Neutral Citation Number: [2019] EWCA Civ 1482

Case No: B6/2018/2975

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
FAMILY DIVISION
HIS HONOUR JUDGE WALLWORK
Sitting as a Deputy High Court Judge
LV16D01674

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/08/2019

Before:

LADY JUSTICE KING
LORD JUSTICE MOYLAN
and
LADY JUSTICE ROSE

- -

Between:

MOHER	**Appellant**
- and -	
MOHER	**Respondent**

- -
- -

Brent Molyneux QC and Juliet Allen (instructed by **Judge Law Solicitors**) for the **Appellant**
Sally Harrison QC (instructed by **Bps Family Law Llp**) for the **Respondent**

Hearing date: 9th May 2019

- -

Approved Judgment

LORD JUSTICE MOYLAN:

Introduction

1. The husband appeals from a final financial remedy order dated 4th May 2018 made by His Honour Judge Wallwork, sitting as a Deputy High Court Judge.

2. The husband challenges some specific provisions of the order but also submits that the judgment as a whole is deficient because it contains neither a sufficient evaluation of the husband's financial resources nor a sufficiently reasoned explanation for the award of a lump sum of £1.4 million. These issues arise in the context of a case in which the judge determined that the husband had comprehensively failed to comply with his obligation to give disclosure of his financial resources.

3. At its core, the husband's challenge to the judgment is based on the submission that a judge is *required* to evaluate the scale of the undisclosed wealth by providing a figure or a bracket of figures. This submission is based significantly on *NG v SG (Appeal: Non-Disclosure)* [2012] 1 FLR 1211, in particular [16(iii)], in which Mostyn J said that: "If the court concludes that funds have been hidden then it should attempt a realistic and reasonable quantification of those funds, even in the broadest terms". This, Mr Molyneux QC (who did not appear below) on behalf of the husband submitted, required the judge, at least in this case, to provide a figure for or a bracket of the scale of the husband's non-disclosed assets. The result of the judge's failure to do this is said fatally to undermine his judgment such that the case should be remitted for a rehearing.

4. In summary the husband's grounds of appeal are as follows:
   (a) The judge failed to quantity the extent of the husband's financial resources and as a result failed to undertake a necessary element of every financial remedy judgment;
   (b) The judge's calculation of the award of £1.4 million was not properly reasoned and, in any event, was flawed in that it was more than was properly justified by the wife's needs;
   (c) The judge was wrong to award interest on the lump sum and periodical payments;
   (d) The judge was wrong to order that periodical payments for the wife should continue until the grant of a Get by the husband; and
   (e) The costs order was wrong.

5. I am grateful to counsel for their focused but comprehensive submissions.

Background

6. The judgment below, and the skeleton arguments, contain few background facts. What follows is, therefore, a very brief summary.

7. At the date of the hearing below the husband was aged 53 and the wife 45. They married in 1995 and separated in 2016. They have three children aged between 10 and 21 all of whom remained financially dependent.

8. During the marriage the husband was a businessman and, it appears, owned and ran a company which imported goods. The wife looked after the home and the children and had "some small part-time employment". Since the parties separated, she has obtained more substantive employment and also undertakes occasional other work.

9. The judgment refers to schedules of assets as produced by the parties but does not set out what they contained nor does the judgment contain any schedule or summary of, what were described in *Behzadi v Behzadi* [2009] 2 FLR 649, at [16], as the "visible" assets. I deal with this omission further below, at [113]-[114]. In his submissions for this appeal, Mr Molyneux stated that the "identifiable assets" were said by the wife to be £1.875 million from which had to be deducted the husband's debts of some £177,000 giving net assets of, very approximately, £1.7 million.

10. The financial proceedings were, as the judge found, "far more complex than (they) need have been, largely due to the failure of the husband to provide adequate disclosure and his lack of adherence to court orders".

11. The husband was convicted of assault and harassment of the wife after the parties' separation. The judge also found that the husband had interfered with the sale of the former matrimonial home by contacting prospective purchasers. The judge considered that, if possible, it was "imperative" for there to be a complete clean break between the parties, not just financially.

12. The proceedings concluded with the final order dated 4th May 2018 which followed a four-day hearing. As set out in the judgment, the husband proposed that the wife should receive £960,000 while the wife sought a lump sum of £1.5 million. The wife's case was that "what the husband has disclosed and the values disclosed are likely to represent a significant undervalue of the true extent of the assets". The wife advanced a similar case in respect of the husband's income. The judge essentially accepted the wife's case as to the effect of the husband's failure to provide proper disclosure and rejected the husband's case that he had provided the court with "a true picture of his finances" and of his current difficulties.

13. In so far as relevant to this appeal, the final order contained the following provisions.

14. The order provided that it is "with effect from Decree Absolute". The husband was ordered to pay the wife "a lump sum of £1.4 million by 4.00pm on 25th May 2018". It is additionally provided that, if the husband failed to pay all or any part of the lump sum by that date, interest would accrue at the judgment debt rate. I will consider the effect of these provisions below when I deal with the husband's challenge to the imposition of interest in addition to periodical payments.

15. The husband was ordered to pay the wife maintenance pending suit until decree absolute and thereafter periodical payments at the rate of £22,000 p.a. until the *later* of "the grant of a get" or "the payment in full of the lump sum together with any interest accrued thereon".

16. An order was also made under section 10A of the Matrimonial Causes Act 1973 ("the 1973 Act") prohibiting the husband from applying for decree absolute until a declaration had been filed by the parties that they had taken such steps as were required to dissolve the marriage by means of a Get.

17. Finally, the husband was ordered to pay just over £52,000 towards the wife's costs.

18. I now turn to the judgment below.

The Judgment

19. As referred to above, at the outset of the judgment the judge commented that the case:

> "has become far more complex than it need have been, largely due to the failures of the husband to provide adequate disclosure and his lack of adherence to court orders."

The judge specifically rejected, as "simply an excuse", the husband's assertion that his ability to make full disclosure had been impeded because "a large amount of financial information remained in the former matrimonial home upon his departure". The judge was satisfied that the husband "would have been able to access all information required to give full disclosure". He returned to this issue a number of times during the course of his judgment.

20. For example, the judge found that the "husband has undoubtedly provided misleading and incomplete information in his Form E"; that the "difficulties in ascertaining the precise level of capital and of the husband's income are manifest"; that the husband's evidence was "unreliable for a number of reasons" which included that his litigation conduct had been "appalling" and that "he was generally obstructive in order to obfuscate and to prevent an accurate evaluation of the parties' true financial position"; and that the husband's evidence "did not stand up to scrutiny".

21. The judge was "mindful of the case law in respect of non-disclosure", adding: "in particular, whilst the court can draw adverse inferences from a failure to disclose, the court should make some attempt to evaluate the extent of the assets in endeavouring to achieve a fair outcome". He later added that, because the wife, "with some degree of pragmatism", put her case "on a needs basis rather than on a sharing basis" he did not need to identify "with the precision which might otherwise have been necessary the exact size of the parties' capital".

22. The judge accepted the wife's case and found that "it is likely that there remain assets which have not been disclosed". The judge also referred to the "principal business operated" by the husband at the time of the separation and that despite "requests for evaluation of the husband's interest, there has been no satisfactory response". Only abbreviated accounts had been produced.

