Neutral Citation Number: [2021] EWFC 2

Case No: FD09D05205

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2021

Before :

MR JUSTICE MOSTYN

- -

Between :

AZ **Appellant**

and

FM **Respondent**

- -
- -

The Appellant acted in person
Helen Williams (instructed by **Bross Bennett LLP**) for **the Respondent**

Hearing dates: 12-13 January 2021

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Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Mostyn:

1. In this judgment I will refer to the appellant as "the husband" and to the respondent as "the wife".

2. This is my judgment on the husband's appeal against the judgment of Deputy District Judge Butler ("the trial judge") dated 29 January 2019 (as supplemented on 24 July 2019, 25 September 2019 and 16 October 2019) which (a) refused the husband's application to vary downwards periodical payments made for the benefit of the child of the marriage; (b) capitalised those periodical payments; and (c) dealt with the division of the remainder of a fund previously set aside to satisfy the parties' liability for capital gains tax ("the CGT fund").

3. In this judgment I shall refer to a lump sum which capitalises and replaces future payments of periodical payments in favour of a child as a "commutation lump sum".

4. On 30 January 2020, in a decision made on the papers, HHJ Everall QC granted the husband permission to appeal the order of the trial judge on a single ground which challenged the jurisdiction of the court to capitalise periodical payments for child maintenance (Ground 2). He refused the husband permission in respect of Grounds 1 and 3 which asserted respectively that the judge was wrong (a) to draw adverse inferences as to his level of income, and (b) to divide the CGT fund as he did. At the hearing before me the husband renewed orally his application for permission on Grounds 1 and 3. I refused permission on those two grounds but made clear that I would correct any mathematical errors in the calculation of the commutation lump sum either under the slip rule or the court's inherent jurisdiction.

5. This judgment records my reasons for refusing permission on Grounds 1 and 3. It also gives my decision on Ground 2.

6. The husband is a well-respected architect, aged 57. He resides in the USA and holds a professorship at Princeton University, although he told me during the hearing that the future of this position is uncertain as he is in dispute with the university. In 2012 the husband remarried a woman who is also an architect and academic. They now have two young children. I was told in the husband's skeleton argument, and by him orally in his submissions, that since the hearing before the trial judge the eldest of these daughters has been diagnosed with an incurable illness which is life-limiting and requires extensive care. The husband tells me that there are significant costs associated with this care and treatment regime which may increase in the future, especially if he were to lose the medical insurance provided by his employer. I will explain below that none of these changes of circumstances has been the subject of a formal application to adduce fresh evidence notwithstanding that HHJ Everall QC specifically directed that such an application should be made if the filing of such evidence were to be pursued.

7. The wife is also a very well-respected architect, aged 55. She continues to reside in London and holds a professorship at Harvard University.

8. The child of the marriage, M, in whose favour the order for the periodical payments was made, is now aged 19 and is studying at a university in London. Outside term

time, she resides with the wife and has had very little direct contact with the husband for some years now.

9. The parties were married for 15 years. They enjoyed a good standard of living together, building successful careers and acquiring multiple properties.

10. Since their separation, the parties have been engaged in very lengthy and costly litigation not only in the Family Court but in the Chancery Division also. Moylan J made a final order in the financial remedy proceedings on 23 June 2011. There was also parallel commercial litigation arising out of the division of the parties' joint architects' practice. These proceedings were not settled until 2014. Further, the wife had to bring enforcement proceedings in November 2017 following the husband's failure to pay periodical payments for M from June 2017, though these were not pursued once the husband cleared the arrears.

11. The husband applied on 20 October 2017 to vary Moylan J's child maintenance order and the final hearing took place before the trial judge on 9 and 10 July 2018. Judgement was reserved. As mentioned, that main judgment was produced in writing on 29 January 2019. Clarifications were sought, predominantly by the husband's legal team, and consequently supplemental judgments were given on 24 July 2019, 25 September 2019 and 16 October 2019. The order giving effect to the judgment was not perfected until 1 October 2019. I have to say that for an application relating merely to child maintenance to take almost two years from start to finish is an unacceptably long period of time. Further, it is my view that to take 6½ months to produce a reserved judgment is also an unacceptably long period of time.

12. The salient parts of Moylan J's order were:

    i) The husband shall pay periodical payments to the wife for the benefit of M at the rate of £1,700 per month until she attains the age of 18 years or ceases full time tertiary education (to first degree level and to include one gap year) whichever shall be the later or until further order.

    ii) When in tertiary education the husband shall, provided M continues to make her primary home with the wife during vacations, pay the maintenance ⅓ to the wife and ⅔ directly to M.

    iii) The parties agree and undertake to pay 50% each of the school fees for M (and reasonable extras appearing on the school bill).

    iv) The parties agree and undertake to pay 50% each of the university fees for M (and reasonable extras).

13. The husband's variation application was based predominantly on the argument that M was now older and that her needs could be sufficiently met by a smaller award; that the amount was unaffordable; and that the obligations were onerous and unfair. He was seeking to reduce the monthly payments from £1,700 to £800, a saving of £1,100 each month for perhaps four years. So the parties were arguing about £50,000 or thereabouts.

