paying maintenance of around £3,000 a month, took out a mortgage for roughly 18 years (to retirement age 67) the husband would be able to borrow around £150,000 at a cost of about £800 a month and around £350,000 at a cost of £1,940 or £594,000 at a cost of £3,274 a month. The judge took into account that the husband's status as a self-employed [professional] injected additional uncertainty but found on balance that the husband had capacity to borrow up to £352,000. Whether it was fair to require the husband to utilise that capacity to its full in order to house himself is a different question, but the finding that he could borrow to that level is sound given all the evidence before the judge.

25. The judge said little about the parties' debts save to state, *'Both parties have debts and I find those debts need to be cleared to enable the parties to fund two homes at a reasonable standard in the future.'* The judge rejected a submission made by the wife that maintenance should be capitalised because the husband had been unreliable when it came to supporting her and the children and paying bills. The judge was not satisfied the wife had established that was the case.

26. All of these conclusions were plainly justified on the evidence, and the judge gave clear reasons for the findings reached.

27. I have set out in full the judge's approach to the parties' respective housing needs:

'I turn to the parties' housing needs but these cannot be considered in isolation, in this case the husband has a significant mortgage capacity but, at the very least for the immediate future, he will not only be paying his mortgage but supporting the wife and children and his ability to raise monies by way of mortgage are limited by the availability of his income to pay such a mortgage. The wife accepts that the husband will need between £450,000 and £600,000 to rehouse himself, that figure is based on property particulars provided by the husband as being suitable for either party. Taking account of the need to repay his debts and to pay his mortgage and leave sufficient income to support himself and the wife and children I will limit the husband's housing fund to £550,000. The husband will need £238,140 to repay his debts and therefore needs capital of £788,140. If he borrows £350,000 he will need a balance of £438,140 or roughly £450,000. His monthly mortgage payments will be £1,940 a month leaving £5,300 a month to support himself, the wife and the children. I have considered the possibility of his taking a higher mortgage and have concluded it is not feasible as there would simply not be sufficient income available to support the family.

28. The husband's housing need was put into a bracket of £450,000 to £600,000 based on the property particulars provided by the husband and accepted by the wife as a reasonable range. The figure of £550,000 was reached on the basis that the husband could service a mortgage of £1,940 a month, pay £3,000 child and spousal maintenance and live on the remaining £2,000 per calendar month. The judge had identified that the husband's living expenses could be met by the sum of £1,500 a month. It may or may not be affordable, but there is a risk of unfairness to the husband in this approach which appears to have considered the question of affordability first and as determinative of the sum to be awarded to the husband, rather than there being in the first instance an objective assessment of the husband's actual housing needs.

29. The judgment goes on to consider the wife's housing need, but from a starting point that the husband's needs could be met by the release of only £450,000 of the joint proceeds of sales to him:

The capital available to the parties is £1,402,555, if the husband receives £450,000 from the net proceeds of sale the amount left for the wife to rehouse herself and the children and pay her debts will be £952,555. It is the wife's case that she needs £800,000 or more to rehouse herself and the children in a suitable property. I calculate the wife's debts come to £110,000 … If those debts are paid out of the £952,555 the wife will be left with £842,555 to rehouse. I find that sum is sufficient to enable her to purchase a property which will provide a suitable home for her and the children. The wife says that it is essential that she remains living in [place name redacted] where she has a support network and the children are also settled. [Place name redacted] is a particularly expensive area; the wife has produced particulars for properties which she says would be suitable to rehouse her and the children at prices ranging from £799,950 to £875,000. Not all the properties are in [place name redacted] but, on the wife's case they are close enough and/or have good transport links to [place name redacted]. The husband has produced particulars of properties that he says would be suitable to rehouse the wife and children ranging from £450,000 to £600,000. The wife says those properties are not suitable and her particular complaint is that they are too far away from her support network and the children's social networks. There are a number of properties in [alternative local town] which would appear to be suitable, there are good transport links between [alternative local town] and [place name redacted], and two of the children attend school in [alternative local town]. I think it is fair to say that [alternative local town] is a significantly less desirable area than [place name redacted] and that is reflected in house prices.

