Case No: WU18D00655
Appeal No.2 of 2021

IN THE FAMILY COURT

Sitting remotely, on appeal from the Family Court, sitting in Birmingham

23 August 2021

Before:

His Honour Judge Mark Rogers

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Between:

LF	**Appellant**
- and -	
DF	**Respondent**

- -
- -

Juliet Allen (instructed by **Harrison Clark Rickerbys**) for the Appellant
Nicholas Starks (instructed by **Thursfields**) for the Respondent

Hearing dates: 17 May 2021

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JUDGMENT
(Approved)

His Honour Judge Mark Rogers:

1. This is an appeal against the order of District Judge Murch of 13 January 2021, consequent upon a financial remedies hearing which occupied several days in November and December 2020, following which the Judge circulated a draft reserved judgment which itself generated a request for clarification, further email submissions and ultimately a slightly revised approved judgment.

2. Adopting the spirit of paragraph 48 of The Road Ahead 2021, promulgated by the President at the height of the current pandemic, I propose to deliver a "short judgment". In other words, I will not be reciting in detail the underlying factual background of this case. Nor will I rehearse at length the detailed submission of counsel or citations from authority, unless it is essential that I do so to demonstrate my reasoning.

3. The extensive appeal bundle, from which I will extract page numbers in parentheses as required, is a comprehensive record of the relevant material and contains a number of broadly similar asset schedules and chronologies. They are overwhelmingly non-controversial and may be taken as read. An extensive authorities bundle was provided and reference was made to each of the cases. However, I do not propose an analysis of them all, but I have reread them before preparing this judgment.

4. This appeal mainly raises issues of principle and so I will adopt significantly rounded figures for ease. Again, the detail is all to be found in the bundle.

5. I am using anonymous letters in the title of the proceedings to describe the parties. I hope they will understand that is not to disrespect or dehumanise them.

It is merely a device to ensure anonymity in any wider publication of the judgment. LF, the appellant, was the wife and DF was the husband.

6. LF filed her Appellant's Notice (B48) on 2 February 2021. The Grounds of Appeal document (B58) contains four grounds. By my order of 12 February 2021 (B61), I refused permission to appeal against Ground 1 but granted permission in relation to the other grounds. There has been no application to renew a consideration of Ground 1 and so the appeal was limited to the remaining grounds.

7. Ground 1 was a substantial challenge to the Judge's approach to the issue of alleged non-disclosure which had so dominated the hearing at first instance that the greater part of the judgment (B1), which runs to some 42 pages, was concerned with that aspect. Although it remains an important backdrop to the arguments on costs liabilities in the appeal, mercifully more detailed analysis is not now required. The Judge dealt with the issues comprehensively and impressively and, in refusing permission, I was satisfied that there was no realistic prospect of overturning his evaluation.

8. As Ground 1 is no longer in play, the apparent factual complexity of the case largely falls away, so that the remaining points are disarmingly simple to identify and articulate, although they have proved very difficult to resolve as they are far from easy.

9. The circumstances of the parties and their family are set out with particularity by the Judge from paragraph 6 of the judgment (B3). In the briefest summary for context, I need only record the following. The parties are in their middle age, although DF is a few years older than LF. They married in 2014 and separated

in 2017. Their child was born in 2015. LF has two older children, one of whom is under 18 and therefore featured to some extent in the evidence.

10. LF is a health professional, although not working at present. By cruel coincidence, the day before the commencement of the hearing before the Judge, LF received a serious medical diagnosis. Bravely, she preferred the hearing to proceed. The medical evidence was inevitably limited but the Judge was able to analyse the position and make unchallenged findings as to the impact, if any, on earning capacity and labour market disadvantage (B35).

11. DF is an internet entrepreneur whose business interests were analysed at length in the evidence and by the Judge. DF's fortunes, sadly, have taken a significant downturn and so the very substantial wealth previously enjoyed is not now available.

12. Suitability and availability of housing and income needs were dealt with conventionally and appropriate findings were made. There was quite a lot of debate as to the child's housing and educational needs. For reasons he explained (B39), the Judge was reluctant to be drawn into an issue about schooling which might have had to be resolved elsewhere. In the end, therefore, having accepted DF's evidence substantially on the non-disclosure allegations, the asset schedule remained as it had appeared at the commencement of the trial and the Judge's task was to construct a fair and non-discriminatory award both as to capital and income from the available resources. In a sense, the case had become a relatively conventional exercise whilst remaining fact specific to the parties.

13. The central and key starting points about which there was no dispute were these. Firstly, this was a short marriage. Secondly, the wealth all originated from the

efforts of DF prior to the marriage. Thirdly, although the sharing principle could apply to the value of the family home, given its unique place at the heart of a marriage, LF's award could not be met adequately simply from sharing. This was without question a needs case.

