Neutral Citation Number: [2024] EWHC 949 (Fam)

Case No: FA-2023-000290

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 March 2024

Before :

MR JUSTICE CUSWORTH

- -

Between :

TW	**Appellant**
- and –	
GC	**Respondent**

- -
- -

Patrick Chamberlayne KC (instructed by **Hopkins Law Limited**) for the **Appellant**
Sally Harrison KC and Lisa Thomas (instructed by **Berry Smith**) for the **Respondent**

Hearing date: 21 February 2024

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JUDGMENT

This judgment was handed down remotely on 22 April 2024 and by circulation to the parties or their representatives by e-mail and by release to The National Archives on 23 April 2024.

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This judgment was delivered in public. 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 OR the parties must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Cusworth :

1. This is an appeal against the order of HHJ Furness KC made after a hearing which commenced on 16 January 2023, but due to the judge's illness concluded after an 8 month adjournment on 6 September 2023, with the judge handing down a full written judgment on 20 September 2023. Both parties then sought clarification in relation to certain points in the judgment, to which the judge replied on 5 October 2023. The final order was approved on 22 October 2023.

2. The judge set out the background to the parties' marriage, and their asset base, in his judgment as follows:

    a. The parties' relationship lasted 19 years, from 2001 (as he found) until 2020. They married in 2006.

    b. H's petition was dated 10 January 2021, although the parties remained under the same roof until May 2021, when H left.

    c. The parties have 3 daughters aged at the time of judgment 21, almost 20 and 7 years 8 months.

    d. The husband was then aged 56 and is a company director. His tax return for 2021/22 showed net income of £165,352. The SJE accountant accepted that whilst his companies continued to support a loss-making member of their group, A Ltd, that the husband's current level of income could not be increased. However, should that business be closed, there would be significant profits that could be distributed. Assuming a distribution of 50% of those profits, the SJE considered that the husband could achieve around £300,000 pa. net, plus rental income of over £100,000pa gross.

    e. The wife was then aged 40 and is not working. She was receiving £3,000pcm by way of interim provision, and some additional outgoings paid directly. He found that the wife could find employment (she is a qualified but not experienced hairdresser and pilates instructor) but that she is hampered by obligations to her youngest daughter. The parties agreed that she could earn up

to £20,000pa gross subject to child-care costs. The judge found that the prospects of her making a significant net contribution to her budget over the next 9-10 years was low. She would have 15 years of making a small post-tax contribution to her budget thereafter.

f. The judge found the assets to be as follow:

Asset	Husband	Wife	Total
Properties	£6,025,000	£257,050	
Business Interests	£5,100,000		
Bank Accounts	£20,678	-£843	
Investments	£20,935	£226,000	
Pension Assets	£1,300,889	£92,305	
	£12,467,502	£574,512	£13,042,014

g. As to liabilities, he found the wife's liabilities to be mostly in respect of legal fees, in the sum of £477,427. He disregarded an alleged loan of over £1.65m from the husband's father, and some claimed costs in respect of an access road, but did deduct another c.£70,000 in other smaller liabilities. This led him to determine that the non-pension assets less liabilities could be computed as £10,875,672. Of this, he found that only £3,575,000 were matrimonial and so could be the subject of a sharing claim.

h. In respect of the pensions, only £284,816 were classed as matrimonial, which included the wife's pension.

i. He found that the wife's housing needs would be met by the payment of a fund of £1,022,600 to acquire a suitable home for herself and the children, and that finding was not the subject of an appeal.

3. In those circumstances, the judge concluded that the wife's needs would not be met by her sharing entitlement in respect of her non-pension assets. This was contrary to the wife's case, who had initially sought a lump sum of about £4m on a sharing basis, to produce an income for her of £150,000pa on a lifetime Duxbury basis. For the husband's part, he had offered a needs based award based on a lifetime Duxbury of £54,000pa, which would have required a sum of c.£1.2m. Both sides seem to have been working off the Duxbury tables in At a Glance, rather than the more bespoke calculations which are obtainable from the Capitalise programme.

4. The judge found fault with both of the parties' respective initial budgets. The husband had indicated an annual spend of £317,614 in his Form E – a figure which the judge found gave some insight into the standard of living during the marriage. Stripping out extraordinary items the judge produced a residual figure for the husband's spending of £136,700, post separation, which he preferred to his s.25 figure of just under £5,000pcm, including child maintenance, which the judge found to be significantly pared down and unrealistic.

