Neutral Citation Number: [2022] EWHC 2698 (Fam)

Case No: FA-2022-000188
BV19D23919

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/10/2022

**Before** :

**MR JUSTICE MOSTYN**

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**Between :**

| | |
|---|---|
| **SUSAN MARIA CLARKE** | **Appellant** |
| **- and -** | |
| **RICHARD WALTER CLARKE** | **Respondent** |

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The Appellant appeared in person
**Max Lewis** (instructed by **Stevens & Bolton LLP**) for the **Respondent**

Hearing date: 20 October 2022

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# Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in open court. There are no reporting restrictions.

## Mr Justice Mostyn:

1. The appellant, Susan Clarke, appeals against the judgment and order of HHJ Farquhar dated 5 July 2022. Although her grounds of appeal were extensive, the permission to appeal granted to her by Sir Jonathan Cohen on 15 August 2022 was limited. She was allowed to appeal on two grounds only. However, on 17 August 2022 Sir Jonathan remitted one further issue to me.

2. The two grounds as formulated by Sir Jonathan are:

   i) Whether the format of the order should provide for the appellant to receive a minimum sum [from the proceeds of sale of the matrimonial home] ("Ground 1");

   ii) Whether the sum awarded for maintenance, whether capitalised or not, should include a higher sum than £26,000 p.a .while the respondent is still working and earning a substantial income ("Ground 2").

3. The additional issue remitted to me was expressed by Sir Jonathan in these terms in his order of 17 August 2022:

> "2. The parties shall write a joint letter to the company accountant asking for a print-out of the respondent's director's loan account (DLA) for the period 1/1/20-1/7/22 and requesting him to confirm whether any part of the DLA has been taken by the respondent as dividends.
>
> 3. It shall be a matter for the judge hearing the appeal whether he/she permits the appellant to expand her appeal to encompass any argument she seeks to run out of the matters raised at paragraph 2 above."

4. My reading of these paragraphs is that I can decide whether the appellant should be given permission to argue not merely that the judge erroneously dealt with the DLA both mathematically and factually, but also as to whether the overall value of the business was dealt with correctly. I shall refer to this issue as 'Ground 3'.

## Ground 3

5. I shall deal with Ground 3 first. The judge recorded that the respondent was a 50% shareholder in 2R Investments Limited and PCP Cladding Ltd. 2R Investments Limited is a holding company. It has no other purpose other than to hold subsidiaries. It was common ground that the respondent had an overdrawn DLA with the company, owing £239,500. That debt was an asset, a chose in action, of the company.

6. The respondent's interests in the two companies were valued by the company accountant at £753,653, of which £677,000 was referable to 2R Investments Limited and £76,653 to PCP Cladding Ltd. In his judgment at [33] the judge stated:

> "After the hearing finished yesterday, I submitted a question to Mr Lewis in relation to the schedule of assets because it was not clear whether the valuation of the company in the sum of

> £755,000 (*sic, semble* £753,653) was net of the director's loan account of £239,500 which is owed by Mr Clarke to the company, 2R Investments Limited. The accountants have clarified that whilst that is seen as an asset to the company and, therefore, is included within the figure of £755,000 clearly the asset to the company is a liability to Mr Clarke and, therefore, that has to be taken into account looking at the overall assets and I will do that in the distribution phase."

And the judge went on in [54] to state:

> "So the total for Mr Clarke would be in the sum of £1,262,350. From that he will have to be reduced by his director's loan account of £239,500 and also the tax on that loan of £94,243. That leaves him with a net figure of £928,607 and that compares with the figure of £989,400 in Mrs Clarke's name."

7. In her submissions the appellant argued that £149,000 of the money borrowed from the company had disappeared and that the judge had failed to make findings about that disappearance or to take it into account in his judgment. That was not a submission that was encompassed by any of the permitted grounds. But as her submissions developed it became apparent to me that the value of the DLA debt had not been taken into account in the valuation of the company.