14. The salient parts of the trial judge's judgment and order were:

i) Although the parties accepted that the jurisdiction of the Child Maintenance Service ("CMS") and the court could not be excluded in relation to financial provision for M, the parties agreed that the terms of the order were intended to meet M's maintenance needs through to the end of her first degree, including a gap year. The husband and wife therefore agreed not to make any further application to any court or to the CMS for further financial provision to meet M's maintenance needs beyond the terms of the order.

ii) The parties agreed and undertook to pay 50% of M's university tuition fees to the end of the first degree.

iii) The wife agreed and undertook to the court that in the event that she seeks any further or additional child maintenance for M (beyond the sum provided for in the order), any such payment which the husband has to make to M or the wife shall be repayable in full by the wife to the husband within 14 days of the receipt.

iv) Within 7 days of receipt of the funds set out below, the wife agreed and undertook to pay the sum of £44,000 into an account in M's name and the balance plus 50% of the CGT funds into an account in her own name to be used solely for the purpose of sustaining M in tertiary education.

v) The CGT fund and interest accrued were to be paid to the wife.

vi) The husband was to pay the wife a lump sum of £59,200, less 50% of the CGT funds, in discharge of the obligation to pay periodical payments for the benefit of M. 50% of the CGT funds amounted to £7,096. Therefore, the commutation payment to be paid by the husband was £52,104.

vii) The husband was to pay the wife's standard costs, with a payment of £17,500 on account.

15. In his main judgment at [9] the trial judge explained the circumstances in which he was making this atypical order of a single lump sum in lieu of monthly payments. He said:

> "It would be a significant understatement to say that since the Moylan Order there has been a depressing amount of litigation between the Husband and the Wife over the implementation of the terms of this Order. The chronologies provided to me demonstrate that the Husband and the Wife have been engaged in almost constant litigation since the Moylan Order, not only in this Division but also the Chancery Division. It is extremely depressing when standing back to see that an Order which was designed to address the financial matters between them and bring finality has given rise to such an extraordinary level of conflict and, no doubt, a significant amount of costs expenditure on both sides."

And at [14(viii)]:

> "Between them these parties have spent [costs of] £124,586.68. It is not difficult to see how this has happened. A huge amount of work has been done. Stepping back and analysing the commerciality of this exercise, I have to confess when surveying what is actually between these parties, I struggle to understand how it could be possible for them to have got so far and spent so much money (particularly the Husband) over what are relatively modest amounts of money. The only explanation available to me is the one advertised by the litigation that has ensued since the Moylan Order; these parties remain connected sadly, not just by M, but by continuing litigation. It is something I cannot ignore in seeking to provide the correct solution."

And in the first supplemental judgment at page 5:

> "There has been a lengthy history of litigation and as referred to in my judgment it is right to try and bring this to an end. I accept that what I regard as a very fair solution from the Husband's point of view may not be warmly welcomed because this Husband seems to thrive on litigation. I further accept that child maintenance cannot be dismissed but the payment of a lump sum by the Husband in circumstances described by me is not something which puts the Husband at risk. To suggest otherwise is risible. Furthermore, I cannot envisage that the Wife would not provide the requisite assurances to the Husband were he to indicate his wish to make the capital payment."

16. The order of the trial judge was largely in accordance with the wife's open position. It was not a major departure from the order of Moylan J, save for a small reduction in periodical payments once M was at university (as proposed by the wife) and the capitalisation of those periodical payments.

17. The husband's costs of the variation application before the trial judge were about £91,000. The wife's costs were about £33,000. The husband tells me that since that hearing he spent a further £74,000 on this appeal until July 2020 when he dispensed with his experienced solicitors and decided to act in person. The wife has spent about £26,000 on the appeal. A total of £224,000 has been spent arguing about a maximum of £50,000. These eye-watering costs speak for themselves: they are completely disproportionate to the issues between the parties.

18. The lump sum and costs orders of the trial judge have been stayed pending the outcome of this appeal. The original order of Moylan J has remained extant *pro tem*. The husband has only sporadically paid the periodic amounts due under the order of Moylan J, and by his own admission he is in breach of the order. Ms Williams has informed me that the husband failed to pay the sum due in January 2020 and has failed entirely for each month from and including March 2020. The husband has told me that in any event he will seek to issue a further application to vary the periodical payments. He even emailed a draft of a Form A seeking variation to my clerk shortly before the appeal hearing. The question has arisen whether I should, in the event that

the husband is unsuccessful in this appeal, stay the order of the trial judge nevertheless in order not to deprive the husband of the opportunity to make a further variation application. I will deal with this issue below.

The renewed application for permission in respect of Grounds 1 and 3

19. Ground 1 states:

> The judge wrongly concluded that the husband failed to disclose material documents engaging pillar (i) and (ii) of *D v D* [2015] EWHC 1393 (Fam). This unjustly influenced his findings in relation to the husband's income which then resulted in him erroneously accepting the wife's evidence in relation to her income and M's needs and prevented him from varying the maintenance order in the husband's favour.