5. By contract, the wife's figures had gone the other way, moving from £5,556pcm in Form E (excluding a number of items still paid directly by the husband), to £15,675pcm. Whilst the judge found that those outgoings reflected the standard of living during the marriage, he nevertheless concluded that there were significant savings to be made. However, he found that the wife's budget could not be reduced below £8,434pcm, which was the figure he arrived at for the wife's income need.

6. He then concluded that this was a figure which could be afforded by H on the basis of his own case about income – that he had £165,352pa net – and if his asserted outgoings, that the judge had already found to be unrealistic, were accurate.

7. He then capitalised W's figure on a lifetime basis, but deducted a round figure of £100,000 from the sum produced to take account of the wife's lifetime income contribution. This produced a net figure required on account of the wife's income needs of £2.36m, and which figure is the principal subject of the husband's appeal.

8. After an initial refusal of permission by the Judge, Sir Jonathan Cohen then granted permission to appeal on 1 December 2023, on the following basis:

> *'The applicant presents an arguable case that the capitalisation of the respondent's needs-based income award was wrong in the circumstances in particular of:*
>
> *i. The relative youth of the respondent*
>
> *ii. The level of the respondent's reasonably available net income*
>
> *iii. The respondent' ability to contribute towards the meeting of her needs, by income generation and/or pension*
>
> *iv. The real level of her income need*

9. The matter has been listed before me for 2 days. I have heard submissions from Mr Chamberlayne KC for the appellant husband, and from Ms Harrison KC and Ms Thomas for the respondent wife, on 21 February 2024, and have then adjourned to the second judgment writing day of 1 March 2024. I am very grateful to counsel for their detailed and forthright submissions.

10. The Law. In dealing with this appeal, I have had in mind the clearly established line of authority recently encapsulated by Peel J in *Ditchfield v Ditchfield* [2023] EWHC 2303 (Fam), where he said, under the heading **'***The legal principles on appeals':*

> 4. An appeal operates by way of a review of the decision of the lower court: FPR 30.12(1).
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> 5. By FPR 30.12(3) an appeal may be allowed where either the decision was wrong or it was unjust for serious procedural or other irregularity.
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> 6. The court may conclude a decision is wrong because of an error of law, because a conclusion was reached on the facts which was not open to the judge on the evidence, because the judge clearly failed to give due weight to some significant matter or clearly gave undue weight to some other matter, or because the judge exercised a discretion which "exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong": *G v G (Minors: Custody Appeal)*.
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> 7. The appellate court must consider the judgment under appeal as a whole: *Re F (Children)* [2016] EWCA Civ 546 per Sir James Munby P at para 22.
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> 8. When deciding whether the decision below was wrong, per Lewison LJ in *Volpi and Ors v Volpi* [2022] EWCA Civ 464 at para 2:

"i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

11. Peel J then went on to refer to another judgment of Lewison LJ, in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor [2014] EWCA Civ 5*, where that judge had said, under the heading: '*Appeals on fact'*:

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* [1977] 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.

12. These are the principles which I have applied in determining this appeal.

13. The husband's Grounds of Appeal are 3 in number, and I will deal first with the second, as this is the ground that will have the most significant impact upon the outcome of the appeal if allowed. It is also the principal basis upon which Sir Jonathan Cohen granted permission as set out above. It begins by reciting that:

'*The judge fell into fundamental error in relation to the proper quantum of the wife's annual maintenance need, and the capitalisation thereof.*'

14. The document then breaks that down as follows. First it asserts that:

'*The judge fundamentally erred by concluding that the husband's income should be calculated on the basis that he was required to close down part of his business (A Ltd). He was not entitled to do so, and failed to take into [account] the implications of such a suggestion…*'

15. What the judge in fact said, at paragraphs 119/120 of his judgment, was:

'After hearing all the evidence and hearing H's false assertions about why A Ltd must be retained I still have no real idea why it must continue, other than his desire to turn it around and turn it into profit… the expectation of H was that he would be able to turn this business around as he has done with other purchases. If he cannot, it must not be allowed to bring down the rest of the businesses and should not be seen as limiting

his ability to pay periodical payments. I have no doubt that H can, or should be able to, increase his income significantly from the level that he has taken in the past.'

