Neutral Citation Number: [2020] EWCA Civ 1215

Case No: B6/2020/0411

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MR JUSTICE COHEN
ZC16D00276 and ZC17C00215

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/09/2020

Before:

LORD JUSTICE PATTEN
LORD JUSTICE MOYLAN
and
LORD JUSTICE NEWEY

- -

Between:

Richard Rothschild	**Appellant**
- and -	
Charmaine De Souza	**Respondent**

- -
- -

Mr P Chamberlayne QC (instructed by **Payne Hicks Beach**) for the **Appellant Husband**
Mr C Hale QC (instructed on a direct access basis assisted by **Cara Nuttall of JMW Solicitors LLP**) for the **Respondent Wife**

Hearing date: 9th July 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am Friday 18th September 2020.

Lord Justice Moylan:

1. The husband appeals from a final financial remedy order made by Cohen J on 5 February 2020 (the "February 2020 order") following his judgment dated 20 December 2019 ("the December judgment").

2. I gave permission to appeal on 6 May 2020 and at the same time stayed payment of the lump sum provision in the order by which the husband was required to pay the wife £225,000 by 1 June 2020. The February 2020 order also provided that, in default of payment, a specified property (called, in the judgment, the "Miami property") was to be sold and the lump sum was to be paid to the wife from the proceeds of sale.

3. It was, therefore, surprising to be told the day before the hearing of this appeal that the husband had, or at least we were told that he had, transferred his beneficial interest in the Miami property to his mother. This was even more surprising in that the husband's mother has played a significant part in the financial remedy proceedings, as explained below.

4. It was said that the husband's interest had been transferred subject to the mortgage of c.$1.3 million (and other liabilities totalling $225,600), for the sum of $2.5 million, with "a further discount of $150,000 in lieu of the agent's fees which would otherwise have been paid". The "balance due" of $824,400 (or c.£634,000) was said to have been paid "in part satisfaction of the £865,000 loans from relatives and family friends" (which I refer to further below).

5. I should make clear that the husband's solicitors were unaware of this development until the day before the hearing and immediately notified the wife's solicitors and the court.

6. Mr Hale QC questioned whether the husband's conduct meant that we should not hear his appeal. This was on the basis that the alleged transfer was in breach of the February 2020 order, and possibly also an earlier freezing order, and that it appeared clearly designed to seek to, at least, impede if not frustrate the wife's ability to enforce the lump sum order in the event of the appeal being dismissed. However, after taking instructions from his client, he invited us to continue to hear the appeal, which we did.

7. The sole ground of appeal was that the judge failed to assess or take into account the husband's needs and only considered the wife's needs. However, as set out below, the submissions made by Mr Chamberlayne QC covered a much wider canvas in support of the husband's case that the judgment was flawed and the award was unfair.

8. I am grateful to counsel for their submissions.

Background

9. The December judgment is reported as *TT v CDS* [2019] EWHC 3572 (Fam). This contains a detailed account of the background, so I propose to set out only a brief summary. In this judgment, I propose to adopt the same nomenclature as in the December judgment.

10. At the date of the hearing, the husband was aged 44 and the wife 45. They had met at university and started living together in 1995. They married in 2005 and separated, in

what the judge described as "highly acrimonious circumstances", in 2016. The judge treated "the relationship as one of 21 years with the quality of the relationship pre-marriage being indistinguishable from that post-marriage"

11. There are two children aged 13 and 9. The judge described them as having "suffered grievously as a result of the breakdown of the marriage and, in my judgement, by the behaviour of H towards them and their mother". They both have "particular needs". They "live with their mother and have very limited contact with their father".

12. The parties built up a "successful business", called "AM", which provided the family "with a very good but not opulent standard of living".

Proceedings

13. As described in the December judgment, at [9], the "litigation has been on a massive scale". It had been, at [110], "the most destructive litigation".

14. There had been proceedings under the 1980 Hague Child Abduction Convention; the husband's mother had brought proceedings in the Chancery Division the "gist of them being" that she was the beneficial owner of the "family business and residential properties"; and the financial remedy proceedings had taken 2/3 years to determine.

15. The proceedings under the 1980 Convention were determined by Cohen J in November 2017. He found that the husband had abducted the children from Miami to England. In his December judgment, the judge summarised those proceedings as follows:

> "[10] … The background was that in August 2017 H had taken advantage of the fact that W had informed him that she would unavoidably be some hours late in collecting the children from H following an agreed period of summer holiday contact to H in America to remove them from Miami back to England. In my judgment I described his behaviour as 'deplorable' and that, contrary to his assertion, it was plain that the relocation of the children to Miami was consensual and that they were habitually resident in Florida."

16. The proceedings commenced by the husband's mother ("Wanda") were stayed and she was joined as a respondent to the financial remedy proceedings. Her claim was, as described by Cohen J, "decisively rejected" by Mostyn J after a four day hearing. Mostyn J determined that the husband and the wife were joint beneficial owners of AM and the disputed properties; that Wanda was the sole beneficial owner of a property called 45 AG; and that the husband and wife were jointly and severally liable for the mortgage on that property. The husband and Wanda were ordered to pay the wife's costs and were ordered to make a payment on account of £150,000 by 15 August 2018. By the December judgment, no payment had been made.

17. In August 2018, the wife obtained an injunction against the husband prohibiting him from interfering with AM.

18. On 4 December 2018, Mostyn J found that the husband was in contempt of court by, among other things, "failing to complete the repair works to the Miami property and vacate it" as he had undertaken or been required to do by the order of 7 June 2018.

19. In or about April 2019, Mostyn J made a freezing order against the husband and Wanda. The husband had "purported to execute a transfer of the title of the Miami property to his mother". They were prohibited from "dealing with the property in any way".

20. Both parties filed conduct statements setting out the matters which they asserted should be taken into account under section 25(2)(g) of the Matrimonial Causes Act 1973 ("the 1973 Act").