20. HHJ Everall QC's decision refusing permission to appeal on Ground 1 was as follows:

> "(i) The Deputy District Judge (the DDJ) correctly directed himself as to the legal principles (see first judgment paras 45 to 49).
>
> (ii) The DDJ had written evidence of the parties and heard the oral evidence of the parties over 2 days.
>
> (iii) The DDJ set out his reasons for making the findings in relation to pillar 1 and 2 of the principles set out by Roberts J in *D v D* (first judgment paras 36 to 39, 45, 47). He further expanded on those reasons in his Supplemental Judgment. The Reasons given are cogent and based upon the evidence which he had received.
>
> (iv) The DDJ was entitled to make the findings which he made on the evidence before the court. The appellant has no real prospect of successfully arguing that the DDJ was wrong to make the findings which he made or that in making his findings he took into account irrelevant evidence or failed to have regard to relevant evidence. See *Royal Bank of Scotland v Carlyle* [2015] UKSC 13, Lord Hodge at paras 21 -22.

21. Ground 3 states:

> The judge wrongly found that the monies held by Bross Bennett in relation to the division of CGT are forthwith payable to W (para 61). This is inconsistent with para 63 of the judgment which provides that if the order is capitalised the wife will credit the husband with half of the CGT funds. However, the judge goes on to add the husband's 50% share of the funds to what is owed to W which is contradictory with para 63. The supplemental judgment goes on to say that half of the CGT

> fund held by the wife's solicitors is to be deducted from the lump sum to be paid by the Husband (p 4 (vi (a)).

22. HHJ Everall QC's decision refusing permission to appeal on Ground 3 was as follows:

> "(i) The Appellant has no real prospect of successfully arguing that the DDJ fell into error in his calculation of the lump sum.
>
> (ii) The calculation started with the Wife's suggested figure of £77,800 which the DDJ found to be "reasonable". That figure was based on (a) 1,700 pm for 14 months and (b) £1,500 pm for 36 months. The figure of £77,800 is reduced to £66,000 because credit is given for 7 months of payments made at £1,700 pm. As at the date when the order was finalised, another 4 months at £1,700 had been paid."

23. The right to seek an oral renewal hearing is provided for in FPR r.30.3(5). This right can only be taken away where a High Court judge or a Designated Family Judge refuses permission to appeal and certifies the application to be totally without merit – see r.30.3(5A). The continued existence of this right contrasts with the position in the Court of Appeal since 3 October 2016 where the decision of the single judge on the papers is final and may not be orally renewed unless the single judge permits such an oral hearing: see CPR r.52.5. In my opinion, appeals under FPR Part 30 should be aligned as soon as possible with those in the Court of Appeal. Just as in the Court of Appeal there should be complete trust reposed in the single appeal judge who determines the permission application on the papers. It is a waste of precious judicial resources for a permission application to be run twice, once on paper and once orally.

24. On 10 February 2020 the husband applied for an oral renewal hearing. On 26 February 2020 Williams J directed that the application would be heard by me alongside the substantive appeal on Ground 2.

25. I have mentioned above that on 22 July 2020 the husband elected to act in person. This would explain why there was no compliance with PD30A para 4.14. This requires the advocate for a represented appellant to file with the court four days before the appeal hearing a brief written document informing the court and the respondent of (a) the points which the appellant proposes to raise at the hearing and (b) the reasons why permission should be granted notwithstanding the reasons given for the refusal of permission. This is, in my opinion, a highly important provision and I can discern no good reason why it should not extend to appellants who are self-represented.

26. The terms of para 4.14(b) clearly signifies that there is an obligation imposed on an appellant at an oral renewal hearing to demonstrate a good reason why the decision of the single judge refusing permission on the papers was wrong. Such an approach would be consistent with my decision in *R (Kuznetsov) v Camden LBC* [2019] EWHC 3910 (Admin), 21 November 2019 where a costs order was made by the court of its own initiative and without a hearing in judicial review proceedings. The claimant applied to set aside the order. I noted there was no authority on the approach under CPR r.3.3(5) to set aside or vary an order made under CPR r.3.3(4). I held at [24] that the test under CPR r.3.3(5) was that the court should give due weight to the decision

of the judge who dealt with the matter without a hearing and should be able to identify a good reason for disagreeing with his or her decision.

27. I can identify no valid reason why this approach should not be applied where an oral renewal hearing is sought following a refusal of permission to appeal by a single judge on the papers. It makes no sense that I should redetermine the application *de novo* without giving due weight to the previous decision.

28. HHJ Everall QC rightly identified that the gravamen of Ground 1 was an appeal against primary factual findings by the trial judge and his evaluation of those findings. Such an appeal is always extremely difficult to pursue. HHJ Everall QC cited Lord Hodge's judgment in *Carlyle (Scotland) v Royal Bank of Scotland Plc* [2015] UKSC 13. At [2] Lord Hodge said:

> "…the court must have regard to the limited power of an appellate court to reverse the findings of fact of the judge who has heard the evidence. Those limits are well known. The House of Lords discussed them in *Thomas v Thomas* 1947 SC (HL) 45. More recently this court has reiterated those limits in *McGraddie v McGraddie* 2014 SC (UKSC) 12 and *Henderson v Foxworth Investments Ltd* 2014 SC (UKSC) 203; [2014] 1 WLR 2600 and the Judicial Committee of the Privy Council has made similar comments in *Beacon Insurance Company Limited v Maharaj Bookstore Ltd* [2014] UKPC 21, at paras 11-17. Those limits apply equally in this court as in other appellate courts."