16. I do not take this as being any sort of requirement by the court that the husband must close down the loss-making business, causing redundancies. Rather the judge has left it to the husband to deal with A Ltd as he sees fit, but on the basis that both the costs and potential benefits of doing so will be left for the husband's account. Mr Chamberlayne is right that the husband's net salary was broadly agreed at a little over £165,000pa, although it had been both £40,000 or so higher and lower within the previous 4 years. But that does not mean that the judge was not entitled to conclude that the business as a whole was a greater potential resource for the husband going forward than the simple amount of the income that he drew; that either if he did turn A Ltd around, or if he jettisoned it, then there would be significantly greater levels of drawings available. That after all had been the conclusion of the SJE.

17. The husband's grounds continued by asserting that:

'The judge then compounded that error by confusing gross income with net income. He therefore went on to consider the wife's maintenance need on the basis of a wrong figure for the husband's income. This is why he decided that the wife should have a budget of £100,000pa.'.

18. In fact, in the passage complained about, at paragraph 118 of the judgment, the judge had significantly undercounted the husband's available net income by omitting the consider the SJE's responses to further questions. In that document he had accepted an error in calculating the required deductions for tax, such that a figure of £219,500pa net in his original report, which the judge took as the available net salary if the A Ltd income had been stripped out, should in fact have been nearer £300,000pa. That he then mentioned what appears to be a gross figure for 'dividends and rents' at £100,000pa as additional income does not necessarily mean that the judge took that gross figure as net in his calculations. But it is clear that in fact the notional income calculated in the way which the SJE had suggested, as amended, would have been higher still than the figure which the husband here complains about; so this is not an error that will assist in supporting this appeal.

19. However, it must also be said that the judge's determination that the wife's budget should be set at c.£100,000pa does not appear to be solely linked to his findings about available income. He had set out, as explained, that the husband was offering a lifetime Duxbury fund of £1.2m producing £54,000pa; and that the wife was originally seeking £150,000pa – a fund of just under £4m. (paragraph 153). He pointed to their widely varying historical presentations, identified the husband's core spending from his Form E presentation of his future income needs, having stripped out non-recurring items, as being £136,700pa, and then pared down the wife's budget to a lower figure than that - £8,434pcm - £101,208pa. He found that that figure required significant reductions for her – including 60% off her claimed personal expenses, but also that it was affordable by the husband on the basis that he would only spend what on his case he needed – the unrealistic estimate of £5,000pcm including child maintenance – but that also he was satisfied that 'in reality there is room for a significant increase to his income.'

20. In other words, either the husband's initial budget was accurate, on the basis that more income could be made available as the SJE had found, or, if not, and the husband's evidence at trial both of lower income and income needs was accurate, then the figure ordered would still be affordable. All of this must be seen alongside the judge's findings about the husband's credibility, at paragraphs 54 and 55 of the judgment. He found:

'Every untruth created opacity and always it seems to lead to a reduction in asset value for H with a consequent depression of the claims for W. In my judgement it is not a coincidence, it has been a deliberate course of action to tell as little as possible, to avoid disclosing matters that were contrary to his case and to paint the picture as bleak as possible in respect of his business interests. That is the prism though which, in my judgement, I must consider his evidence and his proposals.'

21. In circumstances where the judge has made significant reductions in the wife's budget as presented, and has determined both that the husband's evidence as to his available resources could not be relied on, and that the amount of maintenance is proposed is less than the husband's own originally proposed rate of expenditure, as well as affordable on his own open case, I cannot see that the judge exceeded the broad ambit

of discretion allowed him in cases such as this in fixing the wife's income need at the figure which he did.

22. I also note that both parties were agreed that the wife's income claim was to be capitalised, such the husband would not be actually required to make ongoing provision for her from his received income on an ongoing basis. Whilst this would not justify an award based on an income level which exceeded the husband's ability to fairly meet it in the round, where he is as here in control of the amount he draws, and chooses to reinvest much of the profit of the businesses in the expectation of future reward, I find that the judge was quite entitled to alight on the figure which he did.