I do not dismiss the properties suggested by the husband out of hand and if the division of the liquid capital between the parties meant that the parties' needs could only be met if the wife and children rehouse for about £600,000 that is what the wife would have to accept. In this case I calculate that the husband's needs can be met leaving a sum in the region of £842,555 available to rehouse the wife and the children. Taking account of stamp duty and other expenses in connection with the wife should be able to find a property that will suit her needs and those of the children including her wish to be in or near [place name redacted] for about £800,000.'

30. The judge appears to make a finding that the wife's housing need is £600,000, but says happily there are sufficient funds for the wife to receive an additional £242,555 so as to be housed where she would like to be housed, albeit well in excess of her needs.

31. But that was only possible on the basis that the husband borrowed at the very top of his mortgage capacity and spent around 30% of his income on the mortgage. Further, it was based on an assessment of the husband's income needs in which the judge *'pared to the bone'*, finding that his *'very basic and essential expenses come to approximately £1,500 a month.'* No equivalent assessment was carried out of the wife's monthly expenditure, which was rounded down to £3,000 a month.

32. The result was that the wife has ended up with £842,555 cash to spend on a mortgage free property, and is debt free, while the husband has only £210,000 to invest and still has to borrow heavily to purchase a property for himself, which will be of significantly less value than the wife's.

33. Such a substantial departure from equality should have been explained clearly by the judge but was not.

34. On behalf of the wife, Miss Gillman argues that the judge had in mind to ring-fence for her a proportion of the assets to reflect the wife's capital contribution to the purchase price of the parties' first home together (£150,000), and that the judge was entitled to do so. There is some basis for this in the judgment:

'If there was sufficient capital available to meet the parties' needs if the wife's contribution was excluded I would accept the submission made on behalf of the wife and ring fence her contribution in whole or in part but I have found it difficult to divide the parties' limited capital in such a way as to ensure that both the parties' and the children's needs are met. In those circumstances I cannot award the wife an additional sum to take account of her premarital contribution. I note however that when I have taken account of the parties' needs as set out above, the division of available capital after deduction all the parties' debts means the wife will be receiving approximately 80% of the capital and the husband approximately 20%.'

35. If the wife's capital contribution was a substantial reason for the departure from equality, in my judgment this was an error. At paragraph 113 of *WX v HX* [2021] EWFC 14, Roberts J summarises the law in relation to matrimonial and non-matrimonial property in the context of the parties' sharing claims:

'Each case has to be considered on its own facts and the court's assessment of fairness in that particular case. The judge must consider whether the existence of such property should be reflected in outcome at all. This will depend on the extent to which it has been 'mingled' with matrimonial property and the length of time over which that 'mingling' has taken place: per Mostyn J in N v F (Financial Orders: Pre-acquired Wealth) [2011] EWHC 586 (Fam).

36. At paragraph 116, Roberts J discussed cases where the court will need to decide whether non-matrimonial property has been mixed, merged or mingled with matrimonial property. The court will need to consider whether the contributor has accepted that their property should be treated as matrimonial property. Roberts J cites Wilson LJ's judgment in *K v L*

This element of 'merger' flows from para 18 of Wilson LJ's judgment in *K v L* (above) in which he posed three separate situations:-

"(a) Over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property.

(b) Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated

as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult.

(c) The contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name has – as in most cases one would expect – come over time to be treated by the parties as a central item of matrimonial property."

117. The classic example of this sort of situation is the use by one of the parties of his or her non-marital funds towards the purchase of a family home. Whether or not the title to that property is held in the joint names of the parties, it will invariably be treated by the court as a matrimonial asset for the purposes of any sharing claim. That example lies at one end of the factual spectrum. There are other more complex situations which fall into sub-categories (a) and (b) above where the court will need to analyse carefully whether the evidence will support a finding that property which was originally non-matrimonial has been treated, or dealt with, in such a way as to bring it within a sharing claim made by the other spouse. If the evidence leads the court to conclude that one of the parties has indeed through words, actions or deeds manifested an acceptance that it should be treated as such, it must then go on to determine the extent to which that property falls to be shared as between them.