21. In her statement dated 12 September 2019, the wife relied on the "numerous ways" in which the husband's conduct had impacted adversely on the "financial circumstances of the family". These were summarised as follows:

> "• Through his deliberate and wanton overspending and dissipation of assets, for his sole benefit, and at a level wholly unsustainable as against the assets we have and our needs moving forwards;
>
> • Through destructive behaviour which has impacted negatively on the value of the assets;
>
> • Through refusing to allow the rental (or rental at a commercial rate) of the property portfolio since the separation, resulting in repossession proceedings and other enforcement proceedings, together with increased costs, as well as depletion of other capital and income to save them;
>
> • Through refusing to obtain any form of paid work in the 3 years since separation to assist in meeting the increased costs of a separated household and litigation;
>
> • Through the impact of his behaviour on our children, increasing the expenses associated with meeting their needs;
>
> • Through his sustained refusal to participate appropriately within these proceedings, bringing unmeritorious applications and consistently failing to comply with orders and deadlines, needlessly increasing costs by a vast amount; and
>
> • By refusing to agree to the release of assets on an interim basis to allow us both to meet legal fees, forcing me to resort to expensive specialist litigation funding at significant costs that could have been avoided."

22. Under the heading, "Litigation Conduct", the wife set out, in some detail, the nature of her case that the amount which had been spent on costs was "attributable to [the husband's] behaviour". Her costs in England totalled approximately £500,000. This did not include "the further costs of concluding these proceedings, the costs of concluding the associated Chancery proceedings with Wanda or the costs of other

proceedings". She had also incurred costs of £65,000 in respect of proceedings in the USA. She listed the proceedings which she invited the court to take into account which included the 1980 Convention proceedings and the claim brought by Wanda.

23. In his response, the husband acknowledged that the impact of the breakdown of the marriage had caused him "to stray from the path of reason and, occasionally, focus upon peripheral rather than fundamental aspects of the proceedings". He accepted that "a number of the allegations made by [the wife] are not without merit" although he also said that he "disagree[d] with almost everything that she says". However, although he believed that he had been justified, "on occasion", in acting as he had, he did not propose "to respond in kind". This was because:

> "I recognise that we should now be focusing our efforts on a resolution of these protracted and expensive financial remedy proceedings; that we should be seeking to stem the haemorrhaging of legal costs and the resulting depletion of our matrimonial assets and to focus on our lives after divorce; including, not least, the future welfare of [the children]."

24. In summary, the matters of conduct on which he relied were as follows: the manner in which the wife had mismanaged AM after the parties' separation; that she had caused very significant damage to his credit rating; that she had participated "in dishonest and fraudulent activity"; that, by failing to make payments due in respect of, what were called, the GSH properties and the Miami property, she has put them at risk of being repossessed.

25. At the pre-trial hearing, it became apparent that none of the valuations or expert evidence which had been ordered had been obtained. Both the husband and the wife said that they "did not have the money to pay" for their share of the costs of obtaining this evidence. This was described by the judge as a "highly unsatisfactory situation". He gave directions for an updated valuation of AM; for the production of evidence dealing with the tax consequences of the sale of AM; and for informal valuations of "the London properties".

26. The final hearing took place between 18 and 22 November. Following the December judgment being handed down, a further hearing took place to determine the terms of the order on 5 February 2020. This led to some slight adjustments, as explained in a further, short, judgment, but did not change the overall effect of the judgment.

The Judgment

27. The judge determined that all the parties' financial resources had been accumulated during the course of the relationship.

28. In summary, he determined that the assets comprised the following:

> (a) The business, AM, valued at £1.85 million gross. The sale costs were estimated at £142,000, which the judge considered, at [88], a "high figure". There would also be "a significant tax liability" if the wife remained resident in the USA. If she was resident in the UK, she would "presumably be able to take advantage of Entrepreneurs' Relief". The judge concluded that "there will be some tax payable

on any sale but I regard the extent of the tax payable and sale costs as somewhat hypothetical".'

(b) Two properties in London (43 and 44 GSH), valued at £410,000 net;

(c) A third property in London (16 GSH), valued at £168,000 net;

(d) The Miami property, valued at $3 million gross, £1.253 million net. The husband sought to appeal the judge's determination of the value of this property but I refused him permission to do so;

(e) Another property in Miami valued at £143,000 net;

(f) A debt due from three individuals, or their business, identified as PJM. The judge found that they had been lent £300,000 and that the husband had been repaid £178,000 in June 2018. He also found that interest was due. He rejected the husband's evidence that no further sum was due from PJM. He concluded that he did "not have the evidence which would permit me to try and assess what he is owed, but I am satisfied that he is entitled to a further payment".

29. The parties' debts were as follows:

(a) The wife had debts of £891,000. Of these, at [91], £613,000 represented "English legal fees" and £34,000 "in respect of US legal fees";

(b) The husband had debts of £758,000. Of these, at [96], £221,000 represented costs due to the wife which, if deducted, left £537,000. £170,000 represented outstanding legal fees to his first solicitors. The judge, at [97], excluded alleged debts of £865,000 said to be due to "friends and relatives". There was "not a shred of evidence of any of these debts" and the judge found it "astonishing that H is unable to provide any further detail". It was said that the money had been provided by the mother's friends who "felt sorry for" the husband" which the judge found "hard to fathom" as he "enjoyed a sybaritic lifestyle". The judge did not "exclude the possibility that there might be indebtedness, but I am not prepared on the evidence to accept this sum or to accept that any liability is a hard debt but I have not excluded the possibility of an indebtedness from consideration." He then added, at [99], that his "reluctance to accept this alleged debt is increased by the difficulty in finding an explanation of a debt of this size in addition to his credit card debts in circumstances where H has been living either with his mother on his relatively infrequent stays in England or living off Airmiles when overseas";

(c) The parties had a joint liability to Wanda of £610,000. The judge decided, at [94], that it was "unlikely that Wanda would seek to recover the sum from" the husband "of whom she is so supportive". He had "no doubt that she would seek to recover it from W if she could";

(d) The husband and Wanda were also jointly and severally liable to the wife for the costs of the claim determined by Mostyn J. These comprised the payment on account of £150,000 (which, as referred to above, had not been paid) and an unassessed claim by the wife of £67,000.