23. The grounds of appeal continue:

'The judge filed to take into account properly the actual evidence in relation to the wife's own earning capacity…her own evidence was that she could earn £20,000pa when working full time. The only minor child was 7, but the judge concluded (with no evidence in support) that this meant that the wife could earn nothing until the child was 17, due to childcare costs.'

24. What the judge had said, at paragraph 124, was:

'Any income she does receive will be taxed at higher rates because even on H's proposal she will have a Duxbury payment equivalent to £55,000pa. In my judgement prospects of her making any significant net contribution to her budget over the next 9-10 years is low and thereafter she will be a 50 year old woman with little work experience but will be able to earn something. In summary she probably has 15 years or so out of 40 or so when she can be expected to make a small post tax contribution to her budget.'

25. Later, he reduced the Duxbury award which he had provisionally calculated at £2.46m by £100,000 on account of the wife's earning capacity. Here, I accept that the reduction which the judge has included in the figures is a lower one than some other judges might have included. It is also the case that he was wrong to suggest that the wife's salary would be taxed as a top slice because of the receipt of a Duxbury sum. However, he has undoubtedly taken the wife's earning capacity into account, and has provided for specific deduction to the husband's obligations on account of that consideration. I will deal below with the overall question of the award in the context

of the assets in the case, and the judge's other findings, but here I am not satisfied that the reduction by reason of the wife's earnings is so far short of other judge's might consider appropriate that I should replace the judge's discretionary determination with my own.

26. Finally, under this head, ground 2 concludes as follows:

'The judge went on to capitalise the wife's £100,000 award. Despite having been repeatedly reminded of the relevant case law, to the effect that the longer the period over which the capitalisation was to provide for the less likely it was that the paying party would be required to maintain anything like the matrimonial standard. In this case the wife's life expectancy… was nearly 50 years. But the judge ignored this and capitalised the award at £100,000pa over the entire period.'

27. Here Mr Chamberlayne relies on the judgment of Roberts J in *Juffali v Juffali* [2016] EWHC 1684 (Fam), and cites to me that experienced judge's distillation of principle from paragraph 79 of her magisterial judgment. However, I consider that the consideration of earlier authority which preceded that paragraph in the judgment add necessary context. Her full exposition reads as follows:

75. The need to focus on the marital standard of living was confirmed by Moylan J in his recent decision reported as *BD v FD* [2016] EWHC (Fam) 594. In that case his Lordship was dealing with a "needs" based claim where the husband had personal assets of £58 million and interests in trusts worth a further £105 million. The wife in that case had accepted that, because of the non-marital provenance of the available wealth, her claims for a capitalised *Duxbury* fund should be assessed on the basis of her future needs as opposed to a share of the husband's existing wealth. Dealing with her income needs, Moylan J said this:

"91. …. In her oral evidence the wife was clear that she seeks a very different lifestyle and one which, in her view, is justified because the husband can afford it…."

And later,

"112. … ..the determinative principle in this case is that of need. When an application is being determined by reference to the principle of need the court will, obviously, have to assess the applicant's capital needs (housing and other capital items) and income needs (their annual living expenses). Further, if the latter are being met by the payment of a capital sum, the court will have to consider the period for which income needs, in fairness, should be met and the rate at which they should be made for the duration of or during that period.

113. Subject to first consideration being given to the welfare of minor children, the principal factors which impact on the court's assessment of needs are: (i) the

> length of the marriage; (ii) the length of the period, additional to (i), during which the applicant spouse will be making contributions to the welfare of the family; (iii) the standard of living during the marriage; (iv) the age of the applicant; and (v) the available resources as defined by section 25(2)(a).
>
> 114. In my view, the starting point for the assessment of needs is the standard of living during the course of the marriage. This was the view expressed by the Law Commission in its 2014 report, *Matrimonial Property, Needs and Agreements* (Law Com. No 343)(para 2.34/2.35) in respect of "very wealthy cases": "needs are still assessed primarily by reference to the marital standard of living". This does not mean that it is either a ceiling or a floor but, as Mr Howard agreed during the course of his submissions, it provides a benchmark or starting point against which to assess needs."