And at [22]:

> "The rationale of the legal requirement of appellate restraint on issues of fact is not just the advantages which the first instance judge has in assessing the credibility of witnesses. It is the first instance judge who is assigned the task of determining the facts, not the appeal court. The re-opening of all questions of fact for redetermination on appeal would expose parties to great cost and divert judicial resources for what would often be negligible benefit in terms of factual accuracy. It is likely that the judge who has heard the evidence over an extended period will have a greater familiarity with the evidence and a deeper insight in reaching conclusions of fact than an appeal court whose perception may be narrowed or even distorted by the focused challenge to particular parts of the evidence."

29. These views have been stated on many occasions. In the well-known case of *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5, Lewison LJ helpfully summarised the learning at [114]:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those

> facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1997] RPC1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include: i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed. ii) The trial is not a dress rehearsal. It is the first and last night of the show. iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case. iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping. v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence). vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

30. In his oral submissions to me the husband complained that the trial judge's adverse findings against him concerning his duty of disclosure were "prejudiced". I asked him to give me his best example of this. He referred to the omission from his Form E of the existence of a Swiss branch of his architectural business. The wife noticed a reference in the accounts of the business to an overseas undertaking which led, months later, to the husband admitting the existence of this branch in his reply to questionnaire. This was one of a number of omissions that led the judge to form the view that the husband had been highly defensive in his disclosure obligations. The husband considered that the criticisms were unjustified as this, in common with a number of other omissions, was the result of a mistake when he filled in his Form E. He had never intended to mislead and pointed out that the existence of the Swiss branch was at all times visible on the business's website. I have to say that I was completely unpersuaded by this argument. The husband did not hasten to correct the error; rather, the truth had to be dragged out of him by the questionnaire process.

31. Here, the assessment of the husband's motives was quintessentially a matter for the trial judge. Having reached the conclusion that the husband was in breach of his duty of candour the trial judge was plainly entitled to rely on it in reaching his conclusion as to the likely scale of the husband's future income. He did so by reference to the whole sea of the evidence, the experience of which cannot be replicated in the appeal court which is confined, necessarily, to island-hopping.

32. In my judgment this case does not come close to the high standard that needs to be demonstrated in order to disturb findings of fact. The husband has failed to show any good reason why HHJ Everall QC was wrong in the decision that he made.

Accordingly, I, too, refuse permission to appeal on Ground 1. I certify that the renewal application in relation to this Ground was totally without merit

33. The pursuit, again, of Ground 3 is likewise refused. Although the trial judge used some slightly ambiguous and contradictory language, what he intended to achieve is abundantly clear. He made a determination that the residue of the CGT fund was to be divided equally between the parties. This equal division reflected the equal sharing principle as well as their likely proprietary interests in the fund. However, the husband's half share of the fund would not be paid to him; rather, it would instead be paid to the wife in partial satisfaction of the lump sum awarded in lieu of continuing monthly payments of child maintenance. This is plainly what the judgment intended, and it is explicitly provided for in the order giving effect to it.

34. In his oral submissions the husband sought to argue that the whole of the CGT fund should be applied as a credit against the lump sum liability. This is completely untenable. The wife's half of the CGT fund is her own property and there is no reason at all why it should be applied as a credit towards the lump sum liability. To do so would be to treat it, as well as the husband's half, as the husband's property; or, to put it another way, to treat the whole fund as the husband's property. The trial judge did not make that finding, and there was no basis on which he could have done so. Therefore, permission will be refused in relation to this ground and its pursuit will also be certified as having been made totally without merit.

The appeal on Ground 2

35. Ground 2 states:

> "The judge made a fundamental error of law by capitalising child maintenance when there is no jurisdiction under the Matrimonial Causes Act 1973 to do so."

36. The appeal notice advances the following points in support of this submission:

> "In support of Ground 2 the following points are made:
>
> a. Section 31(7A) and (7B) of the Matrimonial Causes Act 1973 relates to a lump sum made "in favour of a party to the marriage" of which the child is not. The judge failed to give any or any adequate reasons for capitalising child maintenance and failed to explain what power the court has to make the order.
>
> b. The judge accepts in his supplemental judgment that child maintenance cannot be dismissed leaving the door open to future applications.
>
> c. Such an order fails to take into account what should happen if the child does not go to university or drops out of university.
>
> d . It is wrong for an 18 year old to be paid a lump sum of £44,000 of which she has complete control."

37. In the skeleton argument, the husband's then counsel put it this way:

> "There are three principal reasons why capitalisation of child maintenance is not allowed.
>
> (a) Firstly, you cannot statutorily dismiss an application for child maintenance. The main reason why you should not capitalise child maintenance is, for example, if you give a child a large lump sum he/ she cannot be prevented from coming back for more as there is no statutory bar to this. It then lends itself open to subsequent applications.
>
> (b) Secondly, what happens if the child changes their residence with (*sic, semble* to) the father, however unlikely? The maintenance payable is based on the child attending University and her financial needs throughout University, originally intended to be specifically studying at Oxford University and living otherwise with her mother. What would have happened if the child chose not to go to University or studied at a College where her financial needs will be less? What happens if the child leaves University earlier or perhaps later? These are examples of reasons why child maintenance should not be capitalised.
>
> (c) Thirdly, child maintenance is meant to be variable subject to the circumstances of the case based on (a) H's income and (b) on the child's needs. Therefore, if capitalised you cannot do either."