30. The judge addressed the income and earning capacity of the parties.

31. The wife had been drawing between £186,000 and £232,000 annually from AM. This, at [60], was "considerably less than had been drawn in previous years but is the most the business can sustain". She accepted that she could obtain another job in industry but, as referred to below, sought the transfer of AM to her.

32. The husband was described by the judge, at [63], as "an entrepreneur by nature" and as having "substantial entrepreneurial skills". The husband said in evidence that "he gets offered business opportunities on a daily basis". The judge summarised, at [68], the husband's position as follows: "He is completely confident of his own abilities and says that, if the court does not permit him to resume control of AM, he will set up a business in competition. Provided proper safeguards are put in place to protect AM, W, in my view rightly, does not object to such a course. I am satisfied that he will start off again, in a new enterprise and will prosper".

33. The judge also referred, at [92], to the costs orders which had been made against the husband. There had been 13 such orders. The assessed costs totalled £268,000 (net of interest) of which approximately £61,000 had been paid "out of the sums received from court order sales". There was also one order which had not been assessed and in respect of which the wife claimed £67,000.

34. The wife sought the transfer of AM. As set out, at [61], she "accepts that her skills would enable her to get a job in industry, but she says that the children's needs are so great that she has to have a job that permits her largely to work from home and be a hands-on mother. This is one of a number of reasons why she is so keen to continue running the business on her own. She would not be able to exercise her earning capacity away from home and at the same time provide the children with the support that they need".

35. The judge considered the parties' needs.

36. In respect of the wife he determined, at [101], that her income needs included those of the children. He explained his conclusions as follows:

> "I can have no confidence that H will provide for W or the children. While he says that he will, once he perceives himself being wronged in some way by W or feels indebted to his mother, the provision is likely to dry up. The needs of W and the children must be met by W out of the business. H can and will start again."

Earlier in the judgment, at [48], the judge had referred to his conclusion that the wife would have to retain ownership of the business because this was "the only way that she can provide for the children".

37. The judge concluded, at [59], that: "These children more than most require stability and certainty". It was "plainly in their interests that they remain in their current schooling, if financially possible, as I find it to be". Their school fees were $65/70,000 per year combined.

38. In respect of the husband, the judge noted, at [102], that the husband "has no current earned income", adding that he "has taken no steps to achieve one". Earlier in the

judgment, at [67], he had described the husband's lifestyle "over the last three years [as] extraordinary". He had "spent the time travelling the world". He said that "it is in the family's financial interest that instead of trying to generate an income from employment or self-employment, it is better that he preserves his non-domiciled tax status and lives a life of luxury on the back of the Airmiles". The judge noted that it was "hard to follow the logic".

39. The wife needed a home for herself and the children. She was renting a property and the judge concluded, at [102], that "it seems inevitable that this will continue even if, and it will be a matter for her, she sells rather than retains 43 GSH".

40. In respect of the husband, the judge concluded, at [102], that he would "continue to live a peripatetic life and has not suggested that he would wish to buy a home".

41. The judge dealt with the issue of conduct, at [104]-[106], which I quote in full:

> "[104] Each party has made allegations that the other is guilty of conduct which it would be inequitable to disregard. It is unnecessary for me to go into the details although I have read both parties' conduct statements and W's statement in reply. What the statements show very clearly is that the financial links between the parties must be severed as far they can be. They emphasise how obvious it is that W must be the one who ends up in control of the business.
>
> [105] Much of H's conduct has been lamentable and although some of it has been punished by costs orders other aspects are not so easily recompensed. If there had been more money in this case it might become necessary to seek to put a financial value on the conduct that is set out. But, the sad fact is that the assets are simply not available in this case to seek to do other than meet needs.
>
> [106] W must be able to go forward in life without being excessively trammelled by debt. In so far as the resources are not there to enable H to have the same freedom, that is the inevitable result of statute requiring me to give first consideration to the children and because of the way that H has acted since the breakdown of the marriage which has been vindictive and irrational, and which has caused a huge and unnecessary haemorrhage of money to pay for this litigation."

42. Under the heading, "Outcome" the judge said:

> "[110] It is obvious that this has been the most destructive litigation. There is no avoiding the fact that H is very largely responsible for the situation that has arisen. Since the breakdown of the marriage he has acted destructively and throughout the litigation without any regard to the normal rules.

> [111] Although H was unrepresented at this final hearing, which was most unfortunate, he has been represented for most of the way through these proceedings and has had the services or advice at different times of no less than four Queen's Counsel and three firms of solicitors, albeit PHB only for a short time.
>
> [112] It is inconceivable that the parties could work together in the business and as I have already stated the only way that I can be confident that W and the children are properly looked after and do not find themselves deprived of funds is if the beneficial interest in the business is transferred to W. Thus it will be that she is provided with an income which will permit her to run her home, pay the children's school fees and maintain an appropriate standard of living for the children. I very much hope that H's relationship with his children might be restored but that will be dependent on the way that he behaves ….
>
> [113] In deciding how to distribute the assets I have sought as far as possible to ensure that H and W have no further cause to litigate or have to deal, for example, with issues such as enforcement or assessment of costs orders.
>
> [114] I am satisfied that 43 and 44 GSH should remain in the sole ownership of W. H should ensure that P, J and M move out as soon as W requires in accordance with what he has told the court about their willingness to leave. When they have vacated W will be able to restore the flats into two separate units and do the necessary works which will then permit her to sell 44. Whether W keeps 43 as her London home for her monthly visits will be her decision. The equity in 44 will go towards her costs liability. 16 GSH will remain in H's sole ownership.
>
> [115] The cabana will be transferred to W. She has a buyer at $195,000 and she will no doubt sell it as soon as she can.
>
> [116] The Miami property will remain in the sole ownership of H. W will receive a lump sum from H which is to be secured upon the property in the sum of £250,000. If it is not paid by date to be identified but provisionally 1 May 2020 the property is to be sold. W shall have conduct of the sale and after payment of her lump sum the balance will be paid to H.
>
> [117] There will be clean break between H and W as soon as possible."