76. However, as Moylan J went on to state (correctly, in my judgment), a needs generated award calculated on the basis of a *Duxbury* multiplicand which reflects the former marital standard of living is not necessarily a complete answer in every case where the extent of the available resources makes such an award feasible. At paragraph 118 of his judgment in *BD v FD*, Moylan J said this:

> "The use of the standard of living as the benchmark emphatically does *not* mean that, as referred to above, in every case needs are to be met at that level either at all or for more than a defined period (of less than life). Often, as Baroness Hale said in *Miller v Miller; McFarlane v McFarlane* [para 158]: "The provision should enable a gentle transition from that standard [the marital standard of living] to the standard that she could expect as a self-sufficient woman." In *G v G*, Charles J said:
>
> > "[136] What I take from this guidance on the approach to the statutory task is that the objective of achieving a fair result (assessed by reference to the words of the statute and the rationales for their application identified by the House of Lords):
> >
> > (i) is not met by an approach that seeks to achieve a dependence for life (or until remarriage) for the payee spouse to fund a lifestyle equivalent to that enjoyed during the marriage (or parity if that level is not affordable for two households), but:
> >
> > (ii) is met by an approach that recognises that the aim is independence and self-sufficiency based on all the financial resources that are available to the parties."

77. It is equally clear that the marital standard of living cannot be assumed to be a "lodestar", as Mostyn J described it in his recent judgment in *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam), [2015] 2 FLR 1124. At paragraph 35, his Lordship said this:

> "It is a mistake to regard the marital standard of living as the lodestar. As time passes how the parties lived in the marriage becomes increasingly irrelevant. And too much emphasis on it imperils the prospects of eventual independence."

Whilst that observation was made in the context of a case where there were limited resources and where ongoing provision for monthly spousal maintenance was

required to meet needs, it is a general principle with which I wholeheartedly agree, as did Moylan J in *BD v FD.* In that case, his Lordship took the view that in the case of a very long 30-year marriage, where there were ample resources to meet the claim, the longer the length of the marriage and/or the periods over which the applicant spouse would be making ongoing contributions to the welfare of a child or children of the family, the more likely the court will decide that the applicant spouse's needs should be provided for at a level which is similar to the standard of living during the marriage.

78. The implications of a significant future period of ongoing contribution towards the welfare or care of a child of the family was neatly summed up by Holman J in *Murphy v Murphy* [2014] EWHC 2263 (Fam) when he said "the having of children changes everything" (paragraph 35).
79. Thus, what I collect from these decisions are the following principles:-

(i) The first consideration in any assessment of needs must be the welfare of any minor child or children of the family.

(ii) After that, the principal factors which are likely to impact on the court's assessment of needs are: (i) the length of the marriage; (ii) the length of the period, following the end of the marriage, during which the applicant spouse will be making contributions to the welfare of the family; (iii) the standard of living during the marriage; (iv) the age of the applicant; and (v) the available resources as defined by section 25(2)(a).

(iii) There is an inter-relationship between the *level* at which future needs will be assessed and the *period* during which a court finds those needs should be met by the paying former spouse. The longer that period, the more likely it is that a court will *not* assess those needs on the basis throughout of a standard of living which replicates that enjoyed during the currency of the marriage.

(iv) In this context, it is entirely principled in terms of approach for the court to assess its award on the basis that needs, both in relation to housing and income, will reduce in future in an appropriate case.

28. Whilst Roberts J was entirely right to collect those principles in the context of her case, the following may fairly be noted:

a. A future reduction in the level of need may be principled ‘in an appropriate case’; that does not mean that *in no case* where payments are to be calculated over a long period will a fixed lifetime Duxbury ever be appropriate.

b. As Moylan J made clear in *BD v FD*, in the case of a long marriage, where there were ample resources to meet the claim, the longer the length of the marriage and/or the periods over which the applicant spouse would be making ongoing contributions to the welfare of a child or children of the family, the more likely the court will decide that the applicant spouse's needs should be

provided for at a level which is similar to the standard of living during the marriage.

c. Here, the judge would have been entitled to consider that four of the five factors collected by Roberts J at [79ii] from Moylan J's earlier exposition would have pointed in the direction of a continuance of the marital standard, namely the length of the marriage, the length of time over which the wife would continue to support a minor child, the standard of living and the available resources. Only the wife's relatively young age would have pointed in the other direction.