8. The enquiries made by the judge led the company accountant to write to the respondent's solicitor saying:

> "The value of the loan has not been taken into account in the valuation on the basis that Richard Clarke has a personal liability for the same amount to the company."

She replied saying:

> "Just to be clear, does that mean it's included as part of the debtors balance to the company? If Richard owes the company something doesn't that mean the company has that as an asset?"

To which the accountant replied:

> "Yes the company has a debtor balance for that loan which is an asset, but likewise Richard Clarke has a personal liability to the company."

9. These emails were forwarded to the judge by Mr Lewis on 11 July 2022 with the message:

> "We forwarded your question to the accountant, and the chain of emails is below.
>
> The accountant has said that H's obligation to repay his directors' loan balance is shown as an asset of the company on its balance sheet."

10. The judge accepted this and duly went on in [54] to attribute the debt to the husband personally as set out above in my para 6.

11. A careful reading of the emails would have made clear that the value of the debt as an asset had been excluded from the valuation of the company because it was said to be matched by the liability of the respondent to repay it. That this was so was confirmed by a letter from the company accountant to the respondent's solicitor written on 31 May 2022. This showed that the valuation of the respondent's interest in the companies did not include the value of the debt owed by him to 2R Investments Ltd. It captured only the values of three subsidiaries of that company.

12. I have to say that it must be wrong to exclude the sum from both sides of the equation given that as a debt it falls entirely on the respondent, while as an asset its value suffers discount and tax and then is divided between the respondent and his fellow shareholder. This is illustrated by the following example where a business is jointly owned by X and Y and is worth £1m, but where X has borrowed £250,000 from the company via his DLA. The value of X's interest in the business is correctly calculated in column A. This has the debt in on both sides of the equation. The calculation of the value of X[s interest in column B, where the debt is left out on both sides of the equation, wrongly over-values X's interest by £137,500:

| | A | B |
|---|---|---|
| value of business | 1,000,000 | 1,000,000 |
| omitted DLA amount | 250,000 | |
| | 1,250,000 | 1,000,000 |
| X's 50% | 625,000 | 500,000 |
| less tax | (62,500) | (50,000) |
| | 562,500 | 450,000 |
| less X's DLA debt | (250,000) | |
| value of X's interest | 312,500 | 450,000 |

13. In this case the result is that an asset owned by 2R Investments Ltd worth £239,500 was omitted in the calculation of the value of the respondent's business interests. The value given by the accountant of the respondent's interests was, as stated above, £753,653. This figure was calculated as follows:

| | | | |
|---|---|---|---|
| **Value of respondent's 50% share in 2R Investments Ltd** | | | |
| Value of 100% of Premier Building Products | | 576,000 | A |
| | | | |
| Value of 100% Premier Building Products (Anglia) | | 1,355,000 | |
| less 10% discount for lack of control | | (135,500) | |
| | | 1,219,500 | |
| | 66.67% | 813,041 | B |
| | | | |
| Value of 66.67% PSF Steel Ltd | | 815,000 | |
| less 10% discount for lack of control | | (81,500) | |
| | | 733,500 | |
| | 66.67% | 489,024 | C |
| | | | |
| Overall value of subsidiaries (A + B + C) | | 1,878,065 | |
| Respondent's 50% | | 939,033 | D |
| less 20% discount for lack of control, unquoted etc | | (187,807) | |
| Value of respondent's share | | 751,226 | E |
| | | | |
| **Value of respondent's 50% share in PCP Cladding Ltd** | | | |
| Value of 100% of PCP Cladding | | 212,000 | |
| Respondent's 50% | | 106,000 | |
| less 20% discount for lack of control, unquoted etc | | (21,200) | |
| Value of respondent's share | | 84,800 | F |
| | | | |
| **Value in both** | | | |
| Value of both to respondent (E + F) | | 836,026 | |
| less CGT at 10% after personal allowance of £12,300 | | (82,373) | |
| Overall value of respondent's business interests | | 753,653 | |

It can be seen that in this calculation no account is taken of the value of the debt owed by the company by the respondent.