43. The judge summarised the effect of his proposed order, at [118]-[120]. The wife would have the business, AM, minus net debts of £90,000. This would leave her with £1.73 million, less the costs of sale and tax which might be due on the sale of AM. Even though the judge described these as "somewhat hypothetical", liabilities of this type are conventionally taken into account when considering the net effect for each of the parties of a proposed award. The wife would also "forego further enforcement of the costs

orders in her favour against either H or Wanda". The husband would have net assets of £634,000 on the basis that Wanda did not "call for her money".

44. The above provisions were adjusted (including by reducing the lump sum to £225,000) following the hearing on 5 February 2020 but this did not change the net effect of the order.

45. The judge concluded his December judgment as follows:

> "[124] The effect of this is that neither party will end up with much, if any, capital but W will end up with the business. H has brought this upon himself. In so far as there is a departure from equality it is necessary so as to meet the needs of the children and to meet W's debts which he has created in significant part.
>
> [125] I have attempted to reach what I regard as a fair outcome to both H and W in this unusual and unfortunate case."

46. The February 2020 order gave effect to the judge's decision. The wife undertook, "for the time being", to pay "all of the costs of the children's schooling and their expenses when with her". She also undertook to pay the husband £5,000 pcm with the last payment due on 31 May 2020.

Submissions

47. I propose only to summarise the parties' submissions. I have, of course, taken into account all the points raised in the comprehensive submissions made to us in support of their respective cases.

48. Mr Chamberlayne submitted that the "central problem" with the judgment was that the judge specifically made it clear that he was not taking conduct into account in reaching his decision and was determining the case on the conventional basis of need. However, the judge must have taken conduct into account because: (a) that was the only way in which the division of the matrimonial assets which his award effected could be justified; and (b) there were "other comments" in the judgment which indicated that he was taking conduct into account.

49. Mr Chamberlayne submitted that the judgment was, therefore, flawed. If conduct is going to be taken into account, it is incumbent on the judge: to make findings as to "what the conduct was"; to undertake some assessment of the financial effect of that conduct; and having taken that conduct into account, not to lose sight of that party's needs. The effect of the conduct needed to be made clear so that the outcome could be seen to be justified by, for example, the seriousness of the findings. The judge was also required to undertake an overarching s.25 analysis which included the husband's needs.

50. The need for a clear analysis of the effect of conduct was particularly so in this case because of the disparity in the financial positions of the parties resulting from the order. Mr Chamberlayne submitted that the wife received resources of £1.76 million while the husband, after payment of £610,000 to Wanda, would have £24,000. This level of disparity, which he described as a "penal" order, required powerful, explicit, justification which was absent from the judgment. During the course of the hearing,

Mr Chamberlayne entirely properly referred to the costs and tax which would be incurred on the sale of AM. There had been, what he described as, "fairly sketchy" expert evidence, which had put the costs of sale at £142,000 and capital gains tax at £422,000. However, he submitted that even if these potential liabilities were taken into account, the wife would still have assets valued at £1.2/1.3 million.

51. Mr Chamberlayne acknowledged that litigation misconduct can fall within section 25(2)(g). Indeed, he acknowledged that the judge in this case could have taken the husband's litigation conduct into account on the basis that the more that had been spent on legal costs the less there was available for distribution between the parties. However, he submitted, the judge, at [105] and [106], made clear that he was not taking such conduct into account but then, implicitly, must have done so.

52. Mr Chamberlayne referred to *M v M (Financial Provision: Party Incurring Excessive Costs)* [1995] 3 FCR 321 and to *Beach v Beach* [1995] 2 FLR 160 in support of his submission that, if a judge is taking conduct into account, he must adopt the structured approach referred to above and in support of his further submission that, even when conduct is taken into account, the award cannot be "depressed below needs".

53. As to the latter submission, Mr Chamberlayne submitted that the disparity effected by the judge's award was not only not explained in the judgment but cannot be justified. In simple terms, he submitted that the outcome could not be fair because the husband is left with no capital and, at present, has no income. Further, Mr Chamberlayne questioned why it was fair for the wife to be awarded the business outright rather than for the husband to retain a share to be realised once the children were adult and the income was no longer required to meet their and the wife's needs. He relied on *Elliott v Elliott* [2001] FCR 477.

54. He also submitted that the judge had undertaken only an "artificial and cursory" assessment of the husband's needs. It had been wrong to dismiss the husband's need to purchase a home and had been wrong to take at face value the husband's "bravado comments" about his future prospects. The judge should have taken a more "realistic view" of the husband's evidence. His analysis was insufficient and flawed and did not properly consider the husband's financial needs.

55. In the course of his submissions, Mr Chamberlayne sought to challenge the judge's finding that Wanda would not seek to recover the sum owed to her from the husband. I can say straight away that there is no basis on which this court could interfere with that finding which was plainly open to the judge to make.

56. Mr Hale submitted that the only formal ground of appeal was unsustainable because the judge had clearly considered the husband's needs during the course of his judgment. He also submitted that the award was fair.

57. Mr Hale told us that the wife's total costs were in the region of £900,000 with interest due to accrue at the rate of £7,000 pcm because she had had to obtain litigation funding. The husband's costs must also have been substantial but, because he provided no Form H, the extent of them was not clear. The total costs, which Mr Hale put at well in excess of £1 million, reflected the destructive impact of the husband's conduct on the matrimonial assets which had been depleted by, what Mr Hale described as, the husband's "egregious" approach to litigation. This was "ruinous expense", as stated by

the judge, at [50], which had had a dramatic impact on the parties' assets. Mr Hale submitted that the costs would have been a fraction of this if the litigation had been conducted "normally".