38. The commutation lump sum in this case was not ordered under s.31(7A) and (7B) of the Matrimonial Causes Act 1973. A lump sum under those subsections can only be made in favour of a party to the marriage and only following the discharge of a periodical payments order, either immediately or after a specified period. The commutation lump sum here was made in favour of M. It may have been payable to the wife but it was for the benefit of M. Para 15 of the order of 1 October 2020 provided:

> "Paragraph 6 of the order of Mr Justice Moylan in this matter dated 23rd June 2011 shall be varied to provide that the Applicant shall pay to the Wife periodical payments for the benefit of M. Payments shall start on 1st March 2019 and end on M attaining the age of 18 years or ceasing full time tertiary education (to 1st degree level and to include one gap year) which ever shall be the later, or further order. Payments shall be made in their entirety in advance in the sum of £59,200 less half the sum of the money referred to at paragraph 14 above and paid by 4:00pm on 1st September 2019. On receipt by the Wife of the entirety of the lump sum ordered herein paragraph 6 of the 2011 order shall be discharged with immediate effect."

39. The lump sum ordered was not in favour of the wife, and therefore was not within s.31(7A) and (7B), but rather was in favour of M. So, what was the power to make that order? The husband argues that there is no such power. Thus, Ground 2 is confined by him solely to the question of jurisdiction, although it must be said that some of the arguments advanced by him seem to bear on the question of how, as a matter of discretion, the power should be exercised, if it exists.

40. Sub-sections (7A) - (7H) were inserted into s.31 of the Matrimonial Causes Act 1973 by the Family Law Act 1996, Schedule 8, para 16(7), and took effect on 1 November 1998. They were passed by Parliament following a campaign by professionals to amend the statute to give the court power to capitalise a periodical payments order and thus to bring about a clean break. There had been judgments from senior judges lamenting the absence of that power. For example, in *Boylan v Boylan* [1988] 1 FLR 282 Booth J stated at 286:

> "I have had the advantage of considering the judgment of Waite J in *S v S* [1987] 1 FLR 71. In that case the judge considered in some detail the construction now to be placed upon s. 31(5) and (7) and deemed it right, in the light of the new legislation, to place a broad interpretation upon the words of the section. With that conclusion I respectfully agree. I wholly endorse his conclusion that the words 'all the circumstances of the case' enable the court, where it thinks it appropriate to do so, to consider and evaluate earlier orders for capital provision and property adjustment and that on a broad construction of the statutory provision the court has jurisdiction to terminate the wife's periodical payments on the basis of a capital offer made by the husband.
>
> Nevertheless, it has not been suggested, nor could it be, *that S v S* (above) is authority for the proposition that the court can impose upon the husband the payment of a lump sum in commutation of the wife's periodical payments however desirable the court may consider it to be that the financial obligations of the parties to each other be brought to an end. While it may consider whether a capital offer made by a husband is such as will enable the wife, without undue hardship, to adjust to the termination of the periodical payments at the end of an appropriate period, the court continues to be precluded by s. 31(5) of the 1973 Act from imposing a property adjustment or lump sum order upon the husband."

41. Thus, the then law prevented the court on a variation application imposing on the payer of spousal maintenance a lump sum in commutation of an existing periodical payments order. This was the legal lacuna that the reform mentioned above filled.

42. Booth J identified the barrier to a commutation of spousal maintenance as s.31(5) Matrimonial Causes Act 1973. Immediately before the reforms enacted in the Family Law Act 1996 this provided:

> "'No property adjustment order shall be made on an application for the variation of a periodical payments or secured periodical payments order made (whether in favour of a party to a marriage or in favour of a child of the family) under s. 23 above, and no order for the payment of a lump sum shall be made on an application for the variation of a periodical payments or secured periodical payments order in favour of a party to a marriage (whether made under s. 23 or under s. 27 above)."

43. This provision was first enacted in s.9(5) of the Matrimonial Proceedings and Property Act 1970.

44. When construing a statutory provision in order to determine its jurisdictional reach the first port of call is a textual interpretation which asks what the words reasonably and fairly meant at the time that they were enacted. This is the correct technique, in my opinion, where the provision in question is not a replication of a long-standing predecessor which has been the subject of authoritative interpretation (for an example of a replication see my decision of *CB v EB* [2020] EWFC 72).

45. In my opinion, the words used in the statute as enacted in 1970 have a very clear literal meaning which is not either incomprehensible, or incompatible with previously enacted statutes, or inconsistent with any understanding of legislative intent in 1970. What they mean is that on an application to vary a periodical payments order the court may not make a property adjustment order either in favour of a party to the marriage or a child of the family. Further, on such an application to vary the court may not make a lump sum order in favour of a party to the marriage but there is no prohibition on it doing so in favour of a child of the family. The language is completely clear. Where the application is to vary a periodical payments order in favour of a child of the family then there is power to award a lump sum.

46. In such a situation the problem facing Booth J in *Boylan v Boylan* simply does not exist. Where a variation application relates to a periodical payments order in favour of a child of the family the court has the power to discharge the order and to order instead a commutation payment. That is what s.31(5) permits.

47. The power to award a commutation lump sum in favour of a child of the family exists even where the court has made a previous lump sum award in favour of that child. Section 23(4) provides that the court may make an order for a lump sum in favour of a child on more than one occasion. This power is subject to the restrictions imposed by s29 in respect of a child who has turned 18, but these do not apply if the child is in full time education.