14. I turn to the 20% discount that was applied in the valuation of the respondent's interest in both companies.

15. The judge explained that the accountant had applied this discount to take account of the unquoted status of the company, the lack of marketability of the shares and the lack of overall control "due to his percentage of the total shareholding". At [28] the judge observed:

> "Discounts vary between 10 and 20 per cent and having seen many reports in previous cases of businesses those are the issues upon which discounts are applied because the ability to sell the company et cetera and, therefore, they are not unusual."

If there were no 20% discount the bottom line figure would be £941,759 (G). The effect of the discount is to reduce the value by £188,106.

16. The judge was clearly uncomfortable with the 20% discount, and rightly so. He said:

> "29. In his oral evidence Mr Clarke stated that he had been trading with his partner, Mr Shadforth, for many years and he would imagine that they would always take decisions jointly. There was an element as I discussed with Mr Lewis in what he described, he, Mr Clarke, described, as a quasi-partnership as is seen in the well-known case of *G v G (Financial Provision: Equal Division)* [2002] before Coleridge J. If all of those conditions are met, then in appropriate cases no discount needs to be applied. It may well be the case that the discount need not be quite as great in this case as that which has been indicated by the accountant, due to the apparent control that, in fact, Mr Clarke would be able to have because he had always been doing things in the main it would appear in concert with Mr Shadforth.
>
> 30. However, the evidence in this area has been sparse. I have not heard or seen anything from Mr Shadforth and, consequently, it is difficult to be precise on this matter as it always is. In his oral evidence Mr Clarke set out the possibilities of what could happen in the future. Finding an individual to take over his role so he may either fully or partially retire, this would mean that he would not immediately obtain his capital from the business, but he would retain an income albeit at a lower rate than present as the individual employed would have to have a salary. The alternative is to find a buyer for all of the companies either together or in different parcels and he indicated that Mr Shadforth would be possibly amenable to that if, obviously, the right number could be obtained. Mr Shadforth, I note, is some 11 years younger than Mr Clarke and, therefore, clearly has a longer period in which he requires an income source. Mr Clarke added that he would wish to be able to retire next year when he is 65 but it seems to me that the reality is that no steps have been taken for that to occur at present and no serious thought or discussion has been had with Mr Shadforth as to how that may occur. It seems likely to me that he will continue to work in some capacity within the business for at least two to three further years and possibly longer."
>
> 31. In terms of the valuation of the business it is not for this court simply to rip up all of the figures set out by the accountant and start again and carry out my own, effectively, single joint expert analysis, that would be unfair on the parties, but I can look at the accountant's calculations as a guideline. As I have indicated it may well be that the discount applied is slightly too great bearing in mind the cooperation that there is between Mr Shadforth and Mr Clarke and looking at it overall, as I must, I am satisfied that a reasonable valuation to put on this business is slightly higher than that which has been obtained and I would calculate that as one of £800,000 and that is the figure that I will use."

17. Of course, it is perfectly true that were the respondent to seek to sell his 50% shareholdings in 2R Investments Limited and PCP Cladding Ltd he would struggle to do so, and if he were able to find a buyer would have to sell at considerably less than the par value of £939,033 (figure D above in para 13). So in that sense the 20% discount is logical. But it is also completely unreal because, in my judgment, on the evidence it was not possible for the judge to find that there were any likely circumstances in which the respondent would sell his shares other than in conjunction with his fellow 50% shareholder. It is my opinion that the judge should have looked into the future, and asked himself whether it was more likely than not that a discount would be suffered. The answer to that question would, on the balance of probability, be no. If the judge was satisfied that the business was run as if it were a partnership, and if the judge was satisfied on the balance of probability that no discount would be suffered on any disposal in the future, then the judge should not have made a middle choice. It seems to me that the question is a binary one. Either the discount applies or it doesn't. There is no room for a third way.