29. In this case, the parties' youngest daughter was still 7 at the time of the trial, at the end of a 19 year marital relationship. As to the standard of living, the judge found at [164] that '*the wife's evidence about money being no object is certainly accurate since 2010, and that the parties had an excellent standard of living from then…*'. The judge referenced the husband's schedule of anticipated outgoings attached to Form E by way of confirmation, from which he was entitled to assume that the husband would be living at a higher rate than that which he was proposing to make available for the wife, having disregarded the husband's later reduction in his case as unrealistic. He also found (at [120]) that the husband '*can or should be able to increase his income significantly from the level that he has taken in the past'*, as discussed above.

30. Further, neither party had evidently prepared for the judge any calculation of an appropriate Duxbury based on a downward taper. Both had sought to justify their positions by reference to lifetime Duxbury calculations, even if Mr Chamberlayne did then urge on him authorities which highlighted the merits of a tapered solution. Having myself considered the impact that a reducing obligation might have made on the outcome, however, I have noted that:

a. Had a taper been applied to the figures produced by the income fund which the husband was then offering, and continues to propose before me, of £1.2m, it would have made little difference to the overall scale of what was being offered. That sum produces for the wife under the Capitalise programme £54,000pa on a straight line basis, but if a 25% discount is applied after age 70

– reducing the amount to be spent in retirement in today's money to just £43,000pa – the available income to be taken immediately becomes just £57,617pa. This is because the wife has more than 25 years until she reaches retirement age.

b. Had a taper of the same proportion and timing been applied to the income to be produced from the judge's figure of £2.36m (already slightly reduced to take into account the wife's notional income contribution), the amount now available would have increased from £95,984pa, to £102,948pa. So, even if such a taper had been applied, the available level of income for the wife would not have been of a significantly different order.

c. Whilst Mr Chamberlayne would no doubt argue that greater cuts could be made sooner, I must remind myself of the judge's findings generally, which led him to a needs based award at what I acknowledge was at the upper end of the discretionary scale. As it is clear that the judge could have deployed an appreciable taper to the wife's reasonable drawing from her fund, and still produced a lump sum award of the same magnitude as that which he ordered, that would not suggest that the judge's discretionary outcome is insupportable.

31. I also have to consider the judge's outcome in the round after this long marriage, and his award of a lump sum £3.6m, plus the modest pension share which I will deal with below, against an asset base of £12.3m, of which £3.575m, plus £280,000 in pensions, was matrimonial.

32. It can be seen that the judge's non-pension award equated to just over the entirety of the non-pension matrimonial assets, but to just under one third of the total value of the non-pension assets as he found them to be. This was not therefore an award made from largely non-matrimonial assets, nor one impacting disproportionately upon the husband's own available living standards going forward. The income figure on which he based his Duxbury calculations was firmly centred mid-way between the parties' rival contentions as to income need at the outset of the trial, and at a lesser level than he found that the husband was likely to spend based on his Form E presentation going forward. He took modest account of the wife's earning capacity, but in circumstances

that whilst she was then still approaching 41, she also had up to 15 years of likely future responsibility for a child in education, notwithstanding the length of the marriage.

33. It should also be remembered that the husband had not provided the judge with any assistance about his borrowing capacity, about which he was criticised in the judgment. The judge himself can hardly then be criticised for finding that the husband could raise the sum ordered within a reasonable period, and without expressing concern about the impact of raising such a sum on the husband's own living standards going forward. As the authorities have made clear, an appellate court is in no position to substitute its own discretion for that of the trial judge in the absence of clearly identified errors of principle, or findings that were simply not open to the court on the basis of the evidence before it. That is a significant hurdle.

34. In all of the circumstances, I am satisfied that I must dismiss the husband's appeal on Ground 2, on the basis that he has not demonstrated that the judge has produced an outcome that is not firmly within the discretionary boundaries afforded by the 1973 Act.

35. **The Pensions**. Ground 1 of the husband's appeal sets out that:

'*The judge made one award overall based on the wife's needs. However, he then went on to deal with the pensions in the case on a sharing basis, as if they were separate from the assessment of the wife's needs.*'

36. In his judgment, at [171], the judge said that:

'There seemed to be a measure of agreement about a pension share, but H was putting it forward as part payment of any lump sum. In my judgment pension assets fall into a separate category and should not be treated in this way.'