23. The judge also rejected the husband's case that he was "unable to generate the same income as hitherto". The judge found that, despite his denials, the husband was "both involved and intends to become more active in" another business to which he had transferred "stock and money". He also found that, even if the husband was only currently earning what he alleged, "he will undoubtedly be able to significantly increase his earnings should he choose to do so and generate higher income in the future". The husband's "skills and business contacts" were such that he would be able to generate an income "at a much greater level than he presently admits and in line with his past earnings which enabled him and the family to amass both capital and to have income to enjoy a comfortable lifestyle".

24. The husband's earning capacity was "considerable and far greater than that of" the wife. The wife's earning capacity was significantly more limited than the husband's,

"as a mother who has not enjoyed a career outside the marriage". The judge also considered that there was "a lack of certainty about the wife's ability to generate income of her own" in the future.

25. The judge's analysis of the wife's current income was not as clear as it might have been. He specifically referred to the wife's occasional work but does not refer to her substantive employment. At one point he stated that he "would expect her to be able to generate an income". These points might suggest, as Mr Molyneux submitted, that the judge had overlooked the fact that the wife already had a regular earned income of approximately £12,500 p.a. plus benefits. I deal with this further below when dealing with the husband's challenge to the level of the lump sum award.

26. The wife's case was that, "in light of the non-disclosure … and the husband's lack of frankness, the court can be satisfied that the husband has resources not only to meet the wife's requirements, but also to have more than enough to meet his own reasonable needs". When dealing with the wife's asserted housing need, the judge said that the "issue is whether there are sufficient resources – considering the needs of each party and having regard to the section 25 criteria – to meet that aspiration". The judge referred again later in the judgment to the issue of whether there were "sufficient means to meet" the wife's needs. On this occasion he said that: "Subsumed within that question come the needs and obligations of the husband".

27. The judge determined that the wife's housing need was £700/750,000. The judge also determined that the wife's budget was "a reasonable one". Some items were "a little high" but "a figure of in excess of £4,000 per calendar month is perfectly reasonable". He also decided that she needed "a substantial capital cushion in order to meet her maintenance needs and those of her family" and that the capitalisation of her income needs should be "on a *Duxbury* basis". Having concluded that £4,000 pcm was reasonable the judge then stated that on "a *Duxbury* basis, a figure of just over £1 million would be necessary to capitalise that".

28. The judge also referred to school fees and the wife's "itemised" borrowings. The latter totalled just under £59,000.

29. The judge then said that the wife "had not set the bar too high in seeking £1.5 million". He was satisfied that there were resources available "to meet that payment". However, the judge reduced his award to £1.4 million largely, it appears, because of the incomplete picture in relation to "the assets" and to the husband's "income generating capability". Beyond the details referred to above, the judge did not set out what is comprised within his award of £1.4 million.

30. I should make clear that, in the course of his judgment, the judge also specifically referred to the husband's need for accommodation and he made a specific determination that the husband "will be able to provide for himself to a reasonable standard".

31. Finally, after referring to aspects of the husband's conduct, including the conviction for assault and other matters, the judge accepted that the wife was "fearful of him". It was his assessment (as referred to above) that, if possible, it was "imperative that there should be a clean break". In an additional judgment dealing with the form of the order,

the judge reiterated that there needed to be a clean break with "the parties able to make new lives".

Submissions

32. At the hearing, Mr Molyneux placed at the centre of the husband's appeal the submission that the judge had failed to undertake, what Mr Molyneux called, the twin pillars of any financial remedy judgment, namely (i) an evaluation of the parties' resources and (ii) a reasoned explanation for his award. He submitted that it is not possible in this case to ascertain why the judge made the award which he did. The consequence is that the judge's order must be set aside and a rehearing ordered.

33. I propose to summarise the submissions under each of the grounds of appeal as set out above.

34. (a) Mr Molyneux submitted that, when one party has not given proper disclosure, a judge *must* quantify the scale of the undisclosed financial resources by either giving a figure or a bracket. Otherwise, he submitted, the judgment will not provide a sufficiently reasoned explanation for the ultimate award. As referred to above, based, in particular, on *NG v SG* he submitted that this is a necessary step as part of the court's evaluation of the parties' financial resources for the purposes of section 25 of the 1973 Act.

35. Initially, Mr Molyneux appeared to be submitting that this was a necessary requirement in *every* case. However, in response to questions from Rose LJ as to how this would work in practice, he accepted that there will be different types of non-disclosure which may justify different responses from the court. He maintained that, in this case, the judge's failure to attempt to identify the scale of the undisclosed assets ("no attempt at any quantification") or the scale of the husband's future income vitiate his award. Further, Mr Molyneux submitted that the evidence did not justify, what he described as, the judge's "implied" determination that the husband's resources would be sufficient to meet his own needs.

36. (b) Mr Molyneux challenges the award of £1.4 million, submitting that the judgment does not contain any reasoned explanation of how the judge calculated this amount and, further, that in any event it was in excess of the wife's needs. This submission was in part based on how the case had been opened on behalf of the wife at the hearing below. I do not propose to set out this submission because, as Mr Molyneux acknowledged, the wife's case developed during the course of that hearing.

37. Mr Molyneux specifically challenged, what he characterised as, the judge's determination that capitalisation of the wife's income needs would require just over £1 million. This was substantially in excess of the income fund sought by the wife in her closing submissions of £570,000.

38. He also challenged the inclusion, as a need, of the sum of £59,000 (see [28] above) both because the wife had already received £150,000 (on account of her claims) and because the judge subsequently made an order that the husband should pay the wife's outstanding costs in the sum of £52,400. The latter figure, or at least part of it, was included in the total of £59,000. As a result, Mr Molyneux submitted that this represented double recovery.

39. In his written submissions, Mr Molyneux sought to question the judge's assessment of the wife's income needs by reference to some of the specific items in the wife's budget. However, I see no basis on which the judge's determination that a "figure in excess of £4,000 per calendar month is perfectly reasonable" can be successfully challenged on appeal. The judge was undertaking an assessment of the wife's needs based on the evidence he had heard and there is nothing to suggest that this was not a determination open to him on that evidence.

40. In addition, Mr Molyneux challenged the judge's assessment of the wife's income needs in two other ways. First, he submitted that the sum of £4,000 should have been further adjusted "to remove all child-related expenditure" as this element of the wife's needs should not have been capitalised on a *Duxbury* basis. This would have reduced the annual sum by £6,600. Secondly, he submitted that it appeared from the judgment that the judge had failed to take into account the wife's current substantive earned income (and benefits). This submission was based, in part, on the absence of any reference to the wife's earned income from her regular employment.

41. Finally, in respect of this aspect of the appeal, Mr Molyneux submitted that the judge did not have sufficient regard to the impact of his award on the husband because he made only "cursory" references to the husband's needs. Further, the judge could not have been satisfied that the husband would have sufficient resources to meet his needs. Because the judge made no findings as to the true extent of the husband's financial resources, he was not in a position to determine whether the husband would be able to meet his own needs. Mr Molyneux also submitted that, unless the judge found that the husband was able to afford to pay periodical payments at the level sought by the wife, he should not have capitalised the wife's income claim or her income needs at that level.

42. (c) In respect of interest and periodical payments, Mr Molyneux's first submission is that the order appears, or might appear, to make the lump sum payable on 25th May 2018. This is because, even though the order states that it is "with effect from Decree Absolute", the lump sum provision does not expressly state that payment is due on 25th May 2018 *or* the date of decree absolute, whichever is the later. As set out below, the wife concedes that the lump sum is not payable until the date of the decree absolute. Accordingly, because the decree in this case has not yet been made absolute, the wife accepts that the lump sum is not yet payable.