18. Accordingly it is my opinion that the value the judge should have taken was the full £941,759 (figure G in para 15). That is not to "rip up all of the figures set out by the accountant and start again and carry out my own, effectively, single joint expert analysis". On the contrary, it is to adopt all of the figures except one (viz 20%), the use or non-use of which depended on a prediction about the future which lay exclusively in the judge's domain.

19. The judge's figure of £800,000 implies a discount of 15%. In my opinion that was an overly generous decision in favour of the husband. In my opinion, in what was otherwise an excellent judgment the judge should have had the courage of his convictions and rejected the 20% discount as highly artificial and highly improbable.

20. Bringing the omitted DLA debt into account, and removing the 20% discount, leads to the following revised calculation of the value of the respondent's business interests. I have highlighted the additions and changes to the previous calculation in para 13 above.

**Value of respondent's 50% share in 2R Investments Ltd**

| | | | |
|---|---|---|---|
| Value of 100% of Premier Building Products | | 576,000 | A |
| | | | |
| Value of 100% Premier Building Products (Anglia) | | 1,355,000 | |
| less 10% discount for lack of control | | (135,500) | |
| | | 1,219,500 | |
| | 66.67% | 813,041 | B |
| | | | |
| Value of 66.67% PSF Steel Ltd | | 815,000 | |
| less 10% discount for lack of control | | (81,500) | |
| | | 733,500 | |
| | 66.67% | 489,024 | C |
| | | | |
| Overall value of subsidiaries (A + B + C) | | 1,878,065 | |
| add DLA | | 239,500 | |
| | | 2,117,565 | |

| | | |
|---|---|---|
| Respondent's 50% | 1,058,783 | D |
| No discount as quasi-partnership | 0 | |
| Value of respondent's share | 1,058,783 | E |

**Value of respondent's 50% share in PCP Cladding Ltd**

| | | |
|---|---|---|
| Value of 100% of PCP Cladding | 212,000 | |
| Respondent's 50% | 106,000 | |
| No discount as quasi-partnership | 0 | |
| Value of respondent's share | 106,000 | F |

**Value of respondent's interest in both companies**

| | |
|---|---|
| Value of both to respondent (E + F) | 1,164,783 |
| less CGT at 10% after personal allowance of £12,300 | (115,248) |
| Overall value of respondent's business interests | 1,049,534 |

21. In my judgment, the respondent's business interests were under-valued by £249,534[1].

22. In [54] the judge set out the net effect of his disposition. I reproduce below his calculation in tabular form. Column A is the judge's disposition on his (erroneous) figures. Column B uses the correct figures and shows the effect of the under-valuation. Column C uses the correct figures and shows what the disposition would have to be if the judge's target of equality were to be achieved:

| | **A** | **B** | **C** |
|---|---|---|---|
| **Respondent** | **Judge** | **Correct** | **Equality** |
| Total | 928,607 | 1,178,141 | 1,041,141 |
| pensions | 204,050 | 204,050 | 204,050 |
| | 1,132,657 | 1,382,191 | 1,245,191 |
| | 50.5% | 55.5% | 50.0% |
| **Appellant** | | | |
| Total | 989,400 | 989,400 | 1,126,400 |
| pensions | 120,739 | 120,739 | 120,739 |
| | 1,110,139 | 1,110,139 | 1,247,139 |
| | 49.5% | 44.5% | 50.0% |
| **Total** | 2,242,796 | 2,492,330 | 2,492,330 |

Equality will be achieved by a transfer of £136,026 of value from the respondent to the appellant.[2]

23. The former matrimonial home was held in the sole name of the wife. The judge ordered it to be sold. The anticipated net proceeds of sale are £1,236,750. Under the judge's disposition 20% will go to the respondent (£247,350) and 80% to the appellant (£989,400). If the respondent's share is reduced, and the appellant's share increased, by

[1] 1,049,534 - 800,000 = 249,534
[2] (1,382,191 – 1,110,139)÷ 2 = 136,026

£136,026 then the respondent's percentage of the net proceeds falls to 9% (worth £111,324) and the wife's is increased to 91% (worth £1,125,426).