14. Using very broad and rounded figures, the net capital, albeit represented by different classes of assets, available was in the region of £2m.

15. On a needs basis, in her open offer of 15 October 2021 (D217), LF sought various capital sums; £500k for housing, £180k (later adjusted) to clear debts (almost entirely costs), £200k capitalised spousal maintenance, £200k for an educational fund for the child and the retention of her vehicle. The spousal maintenance claim was revised to £250k in counsel's closing submissions, in part to reflect the medical change of circumstances.

16. DF's offer (D215) proposed a lump sum of £475k, £2000 per month spousal maintenance for 12 months on a non-extendable basis and child maintenance of £500 per month.

17. I have to say that the process of negotiation in this case has not been a model. Each party criticised the other for the lateness of the offers and the reluctance to engage constructively. That, in my judgment, is heavily tied in with the bitterly contentious issue of disclosure which dogged preparatory stages.

18. There was on the face of the offers and in the conduct of the case an apparent agreement that the matter would be concluded on the basis of a clean break. Clearly the perceptions of the parties as to the capital adjustment necessary to achieve a fair clean break were wildly different and that is not uncommon. What

came as a significant surprise to me, however, was that there was no consensus between counsel, at any rate, as to what the term "clean break" actually means in the context of this case. This is, unfortunately, not merely a dry semantic debate as it coloured the approaches taken by counsel to the issue of the extendable term and the Judge's responses to the request for clarification (C97).

19. The order of 13 January 2021 (B43), reflective of the Judge's decision, made the following principle awards and adjustments. The offer of £500 per month for the child was accepted and embodied in a recital. A lump sum of £475k was ordered. The vehicle was transferred. Spousal periodical payments at the rate of £3300 per month were ordered until, subject to other triggers, 30 May 2022 (that is 18 months) and that was on a non-extendable basis pursuant to s28 (1A) of the Matrimonial Causes Act 1973. There followed a clean break and no order as to costs.

20. I am told that the draft judgment did not make clear whether the periodical payments order for a term was to be capable of extension or subject to an absolute bar. Ms Allen asked for clarification (C93). Mr Starks said the point was clear by inference and in any event that it was not open to Ms Allen to canvass the non-extendable term issue after the event as both sides had argued for a clean break. The Judge's response (C97) was to accept Mr Starks's point that Ms Allen was attempting to vary the basis upon which she put her case inappropriately. In the oral argument the point developed into a discussion as to whether Ms Allen's client had *conceded* a clean break and, if so, whether she could attempt to go behind that. In this regard, the definition of a clean break is not merely academic.

21. The three live grounds of appeal (B58) are that the Judge:

    a) Was wrong to make no provision for LF's liabilities,

    b) Failed to step back and cross check his award to ensure fairness, and

    c) Wrongly imposed a s28 (1A) bar.

22. Liabilities.

LF's liabilities were said to be £180k, reduced to £170k+ to take account of a disputed figure. Although they comprised different categories of indebtedness they were, in effect, her unassessed total costs liability to her solicitors. That is, on any view, an enormous figure for a case of this sort. DF's revised costs schedule showed more than £130k on his side, an equally disproportionate figure, when viewed objectively.

23. Exactly how those figures were generated is less important that the broader point. For the majority of the population the funds available in this case, around £2m, represent great wealth. There looks to be more than enough to go around. Why then was it necessary to spend £300k of family money on this exercise? Why was the case not settled? Why have at least 5 days of Court time been used to determine this dispute? These are not simply rhetorical points, as they are questions, DF argues, which need answering in order to lay bare the approach to the litigation adopted by JF and to explain the approach of the Judge in this case.

24. Unusually, there is a Respondent's Notice (B74), as DF seeks to uphold the Judge's order on additional grounds to those of the Judge himself. In his skeleton argument in support of the Respondent's Notice and to resist the appeal, Mr Starks does not hold back in criticising LF's approach and to explain the enormous level of costs. He says that her failure to make open proposals, her adoption of unrealistic goals, her outlandish allegations, her unbridled and relentless pursuit of irrelevant issues and her obsessive financial wild goose chase are the consequence of her own decisions for which she must bear responsibility. These submissions are reflections of the criticisms made to the Judge and are to be seen in the contemporaneous documents of counsel for that hearing, where Mr Starks characterised the debts as non-matrimonial (C65).

25. To understand the Judge's approach to LF's liabilities, it is necessary to consider the structure of the judgment and the approach of the parties. I have admiration for the Judge's attention to detail and close analysis of the financial picture and dealings of DF's corporate structure. What, however, I confess, strikes me as odd is the prominence of this issue and the wider question of non-disclosure.