58. I don't think it is unfair to Mr Hale to say that his written submissions as to the effect of the husband's conduct on the award made by the judge were not as clear as they might have been. A number of points were made which, at least on an initial reading, did not seem entirely compatible. It was submitted: (a) that the judge had been entitled to find that the husband's conduct had "caused a huge and unnecessary haemorrhage of money" because of *all* the various litigation costs incurred by the parties; (b) that, although the judge did not disregard this, it did not "ultimately, influence the award" which above all was influenced by the needs of the children; and (c) that, the judge's treatment of conduct had been correct because, by analogy with *Beach v Beach*, the husband had dissipated the family money so significantly that the division effected by the judge was justified.

59. In his oral submissions, Mr Hale clarified his case as being that the judge had fully taken into account the "destruction" of the marital assets caused by the husband's conduct and had been entitled to do so. This had severely reduced the resources available for distribution between the parties and had justified the imbalance in the outcome effected by the judge's award. Mr Hale further submitted that this was not as stark as portrayed by Mr Chamberlayne. The husband would have approximately £630,000 and the further sum due from PJM which was not less than £120,000. In addition, the judge had been entitled to find that the husband would "start off again, in a new enterprise, and prosper". There was no reason for the judge to reject the husband's evidence that he was being "offered business opportunities on a daily basis".

60. As to the husband's needs, Mr Hale submitted that the judge had taken them into account as set out in the judgment but had, rightly, concluded, at [124], especially having regard to the fact that the children are particularly vulnerable, that departure from equality was "necessary so as to meet the needs of the children and to meet W's debts which [the husband] has created in significant part". Mr Hale referred to *B v B (Financial Provision: Welfare of Children and Conduct)* [2002] 1 FLR 555 in support of his submission that conduct can be reflected in different ways and that this can include giving priority to the needs of the wife and children with the husband's "needs coming last".

Legal Framework

61. I propose to start by addressing the issue of conduct.

62. Section 25(1) of the 1973 Act provides:

> "It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24 above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen."

Section 25(2) lists the matters to which the court must "in particular have regard" including:

> "(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;"

63. In my view, Mr Chamberlayne was right to accept that litigation conduct (or, as he more accurately described it, litigation misconduct) *can* be taken into account under section 25(2)(g). This is in part because, as he said, money spent on legal costs is no longer available for distribution between the parties and, as a result, no longer available to meet their needs or be shared between them. The depletion of the matrimonial assets will plainly not be remedied by an order for costs. Such an order simply reallocates the remaining assets between the parties. It does not necessarily remedy the effect of there being less wealth to be distributed between the parties.

64. It is not necessary in this case to make other than a few brief observations about this issue.

65. The general approach is that litigation conduct *within* the financial remedy proceedings will be reflected, if appropriate, in a costs order. However, there are cases in which the court has determined that one party's litigation conduct has been such that it should be taken into account when the court is determining its award.

66. An example is *M v M*, a case which pre-dated the current costs rules. In that case, Thorpe J added back resources dissipated by the husband so that, at p. 327, the available resources were the "notional sum … [of] nearly £900,000". He awarded the wife £450,000. He explained his approach as follows, at pp. 331/332:

> "Conduct is only relevant in so far as the wife relies upon the manner in which the husband has conducted these proceedings. Ordinarily speaking, it seems to me that the manner in which proceedings are misconducted is to be reflected in orders for costs rather than directly in the scale of the awarded sum. However, this seems to me to be a quite exceptional case where the husband's strategy has been so gross and so extreme that it would be inequitable to disregard it. It seems to me that it is appropriate to look to the quantification of the wife's share not of what remains today but of what would remain today had that policy of waste and destruction not been pursued."

67. Having regard to Mr Chamberlayne's broader submission as to the relationship between conduct and needs, it is relevant to note that Thorpe J also made an order that the husband should pay the wife's costs the effect of which, it had been argued on his behalf, at p. 333, would be to reduce his share of the matrimonial assets to "virtually nil". Thorpe J responded, at p. 333, to this submission as follows:

> "It seems to me that the husband should have contemplated that realistic possibility after the transfer of these proceedings to this court and after the grant of his certificate. It was perfectly open to him to shield himself against such an eventuality by writing a reasonable Calderbank letter. He did not write any Calderbank letter. It seems to me that it would be manifestly more unjust that the wife, who has been sorely tried throughout these

> proceedings by having to resist unnecessary and unmeritorious ploys, should see any part of her recovery removed by operation of a Law Society charge."

This decision was referred to by Thorpe LJ in both *Tavoulareas v Tavoulareas* [1998] 2 FLR 418 and *Young v Young* [1998] 2 FLR 1131.

68. I next deal with *Beach v Beach*. The parties in that case had married in 1980 and separated, it appears, in 1989. The husband owned a farm into which the wife had made significant financial contributions. The husband was made bankrupt and the wife received approximately £415,000 from the trustee to reflect her interest in the farm. She had further resources of approximately £405,000 which had been given to her by her mother. The husband had no capital and received income support.

69. Thorpe J decided that the husband's financial misconduct in dissipating resources fell within s.25(2)(g), at p. 169:

> "So the crux of the case is really the responsibility for the present near-destitution of the husband. How has this come about? Who is responsible for this state of affairs? Is it the product of the husband's misconduct?
>
> I have already recorded the developments and find the history as the wife presents it. I utterly reject Mr Moor's submission that this history is irrelevant to the outcome of this case. I think Miss Ralphs is fully entitled to suggest that the husband's conduct amounted to conduct which it would be inequitable to disregard.

He then set out his conclusions, at p. 170:

> "So, on one view, why should he have anything when she has not even had what should have been her due under the freely negotiated contract? My first impression was to dismiss this claim as Miss Ralphs invited me to do. However, on further reflection I have concluded that the disparity between the present position of the husband and the wife is so great that that would not be a fair application of the s 25 criteria."