48. Now, I readily admit that such an order for a commutation lump sum in 1970, or thereafter, would have been extremely unusual. I was in full-time practice from 1981 onwards and I have no memory of ever encountering such an order. But the rarity of such an order is of no assistance in answering the question whether there is jurisdiction to make it.

49. Section 31(5) was amended on 1 November 1998 to make it subject to the new provisions allowing capitalisation of spousal maintenance. It has been further amended to recognise the advent of pension sharing. It now reads:

> "Subject to subsections (7A) to (7G) below and without prejudice to any power exercisable by virtue of subsection (2)(d), (dd), (e) or (g) above or otherwise than by virtue of this section, no property adjustment order or pension sharing order or pension compensation sharing order shall be made on an application for the variation of a periodical payments or secured periodical payments order made (whether in favour of a party to a marriage or in favour of a child of the family) under section 23 above, and no order for the payment of a lump sum shall be made on an application for the variation of a periodical payments or secured periodical payments order in favour of a party to a marriage (whether made under section 23 or under section 27 above)".

The key phrase "and no order for the payment of a lump sum shall be made on an application for the variation of a periodical payments… order in favour of a party to a marriage" remains intact.

50. I have set out above the three reasons advanced by the husband's counsel as to why capitalisation of child maintenance is said not to be "allowed". First, she argues that a child maintenance capitalisation is, unlike a spousal maintenance capitalisation, not watertight. The child cannot be prevented from coming back for more. Her third reason is the direct opposite of this. Here she argues that child maintenance is meant to be variable in accordance with the current circumstances prevailing referable to the child's needs and the payer's income and if there is a capitalisation this cannot be achieved. The second reason is in the same vein. It asks rhetorically: what is to happen if the predictions about the child's future all turn out to be wrong?

51. When the court is considering capitalisation of spousal maintenance it has to make predictions about the future. It makes predictions about the applicant's life expectancy, lack of prospects of remarriage, and needs. It makes predictions about the respondent's economic stability, scale of wealth and liquidity. Often these predictions turn out to be wrong. Indeed, Mr Tim Lawrence, the creator of the Duxbury programme, which is invariably used in spousal capitalisation cases, often would remark that the one thing about Duxbury about which you could be certain is that it would give the wrong result. Unpredictable things happen. The reason the insurance industry exists is because unpredictable things happen. But one is generally able to make some predictions with a reasonable degree of accuracy. To take an extreme example, I can predict with 100% confidence that the sun will rise tomorrow. Other things are much more difficult to predict, obviously. In *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam) at [55] I referred to the epigram of the great atomic physicist Niels Bohr that "prediction is very difficult, especially about the future" and to Mark Twain's quip that "prophecies which promise valuable things, desirable things, good things, worthy things, never come true."

52. In a capitalisation case difficulties in probabilistic assessments of what might or might not happen in the future are not of themselves anything to do with whether the power

to commute exists. They may supply good reasons in a particular case why a capitalisation power should not be exercised, but they do not throw any light on the existence, or non-existence, of the power.

53. In her first reason the husband's counsel argues that a child maintenance capitalisation is not watertight and it would still be open to the child to return seeking further lump sum or periodical payments. In theory, if the court was undertaking a spousal maintenance capitalisation, but wished nonetheless to preserve the entitlement of the wife to seek further periodical payments, then s.31(7B)(c) allows the court to withhold a direction preventing the wife from doing so. I myself have never heard of such a direction being withheld, but Parliament has allowed for that possibility.

54. In this case the wife has given an undertaking that were she to seek further maintenance for them, she would immediately repay any sum awarded. I think that this is a symbolic gesture because it would be open to the court if it did intend to make an award of a further lump sum or maintenance to release the wife from her undertaking. However this undertaking does demonstrate the clear intention of the wife to bring matters to an end and not to seek variation.

55. In my judgment, where the court has made a capitalisation of child maintenance it would need a change of circumstances of exceptional magnitude before the court would augment what was intended to be a one-off commutation payment.

56. My clear conclusion is that none of the points raised by the husband's counsel bear upon, or say anything about, the existence of the jurisdiction of the court to discharge a child maintenance order and to award a lump sum in lieu of future periodic maintenance. The clear words of s.31(5) of the 1973 Act permit such an order to be made.

57. Ground 2, and therefore the appeal itself, is therefore dismissed.

58. I make clear that although I am satisfied the jurisdiction exists, and that in this case the trial judge was entitled to exercise it, it will remain a very rare bird indeed. In this case the Child Support Act 1991 did not apply as the husband was habitually resident in the USA. The combination of: (1) incessant litigation, on which the trial judge found the husband thrived, (2) repeated defaults on the part of the husband with the maintenance obligation, and (3) the age of the child and the relatively short period until the maintenance liability expired, all militated strongly in favour of a capitalisation and the ending of financial links between the parties. In the overwhelming majority of cases, however, the risks and uncertainties inherent in capitalisation will lead the court, where it has jurisdiction, to make, or continue, a traditional order for periodic payments. In most cases where the court is considering a variation of a child maintenance order the Child Support Act 1991 will potentially apply in the sense that it would be open to either party to apply for a statutory assessment under the Act, replacing the order, once 12 months had expired following the making of the order. As a general principle, it would not be a proper exercise of the court's powers to capitalise periodical maintenance and to abrogate that right. Therefore, it seems to me that capitalisation could only properly be considered where the 1991 Act could not apply, because, for example, one of the parents or the child is habitually resident overseas, or because the child is over 19.