37. If in this case the substantial departure from equality was based on the view that it would be fair to ring-fence the wife's financial contribution to the first family home, in my judgment this was wrong. At around the time of the marriage, the parties did draw up a trust deed preserving a percentage of any sale of [property B] for the wife, but thereafter the situation changed, and that sum was clearly treated as part of the family's finances to be used for the benefit of all. All three of the K v L situations apply here.

Conclusions on the appeal

38. I gave permission to appeal at the outset of the hearing on the basis that the appeal had a real prospect of success.

Grounds 1 and 3

The assessment of the parties' respective needs was unbalanced and unfair;

The division of capital was unfair and fell outside the reasonable bounds of the judge's discretion;

39. I find that both these grounds of appeal are made out. The assessment of the husband's housing need was based on what the judge found he could afford. In carrying out that assessment the judge appeared to take a different approach to the husband's needs than to the wife's. His schedule of income needs was *'pared to the bone'*, the wife's were not scrutinised in the same way. The judge found that the husband should incur debt of

£350,000 repayable over 18 years and end up with a house worth around £550,000, whereas the wife received nearly £250,000 in excess of her assessed housing need debt free.

40. The division of capital and allocating all the risk to the husband was not fair. See Roberts J in B v B [2014] EWHC 4545 (Fam):

> *"**[102]** Whether £420,000 or £458,000 is the right figure on a needs basis for either of these parties, I cannot ignore the fact that W would be left in mortgage free accommodation whereas H would be carrying a repayment mortgage for a number of years into the future. In this respect, I have my doubts as to whether the mechanism of simply top-slicing the cost of servicing that mortgage from H's disposable income is adequate recompense for H. W's equity investment would be growing in the property market in direct proportion to the 100% investment she had made, whereas H's investment return would be significantly less to reflect his much lower equity investment. Given my view about the affordability of pension contributions, Mr Brooks' submission as to W's lack of opportunity to save does not provide a complete answer to this point."*

41. To the extent that an explanation was given that the departure from equality took into account the wife's capital contribution to the parties' first matrimonial home, this was not justified.

42. To the extent that the departure from equality may have been justified by the parties' different earning capacities going forward, this was to compensate the wife twice over, because she will receive child maintenance and spousal maintenance, and will not have a mortgage to service. Mr Brooks' summary of the parties' relative incomes after the judgment is as follows (the first box sets out the position until September 2022, the second thereafter):

Current	**W**	**H**
Earning Capacity		82,800
Mortgage		-23,280
Child maintenance	13,680	-13,680
Spousal maintenance	22,320	-22,320
Net Disposable	**36,000**	**23,520**

From September 2022	**W**	**H**
Earning Capacity	12,000	82,800
Mortgage		-23,280
Child maintenance	13,680	-13,680
Spousal maintenance	10,320	-10,320
Net Disposable	**36,000**	**35,520**

Ground 2

The judge erred in finding that the husband had a mortgage capacity of £350,000;

43. The judge's finding that the husband had a mortgage capacity of £350,000 was sound and based on a thorough investigation of his income and the evidence of what was available in the form of the mortgage quotes. However, for the reasons given above, I find that in all the circumstances, the Court was wrong to conclude that the existence of the husband's mortgage capacity was a good reason to depart as substantially from the equitable sharing of the matrimonial property as occurred in this case.

Ground 4

The judge failed to have adequate regard to the clean break principle and ordered the payment of maintenance that was excessive in amount and duration.

44. The judge gave clear reasons for reaching conclusions about the parties' respective earning capacities. The parties have four children. Going forward there will be a significant disparity between the income they can generate. The judge was within the exercise of discretion in awarding an amount of spousal maintenance to cover a period of time before the wife is in work, and thereafter to reflect the disparities in income and the wife's need to maintain a property for the children.