43. It is also accepted that, in this case, interest does not accrue until the date on which the lump sum has become payable. Ms Harrison QC accepted that there was no intention to make interest accrue prior to this date. As a result (and to repeat, because the decree has not yet been made absolute), both interest and periodical payments are not yet payable. However, they could be in the future and Mr Molyneux submitted that, as a matter of principle, it is wrong for both to be ordered. He relies on *Robson v Robson* [2011] 1 FLR 751 in support of this submission.

44. (d) Mr Molyneux submitted that it was not a proper use of the power to order periodical payments to make them payable until the grant of a Get. Upon payment of the lump sum the wife's income needs will have been met and the continuation of periodical payments after this would mean that she would be "recovering twice". It,

wrongly, imposes a "financial sanction" on the husband if he does not grant the wife a Get. The court's powers "to compel a party" to grant a Get are limited to those set out in section 10A of the 1973 Act.

45. In addition, Mr Molyneux submitted that the order would have the opposite effect to that intended by the judge because, although the court below did not hear evidence on this issue, the "element of compulsion" placed on the husband by the order meant that he would be unable to obtain or grant a valid Get. In support of this submission he relied on *N v N (Jurisdiction: Pre-Nuptial Agreement)* [1999] 2 FLR 745.

46. (e) Save as referred to above, Mr Molyneux did not press the husband's appeal from the costs order.

47. Ms Harrison addressed each of the husband's grounds of appeal.

48. (a) In her submission, the judge made such findings as to the husband's financial resources as he had considered were appropriate having regard to the evidential difficulties created by the husband. She referred to a number of passages in the judgment below including the judge's observation that the "difficulties in ascertaining the precise level of capital and of the husband's income are manifest". It was, she submitted, clear from the judgment that these "difficulties" had been caused by the husband's failure to comply with his disclosure obligations.

49. In addition, during the hearing of the appeal she took us to exchanges with the judge during the course of her submissions in opening when the judge had said that, if he was satisfied from the evidence that there were "hidden assets", he would have to "go on to make some kind of evaluation". Accordingly, she submitted, the judge recognised that he should undertake this exercise if he could. The judge went to "great lengths" to attempt to understand the husband's financial position but, given the defective disclosure, it was, Ms Harrison submitted, not surprising that the judge was unable to provide a figure or even a bracket for the true extent of the husband's financial resources.

50. Further, she submitted, the judge recognised that, when assessing the wife's claims by application of the principle of needs, he was required also to consider the needs of the husband. This, she submitted, is apparent from the judgment. For example, when the judge was addressing the wife's claimed housing need, which was based on her moving to London, he accepted that this was reasonable *subject* to there being "sufficient resources – considering the needs of each party – and having regard to the section 25 criteria". In addition, the judge said, when discussing the wife's needs more broadly: "it is then necessary to consider whether there are sufficient means to meet those needs. Subsumed within that question comes the needs and obligations of the husband". The judge also specifically determined that the husband would "be able to provide for himself to a reasonable standard".

51. (b) In respect of the second ground of appeal, that the judge awarded the wife more than her needs and that his award was not properly reasoned or explained, Ms Harrison submitted that the judge did not award the wife more than her needs and that the elements comprised in the award of £1.4 million can be easily discerned when the judgment is analysed by reference to her final submissions to the judge.

52. The judge determined that the wife's housing need was £700,000 to £750,000. He also took into account debts of just under £59,000 and an unquantified sum in respect of school fees (the judge found that the husband was unlikely to pay his share). Another aspect of the wife's needs referred to by Ms Harrison as being a factor was the judge's determination that the husband could not be relied upon to provide "proper levels of maintenance" for the children.

53. Ms Harrison submitted that the following simple analysis demonstrates that the judge's award did not exceed the wife's needs and also shows how it was computed. Deducting housing of £750,000 (Ms Harrison submitted that the judge's figures did not appear to include SDLT or other associated costs) and debts of £59,000 from £1.4 million would leave £590,000. This, Ms Harrison submitted, was almost exactly the sum which she had advanced in her closing submissions as the appropriate income fund, namely £570,000. This is without including school fees, in respect of which the wife sought the sum of £32,000.

54. Further by reference to her closing submissions, Ms Harrison pointed to the fact that the income fund of £570,000 was based on the wife's needs *after* deducting an amount in respect of the youngest child *and* the wife's income from her substantive employment plus tax credits. She submitted that it can, therefore, be seen that the judge did take these sums into account. Further, Ms Harrison submitted that the judge was also entitled to take into account his determination that "there is a lack of certainty about the wife's ability to generate income of her own".

55. Ms Harrison submitted that, based on this analysis of the award, contrary to Mr Molyneux's submission, the judge can be seen to have taken the wife's own income prospects into account and arrived at an income fund as an element of the lump sum award which did not exceed the wife's needs. This element of the award was, therefore, based on the judge's assessment of the capital sum required, as he had said earlier in his judgment, to enable the wife "to meet *her* maintenance needs" (my emphasis).

56. She also submitted that it is clear from this analysis that the judge was not, as Mr Molyneux submitted, taking the sum of £1 million as being the appropriate *Duxbury* fund for the wife. The judge had merely referred to this figure on the way to calculating his award and it did not form the basis of his award.

57. (c) Ms Harrison accepted that interest was not intended to accrue on the lump sum until it is payable, namely from the date of decree absolute. She also accepted that it is implicit that the date for payment of the lump sum is 25th May 2018 (the date in the order) *or* the date of decree absolute whichever is the later. During the hearing Ms Harrison pointed to the fact that the form of the lump sum order followed that set out in the "standard" orders endorsed by Sir James Munby P in his Practice Guidance dated 30th November 2017.

58. In respect of the argument that the wife benefits twice by providing her with interest and periodical payments, Ms Harrison submitted that this was based on a false premise. The periodical payments order was not made to meet the wife's income needs as

reflected in the lump sum award. The order was calibrated by the judge to meet the additional needs that the wife would incur until the lump sum was paid.

59. (d) Ms Harrison submitted that the two questions which arise in respect of the husband's appeal from periodical payments potentially continuing until the grant of a Get are (a) does the court have jurisdiction to include this provision and (b) if it does, did the judge exercise his discretion to do so properly? In her submission, the court does have power to make such an order and there is no basis on which the judge's decision can be successfully challenged. He decided that there was a compelling need for the wife to be free from the husband and the marriage.

60. She also submitted that this court is not able to determine whether the structure of the order is such as to impede the valid grant of a Get in the absence of any evidence on this issue. In addition, she submitted that the husband is able to address the conundrum which he says he is in, by giving the undertaking that he was requested to give that he will obtain a Get, and/or by voluntarily obtaining a Get given that the periodical payments order is currently continuing because the lump sum has not been paid.

61. (e) In respect of costs, Ms Harrison submitted that it would have been wrong for the judge to add back the sum of £150,000 which the wife had received on account. This had been spent on her costs so was no longer available. There remained a sum due in respect of costs. She submitted that the judge was entitled to order the husband to pay £52,000 towards the wife's costs.

Legal Framework

62. I propose to set out in this part of my judgment my analysis of the legal framework and my conclusions as to the applicable principles. In doing so, I will address the parties' submissions directed to these principles.

63. (A) Non-Disclosure

The issue of how a court should approach a case in which a party has been found to have failed to comply with the obligation to provide full and frank disclosure has been considered in a number of cases.