The outcome was a lump sum award of £60,000 which would provide the husband with "basic accommodation". The wife retained the balance of approximately £760,000.

70. Thorpe LJ returned to the issue of litigation misconduct in *Clark v Clark* [1999] 2 FLR 498. I do not propose to summarise the facts of that case which Thorpe LJ described, at p. 509, as, "as baleful as any to be found in the family law reports". He addressed the issue of litigation misconduct, at p. 509, as follows:

> "Here the wife's litigation misconduct cost the husband approximately £250,000. His solicitor and own client costs throughout were just less than £200,000. Therefore this was as a matter of classification one of those rare cases where the litigation misconduct could not be the subject of full

> compensation to the victim simply by the adjustment of orders that would otherwise have been made for costs. Ancillary relief procedures are currently undergoing complete reform. Case management by the judges will help to curb litigation misconduct. But if costs are wasted it will be easier to quantify the waste. That gives the court the opportunity to ensure that the litigant responsible bears the cost of waste in full. Unless there are exceptional mitigating circumstances, that should be the objective of the court's order. In my opinion the judge was right to proceed on the basis that he would make no order for costs either way in the light of the reality that the husband had effectively funded both sides. It was obviously sensible to reflect both the marital misconduct and the litigation misconduct in quantifying the wife's award. Otherwise the husband would in effect be funding the wife partly in order to meet costs orders in his own favour."

This case provides an example of litigation misconduct in the course of the financial remedy proceedings being taken into account "in quantifying the wife's award". I would also note Thorpe LJ's observation about the court ensuring that "the litigant responsible bears the cost of waste in full" as an example of the way in which the court *can* treat such conduct.

71. I also propose to quote another passage from *Clark v Clark* which relates to Mr Chamberlayne's submission about the structured approach a judge should take to the issue of conduct, at p. 509:

> "Mr Scott has also submitted that in every case the judge should make a clear finding of what he would have awarded the wife assuming no discount for misconduct. Then the judge should quantify the misconduct in cash. Finally he should deduct the second total from the first to arrive at a patent result. I would reject that submission. The statute defines the judicial task and I am against further elaboration or overlay. There may be cases in which such an exercise would be appropriate in the judgment. There will certainly be cases where it will not. There may be cases in which a judge may adopt such an exercise whilst feeling his way towards a result. It is, of course, incumbent upon a judge to explain his conclusions, but it is fortunately not incumbent upon him to reveal all the thought processes through which he passed on his route to conclusion."

72. I also quote what I said more recently, in *Moher v Moher* [2020] Fam 160, about the need for an appropriate degree of detail in a financial remedy judgment in the context of non-disclosure:

> "[114] In summary, as a matter of course:
>
> (i) Every financial remedy judgment should clearly set out the judge's conclusions in respect of each of the relevant section 25 factors as part of the substantive structure of the judgment and/or

> by way of a summary. This is not for the purposes of demonstrating that the judge has had regard to those factors, although it will do this, but so that the parties and anyone else reading the judgment can easily understand the judge's conclusions as to these factors which, in every case, underpin the ultimate award;
>
> (ii) This includes by providing, even in a non-disclosure case, a schedule "of the parties' visible net assets", to adopt the words from *Behzadi v Behzadi* [2009] 2 FLR 649, even though in such a case this will comprise only part of the parties' resources; and
>
> (iii) Every financial remedy judgment should clearly set out how the award has been calculated.
>
> This is because a fair outcome in financial remedy cases is in part process driven, as in applying section 25, but also significantly outcome driven in the sense of explaining the basis of the award either by reference to needs or sharing."

73. In *B v B*, Connell J took into account a number of factors, including the husband's litigation misconduct, as justifying a very substantial departure from equality. The husband appealed from the district judge's order which had awarded the wife the whole of the equity in the former matrimonial home, the parties' only remaining asset. Connell J dismissed the appeal for the reasons summarised in the headnote:

> "… the award to the wife of the entire net value of the matrimonial home was justified by the need to house the child of the marriage to a reasonable standard. A Mesher order was not appropriate, taking into account not only the contributions of the parties, particularly the wife's ongoing contribution to the care of the child, but also the parties' conduct. The wife was entitled to rely on various aspects of the husband's conduct, including: his litigation conduct in not disclosing the removal of moneys from the jurisdiction; his actual conduct in preventing the court from having any meaningful say in the disposition of those moneys; the reality that the burden of maintaining the child was likely to rest with the mother alone; and the husband's abduction of the child. The husband's conduct was particularly relevant when considering the court's duty to give first consideration to the welfare of the child. Although it was appropriate for the court to look at the question of equality, and to depart from equality only if there was good reason for doing so, the court's overriding duty was to reach a solution which, in all the circumstances, was fair. Applying the s 25 criteria to the facts, the conduct and contributions of the parties, together with the desirability of a clean break order, provided good reasons for departing from equality."

74. Further, since the above cases were decided, the costs rules applicable to financial remedy cases have changed significantly. One of the objectives of the current rules was

to enable the court to take the effect of costs into account when determining the fairness of the proposed award and not to risk a carefully crafted needs award being jeopardised by the subsequent disclosure of a Calderbank (without prejudice) offer.

75. This led to the adoption of the general rule that the court will not make an order for costs in financial remedy proceedings: r. 28.3(5) Family Procedure Rules 2010. This is subject to sub-paragraph (6) which provides:

> "(6) The court may make an order requiring one party to pay the costs of another party at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them)."

This provides an exception to the general rule but these provisions would still enable the court, at least, to have in mind the potential impact of any prospective costs orders when determining the award.

76. In addition, there are two classes of litigation misconduct. Misconduct within the financial remedy proceedings and misconduct in relation to other litigation. Rule 2.83 only deals with costs in the financial remedy proceedings and does not provide a vehicle by which the court can take into account the dissipation of assets through the costs of other proceedings. The effect of such costs might have been to reduce the matrimonial assets available for distribution or might be relied on by a party, if the costs are unpaid, as a debt which should be included within their needs.