26. In her closing written submissions to the Judge at paragraph 2 (C43), Ms Allen adhered to an adverse inference finding invitation that there were undisclosed resources. However she did not put her case as a formal "add back" argument; rather that the visible resources were sufficient for a fair order to be made in her client's favour and that the effect for the Court would be as to the generosity or otherwise of assessment of need; she, of course, arguing for generosity in favour of her client. It is perhaps not central to the role of the appellate tribunal, but I am driven to remark that the potential cost benefit advantage of such a strategy

is not immediately obvious. A rather more generous interpretation of need following an adverse finding might enhance an award somewhat but if at the expense of very increased costs liabilities the gain may be pyrrhic.

27. The judgment requires reading as a whole, but the stark fact against which there cannot be an appeal is that the Judge largely rejected LF's case on non-disclosed assets or misleading disclosure. He summarises his finding in the section of the judgment dealing with conduct (B39). The reality is that DF had great wealth, but the majority has gone, leaving the assets as set out in the schedules.

28. This finding, says Mr Starks, is key to an understanding of the case. The time, money and energy devoted to it was a monumental waste of time and a distraction, he says.

29. It certainly occupies a very large part of the judgment. It is not really until paragraph 68 (B29) that the Judge begins the evaluation of the questions he ultimately has to consider. At paragraph 71 he makes the superficially bland but crucial finding that he broadly accepted the schedules of assets about which there had been in large measure agreement. In other words, nothing that had gone before had apparently made any significant difference to his basic task of distribution.

30. With two such experienced and expert counsel it is inconceivable that the Judge would not have been taken through the appropriate legal principles. Their written submissions in the bundle demonstrate that that is so. And yet, the judgment is curiously devoid of detailed legal anchorage. He identifies the case as one based on need rather than sharing or compensation. At paragraph 85 (B36), he specifically says he will consider all the matters to which he is

required to have regard and refers to section 25 of the Act. He looks individually at the matters in section 25 (2) but does not make specific reference to giving first consideration to the welfare of the child, nor does he appear to address his mind expressly to the question of the potential clean break and the implications of an extendable or non-extendable term. In other words, there is no express reference to sections 25A or 28 of the Act.

31. Normally an appellate Court would not be troubled by such omissions if it were clear from context that the points were plainly considered. It is, unfortunately, in my judgment, difficult to draw such inferences and it is troubling that the original draft was silent on the exact nature of the order under section 28 intended.

32. I mention these points not to be unduly critical of the Judge but to give some context to Ms Allen's critique of his approach.

33. As in the majority of needs cases the main ingredient for the spouse with a dependent child is housing. The Judge had material before him on suitability, affordability and location. It was not complete, as he commented, but adequate for him to make detailed findings. In a lengthy passage from paragraph 73 (B31) he undertakes a careful analysis and concludes that a three bedroomed house is suitable for the family and at paragraph 100 (B40) makes the central finding that £475k is required.

34. Paragraph 100 is not altogether easy to understand and I was unclear at first whether the Judge was assessing housing need or general capital need. Counsel told me that the paragraph had been revised after the clarification request. In that context, it is then clear that the Judge was indeed making a housing need

evaluation with the separate sum of £25k being ancillary to the purchase fund to be used for furnishings and removal costs. What I am satisfied of is that the Judge was not purporting to make any award towards LF's liabilities.

35. The Judge made no other capital award. He had identified LF's debts at paragraph 70 (B30) which were approaching £180k (later slightly adjusted). He dealt with the issue at paragraph 105 (B42) which reads in its entirety:

"I do not accept the applicant's debts arise out of the marriage. I accept the respondent's analysis that to require him to pay them would be to make an order for costs 'by the backdoor'. I therefore make no award."

36. There is no doubt that these were real hard debts and would have to be paid. The only source of payment was the housing fund which would thereby be diminished. This goes to the heart of Ground 2 and Ms Allen's attack on this part of the order.

37. The Judge relied upon his description of the costs liabilities as non-matrimonial and felt he would be making a backdoor inter partes costs order. In my judgment, the point goes rather wider than those two issues and engages several principles. The Judge did not comment upon the quantum of costs accrued or their reasonableness. That is perhaps surprising and presents a difficulty on appeal as the parties' counsel draw very different conclusions from the circumstances, which they submit should alter the Court's approach.

38. My attention was drawn to a number of authorities, the majority involving cases of extreme litigation misconduct which had been found specifically as such. The oral arguments followed the structure of the written submissions which were

clear and focussed. I will not repeat them here. A lot of attention was paid to Rothchild v De Sousa (also known as TT v CDS) [2020] EWCA Civ 1215, a decision of the Court of Appeal where Moylan LJ delivered the substantive judgment. Paragraphs 61 to 80 of the judgment are essential reading and constitute a full and scholarly review of the law in this area, in particular how the Court may treat the tension between litigation misconduct and the need generated by a substantial costs liability.