24. My decision on Ground 3 is that the judge incorrectly valued the respondent's business interests such that the split of the proceeds of sale of the matrimonial home should be adjusted to 91% to the appellant and 9% to the respondent.

**Ground 2**

25. I turn to the second ground permitted by Sir Jonathan Cohen namely "whether the sum awarded for maintenance, whether capitalised or not, should include a higher sum than £26,000 pa while the respondent is still working and earning a substantial income".

26. The appellant claimed in her Form E a mere £26,641.18 as her annual budget. That strikes me, just as it struck Sir Jonathan, as much too low. The judge described it as "very modest". The appellant explained to me that she had understood the requirement was to state only the amounts needed to stave off destitution. She did not advance this aspect of her case with any zeal before the judge because she believed that she would be awarded a sizeable sum in compensation for the retention by the husband of large sums of earnings during the period of separation. She claimed £750,000 under this head. That claim was put squarely before the judge but was firmly rejected at [42] and [43]. The appellant sought to appeal that decision but permission was refused and that ground of appeal certified as being totally without merit.

27. Curiously, although Sir Jonathan granted the appellant permission to pursue the argument that the judge was in error for not allowing a higher annual amount than £26,000, she has shown little interest in it. This raises the question of how much encouragement the court should give to a litigant-in-person to take the right points and to eschew the wrong ones.

28. A judge will be criticised as having abandoned impartiality and independence, and of having descended into the arena, if he or she takes a point favouring one party's case which that party has not raised: see *Villiers v Villiers* [2022] EWCA Civ 772 at [135], [159] and [212] where I was roundly criticised for having raised what I thought was an insuperable jurisdictional obstacle but which point had not been taken on behalf of Mr Villiers. Such criticism would be especially well-merited if (unlike Mrs Villiers) the other party had sought an adjournment to deal with the point, but that had been refused.

29. It could be said that Sir Jonathan has taken two points favouring the appellant's case when he granted leave on two issues not raised by her below. Should it make any difference if the party in receipt of the judge's favourable encouragement is unrepresented? It has been stated time and again, for example in *Barton v Wright Hassal LLP* [2018] UKSC 12, that no special concessions or assistance should be given to litigants-in-person. In that case at [18] Lord Sumption stated:

> "Any advantage enjoyed by a litigant-in-person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights "

30. On the other hand, in a financial remedy case the court exercises a quasi-inquisitorial function. It would be a dereliction of its inquisitorial duty if it allowed a case to be

decided under procedural rules and customs which prevented a just decision being rendered on a particular set of facts because a litigant-in-person has, for whatever reason, chosen not to advance the relevant arguments applicable to those facts.

31. In this case the judge at [52] calculated that on an 80:20 split of the net proceeds of sale of the matrimonial home the wife would be left with £989,400. He assessed the appellant's housing need at £650,000. That would leave £339,400, which would on the Duxbury algorithm give her a little over £25,000 net per annum for life.

32. The judge's approach to the needs question was conventional, and completely correct. He decided that the appellant's needs would be met by first allocating to her a housing fund and then going on to consider how much capital she needed to provide her with a Duxbury income for life. Given the age of the wife and the length of the marriage this was a very obvious case for a full lifetime Duxbury calculation.

33. Where the judge fell into error, in my judgment, was in determining that as little as £26,000 net per annum was a reasonable Duxbury income on which the appellant should subsist for the rest of her life.

34. If the appellant were to receive the whole of the net proceeds of sale of the matrimonial home then her total receipt excluding pensions would be £1,236,750. Of this £650,000 is for the housing fund, leaving £586,750 as a Duxbury fund. This would provide, according to *Capitalise*, a woman aged 60, who has private pensions worth £120,379, and a state pension, with £48,000 annually for life. This I regard as a reasonable income level for this wife, having regard to her age, the length of the marriage and the marital standard of living. I have noted that the respondent's own annual budget was £115,000.