45. On the judge's order, the maintenance payable is £1,840 from sale of the FMH until September 2022, and thereafter £840 a month for a further 225 months. On Mr Brooks' calculations (assuming 15 months from sale of the family home until September 2022) that is a total of £216,600. Allowing a discount for early receipt he says that the surplus capital the wife received from the capital division of matrimonial property more than covers it and if the division is to remain the same, then there should be a clean break on the basis that spousal maintenance should be immediately terminated.

46. I accept the submission made by Mr Brooks on behalf of the husband that the judge ought to have considered explicitly the Court's duty to consider whether it would be appropriate to impose a clean break. Section 25A of the Matrimonial Causes Act 1973 requires the court to consider whether it should exercise its powers so that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as is just and reasonable. Where periodical payments are ordered, whether it would be appropriate *'to require those payments to be made or secured only for such term as would in the opinion of the Court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.'*

47. At that time, the children would be 35, 33, 32 and 29. As the judge anticipated, the wife will have been able to free up some equity by downsizing ten years earlier, once the youngest child has left school. By contrast, in eight years' time on the judge's order, the husband will still have ten years' to pay on the mortgage, will still be paying spousal maintenance and will have much less ability to release equity from his property because he started with only £210,000 equity in it compared to the wife's £800,000.

48. Neither party is in a good position to increase their pensions from income. The husband's pension is currently smaller but he has greater capacity to improve upon it over the next 18 years before his retirement age, (although I appreciate that the burden of maintenance payments and mortgage will constrain him). As a self-employed [professional] he is not compelled to retire at 67 and may choose to work for many more

years, until retirement age of 70 or 75. However, on any view the wife is in a better position than him on the current order because she has been awarded substantially more of the capital division than the husband.

49. In the circumstances I find that the judge should have considered whether or not maintenance could have come to an end at an earlier stage. This ground of appeal succeeds.

Conclusions

50. Grounds one, three and four of the Appeal are made out and the appeal succeeds.

51. It would not be proportionate to remit the case for another hearing and the parties are anxious for these proceedings to conclude. Rule 30.11 of the Family Procedure Rules 2010 provide that the Appeal Court may affirm, set aside or vary any order given by the lower court, and that is what I propose to do.

52. At the outset of the Appeal hearing I was invited to admit into the appeal further evidence in the form of updated schedules, revised mortgage quotations and information by way of position statement concerning the current situation about the marketing of [property B]. Applying *Ladd v Marshall* principles I refused permission, have not taken into account submissions sent to me by parties post-hearing or additional schedules in which each disputes the figures of the other. I proceed on the basis of the information that was before the judge at the final hearing.

53. The judge made some clear findings:

    (i) the parties' debts should be discharged before they purchased their properties;

    (ii) the wife had a housing need of £600,000 and the husband a housing need between £450,000 and £600,000;

    (iii) the husband had an earning capacity of £6,900 a month and from September 2021 the wife had an earning capacity of £1,000 a month;

    (iv) The likely amount of matrimonial assets for distribution was £1,402,555.

54. The proceeds of sale from each of the properties was clearly matrimonial property and the starting point for division should have been to share them fifty-fifty. I find that the judge was wrong to assess husband's need on the basis of an assessment of affordability reached by paring his income to the bone and stretching his mortgage capacity to the maximum, then awarding the rest to the wife.

55. If the proceeds of sale were split fifty-fifty (£701,277 each), after payment of debts the wife would receive £591,277 the husband £463,137. This leaves the wife short of her housing need and she has no capacity to improve her situation by raising a mortgage. She has to be housed mortgage-free. It is hoped by both parties that all children will spend time with both their parents but the judge found that the three children who were living with their mother at the moment were likely to continue to do so, and the wife's limited earning capacity compared to the husband's was in part assessed on the basis that she would continue, as she has throughout the marriage, to take responsibility for the day to day arrangements and care of the children. Her housing need is greater than his who has only one of the children living with him full-time.

56. For these reasons there should be a departure from equality in the division of the assets which is justified on the basis of the wife's current need to be housed in an area reasonably close to the children's schools, to her support network and mortgage free. The judge nevertheless found this could be achieved with the sum of £600,000.