39. As I read it, His Lordship does not seek to lay down rigid rules but highlights the factors likely to be in play and to influence the application of the discretionary exercise. He reminds us that the overarching provision is section 25 (1) but that, as appropriate, conduct is a matter to which particular regard may be had.

40. Moylan LJ further explains the philosophy behind the current costs regime within the Rules and sets out how litigation misconduct can and often does lead to an inter partes costs order. However, he also points out in paragraph 65 that an adjustment of the award itself may be an appropriate response to litigation misconduct.

41. Having cited a number of important authorities, Moylan LJ summarises his own view of the position at paragraph 78:

"The depletion of matrimonial assets through litigation misconduct will plainly not always be remedied by an order for costs. As I have said, such an order simply reallocates the remaining assets between the parties and does not necessarily remedy the effect of there being less wealth to be distributed between the parties. What is important is that, whether by taking the effect of

the conduct into account when determining the distribution of the parties' financial resources (both income and capital) and/or by making an order for costs, the outcome which is achieved is a fair outcome which properly reflects all the relevant circumstances and gives first consideration to the welfare of any minor children."

42. The context for these remarks is clearly in cases of established litigation misconduct, but it is self-evident from the final sentence that in the end the quest for fairness is the immutable goal.

43. Paragraph 80 is an important caveat and reminder that no party has a licence to litigate unreasonably and that misconduct can sound even in needs cases.

44. As I demonstrated earlier, DF's case throughout was that LF was engaged in a wildly disproportionate wild goose chase. By enlarging the scope of the case unnecessarily the level of costs and complexity grew grotesquely, it was argued. Her behaviour in pursuing the non-disclosure point was characterised as litigation misconduct. Having found, as the Judge did, that DF's evidence was broadly accurate and there was no material non-disclosure or hiding of assets, I doubt that LF could have complained if the Judge had made critical comments driving him to a specific litigation misconduct finding or, at the very least, to a finding that the case had been pursued disproportionately, particularly as a positive finding in favour of LF would only have impacted upon the generosity approach to needs to some extent, perhaps not much more than marginally.

45. However, patently the Judge did not make any such finding. There is not even any discussion of the point as the amounts of costs are merely recited in an entirely neutral way. At paragraph 96 (B39), dealing with conduct, he

recognised DF's behaviour, if proved, might come within the category but he is silent about LF.

46. In his skeleton argument (A24), Mr Starks outlines why he says the costs were so high and criticises LF's conduct but those are assertions rather than submissions based upon judicial findings. They may be reasonable inferences from the totality of the material, but they do not feature as criticism in the judgment. On the contrary, submits Ms Allen a close reading suggests that the Judge was sympathetic to the various lines of enquiry, even if ultimately no findings were made. She draws attention to the vocabulary of "understandably", "I acknowledge a few points of concern", "do not sit happily", "less than honest", "cautious" etc etc as showing a Judge carefully weighing legitimate lines of investigation. She says the particular references and an overview of the whole judgment show that that the Judge did not and cannot be taken as having intended to find litigation misconduct, indeed quite the contrary.

47. I find this extremely troublesome. This was the one area where some judicial clarification might have been helpful, but it was not sought. The Judge must have realised the importance of the point given the emphasis placed upon it by Mr Starks and yet he appears not to deal with it. In my judgment it is unhelpful to place undue reliance upon snatches of vocabulary, notwithstanding the care with which Ms Allen extracted them. I accept, of course, that the Judge used language capable of being interpreted as sympathetic rather than critical but, in my judgment, a proper reading of the very lengthy passage in the judgment dealing with DF's business and the question of alleged non-disclosure is that the Judge simply undertook his forensic task in a painstaking and conscientious

way, paying due regard to the points made and using appropriately courteous and measured language. However, I am also satisfied that he did not engage with the questions of litigation misconduct or proportionality and made no findings either way. Is there a plausible explanation for this apparently surprising approach?

48. In my judgment the obvious, indeed the only conceivable, reason is that the Judge felt there was no need to make such findings as he intended to remove the entirety of the costs indebtedness from the equation, as patently he did later in paragraph 105 (B42), without having to consider these vexed questions.

49. As Mr Starks rightly points out an appeal is against an order not a judgment, so the essential question is whether the order is wrong whatever the underlying reasoning. How to deal with unpaid costs liabilities is a very frequent source of dispute in proceedings such as this.

50. As the Court's overriding duty is to achieve a fair outcome, there is no hard and fast rule as to how liabilities, including costs liabilities, are dealt with. I do not understand either counsel to say there is. What they submit, but with different emphases, is that a number of conventional or normal approaches emerge from the authorities.

51. I am quite satisfied that an unmet costs liability on an asset schedule is not the same as an inter partes costs order. To suggest, as the Judge did confidently, that an award which incorporated the discharge of an existing liability was a backdoor costs order is, in my judgment, wrong. Costs orders are made in defined circumstances pursuant to the code to be found in Rule 28.3 of the Family Procedure Rules 2010. As everyone knows, the starting point is that

there should be no order but that may be departed from appropriately where the conduct of the party justifies it.