64. I start with the often-cited passages from Sachs J's (as he then was) judgment in *J v J* [1955] P 215. His decision was unsuccessfully appealed but the Court of Appeal did not comment on his observations on non-disclosure, at p. 227:

> "In cases of this kind, where the duty of disclosure comes to lie on a husband; where a husband has - and his wife has not - detailed knowledge of his complex affairs; where a husband is fully capable of explaining, and has had opportunity to explain, those affairs, and where he seeks to minimize the wife's claim, that husband can hardly complain if, when he leaves gaps in the court's knowledge, the court does not draw inferences in his favour. On the contrary, when he leaves a gap in such a state that two alternative inferences may be drawn, the court will normally draw the less favourable inference - especially where it seems likely that his able legal advisers would have hastened to put forward affirmatively any facts, had they existed, establishing the more favourable alternative. Had I

> simply proceeded on that footing my findings would have been little, if at all, different from those I have reached after coming to the conclusion above stated as to the husband's frankness and reliability."

After making this general observation, Sachs J then went on to conduct "a detailed task – such analysis of the figures in evidence as that evidence permits", at p.227. "In the main", these related to the husband's "capital position" and "his expenditure" on living expenses. He also later said, at p.229:

> "… the obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings - in so far as such inferences can properly be drawn."

65. In *F v F (Divorce: Insolvency: Annulment of Bankruptcy Order)* [1994] 1 FLR 359, Thorpe J (as he then was), having conducted a detailed analysis of the evidence, concluded, at p.366/367 (my emphasis):

> "that *the husband has, in my judgment, so obfuscated his financial position and services that it is quite impossible for this court to be sure as to what he has now in residue*."

He accepted that there "may well be reality" and "a genuine ingredient" in aspects of the husband's case. However, the approach emphasised in *J v J* meant that, at p.367:

> "… if (the husband) has conducted his affairs throughout the marriage in such a covert fashion as to relieve him of the ordinary obligations of citizenship to support the State through tax contribution, if he has conducted these proceedings in a vain endeavour to maintain that camouflage, if in consequence the obscurity of my final vision results in an order that is unfair to him it is better that than that I should be drawn into making an order that is unfair to the wife. If at the end of this case he feels that the lump sum that I order is unfair in reflection of his present retrenchment then he should remember that he has brought that consequences upon himself by the fashion in which he has chosen to arrange his affairs over the course of the last decade, coupled with the fashion in which he has chosen to conduct these proceedings."

66. At the end of his judgment, Thorpe J said, at p.368: "If it were left to me in a vacuum to decide what to do for this wife in this case, I would find it a difficult decision and one without any apparent signposts". However, he was "content to make the order" sought by the wife, namely for a lump sum of £150,000, which had not been "attacked by (counsel for the husband) as being in any sense excessive".

67. In *Baker v Baker* [1995] 2 FLR 829, at first instance Ward J had found that the husband had "in excess of £300,000 available"; that he "has resources sufficient to meet the reasonable needs" of the wife; and that "he is worth enough to meet her claim", at

p.835. The award and the judge's approach were challenged in the Court of Appeal through a number of submissions, including that the judge had "erred in his approach to the failure of the husband to disclose documents and that the judge had, in effect, conjured assets out of the air", at p.831; and that the judge had made an order without sufficient evidence that there were assets to meet it, at p.833.

68. In her judgment, Butler-Sloss LJ (as she then was) rejected the former submissions noting that, at p.832:

> "In many decisions, reported and unreported, judges and district judges have applied those principles (from *J v J*) and drawn, where appropriate, adverse inferences from a deliberate failure of a party to give the court an accurate and complete picture of his true financial position."

As to the husband's case, that the judge's award was not based on evidence, this was also rejected. The judge had been entitled to find that the husband had sufficient resources to meet the proposed lump sum and periodical payments. Butler-Sloss LJ said, at p.835 (my emphasis):

> "In my judgment, there was ample evidence upon which the judge was entitled to draw inferences adverse to the husband and *to make findings that there were assets available to meet the order he made*. To accept Mr Holman's alternative proposition that, unless the assets can be shown positively to be available an order cannot be made, flies in the face of the principles enunciated in the judgment of Sachs J and would send a clear message to spouses unwilling to make full and frank disclosure. It would indeed, as Mr Posnansky said, be a cheats' charter. The amount of the order was appropriate to rehouse the wife modestly and, on the basis of assets available, in no way out of proportion."

69. In the same case, Otton LJ said, at p.837:

> "… the husband cannot complain if the judge following authority explored what was before him and drew inferences which may turn out to be less fortunate than they might have been had he been more frank and disclosed his affairs more fully. Such inferences must be properly drawn and reasonable."

70. In *Al-Khatib v Masry* [2002] 1 FLR 1053, Munby J (as he then was) asked, at [91]: "given my findings thus far what are the inferences that I can properly draw as to the extent of the husband's wealth?" The inference he drew, at [93], was that "the husband's total assets were such as, applying *White v White* [2001] AC 596, [2000] 2 FLR 981, would justify an award of the size being sought by the wife". This was based significantly on the fact that the husband would have been left "in no doubt" by what Coleridge J had said at a previous hearing that, "absent full, complete and frank disclosure the court might very likely draw" such an inference.

71. Later, at [96], when further explaining why the wife should receive, inclusive of her own assets, approximately £25 million, Munby J repeated that the "*inference which in my judgment I can properly draw, and which I do draw, is that the full extent of the husband's present wealth is such as will very comfortably justify on a White v White basis the kind of award which the wife is seeking*" (my emphasis). If required to do so, he would infer that the family's assets were "very comfortably in excess of £50 million". Munby J made clear that there was "no process of purely mathematical calculation that can prayed in aid to arrive at or justify such a figure". It could, however, be cross-checked with his earlier findings about the husband's business activities and the size of the commissions the husband was capable of earning. This supported the conclusion as to the scale of the husband's wealth as being "entirely reasonable".

72. In *Ben Hashem v Al Shayif* [2009] 1 FLR 115, Munby J rejected the wife's case that the husband (who did not appear and was not represented) was worth in excess of $250 million or $500 million but accepted the alternative submission that he had more than sufficient resources to satisfy the wife's needs claim. His conclusions were as follows (my emphasis):

> "[70] The wife, in my judgment, has failed to establish that the husband is worth any of the sums she has mentioned or, indeed, anything approaching them. But just as in *Al-Khatib v Masry* and for precisely the same reasons, *I find that the husband's wealth, whatever it is, is such as will justify very comfortably the kind of award the wife is seeking*. In this case, as in that, this is, in my judgment, the only sensible inference to draw from the husband's behaviour in the litigation and, in particular, his failure, indeed refusal, to make proper disclosure. It is, moreover, an inference which does not attribute to him a degree of wealth in any way inconsistent with the overall picture I have formed on the basis of everything I have read and heard.
>
> [71] I am satisfied that the husband is worth many millions – and significantly more millions than he has been willing to admit – but nothing in the materials before me justifies a finding that he is worth hundreds of millions. It may be that he is worth that much, but the wife has not established that he is."

73. In *Behzadi v Behzadi* [2009] 2 FLR 649, the trial judge, Hedley J, made a number of findings against the wife including that she had not given full disclosure. This led Wilson LJ (as he then was) to say, at [4] (my emphasis):

> "These findings, unchallengeable in this court, make the wife's appeal extremely difficult. It is sometimes even said that a finding of undisclosed resources against a party in proceedings for ancillary relief makes it in practice impossible for him to appeal to this court save when he can argue that, on the evidence, it was not open to the court to make the finding. Such is, of course, an exaggeration; but, by *a party's failure of disclosure, which almost always renders the*

> *court unable to quantify the extent of his undisclosed resources*, he certainly places substantial obstacles in the path of his appeal."