77. An example of the latter was *R v B and others* [2017] EWFC 33. One aspect of that case, at [154], was that the husband had "very significant liabilities" of which the "vast majority relate to the litigation that has ensued following the breakdown of the marriage, which, on any view, has been ruinous". He sought to have these liabilities included as part of his needs, a case rejected by Moor J who said, at [161]:

> "I have come to the clear conclusion that I should not provide additional finance for Mr R to clear all these liabilities. He took them on and he must sort them out. There is no such thing as free litigation. Mr Howard submits to me that these debts form part of his needs and I cannot make an order that does not satisfy his needs. I have already indicated that I do not agree. To do so would be to give a licence to anybody to litigate entirely unreasonably. Financial remedy litigation itself is one thing. Satellite litigation is entirely another. It is clear from *M v M* that extreme litigation misconduct can sound in the award …."

In addition, in that case, Moor J dealt with a submission about the impact of conduct on the assessment of a party's needs:

> "[85] Mr Howard argued that conduct can only be relevant in a sharing case and that it cannot reduce a party's needs. I am not persuaded by that argument. Conduct features in section 25(2) without a gloss. The conduct may be so serious that it prevents the court from satisfying both parties' needs. If so, the court must be entitled to prioritise the party who has not been guilty of such

> conduct. A court can undoubtedly reduce the award from reasonable requirements generously assessed to something less. Indeed, that is exactly what happened in *Clark v Clark* [1999] 2 FLR 498. It may be that, unless there is no alternative, a court should not reduce a party to a "predicament of real need" (see *Radmacher v Granatino* [2010] UKSC 42; [2010] 2 FLR 1900) but that is not suggested in this case."

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.

79. I would also refer to what was said by Cairns LJ in *Martin v Martin* [1976] Fam 335, at p. 342H:

> "A spouse cannot be allowed to fritter away the assets by extravagant living or reckless speculation and then to claim as great a share of what was left as he would have been entitled to if he had behaved reasonably."

This applies to litigation conduct which falls within the scope of s.25(2)(g) and can apply to conduct both within the financial remedy proceedings and in respect of other litigation.

80. In *Vaughan v Vaughan* [2008] 1 FLR 1108, at [14], Wilson LJ after setting out the above quotation from *Martin v Martin* added:

> "The only obvious caveats are that a notional reattribution has to be conducted very cautiously, by reference only to clear evidence of dissipation (in which there is a wanton element) and that the fiction does not extend to treatment of the sums reattributed to a spouse as cash which he can deploy in meeting his needs, for example in the purchase of accommodation."

However, in saying this, he did not mean that the financial effect of litigation conduct cannot impact on a needs-based award. I agree with Moor J in *R v B* when he said that, if required to achieve a fair outcome, the court "must be entitled to prioritise the [needs of the] party who has not been guilty of such conduct". It is clear from the outcomes in *M v M* and *B v B*, as referred to above, that the financial consequences of the litigation misconduct, perhaps combined with other factors, might be such that it is fair that the innocent party is awarded all the matrimonial assets. In this respect, I also agree with Moor J's observation that an order *can* be made which does not meet needs because to exclude that option "would be to give a licence … to litigate entirely unreasonably".

Determination

81. I first deal with the issue of whether the judge's award expressly took the husband's litigation misconduct into account or whether, as Mr Chamberlayne submitted, the judge said that he was not taking this into account but, in fact did, because this is the only way in which his award could be justified.

82. As referred to above, Mr Chamberlayne submitted that the judgment, at [105] and [106], makes clear that the judge did not take conduct into account. However, during the course of the hearing in response to a question from me, he accepted that, on the basis of that submission, there might appear to be an inconsistency in these paragraphs. This was because, the judge first says, at [105], that, "If there had been more money in this case it might become necessary to seek to put a financial value on the conduct that is set out" but then says, at [106], which I propose to repeat in full:

> [106] W must be able to go forward in life without being excessively trammelled by debt. In so far as the resources are not there to enable H to have the same freedom, that is the inevitable result of statute requiring me to give first consideration to the children and because of the way that H has acted since the breakdown of the marriage which has been vindictive and irrational, and which has caused a huge and unnecessary haemorrhage of money to pay for this litigation."

83. In my view, a potential inconsistency between these paragraphs only arises if Mr Chamberlayne's key submission, that the judge said that he was not taking conduct into account but did, is correct.

84. If [106] is read on its own, in my view, it makes clear that the judge *is* taking into account that the matrimonial assets have been very significantly depleted as a result of the husband's conduct which has caused an "unnecessary haemorrhage of money" through litigation costs. The phrases, the "resources are not there", "the husband will not have the same freedom" and "because of the way that H has acted", demonstrate that the judge's award will be reflecting the effect of the husband's conduct.

85. Is this inconsistent with what the judge said, at [105]? In my view it is not. The judge is there referring to the range of matters advanced by the wife in support of her conduct case. Those matters included, but were not confined to, the costs of litigation. There is no inconsistency if the judge's references to "other aspects are not so easily recompensed" and "it might become necessary to put a financial value on the conduct", are references to the matters advanced on behalf of the wife other than litigation misconduct. Some of them, indeed perhaps all of them, would have been "not so easily recompensed". The same could not be said of costs which can, relatively easily, be quantified.

86. Accordingly, I do not consider that there is an inconsistency. The judge did take conduct into account but only in respect of the costs dissipated on litigation. This conclusion is also supported by the judge's comments, at [110], that "this has been the most destructive litigation … [for which] H is very largely responsible" and, at [124], that the husband "has brought this [being the effect of the judge's award] on himself". In my view, and as Patten LJ observed during the hearing, this leaves no room for doubt

that the judge did indeed take the husband's litigation conduct into account when determining his award.