57. I have done calculations in respect of division of the matrimonial property (before and after debts are paid off) on a sliding scale starting at a 50/50 split up to the 80/20 split of the original order. I have concluded that the judge's final award should be adjusted so as to award the wife a greater share of the matrimonial assets than the husband, but not to the extent awarded at first instance.

58. If the figures are adjusted so that the wife receives £752,555 and the husband £650,000, after payment of debts the wife would have the sum of £642,555 to rehouse herself, and the husband a lump sum of £411,860. He could raise a mortgage of £150,000 to £200,000 at around £900 to £1,200 a month, which is affordable on his income. The percentage split becomes 61:39.

59. Having regard to all the factors on the section 25 checklist, the parties' respective earning capacities, ability to improve their pensions in the future and the funds available, the husband's diminishing liabilities towards the wife in terms of child and spousal maintenance, but his additional existing liabilities and need to incur debt to rehouse, my conclusion is that the award should be adjusted so that the wife is awarded the first £752,555, the husband the next £650,000. This more fairly in my judgment shares the joint proceeds of the marriage. If the sale of [property B] does not enable the total fund to reach £1,402,555 then the proceeds of sale should be split pro-rata 61:39. If sums reached are in excess of £1,402,555 I would not disturb the 50/50 split ordered by the judge.

60. My calculation of the distribution of assets on that basis is as follows:

	W	H
[Property A], [place name redacted]	752,555	89,833
[Property B], London		560,167
Subtotal liquid assets	752,555	650,000
H's debts		-238,140
W's debts	-110,000	
Subtotal liabilities		
Total liquid capital	**642,555**	**411,860**
	61%	39%
Total pensions	**260,909**	**156,240**
Total Assets	**903,464**	**568,100**
	61%	**39%**

61. In my judgment the wife will need to receive maintenance at the higher rate assessed until September 2022 and thereafter at the rate of £10,320 a year as awarded by the judge.

62. Consideration does need to be given to whether a time will come when the wife could adjust without undue hardship to the termination of maintenance.

63. By the time the youngest child of the family reaches eighteen in seven years' time, the wife will be fifty-nine, the husband fifty five. The wife will have a property worth around £600,000. Her earning capacity will still be much less than the husband's and it is unlikely that the children will have reached full independence. I do not consider that she could at this stage adjust to the termination of maintenance without undue hardship.

64. At husband's retirement age of sixty seven in just under nineteen years' time, the wife will be seventy-one and all the children will have grown up and will be living independently. The wife could in theory then downsize to generate some capital to enhance her state and private pension income, albeit not as much as was envisaged in the current order.

65. Is there a point in time before then at which point the wife could adjust to the termination of the maintenance order? She is unlikely to be able to increase her pension, her income needs will decrease over time but she will not be able to survive on her income and pension alone for many years. The husband's financial position will improve as he reaches his sixties. His earning capacity is likely to stay the same or increase and his obligations to his children and to any mortgage to lessen. He is likely to have some opportunity to make contributions to his pension to provide for his retirement without the need to sell a property to release equity.

66. In all the circumstances I consider that the order for maintenance should be payable in the same terms as set out in the current order, to husband's retirement age, the wife's remarriage or the death of either party.

67. The terms of the order I propose to make are therefore in the same terms as the District Judge's, save that I substitute the sums awarded to the wife as £752,555 and £650,000 to the husband. I appreciate that the wife has taken steps towards buying a house at a price she could afford under the terms of the original order and could not afford under the terms of this order. I am sorry for the difficulties and expense that I can see this is bound to cause not just for her, but for other buyers and sellers in the chain, and for the children who will have been prepared for a house move. However, for the reasons I have given, I am satisfied that the original order does require to be varied to rectify the unfairness that it produced as between the parties after a twenty year relationship.

68. There is perhaps some room to consider whether or not that should be capitalised so as to enable a clean break, but that is a matter for the parties to discuss. On Mr Brooks' calculations, the total maintenance bill is £1,840 for 15 months to September 2022 and £840 for a further 225 months (total £216,600).