74. At the conclusion of his judgment, at [23.1], Wilson LJ came to the "area of the appeal which has caused me the greatest difficulty", namely whether the judge's award had given insufficient weight to the fact that a substantial part of the wife's assets had been inherited by her and whether, as a result, the judge had awarded the husband too much (47%) of what Wilson LJ described as the "visible net assets", at [2] and [16]. However, he concluded that, because of one factor, namely the wife's undisclosed assets, the award could not be challenged as being excessive, at [23.2] (my emphasis):

> "The figure of 47% reflective of the award to the husband, which seems to cry 'too high!', is misleading. *In the light of the wife's undisclosed assets, the real figure is lower than 47%; but she has disabled us from perceiving the extent to which it is lower.* Forced in effect to guess at the broad scale of the wife's undisclosed assets, the judge spoke in fairly cautious terms. To my mind, however, this factor has in the present case its oft-found, albeit not its inexorable, effect. For it disables the court from concluding that the judge's award fell off the end of the spectrum."

75. In *NG v SG*, Mostyn J set out a summary of the approach which he considered the court should take when "satisfied that the disclosure by one party has been materially deficient", at [16]:

> "(i) The court is duty bound to consider by the process of drawing adverse inferences whether funds have been hidden.
>
> (ii) But such inferences must be properly drawn and reasonable. It would be wrong to draw inferences that a party has assets which, on an assessment of the evidence, the court is satisfied he has not got.
>
> (iii) If the court concludes that funds have been hidden then it should attempt a realistic and reasonable quantification of those funds, even in the broadest terms.
>
> (iv) In making its judgment as to quantification the court will first look to direct evidence such as documentation and observations made by the other party.
>
> (v) The court will then look to the scale of business activities and at lifestyle.
>
> (vi) Vague evidence of reputation or the opinions or beliefs of third parties is inadmissible in the exercise.
>
> (vii) The *Al-Khatib v Masry* technique of concluding that the non-discloser must have assets of at least twice what the claimant is seeking should not be used as the sole metric of quantification.

(viii) The court must be astute to ensure that a non-discloser should not be able to procure a result from his non-disclosure better than that which would be ordered if the truth were told. If the result is an order that is unfair to the non-discloser it is better that (than) the court should be drawn into making an order that is unfair to the claimant."

76. Given Mr Molyneux's reliance, in particular, on paragraph (iii) above as to the need to attempt quantification, it is relevant also to refer to earlier observations made by Mostyn J:

> "[7] There must surely be a sound evidential basis for reaching a conclusion as to the scale of undisclosed assets. The court should not be led into a knee-jerk reaction that says simply because evasiveness and opacity is demonstrated there is some vast sum salted away. This is not to say that the court has to put a precise figure on the scale of the hidden assets, let alone to identify by reference to evidence where they are or what they comprise: see *Al-Khatib v Masry* at para [89] and *Ben Hashem v Al Shayif* at para [70].
>
> [8] That said, analysis of the cases shows that the court always makes a broad (sometimes very broad) estimate, based on admissible evidence, of the scale of the hidden funds.
>
> …
>
> [15] Of course the court must be careful to ensure that the note of caution I have sounded does not give rise to a 'cheat's charter' (as Dame Elizabeth Butler-Sloss P put it in *Baker v Baker*). It would be wrong if the more usual consequence of the application of the principle was for the adverse inference to be too conservative with the result that unfairness is in fact visited on the claimant giving rise to what might be termed a non-discloser's dividend. I accept that the court must be astute to avoid this unfairness and that a strong message must be sent out that a non-discloser should not be able to procure a result from his non-disclosure, better than that which would be ordered if the truth were told. But the court must be realistic and there must surely be some finding, soundly based on admissible evidence, as to the broad extent of the hidden funds. This finding can be as broad or precise as the facts of the case demand. It is noteworthy that in *Behzadi v Behzadi* [2008] EWCA Civ 1070, [2009] 2 FLR 649 Wilson LJ was minded to grant permission to appeal precisely because the trial judge had not attempted a quantification of the undisclosed assets that were found likely to exist in Iran."

In passing, I would note that, in my view, any asserted absence of quantification was not the issue in *Behzadi v Behzadi*. Its broad message is to the opposite effect, namely

that, I repeat, "a party's failure of disclosure, almost always renders the court unable to quantify the extent of his undisclosed resources".

77. I propose, finally on this topic, to refer to *Prest v Petrodel Resources Ltd and others* [2013] 2 AC 415 which dealt with the issue of inferences which can be drawn from a failure to provide disclosure or to co-operate with the proceedings in the context of the beneficial ownership of properties held legally in the names of various companies. In the course of his judgment, Lord Sumption made a number of observations:

> [43] It follows from the above analysis that the only basis on which the companies can be ordered to convey the seven disputed properties to the wife is that they belong beneficially to the husband …
>
> [After quoting from Lord Diplock's speech in *British Railways Board v Herrington* [1972] AC 877, at 930-931.]
>
> [44] … The courts have tended to recoil from some of the fiercer parts of this statement, which appear to convert open-ended speculation into findings of fact. There must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party's failure to rebut it. For my part I would adopt, with a modification which I shall come to, the more balanced views expressed by Lord Lowry with the support of the rest of the committee in *TC Coombs & Co (A Firm) v IRC* [1991] 2 AC 283 … at 300 … :
>
>> "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."
>> Cf *Wisniewski v Central Manchester Health Authority* [1998] PIQR p.324, p.340.
>
> [45] The modification to which I have referred concerns the drawing of adverse inferences in claims for ancillary financial relief in matrimonial proceedings, which have some important distinctive features. There is a public interest in the proper maintenance of the wife by her former husband, especially (but not only) where the interests of the children are engaged. Partly for that reason, the proceedings although in form adversarial have a substantial inquisitorial element. The family finances will commonly have

> been the responsibility of the husband, so that although technically a claimant, the wife is in reality dependent on the disclosure and evidence of the husband to ascertain the extent of her proper claim. The concept of the burden of proof, which has always been one of the main factors inhibiting the drawing of adverse inferences from the absence of evidence or disclosure, cannot be applied in the same way to proceedings of this kind as it is in ordinary civil litigation. These considerations are not a licence to engage in pure speculation. But judges exercising family jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing. I refer to the husband because the husband is usually the economically dominant party, but of course the same applies to the economically dominant spouse whoever it is.
>
> [After analysing the evidence relating to the relevant properties and the husband's and the companies' failure to provide disclosure and other matters, Lord Sumption returned to the issue of what inferences could be drawn.]
>
> [47] … It is a fair inference from all these facts, taken cumulatively, that the main, if not the only, reason for the companies' failure to co-operate is to protect the London properties. That in turn suggests that proper disclosure of the facts would reveal them to have been held beneficially by the husband, as the wife has alleged."

78. I have referred to *Prest v Petrodel* because it demonstrates that non-disclosure can arise in a variety of circumstances. As addressed in the Supreme Court it arose in the specific context of whether the wife could establish that the husband was the beneficial owner of a number of identified properties. At first instance, the canvas had been much broader as set out in my decision, reported as *YP v MP* [2011] EWHC 2956 (Fam). The husband's failure to comply with his disclosure obligations had been "so extensive that little attempt was made by him or on his behalf to seek to put forward a comprehensive case as to the extent of his wealth", at [212]. My key conclusion was set out at [214] of my judgment:

> "… I am satisfied that (the husband) has the financial resources to meet the award I propose to make in the wife's favour (of £17.5 million) and that, in addition, he will retain sufficient resources to meet his own needs and to give him a fair share of the wealth."