35. The effect of a further transfer from the respondent to the appellant of his 9% share (worth £111,324) of the proceeds of the matrimonial home is that the overall assets are divided 54.5% to the appellant and 45.5% to the respondent, as shown in the following table:

| | **Appellant** | **Respondent** | **Total** |
|---|---|---|---|
| non-pension | 1,236,750 | 930,791 | 2,167,541 |
| pensions | 120,739 | 204,050 | 324,789 |
| Total | 1,357,489 | 1,134,841 | 2,492,330 |
| | 54.5% | 45.5% | |

This unequal division is in my judgment well justified on the ground of need in circumstances where the respondent's need for income at the present time is met by a high salary from his business interests, and where his need for accommodation is met by him living with his partner in a valuable property beneficially owned, on the judge's findings, 93% by his partner and 7% by him.

36. Finally under this ground, I would observe that the judge rightly dealt with the claim by imposing a clean break. The appellant's claim for periodical payments was correctly dismissed. The judge commenced his judgment by citing *WC v HC (Financial Remedies Agreements)* [2022] EWFC 22, [2022] 4 WLR 65 where at [21] Peel J laid out an impeccable synopsis of the jurisprudence applicable in financial remedy cases.

This has become justly famous. I would respectfully add to that catalogue one further clause:

> "xvii) Where an application for spousal periodical payments is actively pursued the court must diligently apply s.25A and consider whether the application can be dismissed and an immediate clean break effected. If the court concludes that a substantive order is needed to meet the applicant's needs the court should only make the award in such amount and for such a period as to avoid the applicant suffering undue hardship. The applicant must show good reasons why a non-extendable term maintenance order should not be made. The court's goal should be to achieve, if not immediately, then at a defined date in the future, a complete economic separation between the parties. The same principles apply, mutatis mutandis, where the court considers an application by a payer of spousal periodical payments for the variation or discharge of the order. The burden will be on the payee to justify a continuance of the order, and if so, for how long: *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam), [2015] 2 FLR 1124, *Quan v Bray & Ors* [2018] EWHC 3558 (Fam), [2019] 1 FLR 1114."

## Ground 1

37. The first ground permitted by Sir Jonathan was not pressed on me by the appellant and is in any event now irrelevant in circumstances where the result of this appeal is that the respondent will forego the 20% share in the sale proceeds of the former matrimonial home awarded to him by the judge.

## Result

38. The appellant is therefore granted permission to appeal on Ground 3 namely that the valuation of the respondent's business interests was incorrect. The appeal is allowed on Grounds 2 and 3. The judgment and order of Judge Farquhar are varied to provide that paragraphs 10 – 15 of the order which provide for sale of the matrimonial home and the division of the proceeds thereof, are set aside and replaced by an order confirming the appellant's sole ownership of that property.

## Costs

39. Following the circulation of this judgement in draft, the appellant has signified that she is forgoing the costs of the appeal which she could claim as a litigant in person but that she is seeking an order for costs at first instance. My decision modified to a relatively modest extent the decision of HHJ Farquhar about the division of the sale proceeds of the former matrimonial home. It leaves undisturbed his rejection of the appellant's primary case for compensation (which was largely misconceived legally and factually), as well as his rejection of her factual allegations of hidden assets. The judge made no order as to costs. That was a decision that followed the general rule of no order as to costs set out in FPR 28.3(5), although I observe that the judge would have been well justified in departing from that general rule under FPR 28.3(7)(c) & (d) and making an

order for costs against the appellant having regard to her unreasonable raising and pursuit of the above-mentioned issues.

40. I am in no doubt that had the judge reached the decision as modified by me his decision on costs would have been identical. Mrs Clarke's success before me does not lead to a conclusion that she should recover the costs of her largely misconceived case before the judge. Indeed, her argument is a non-sequitur. Therefore, there will be no order as to costs of the appeal, and the costs order made below will not be disturbed.

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