Correct calculations

59. Although the appeal is dismissed there have been identified some errors in the computation of the lump sum, and there needs to be adjustments made to it in any event in the light of the passage of time during which the husband has made some, but by no means all, of the periodical payments due. The court clearly has power to correct computational or other factual error whether pursuant to the slip rule or its inherent jurisdiction.

60. I have received written calculations from both parties.

61. The first issue separating the parties is the quantum of the headline figure used to compute the lump sum payable. There is a difference of £1,700 between the parties, i.e. one month's payment. In July 2018 the wife's open offer was that the lump sum should be £77,800 based on a further 14 months of periodical payments at £1,700 and then a further 36 months (for a three-year degree) at £1,500 per month. It appears that the confusion has arisen because the periodical payments are payable in advance. In July 2018, there were in fact only 13 months to go until M was to start university when the periodical payments would decrease to £1,500 per month from September 2019 onwards. The husband's figure of £76,100 is therefore correct ((1,700 x 13) + (1,500 x 36) = 76,100).

62. The second issue is what proportion of the remainder of the CGT fund should be offset against the lump sum. The judgment of the trial judge makes clear that the remainder of the CGT fund should be divided equally between the parties. It is therefore only 50% of the remainder of the CGT fund, in other words the husband's portion, that should be appropriated and credited against the headline figure. As explained above, the husband is completely wrong to argue that 100% of the remainder of the CGT fund should be offset.

63. Under the order of the trial judge, by 1 September 2019 £44,000 should have been deposited into an account in M's name and £15,396 should have been deposited into an account in the wife's name for the sole purpose of sustaining M during her education. Obviously, this has not happened because the husband has not paid the lump sum and has only paid some of the periodic maintenance. I am assuming that the wife has supported M out of her own pocket while this case has ground on. The original calculation assumed that M would leave university at the end of August 2022, that is in 20 months from now. The original order of Moylan J provided that two-thirds of the monthly maintenance would go direct to M once she was in University and indeed the £44,000 was calculated by the trial judge on that basis. Therefore, on the basis that the multiplicand when at University is £1,500, the sum to go direct to M each month should be £1,000, giving rise to the sum of £20,000 to be placed in M's name, using a multiplier of 20.

64. The total lump sum now owing is £38,404. I arrive at this figure by deducting from £76,100 the agreed figure for periodic payments made by the husband of £30,600 plus half of the remainder of the CGT fund (£7,096). The wife shall make arrangements to deposit £20,000 into an account in the sole name of M. The balance shall be deposited into an account in the wife's name to be used for the sole purpose of sustaining M in her tertiary education.

65. The third issue is what interest is owing on the unpaid lump sum. From September 2019 to February 2020 (excluding January 2020) the husband made monthly payments of £1,700. Since February 2020 he has made no payments. Interest accrues at 8% per annum. Total interest to date is £5,091 and continuing. This calculation factors in the progressive reduction in the outstanding lump sum.

66. The interest calculation is as follows:

Lump Sum	Date From	Date to	Number of days	Interest
54,000	01/09/2019	19/09/2019	18	213
52,300	20/09/2019	19/10/2019	29	332
50,600	20/10/2019	19/11/2019	30	333
48,900	20/11/2019	19/12/2019	29	311
47,200	20/12/2019	19/02/2020	61	631
45,500	20/02/2020	13/01/2021	328	3,271
			Total	5,091

67. I order, following the rationale of the orders of Moylan J and the trial judge, that ⅔ of the accrued interest should be deposited into the account in M's name and ⅓ in the abovementioned account in the wife's name.

68. As at 13 January 2021 the total liability of the husband is £43,495 (76,100 - 30,600 - 7,096 + 5,091 = 43,495). In addition the husband owes the wife £17,500 being the payment on account of costs, with interest thereon, which I calculate to be £1,753, giving a total in respect of costs on account of £19,253. The total liability of the husband is therefore £62,748.

Fresh evidence

69. I have mentioned above how the husband has sought to tell the court about the illness of his daughter from his marriage and his dispute with his university. In his order of 30 January 2020 HHJ Everall QC provided:

> "1. Permission to rely on the fresh evidence identified in paragraphs 10 and 51 to 55 of the Appellant's Skeleton Argument in relation to Grounds 1 and 3 is refused.
>
> …
>
> 5. If the Appellant wishes to rely on the fresh evidence identified in paragraphs 10 and 51 to 55 of his Skeleton Argument in relation to Ground 2, he must make a formal application to do so supported by a witness statement setting out the fresh evidence and he must by 4:00pm on 24 February 2020 file the application with the Family Division Appeals office at the Royal Courts of Justice and serve the application on the Wife."

70. That order was confirmed by Williams J on 26 February 2020.

71. As explained above, at that time the husband was represented by extremely experienced solicitors. Yet no application to adduce fresh evidence was made.