69. I will leave the parties to agree the terms of the draft order.

Postscript

Judgment on costs

70. The judgment was sent to the parties by email on 24 May 2021.

71. There followed extended debate as to the terms of the order, with both parties providing written submissions. I resolved the outstanding issues by e-mail sent on 28 June 2021.

72. The Appellant then provided a draft order and written submissions on costs on 1 July 2021 and the Respondent replied on 8 July 2021. The further delay in a decision since then is due to other cases of mine taking priority and then my being on leave.

73. The Appellant seeks all his costs of the appeal, in the sum of £18,985 inclusive of VAT and disbursements. The Respondent argues there should be no order as to costs.

74. The general rule in financial remedy cases is that there is no order for costs, but appeals fall outside the general rule (per Moor J in *WD v HD* [2017] 1 FLR 160) so the Court starts with a 'clean sheet', applying CPR 44.2(1). The Court must have regard to all the circumstances, which, per CPR 44.2(4) include:

    (a) the conduct of the parties

    (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

    (c) any admissible offer to settle made by a party which is drawn to the court's attention and which is not an offer to which costs consequences under Part 36 apply

75. The conduct of the parties includes –

    (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre –Action Conduct or any relevant pre-action protocol;

    (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

    (c) the manner in which a party has pursued or defended the case or a particular allegation or issue; and

    (d) whether the claimant who has succeeded in the claim, in whole or in part, exaggerated it's claim.

76. Refusal to negotiate openly will amount to conduct in respect of which the Court will consider making an order for costs. See Mostyn J in *OG v AG* [2020] EWFC 52:

30. The revised para 4.4 of FPR PD28A is extremely important. It requires the parties to negotiate openly in a reasonable way. To take advantage of the husband's delinquency to justify such an unequal division is not a reasonable way of conducting litigation. And so, the wife will herself suffer a penalty in costs for adopting such an unreasonable approach.

31. It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing.

77. The orders which the court may make under this rule include an order that a party must pay-
    (a) a proportion of the other party's costs
    (b) a stated amount in respect of another party's costs
    (c) costs from or until a certain date only;
    (d) costs incurred before proceedings have begun;
    (e) costs relating to a particular step taken in the proceedings
    (f) costs relating only to a distinct part of the proceedings; and
    (g) interest on costs from or until a certain date, including a date before judgment

Decision

78. There were two main issues for determination in the Appeal. The Appellant argued for a different division of the proceeds of sale of the two properties owned by the parties. He was successful on this ground. The Appellant was not successful in the appeal in respect of maintenance.

79. Negotiations in advance of the appeal were fairly half-hearted. The appellant made an offer on 3 May 2021 that the wife should receive £740,000 from the proceeds of sale (I awarded £752,500), and for a substantial reduction in both amount and the term of maintenance. The Respondent made a counter-offer only that the Appellant should have all, not 50% of the proceeds of sale over the £1,402,500 allocated in the order. One would hope the parties would have engaged in more meaningful negotiations, but neither of the opening offers were unreasonable in all the circumstances. The Appellant did not do better than his offer on appeal. I do not find that either of them has refused to negotiate openly to the extent that it should be regarded as conduct that impacts on the decision as to costs.

80. It was reasonable of the Appellant to pursue both grounds of appeal, he was successful on the most significant issue. I find that the larger part of the work is likely to have gone into that issue. Costs should follow the event.

81. It is not for the Court to consider whether or not a party is in a position to meet a costs order in deciding whether or not it is payable in principle.

82. The Appellant's schedule is higher than the Respondent's. There are increased costs associated with being the Appellant in terms of preparation, but I also take note that the Appellant did not succeed on the ground of the appeal concerned with maintenance which was a substantive ground of appeal, not a bolt-on. I also take into account that

following the draft judgment, time was taken up in drafting further submissions in respect of the draft order and in new issues that had not been invited by the Court.

83. In all the circumstances, I will direct that the Respondent pays to the Appellant £12,500 towards his costs, inclusive of VAT and disbursements.

HHJ Joanna Vincent
Family Court, Oxford
24 May 2021
21 July 2021