52. A costs liability on a schedule, however, is simply an obligation to repay a debt and so falls for consideration under section 25 (2) (b) of the Act, as well as being one of the circumstances of the case in particular if that is bound to have an effect on the welfare of any relevant child.

53. Unfortunately, although the Judge works through the items in section 25 (2) he does not appear to factor in the obligations, nor does he address the potential impact on the child.

54. In my judgment and indeed in my experience, routinely in unremarkable financial remedy cases, the parties' liabilities for costs are set out as debits on the asset schedule and are taken into account in the capital distribution. That is so whether the case is a sharing case or a needs case. Where in a needs case, as often by definition it does, an award involves an adjustment away from a party with assets to a party with none or fewer, any sum which is identified as needed to discharge costs obligations to solicitors or third party providers has the effect of relieving the receiving party of that obligation in the same way as an inter partes order would. However, in my judgment, its purpose is entirely different which is to ensure non-discriminatory fairness and that is a consequence of the statutory approach as explained in the authorities rather than an application of the costs code under the Rules.

55. In my judgment appropriate needs based adjustments of this sort are routinely made without a hint of litigation misconduct, particularly where the welfare of a relevant child would be adversely affected by a failure to do so.

56. From paragraph 48 of her first skeleton argument (A15), Ms Allen sets out what she submits the authorities sanction as the "normal approach". I broadly agree with her description and she cites by way of example cases where costs liabilities have been taken into account in a needs based adjustment. I am cautious of the word "normal" as each case is fact specific but the approach she describes is adopted on a daily basis without demur. Many of them involve adjustments "akin to a costs order" but I am not aware of an approach which routinely accepts the argument that that is an illegitimate factor. If it did, in my judgment, there would be many unfair and/or distorted awards as a consequence.

57. Exclusion of costs liabilities on the asset schedule, with the inevitable diminution in the true value of an award is very much more appropriate in a case of established litigation misconduct. The many authorities cited demonstrate that that is so. It is not an absolute rule but plainly is far more likely to be invoked in extreme circumstances. Whatever else is said, it seems to me incumbent on a Judge engaging with that issue to articulate his reasoning clearly and set out the balancing exercise as inevitably it is.

58. As it was not covered directly in Rothchild (supra), I need to say a word or two about WG v HG [2018] EWFC 84, to which both counsel referred. It was a case with considerably more capital assets, so objectively rather more financial flexibility. It was a case of a wife, in the judgment of Francis J, who incurred excessive costs and pursued an unreasonable and unrealistic case. As part of the order a Duxbury fund was awarded. In disallowing, in part, a sum to cover the wife's outstanding costs liabilities, Francis J recognised the impact on the

Duxbury award but felt that was fair in all the circumstances. The exact factual comparison with this appeal is irrelevant but, in my judgment, the approach of Francis J and his application of the competing points to the overall deduction is informative and instructive.

59. At paragraph 91 of the judgment, Francis J says:

"Against that, people cannot litigate on the basis that they are bound to be reimbursed for their costs. The wife has chosen to instruct one of the highest regarded and consequently one of the most expensive firms of solicitors in the country. Whilst I have no doubt that the representation has, at all times, been of the highest quality, no one enters litigation simply expecting a blank cheque. A judge, in a position as I am now in, is facing the invidious position of seeing his or her order undermined by the extent of the litigation loan or costs liability. If, here, I make no provision for the wife's costs or litigation loan, then half of the Duxbury fund will be wiped out and she will be left with insufficient money to manage, according to my assessment. Doing the best that I can to recognise that her costs are excessive, to recognise that she has presented an unreasonable case in financial remedy proceedings but to recognise that her Duxbury fund cannot be completely undermined and that the husband's offer was too low, I am going to add to the lump sum, already referred to above, an additional £400,000 which is a little bit less than half of the total sum due."

60. That passage, in my judgment, shows that even where litigation misconduct or the disproportionate inflation of costs is clear, a Judge has to undertake an exercise of balance and to consider what impact a reduced award will have and whether it remains within the bounds of fairness.

61. In his judgment District Judge Murch also identified the provenance of the potential costs liability as not arising out of the marriage (B42). I infer that he is characterising the indebtedness as non-matrimonial, as that term of art is commonly understood. He accepted Mr Starks's submissions on this point but did not elaborate.

62. I confess some difficulty with pigeonholing the costs liability in this way. It is not, of course, the same as, for example, a joint credit card debt incurred during marital cohabitation, but, in my judgment, a debt incurred in the inevitable process of unravelling a failed marriage has to be looked at carefully.