87. As referred to above, Mr Chamberlayne rightly accepted that it is permissible to take litigation conduct into account when a judge is determining what award to made under s.25. Indeed, as referred to above, he acknowledged that the judge could have done so in this case. It is clear from the authorities that litigation conduct, both in respect of the financial remedy proceedings themselves and in respect of other litigation, can be taken into account under s.25(2)(g). To adapt Cairns LJ's words, a party cannot "fritter away assets" on litigation and then claim as great a share of what is left as he would have been entitled to had he not acted in a manner within the scope of s.25(2)(g).

88. The next issue is whether, as Mr Chamberlayne submitted, the judgment does not adequately explain the manner in which the judge took the husband's conduct into account. He submitted that the judge should have quantified the financial consequences of the husband's litigation conduct that he was taking into account. He suggested that, for example, the judge could have identified the proportion of the costs which the parties had together incurred which he was notionally attributing to the husband.

89. In some respects, these submissions reflect the submissions made on behalf of the husband in *Moher v Moher*, that a judgment, if it is not to be defective, has to contain a reasoned explanation for the award so that the parties know why the judge made the award which he did. It is clear, as I said in that case, at [114(iii)], that: "Every financial remedy judgment should clearly set out how the award has been calculated". However, I do not accept that this necessarily requires the structured approach proposed by Mr Chamberlayne. Adapting what Thorpe LJ said in *Clark v Clark*, at p. 509, there will be cases where this is appropriate but there will be cases where it is not.

90. The question, therefore, is whether the judgment in this case does sufficiently explain the reasons for the judge's award. Before addressing this question, I would, however, also repeat my observation in *Moher v Moher*, that the absence of any express exposition by the judge of how he took conduct into account in the determination of his award provided scope for Mr Chamberlayne's submission that the judge has failed to provide a sufficiently reasoned explanation. It would, undoubtedly, have been better if this had been expressed more clearly and combined with a reasonably structured analysis of its effect on the ultimate award.

91. In order to consider whether the outcome in this case is sufficiently explained, it is also necessary to consider Mr Chamberlayne's additional submission that the outcome was outside the bracket of fair awards because of the disparity between the parties' financial positions.

92. In this respect, I do not accept Mr Chamberlayne's analysis of the effect of the award. The wife received at most £1.73 million, or, if costs of sale and tax are taken into account, as they conventionally are, perhaps £1.2/1.3 million. The husband received £634,000 plus whatever was due to him from PJM. I take the sum of £634,000, because as referred to above, there is no basis on which the judge's decision, that the husband will not have to repay Wanda, can be challenged.

93. In addition, when assessing the husband's financial position, the judge's determination that the husband will start a new enterprise and "will prosper" has to be taken into

account. I agree with Mr Chamberlayne that a judge must be cautious about the weight which can properly be placed on future prospects. However, the judge was plainly entitled to place some weight on, for example, the husband's evidence that he "gets offered business opportunities" every day.

94. The disparity between the parties is, therefore, not as great as that suggested by Mr Chamberlayne.

95. Another critical factor is the judge's conclusion as to the children's needs. Their needs included that it was "plainly" in their interests to remain in their current schooling. He also decided that their needs and the wife's needs "must be met … out of the business" because he had "no confidence" that the husband would make any provision. This is reflected in the terms of the order referred to in paragraph 45 above.

96. Taking all the above into account, does the judgment sufficiently explain the judge's reasons for his award and is that award justified? Even though, as I have said, it would have been better if the judgment had contained more detail, I am not persuaded either that the judgment is defective or that the award was not justified by the circumstances of this case.

97. It is plain, as referred to above, that the judge was entitled to take the husband's litigation conduct into account. Even just taking the figures as they appear from the judgment, the parties had spent at least £800,000 on litigation in England. I say, at least £800,000, because the wife's debt of £613,000 plus the husband's debt of £170,000 were clearly not the only sums spent on costs as some assets had been sold to pay costs during the proceedings. As Mr Hale submitted, in my view correctly, the amount spent on legal costs would have been a modest fraction of this but for the husband's conduct. The excess amount spent on costs of, say, £600,000 (or if the costs were, as Mr Hale told us, in excess of £1 million, at least £800,000) would have been available to be distributed between the parties. This summary is just to provide some additional context to the judge's decision and demonstrate the extent of the resources lost to the family through the husband's conduct.

98. Further, I do not accept Mr Chamberlayne's submission that the disparity in outcome cannot be justified in this case. First, I do not accept that conduct cannot lead to a party receiving less than their needs. This depends on the circumstances of the case and, as referred to above, can be justified. This must, of course, be justified having regard to *all* the s.25 factors but it plainly can be justified.

99. Secondly, the disparity between the parties would self-evidently have been very substantially less if there had been a further £600,000 or more in available resources. It seems likely that the amount dissipated through "destructive litigation" was substantially in excess of this, but even this amount added to the husband's assets would very significantly reduce, or even eliminate, the disparity.

100. Thirdly, as in *B v B*, the judge found that the burden of maintaining the children is likely to be met by the wife.

101. Fourthly, the judge was entitled to conclude that the resources allocated to the wife were no more than sufficient to meet her needs both in the short term and the long term. He was equally entitled to conclude that the amount allocated to the husband, also

taking into account the husband's prospects, and the other material factors such as his conduct, was a just proportion of the assets and was sufficient to meet his needs at a level which was fair to him in the circumstances of this case. To address another of Mr Chamberlayne's submissions, in my view, the judge's observations, at [106] and [124], did make clear that the resources available to the husband as a result of his order, even if not sufficient to meet his needs, fairly reflected the s.25 factors. For the avoidance of doubt, I also do not accept Mr Chamberlayne's submission that the judge's consideration of the husband's needs was inadequate.

102. In conclusion, despite Mr Chamberlayne's powerful submissions, I consider that, for the reasons set out above, this appeal must be dismissed.

LORD JUSTICE NEWEY:

103. I agree.

LORD JUSTICE PATTEN:

104. I also agree.