As Munby J had done in *Al-Khatib v Masry*, I went on to determine that, "conservatively, the husband must be worth at least $60 million, approximately £37.5 million" but this was simply to put into figures the effect of my substantive determination.

79. As I have just mentioned, the circumstances in which one party might fail to comply with their disclosure obligations can vary significantly. One, extreme, example is when a party wholly fails to engage with the proceedings. Another situation is when there is a dispute as to the ownership of a specific asset or as to whether a party has disposed of

or still retains a specific asset. For example, in *Baker v Baker* one issue explored in the case was whether the husband had failed to provide "credible evidence" as to what had happened to a specific sum (£400,000) part of which had been spent in purchasing a second London property (at p.834). The balance was about £120,000. There are many other possible examples.

80. The core submission I must address is whether Mr Molyneux is right as to the nature of the court's obligation when faced with non-disclosure? Must the court give a figure or a bracket for the undisclosed wealth?

81. First, I do not consider that this submission is supported by the authorities as summarised above and as summarised by Mostyn J in *NG v SG*. In my view, the passages I have highlighted point away from any such obligation. For example, in *F v F* Thorpe J considered that the evidence was such "that it is quite impossible for this court to be sure as to what" financial resources the husband had. He could hardly have then gone on to provide a specific figure or a bracket. In *Baker v Baker*, Butler-Sloss LJ rejected the submission that "the assets" had to be "shown positively to be available" and accepted that "there was ample evidence upon which the judge was entitled to draw inferences adverse to the husband and to make findings that there were assets available to meet the order he made". In both *Al-Khatib v Masry* and *Ben Hashem v Al Shayif* the key determination made by Munby J was that the husband's wealth, "whatever it is" (as he said in the latter), would "very comfortably" or "comfortably" justify his award. In *Behzadi v Behzadi*, Wilson LJ considered that "a party's failure of disclosure, … almost always renders the court unable to quantify the extent of his undisclosed resources". And specifically in that case that, because of the wife's non-disclosure, the court could not conclude that (or, indeed, whether) the husband's award, at 47% of the visible assets, "fell off the end of the spectrum".

82. I also do not consider that his submission is supported by *NG v SG*. To propose, as Mostyn J does, that the court "should attempt" quantification of the non-disclosed resources does not mean that the court *must* do so even when the evidence is not sufficient to support such an exercise. Further, to place the court under the obligation advanced by Mr Molyneux would be to place it in a straightjacket which would be inconsistent with what Mostyn J rightly said in [16(viii)], namely that the "court must be astute to ensure that a non-discloser should not be able to procure a result from his non-disclosure better than that which would be ordered if the truth had been told".

83. In my view Mr Molyneux's submission is, in its effect, the same as the submission which was rejected by the Court of Appeal in *Baker v Baker*, namely that "unless the assets can be shown positively to be available an order cannot be made", at p.835. I recognise, of course, that there is a statutory obligation on the court to address the relevant section 25 factors, which will always include the parties' financial resources. However, that is not the issue. The issue is the manner in which a court undertakes this exercise when a party has failed to comply with their preceding obligation to give full and frank disclosure.

84. I also consider that to impose the proposed requirement on the court in all cases of non-disclosure would be inconsistent with the overriding objective which requires the court to deal with a case in a proportionate manner, to save expense and to allocate to a case an appropriate share of the court's resources. As King LJ observed during the hearing,

non-disclosure cases by their very nature often lead to costs being disproportionate. To impose this additional requirement would be to compound the problem.

85. Further, it would seem to me likely not to assist but to impede the court's task of achieving a fair outcome if the court was *required* to seek to fill in the gaps created by a party's failure to comply with their disclosure obligations. This failure will already have impeded the court's task and, again, imposing this requirement would be to compound the consequences. I emphasise required because there will be many cases in which the court, despite the non-disclosure, will be able to and will need to make specific findings (as in *Prest v Petrodel*). But this is very different from saying that the court must always do this.

86. My broad conclusions as to the approach the court should take when dealing with non-disclosure are as follows. They are broad because, as I have sought to emphasise, non-disclosure can take a variety of forms and arise in a variety of circumstances from the very general to the very specific. My remarks are focused on the former, namely a broad failure to comply with the disclosure obligations in respect of a party's financial resources, rather than the latter.

87. (i) It is clearly appropriate that generally, as required by section 25, the court should seek to determine the extent of the financial resources of the non-disclosing party;

88. (ii) When undertaking this task the court will, obviously, be entitled to draw such adverse inferences as are justified having regard to the nature and extent of the party's failure to engage properly with the proceedings. However, this does not require the court to engage in a disproportionate enquiry. Nor, as Lord Sumption said, should the court "engage in pure speculation". As Otton LJ said in *Baker v Baker*, inferences must be "properly drawn and reasonable". This was reiterated by Lady Hale in *Prest v Petrodel*, at [85]:

> "… the court is entitled to draw such inferences as can properly be drawn from all the available material, including what has been disclosed, judicial experience of what is likely to be being concealed and the inherent probabilities, in deciding what the facts are."

89. (iii) This does not mean, contrary to Mr Molyneux's submission, that the court is required to make a specific determination either as to a figure or a bracket. There will be cases where this exercise will not be possible because, the manner in which a party has failed to comply with their disclosure obligations, means that the court is "unable to quantify the extent of his undisclosed resources", to repeat what Wilson LJ said in *Behzadi v Behzadi*.

90. (iv) How does this fit within the application of the principles of need and sharing? The answer, in my view, is that, when faced with uncertainty consequent on one party's non-disclosure and when considering what Lady Hale and Lord Sumption called "the inherent probabilities" the court is entitled, in appropriate cases, to infer that the resources are sufficient or are such that the proposed award does represent a fair outcome. This is, effectively, what Munby J did in both *Al-Khatib v Masry* and *Ben Hashem v Al Shayif* and, in my view, it is a legitimate approach. In that respect I would not endorse what Mostyn J said in *NG v SG* at [16(vii)].

91. This approach is both necessary and justified to limit the scope for, what Butler-Sloss LJ accepted could otherwise be, a "cheat's charter". As Thorpe J said in *F v F*, although not the court's intention, better an order which may be unfair to the non-disclosing party than an order which is unfair to the other party. This does not mean, as Mostyn J said in in *NG v SG*, at [7], that the court should jump to conclusions as to the extent of the undisclosed wealth simply because of some non-disclosure. It reflects, as he said at [16(viii)], that the court must be astute to ensure that the non-discloser does not obtain a better outcome than that which would have been ordered if they had complied with their disclosure obligations.

92. (B) Date of Lump sum and Interest
A financial remedy order under sections 23, 24 and 24B of the 1973 Act cannot be made until on or after the grant of a decree. For example, section 23(1) expressly provides that an order can only be made: "On granting a decree of divorce … or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute)". Additionally, section 23(5) provides that an order for a lump sum (and a periodical payments order) does not "take effect unless the decree has been made absolute".

93. Section 23(6) provides that:

> "Where the court –
> (a) makes an order under this section for the payment of a lump sum; and
> (b) directs –
> (i) that payment of that sum or any part of it shall be deferred; or
> (ii) that the sum or any part of it shall be paid by instalments,
>
> the court may order that the amount deferred or the instalments shall carry interest at such rate as may be specified by the order from such date, not earlier than the date of the order, as may be so specified, until the date when payment of it is due."