63. However, even if the Judge is right, he appears simply to have excluded the sums in question from consideration on the basis of their non-matrimonial status. This is a needs case. Just as with non-matrimonial assets which may be "invaded" to produce a fair outcome in a needs based award, so may non-matrimonial liabilities be taken into account in a needs case if to exclude them would produce unfairness.

64. The practical impact of the Judge's exclusion of the costs liability is to reduce the capital available for housing from £475k to something like £300k, a reduction of about 37%. It must be remembered that the Judge's own assessment of housing need was the entire figure of £475k and so, unlike WG (supra), there is no obvious flexibility. Mr Starks's response is that even with £300k there is sufficient for rehousing and it is a nonsense to say the purpose of the award is entirely frustrated. There are, no doubt, many properties on the market at £300k on thereabouts, but I reject Mr Starks's submission as it cannot in any realistic sense sit with the Judge's own factual finding in this case, particularly where

the welfare needs of the dependent child are required to be given first consideration.

65. In paragraph 52 of her skeleton (A16), Ms Allen highlights the realities and implications of the Judge's order. I need not reproduce her submissions, but they are undoubtedly well made, particularly points (iii) and (iv).

66. I have no hesitation in holding that the Judge was wrong in several respects in relation to this aspect of the case. He failed to engage with the issue of litigation misconduct or disproportionality, believing, as I find, that he did not need to do so. He wrongly isolated the litigation indebtedness as irrelevant either because it represented a non-matrimonial liability or because by taking it into account that would be akin to making an inter partes costs order. In so doing the Judge's approach to the calculation of the correct needs based lump sum was wrong in law and grossly distorted his exercise of discretion which was thereby fatally flawed. Furthermore, having identified this as a needs case, the lump sum ultimately ordered was inconsistent with his own finding as to housing need and obviously inadequate. Unfortunately, the Judge also failed to consider the specific impact on the child's needs and wellbeing. Accordingly, the lump sum ordered of £475k is so obviously too low that it is wrong in law and way outside of any reasonable figure capable of being awarded even allowing for the generous ambit of discretion in cases of this sort. The lump sum must, therefore, be set aside.

67. <u>Cross check</u>

There is no statutory requirement to carry out a cross check. It is simply good practice and affords the Court an opportunity to view the broad landscape of the

case having stepped back from the detail. In sharing cases, it also offers the opportunity to address fairness in broad percentage terms.

68. Failure to carry out a cross check is not, strictly, capable of being a ground of appeal as it is the ultimate decision which is under review as Mr Starks rightly points out. However, as Ms Allen correctly submits, in my judgment, the Judge's failure to do so is clear and illustrates his failure to engage with the true discretionary process.

69. The calculation of a needs based award is more arithmetical often than arises in sharing cases and so the cross check may well have less impact. However, the submissions of Ms Allen in paragraph 62 of her skeleton (A18) highlight the potential unfairness of outcome. It is not so much the differential of 18% and 82% as the obvious unfairness and vulnerability created for the primary carer of the child.

70. I am not satisfied that paragraph 109 of the judgment (B42) is sufficient to show engagement with this point. In the circumstances, it seems clear to me that the Judge's failure to step back reinforces the decision that the lump sum must be set aside.

71. <u>The Bar</u>

A clean break is familiar shorthand for the concept of an order leading to financial independence after divorce. Frequently, there is no ongoing income payment from one spouse to another or the extent of such an order is limited in time. They are, in common usage, clean breaks either immediately or after a

defined period. However, in this case the issue is whether the presence or absence of an order under section 28 (1A) of the Act impacts upon the definition.

72. When making an order for periodical payments limited in time, the Court may either contemplate the possibility of an extension period or render that impossible by the addition of the section 28 (1A) order, often rather crudely referred to as the bar. In this case, such a bar was imposed by virtue of paragraph 15 (d) (ii) of the Order (B46). Periodical payments are to run at the rate of £3300 per calendar month until 30 May 2022, which is 18 months.

73. Ms Allen is undoubtedly right to submit that the substantive order and the issue of a bar are separate and distinct points and should receive separate consideration. That is clear from Quan v Bray [2018] EWHC 3558 (Fam), a decision of Mostyn J.

74. Paragraph 102 of District Judge Murch's judgment (B40) carefully explains his decision on quantum and term and there is no appeal against that. He does not in terms address the issue of extendibility although refers to the achievement of a clean break. Unfortunately, in my judgment, that is insufficient to demonstrate consideration of the issues separately or may indicate a failure to engage with the latter point at all.

75. Ms Allen understandably and properly sought clarification of the draft judgement. Unfortunately, the process went badly wrong. It has been said frequently that the invitation to provide clarification of a draft judgment is just that. It is not an opportunity to reopen the argument substantively. I am sorry to say that that Ms Allen's request (C90) which runs to 5 closely typed pages of

text overstepped the mark in relation to this point and several others. She was entitled to know whether the Judge intended to impose a bar and why, but she could have asked that very much more succinctly.