72. In such circumstances it is unprincipled and unreasonable for the husband to seek a stay pending a further variation application based on informal indications of changes of circumstances where he has chosen not to comply with this very clear order about adducing fresh evidence. I therefore disregard those informal indications and conclude that there is no principled basis to award a stay.

Conclusion

73. My order will record the following:

    i) the renewed permission application in respect of Grounds 1 and 3 is refused and certified as being totally without merit;

    ii) the appeal on Ground 2 is dismissed;

    iii) a stay pending a further variation application is refused;

    iv) the lump sum now owed by the husband, inclusive of his half share of the CGT fund, is £38,404;

    v) interest of £5,091 is owed on the unpaid lump sum;

    vi) interest of £1,753 is owed on the unpaid sum of £17,500 ordered on account of costs; and

    vii) the total liability of the husband on 13 January 2021 is £62,748, with simple interest accruing thereafter on the principal sum (but not the accumulated interest) at £12.25 *per diem*.

74. The order will be drafted by Miss Williams and presented to the husband for his agreement before it is submitted to me.

75. I will deal with any further applications, whether in relation to costs or otherwise, in writing.

Costs

76. Following the distribution of this judgment in draft I have received from Ms Williams an application for costs on behalf of the wife. The accompanying Form N260 states the wife's costs to be £26,515.40. She seeks her costs, to be summarily assessed by me on the indemnity basis.

77. So far as costs are concerned this appeal is governed by FPR r.28.2. This applies Part 44 of the CPR with certain exceptions. One exception is CPR r.44.2(2)(a) which expresses the general rule that costs follow the event. Therefore, the court starts with a so-called clean sheet. However, in *Baker v Rowe* [2009] EWCA Civ 1162, [2010] 1 FLR 761 at [25] Wilson LJ stated:

> 'Even where the judge starts with a clean sheet, the fact that one party has been unsuccessful, and must therefore usually be regarded as responsible for the generation of the successful party's costs, will often properly count as the decisive factor in the exercise of the judge's discretion.'

78. Similarly, in *Solomon v Solomon* [2013] EWCA Civ 1095 Ryder LJ held at [22] that:

> "…the starting point for what are described as 'clean sheet' cases is that costs follow the event."

79. Therefore, in clean sheet cases a soft costs-follow-the-event principle applies. In my judgment the principle is not so soft where the application is an appeal. In a child maintenance case there is a reasonable argument that at first instance it should be very soft: see *KS v ND (Schedule 1: appeal: costs)* [2013] EWHC 464 (Fam), [2013] 2 FLR 698 at [19]. However, an appeal is in a different category altogether. In *KS v ND* at [34] I stated:

> "In my judgment on any financial remedy appeal, including an appeal in Schedule 1 proceedings, costs should prima facie follow the event. Certainly that would be the position on a first appeal to the Court of Appeal and I cannot see why any different rule should apply on a first appeal to the High Court or the County Court. Even if the father had not made a Calderbank offer he would prima facie be entitled to his costs; the existence of his offer strengthens his case considerably. There are no good reasons why, subject to the questions of quantum and timing, he should not have his costs."

80. In this case, as noted in the main judgment, the husband sought to renew Grounds 1 and 3. I dismissed that application and held it to be totally without merit. Williams J had ordered the renewal application to be heard alongside the main appeal. The wife was therefore drawn into that process and needlessly incurred costs in relation to it. Further, on 16 March 2020 the wife made an open offer to settle the appeal. Essentially she sought that appellant should accept the decision of the trial judge; on that basis she would not seek any costs of the appeal. The husband did not respond with an open offer of his own. Although FPR PD 28A para 4.4 does not in terms apply to an appeal governed by r.28(2), in my judgment, an obligation to negotiate to compromise any piece of family litigation, including an appeal, should be recognised. A

81. Therefore, the husband's pursuit of totally meritless grounds, and his failure to negotiate, amount in my judgment to conduct for the purposes of CPR 44.2 (4) and (5). This conduct makes an already strong case for an order for costs irrefutable in my judgment. The more difficult question is whether the basis of assessment should be standard or indemnity.

82. For costs to be awarded on the indemnity basis it has to be shown that there is some circumstance which takes the case 'out of the norm'. In *Three Rivers District Council & Ors v The Governor & Company of the Bank of England* [2006] EWHC 816 (Comm) at [25(5)] Tomlinson J held that "where a claim is speculative, weak,

opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails".

83. I have already explained why the renewal application in respect of Grounds 1 and 3 were totally meritless. However, Ground 2 addressed the trial judge's legally innovative disposal, but its resolution was always going to be adverse to the husband given the words of the statute. But I cannot say that the husband's pursuit of the substantive appeal took the case out of the norm.

84. Does his failure to negotiate take the case out of the norm? I have come very close to deciding that it does. However, in the absence of any specific provision in FPR PD 28A imposing a duty to negotiate in appeal proceedings I have, with some reluctance, decided that while the failure of the husband to negotiate reinforces his liability for standard costs, it does not elevate his liability to indemnity costs.

85. In my judgment the husband should pay the wife's costs on the standard basis. It is appropriate that I should summarily assess them. In my judgment for the wife to recover 75% of her actual costs is a fraction that not only reflects the criterion of reasonableness but also the key principle of proportionality pursuant to CPR PD 44 para 6.2. I therefore award the wife her costs and assess them in the sum of £18,561.

86. That is my judgment.