94. The combined effect of the above provisions is that a lump sum order can be made on or after the grant of a decree nisi but it does not take effect until the decree has been made absolute.

95. In *Robson v Robson*, the Court of Appeal was similarly faced with an order which, "subject to decree absolute", ordered the husband to pay the wife a lump sum by a specified date (1st January 2010) which fell prior to the date of the decree absolute (11th February 2010), at [2]. The order also provided that in default of payment by the due date, interest would be payable at the judgment debt rate. In the course of his judgment, at [64], Ward LJ considered that the order "should have said 'on or before 1st January 2010 or on the grant of decree absolute whichever is the later". He also pointed out that interest at the judgment debt rate "could only run from the date when the judgment became effective", namely the date of the decree absolute.

96. Having regard to the uncertainty created by the terms of the order in the present case, it would clearly be advisable for a lump sum order (and other relevant orders) to make clear that, as set out in *Robson v Robson*, it is payable on the stated date or the decree absolute, *whichever is the later*, if the former might occur before the latter.

97. Although it does not arise in this case, I propose to address Mr Molyneux's submission that interest cannot accrue from a date prior to the decree absolute. *Robson v Robson* did not address the scope of section 23(6). Section 23(6) expressly provides that interest can be ordered to run from "the date of the order" which, as set out above, can be before the date of the decree absolute. As Baron J noted in *H v H (Lump Sum: Interest Payable)* [2006] 1 FLR 327, section 23 was specifically amended by the Administration Act 1982, section 18, to give the court the power to award interest prior to the date when payment is due. This followed the decision in *Preston v Preston* [1981] 2 FLR 331 that the court had no such power. I do not, therefore, accept the submission that a lump sum cannot "carry interest" prior to the date for its payment. Such an interpretation would deprive section 23(6) of all effect because, once a lump sum order is effective, interest will automatically accrue on the lump sum as a judgment debt, subject to any other order made by the court.

98. <u>(C) Interest and Periodical Payments</u>
A number of cases have considered the relationship between periodical payments ordered pending the payment of a lump sum and the imposition of interest on the lump sum. They have focused on the issue of whether the effect is to create an unfair cumulative liability.

99. For example, in *H v H (Lump Sum: Interest Payable)*, although it was conceded on behalf of the wife, Baron J would have determined the issue by reference to the need to avoid "double counting", at [12]. The same approach was taken in *Shaw v Shaw* [2002] 2 FLR 1204 in which Kay LJ referred to "double compensation", at [62].

100. In *Robson v Robson*, Ward LJ adopted what could be said to be a more nuanced approach.

> [67] Payment of periodical payments in the interim is more difficult. There is an element of double counting if maintenance pending suit/periodical payments are contemplated to continue for some time after judgment but at the same time the calculation of the lump sum is made on the basis that it included those payments from the time the judgment is made. On the other hand, hardship may be suffered by the wife if she has no maintenance for her support while she waits for payment of her lump sum. There must be an element of give and take in fairly striking this balance, regard being had to the amounts involved and the likely length of delay to which the judge will have regard. I do not find any precise arithmetical approach to be justified. If maintenance pending suit/periodical payments are ordered, as in this case they were rightly ordered, then some modest discount of the lump sum may be called for depending on how the figures look when one stands back to view the case in the round. This is an area where a judge can use his broad brush."

101. In summary, the court must be aware of the potential for double counting when the court is considering whether to award periodical payments when the applicant's future income needs have been capitalised by a lump sum award. However, when considering the relationship between the two, as Ward LJ observed, the judge "can use his broad brush".

102. (D) Periodical Payments and a Get
As referred to above, the husband was ordered to pay periodical payments until, if later, the grant of a Get.

103. The difficulties created for a wife when she is not granted a Get have long been recognised. In *Brett v Brett* [1969] 1 All ER 1007, on the husband's appeal, it was accepted, rightly, by the wife that maintenance could not be used "as a means of punishing the husband". However, the Court of Appeal ordered the lump sum to be paid in two instalments with the second instalment of £5,000 only being payable if the husband had not granted a Get within three months. The manner in which this was expressed reflects how far social attitudes have developed since then but underlying the decision were the financial impact on the wife (because she would not be able to remarry) and, as found by the trial judge, that the husband hoped to use it to negotiate with the wife to avoid payment of part of any maintenance award.

104. This issue was considered briefly by Wall J (as he then was) in *N v N (Jurisdiction: Pre-Nuptial Agreement).* He referred to the "injustice to Jewish women in particular which arises when a husband refuses to initiate the Get procedure", at p.751 B/C. He also referred to the terms of the order made in *Brett v Brett* and them added, at p.751 D: "the courts have also … been aware that a get obtained by compulsion is invalid in Jewish law. Additionally, based on what Professor Freeman had written in a book published in 1998, *Families Across Frontiers*, he observed that "a Get obtained by compulsion is invalid in Jewish law and, according to Professor Freeman, the rabbinical authorities now regard a Get obtained in circumstances such as those prevailing in *Brett v Brett* as coerced and thus invalid", at p.751 D.

105. In my view, a court does have jurisdiction expressly to order periodical payments to continue until the husband has taken the steps necessary to grant a Get. I do not accept Mr Molyneux's submission that the court's powers in relation to a Get are confined to those set out in section 10A of the 1973 Act. I deal with those provisions below but there is nothing in that section which gives any support for it otherwise limiting the manner in which the court can exercise its other powers.

106. The issue in general terms is, therefore, what might justify the court making such an order? An order clearly should not be made to punish the husband. Apart from that, I consider that the court has a general discretion to determine whether the particular circumstances of the case justify an order for periodical payments fixed to continue until the grant of a Get. There might, for example, be specific direct financial consequences or other factors which have sufficient indirect financial consequences to warrant the making of such an order. I also consider that the court is entitled to take into account that, absent a Get, the parties remained tied together. In *N v N* Wall J referred to the distinct, and what Professor Freeman called the "cataclysmic", consequences for a woman if the husband fails to grant a Get.

107. I deal below, when setting out my proposed determination of this aspect of the appeal, with the submission that the structure of the order prevents the husband from granting a Get. At this stage of my judgment, I propose to consider this issue as a matter of principle by reference to the statutory provision.

108. By the Divorce (Religious Marriages) Act 2002 Parliament sought to provide some assistance to wives by inserting section 10A into the 1973 Act. This provides:

> "10A Proceedings after decree nisi: religious marriage
>
> (1) This section applies if a decree of divorce has been granted but not made absolute and the parties to the marriage concerned—
>
> (a) were married in accordance with—
>
> (i) the usages of the Jews, or
>
> (ii) any other prescribed religious usages; and
>
> (b) must co-operate if the marriage is to be dissolved in accordance with those usages.
>
> (2) On the application of either party, the court may order that a decree of divorce is not to be made absolute until a declaration made by both parties that they have taken such steps as are required to dissolve the marriage in accordance with those usages is produced to the court.
>
> (3) An order under subsection (2)—
>
> (a) may be made only if the court is satisfied that in all the circumstances of the case it is just and reasonable to do so; and
>
> (b) may be revoked at any time."

109. It is to be noted that, under this provision, a husband can be prevented from obtaining a civil divorce until he has done what is required to provide a religious divorce. It would clearly be possible to view this as a form of compulsion in that a sanction is in place until the parties have done what is required of them to obtain a religious divorce. Indeed, Mr Molyneux accepted during the course of his submissions that, although he suggested this was only to a limited degree, it comprises a measure of compulsion. He submitted, however, that it cannot be "read across" to enable compulsion in other respects.