76. The request led Mr Starks to file a terse and critical response (C95), limited in effect to the response that both sides had argued for a clean break and it was now too late to seek by further argument to achieve an extendable term.

77. The Judge responded by email (C97) that Ms Allen was, in effect, seeking to argue her case on a different basis than at trial and that he had, in any event, given his reasons for a clean break. I infer he means for including the section 28 (1A) bar.

78. I am sorry to report that this process was flawed and has become a distraction. Whilst critical of Ms Allen's approach, I am not satisfied that the Judge clarified his reasoning or explained the imposition of the bar. In the argument before me, counsel sought to draw fine distinctions as to the precise definition of a clean break. Literally a time limited order with the possibility of an extension may not be an absolute clean break as there may be circumstances where financial dependence continues.

79. In the end it seems that the Judge made his decision based upon his perception of how Ms Allen put her case. That is an important element but is driven by process rather than substance. It is said that a *concession* was made from which Ms Allen cannot now resile. I do not find it helpful to look at it in that way. It is an over complication and a distraction to frame the argument in terms of what precisely constitutes a clean break and, therefore, what exactly, if anything, was *conceded*. I need not refer to it in terms, but LF's open position (D217) accepted

a clean break on the basis of very much more substantial capital provision. The offer is plainly non severable and so the apparent concession of a clean break, even if defined in its strictest terms, is not sensibly to be picked off piecemeal so as to bind LF in all circumstances.

80. Accordingly, the Judge's approach to this issue is open to criticism but the central question is, looking objectively, whether the ultimate decision is wrong. That requires conventional analysis. The Judge was acutely aware of the facts and realities of the parties, having immersed himself in the hearing. The sad medical diagnosis was known and it was investigated in a proportionate and reasonable way, given the very recent delivery of the news. Although there is a child, for whom provision was made, this remains a short marriage with a wife with a career and work prospects.

81. As well as her procedural criticisms Ms Allen attacks (A20) the Judge's apparent reasoning. Her arguments are powerful but, says Mr Starks, they do not undermine the approach set out in the judgment and the particular findings made.

82. In paragraphs 83, 84, 86, 101 and 102 (B35), the Judge sets out in detail his approach to income, especially in the light of LF's medical situation. He recognised that the material was incomplete and that LF had wished to proceed with the hearing, but he expressed himself as satisfied as to the reliability of his findings on the evidence. He was persuaded to award periodical payments at a greater rate and for longer than had been urged by Mr Starks.

83. Ms Allen submits that he relied too heavily on the shortness of the marriage, a factor diminished in importance, she says, because of the existence of the child

and the health issue. Had he relied simply on that fact, his reasoning would have flawed, but I am quite satisfied that it was but one of a number of factors properly taken into account.

84. Whether or not to impose a bar was a difficult decision and might well have received fuller analysis. However, I am not satisfied that any identified failure of process, even if categorised as an error of law, made a material difference. The point was finely balanced and other judges might have found differently. In my judgment, however, the order made is not wrong. The Judge set out the basis of his reasoning in outline and was satisfied that LF could adjust within the time scale provided. It was plainly an outcome within the range of discretionary orders. What another Judge at first instance or on appeal might have done is irrelevant.

85. I accept, of course, that it can be said that my next comment involves ex post facto reasoning but I am reinforced in my view as a result of the fact that I propose to allow the appeal on Grounds 2 and 3 which, subject to further argument, is likely substantially to increase the capital available to LF. In short, although I granted permission in respect of Ground 4, as there were obviously arguable points giving rise to the real prospect of success required and although the Judge's approach was not as clear as it could have been, in the end the appeal on this ground is dismissed as the actual order made is within the available discretionary outcomes and is justifiable on the evidence.

86. Disposal

Under the Rules, I may remit the matter for a rehearing or for the Judge to deal with the specific matter successfully appealed. Alternatively, I have the same

powers as the Judge and so can redetermine the issue of the lump sum. I propose to adopt the latter course. Remission would be a disaster in terms of time, stress and cost. I am sorry to say I am not confident it would be dealt with in a proportionate and economical way if I did remit it given the unfortunate history I have already recited.

87. However, there was no discussion at the hearing and no submissions were made as to the appropriate level of lump sum in the event that the appeal was allowed on that ground. Accordingly, I will deal with the matter based on all the material before me. As there was very detailed scrutiny by counsel, I am in a better position than many appellate Judges as I feel I was obliged to look in greater depth than often is the position. When sending out this judgment in draft I allowed the parties a further 14 days for any brief additional submissions in the event that my provisional determination, which I set out out, was not accepted. No objection was taken and no further submissions were made and so my provisional view has become the determination itself.

88. Given the length of the judgment already I do not propose to dwell on this issue. I reiterate that the decision is driven by fairness, taking account of all the factors and balancing them, whilst recognising that I must give first consideration to the welfare of the child. As exemplified by the decision of Francis J in WG (supra), there is a tension which is not easily resolved.

89. Notwithstanding the power of Mr Starks's main submission expressed in language highly critical of LF's approach, I am not prepared to find that she has been guilty of the worst kind of litigation misconduct as alleged. For reasons already explained, the Judge did not engage with this issue head on but it is clear

that he had points of substance to consider and his lengthy and careful analysis of the non-disclosure element of the case, shows that he had to drill down into them rather than simply rejecting them as fanciful.

90. However, I am quite satisfied that LF conducted this case in an excessive and disproportionate manner, largely without regard to the escalation of costs. That may involve a relatively fine distinction in comparison with a complete finding of litigation misconduct, but that seems to me to be the better way to describe it. The main element of disproportionality is that even if non-disclosure had been found and/or additional funds were available, on a needs based case the impact would have been somewhere between marginal and small, given that the objective was simply to provide the Court with the option of greater generosity in the assessment of need. In my judgment, that disproportionate approach is relevant to the assessment of a fair award so long as it does not distort the entire situation.

91. As Mr Starks rightly points out the majority of the costs have been incurred in pursuit of an issue upon which she failed. He further correctly says that the costs liability figure at large is on an unassessed basis and so would exceed anything ever awarded under an inter partes order. These powerful points must be balanced in the discretionary decision.

92. I do not propose further to recite the many other points made by counsel at the trial in their notes or before me. I take them into account.

93. In the end, I am left with the reality of the Judge's finding on housing need and the unavailability of capital funds elsewhere. I am also acutely aware of the hard and immediate nature of the indebtedness.

94. My decision is that DF must pay a total lump sum of £600k, which represents an increase of £125k. I have looked back at the asset schedules and am satisfied it is affordable. I am also satisfied that it is fair. It represents broadly a contribution to LF's liabilities which will leave her about £50k short. That is reflective of the balancing exercise I have explained. It is also broadly in line with the sums expended on costs by DF which seems to me a helpful comparison.

95. Crucially, although LF has that shortfall, it will not undermine the rationale of the award itself. She may have to budget more carefully in terms of the sum of £25k identified by the Judges for the incidentals of housing moving. She will also have to scale down the available fund for the house purchase itself and so will have to purchase a little below the Judge's target price. In other words, the housing will be a little less than ideal but, in my judgment will still be perfectly sufficient and adequate both for herself and the child, whose welfare I have already identified.

96. Finally, I have undertaken the useful cross check of stepping back and reviewing my proposal in the round. My adjustment would leave the parties in the proportions of approximately 76% and 24%, using Ms Allen's approach in her net effect table (A18). More important, however, than the exact figures, is the overall balance struck which I am satisfied will allow the parties to put this ruinous litigation behind them and move forward in the relatively near future to financial independence.

97. Outcome

Permission to appeal already having been refused on Ground 1 and granted in respect of Grounds 2, 3 and 4, the appeal is allowed in respect of Grounds 2 and 3 and the lump sum order of £475k is set aside. The appeal on Ground 4 is dismissed. The matter is not remitted but I assess the appropriate lump sum award at £600k.

98. Costs of the Appeal

The costs regime for appeals differs from the no order starting point at first instance. I have a clean sheet, but an important factor is the identification of the successful party on the appeal. Normally that party will receive a costs order. Notwithstanding the fact that I have at times been critical of LF's approach, she prudently did not renew her arguments on non-disclosure after I refused permission. She has been substantially successful on the appeal. There is no merit in approaching this on an issues basis and so I am not persuaded that the failure on Ground 4 makes a material difference. Once again in my draft judgment I offered the parties the opportunity to make further representations. That offer was not taken up and so my provisional view has indeed become my decision. Accordingly, I direct that DF should pay LF's costs of the appeal. Originally, I envisaged a detailed assessment but, at the joint request of the parties, I have subsequently and separately determined the quantum of costs in a summary assessment.

99. Postscript

After I circulated my draft judgment, the Court of Appeal handed down its decision in Azarmi-Movafagh v Bassiri-Dezfouli [2021] EWCA Civ 1184, an authority covering directly the approach to the exercise of the discretion in a needs case where incurred costs represent a significant liability for the recipient party and so of particular interest to the issues in this case.

100. I am relieved to report that, in my judgment, my approach is entirely consistent with the guidance offered by Lady Justice King and accordingly there is no reason to revise my decision. This authority is welcome for the definitive guidance and, in particular, the commentary of Her Ladyship in paragraphs 52 to 59. The emphasis upon the preservation of accommodation security in a needs case, in my judgment, is apposite. Having this guidance should also obviate the need for extensive citation of first instance authorities in cases if this sort.