110. In my view, this provision, when enacted in 2002, must have been based on Parliament being satisfied that its implementation would not make any consequent Get invalid. Otherwise its provisions would be rendered nugatory. The analysis might proceed as follows.

111. Under section 10A, a husband is not being compelled or required to obtain a Get; the court is simply providing that unless and until he grants a Get he cannot obtain a civil divorce. In the same way in this case, the husband is not being compelled to grant a Get. How he responds to the order is a matter for him. In the same way as provided by section 10A, the structure of the order in the present case does not compel the husband to act in a certain way. The court order provides only that until he grants a Get he has to pay periodical payments to the wife. Further, as Ms Harrison said during the hearing, the husband can apply to vary the periodical payments if he has a sound basis on which to do so.

112. Accordingly, as a matter of principle, I do not consider that the structure of the order in this case conflicts with section 10A or otherwise can be assumed to prevent the husband from granting a Get.

Determination

113. Before turning to my determination of this appeal, I make a general observation about the judgment below. In my view, the absence of any structured section 25 analysis and the absence of any express exposition of how the award was calculated provided scope for Mr Molyneux's general submission that the judge failed to provide a sufficiently reasoned explanation for his award as well as for his specific challenges to the calculation of the award, including as to whether the judge failed to take the wife's own earned income into account. In general terms, and subject to what I have said above, I agree with Mr Molyneux's submission that a financial remedy judgment should contain an evaluation of the parties' resources and should contain a reasoned explanation of the award.

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*, 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.

115. I now turn to my proposed determination of the appeal which I do by reference to each of the grounds of appeal as set out above.

116. (a) For the reasons given above, I do not accept that a judge is required to provide a figure for or a bracket of the financial resources in every case even when confronted by non-disclosure. It depends on the specific issues raised in the case and, critically, on

the evidence. The question, therefore, is whether the judgment in this case is defective in that it failed sufficiently to determine the extent of the husband's financial resources.

117. The judge acknowledged in the earlier part of his judgment that, even if he could draw adverse inferences from a failure to disclose, he "should make some attempt to evaluate the extent of the assets". In my view, it follows that the judge must have decided that he could not undertake this exercise in *this* case because the extent of the husband's non-disclosure disabled (to adopt Wilson LJ's word) him from doing so. I do not accept that the judge would have overlooked this task if he considered that he had been able to provide a more specific determination of the husband's financial resources.

118. I do not propose to repeat the passages in the judgment in which the judge set out his conclusions as to the effect of the husband's failure to comply with his disclosure obligations. Just by way of example, the judge said that the "difficulties in ascertaining the precise level of capital and of the husband's income are manifest". This and other passages make plain the judge's conclusions as to the nature *and* the effect of that failure. They were clearly conclusions he was entitled to reach.

119. Further, the judge specifically considered whether the husband would have sufficient resources to meet his own needs. Again, I propose only to refer to one example, namely when the judge determined that the husband would "be able to provide for himself to a reasonable standard". The judge made plain that he was aware that he had to consider "the needs of each party". I do not accept Mr Molyneux's submission that the judge's assessment was "cursory" or that the judge had insufficient regard to the impact of his proposed award on the husband. The judge's conclusions as to the husband's ability to meet his own needs are clear from the judgment.

120. In conclusion, therefore, in respect of this ground of appeal, in my view the judge undertook a sufficient determination of the extent of the husband's resources having regard to the deficiencies in the evidence caused by the husband. The judge was entitled to conclude that there were sufficient resources both to meet the wife's needs at the level of the proposed award and to meet the husband's needs.

121. (b) When I gave permission to appeal I did so in particular because I considered that, as set out in my order, the proposed appeal raised sufficient issues about the judge's calculation of the lump sum to justify the grant of permission. Having heard the parties' respective submissions, I have been persuaded by Ms Harrison that the judge's award was based on a sound assessment of the wife's needs and was an award which was not outside the bracket of permissible awards, notwithstanding the features of the judgment as referred to in paragraph 113 above. This is for a number of reasons.

122. First, although on an initial reading it appeared that the judge did consider that £1 million was the *Duxbury* sum required to capitalise the wife's income needs, on a more careful analysis, he did not. This sum was referred to by the judge as being that required to capitalise the wife's income needs but *without* taking her own earning capacity into account. It was, therefore, only a notional figure and the judge's award can be seen to include only a sum closely aligned with the capitalised income fund of £570,000 sought by the wife in her closing submissions. During the hearing of the appeal Mr Molyneux rightly accepted that he would face a harder task to seek to challenge the award if it was, in part, based on £570,000 as an income fund.

123. Secondly, although there are some references in the judgment which might appear to suggest that the judge had overlooked the wife's substantive earned income (and income from tax credits) I have again been persuaded by Ms Harrison's submissions that these were taken into account. By her analysis of the figures, as referred to in [54] and [55] above, it is clear that the judge's calculation of the income fund included within the lump sum award did, indeed, reflect the wife's substantive earned income (and tax credits). As Ms Harrison demonstrated during the course of the appeal hearing, the income fund did take into account the wife's own earning capacity (which, I would add, the judge found had "a lack of certainty") and *excluded* that part of the wife's global income needs which reflected expenses incurred in respect of the youngest child.

124. I repeat that I also consider the judgment sufficiently demonstrates that the judge took the husband's needs into account. As identified by Ms Harrison, the judge referred to the husband's needs at various stages of the judgment, both in terms of housing and income. The judge rejected the husband's assertions as to his current income and also found that his expenditure "point to a confidence in his income stream which could not be supported by his purported income". The judge had "no doubt" that the husband would be able "to earn at a much greater level that he presently admits and in line with his past earnings".

125. I would also add that the judge was plainly entitled not to add back, or deduct from the needs award, the sum of £150,000 which had been paid on account. This sum had been used to pay most, but not all, of the wife's costs. It was not, therefore, available to meet her future needs.

126. (c) I am not persuaded that the judge's award of periodical payments and the imposition of judgment debt interest operate in this case in a way which is unfair to the husband. I accept that the judge's award was intended to provide the wife with periodical payments to meet her additional income needs pending receipt of the lump sum. There is, therefore, no double counting.

127. (d) As set out above, in my view the court has jurisdiction to make a periodical payments order which continues until the grant of a Get, including when a capitalisation lump sum has become payable or has been paid. The issue is, therefore, as submitted by Ms Harrison whether the judge should not have made the order in this case.

128. The judge decided that there was a compelling need for a "clean break" between the parties so that they would be able to make, what he termed, "new lives". This was significantly based on the manner in which the husband had behaved, including that he had been convicted for assault and harassment of the wife. The judge, no doubt, had regard to the likely impact on the wife if there was not a religious divorce and he was, in my view, entitled to give effect to his determination by making a financial award.

129. As to the submission as to the effect of the order on the husband's ability to obtain a Get, the judge had no evidence on this issue. It is not, therefore, a point which is open to the husband in this appeal.

130. (e) In respect of the costs order, there is a potential argument that the wife's outstanding costs were included in the judge's calculation of the lump sum award. However, this is not a sufficient sum to justify interfering with the judge's order. Mr Molyneux, again, sensibly recognised this when not pressing this aspect of the appeal.

131. In conclusion, I propose that, for the reasons set out above, this appeal is dismissed.

LADY JUSTICE ROSE

132. I agree.

LADY JUSTICE KING

133. I also agree.