37. When this was raised post-judgment, the judge accepted that he had treated pension assets separately, and that the wife 'should have her modest sharing claim satisfied'. He continued that

'it will make practically no difference to the overall satisfaction of needs and is less as a pension share than either party was proposing'.

38. Whilst the judge did acknowledge that the husband was expressly arguing that any pension share for the wife should be included as a part of the calculation of her needs based award, he apparently overlooked the wife's own concession, buried in Footnote 10 to her counsel's trial note, that the amount of the Duxbury sum required to meet her needs, if that basis of assessment was found appropriate, should be adjusted if a pension sharing order were to be made. So, although it was correct that both parties were proposing a bigger pension share, both had accepted, even if the wife only *sotto voce*, that if the wife's award were to be determined on the basis of her needs, that pension would form a part of the asset base from which her needs would be met going forward.

39. I therefore have to consider whether in the circumstances his order can stand, both in relation to the pension share in relation to the husband's fund, and in the decision to disregard any pension income received by the wife from her own fund in the assessment of her own income need.

40. Both the judge, and Ms Harrison for the wife, argue that the amount concerned was sufficiently small that the fund 'makes no real difference to the overall financial package for the wife' – as articulated by the judge when refusing permission to appeal. I have already addressed earlier the relatively modest proportion of the overall asset base that the award formed, for the purpose of assessing the proportionality of the wife's needs determination. However, in my judgment this overlooks the principled basis upon which a sharing claim is computed. Such a claim is never reflective of need, but rather it is a computation of entitlement to share in assets generated during the marriage, or in the part of the value of those assets that reflects their matrimoniality. And that computation should not be conflated with any needs assessment, but rather be contrasted with it.

41. The reason for this was articulated by the Court of Appeal in *Charman v Charman* [2007] EWCA Civ 503, by Sir Mark Potter P, where he said at [73]:

> Then arises a difficult question: how does the court resolve any irreconcilable conflict between the result suggested by one principle and that suggested by another? …in cases in which it is irreconcilable, the criterion of fairness must supply the answer. It is clear that, when the result suggested by the needs principle is an award of property greater than the result suggested by the sharing principle, the former result should in principle prevail: per Baroness Hale in *Miller* at [142] and [144]... It is also clear that, when the result suggested by the needs principle is an award of property less than the result suggested by the sharing principle, the latter result should in principle prevail: per Lord Nicholls in *Miller* at [28] and [29] and Baroness Hale at [139].

42. The consequence of this distinction was then made clear in *Waggott v Waggott* [2018] EWCA Civ 727 by Moylan LJ, where he said at [131]:

> In my view it is clear from *Miller* and *Charman* alone that, as a matter of principle, the court applies the need principle when determining whether the sharing award is sufficient to meet that party's future needs. …there must be a means of determining whether, and if so how, the sharing award does or does not meet the applicant's needs. There is no suggestion that the question of needs for these purposes is to be determined by reference to a different need *principle*, or more broadly, by means of a different approach. Indeed, any other approach would be inconsistent with the observations made by both Lord Nicholls and Lady Hale, that there is no rule about where the court starts the exercise, and inconsistent with *Charman* (para 73) in which the sufficiency of the award by reference to the sharing principle is directly assessed by the award "suggested by the needs principle".

43. Thus, the 2 bases of assessment are separate and distinct, and cannot be applied to different classes of asset within the same outcome to an application for a financial remedy. Once an award has been calculated so that it meets the applicant's needs, there can be no principled basis for adding to it with additional sharing, if the applicant's sharing claim has already been determined to be of lesser value. The award then is likely to become unfair to the respondent, who is left making provision greater than the assessment on either individual basis. Once an applicant's sharing claim has been subsumed by their needs, small bits of the former claim cannot thereafter be resurrected to supplement the needs award.

44. Consequently, although the overall impact of the figures on the judge's overall award is slight, I am satisfied that the judge's decision to treat the pensions in this case as a separate species of asset, to be shared after the wife's needs claim had already been calculated and met from non-pension assets was wrong, and cannot stand. This has two consequences.

a. Firstly, the pension sharing order which the judge made in respect 26% of the husband's matrimonial pension will be set aside.

b. Secondly, the judge was wrong not to take into account the value of the wife's own pension amongst her own income producing assets in the case. This was especially so given his decision to calculate the lump sum payable on the basis of a lifetime Duxbury sum, so that any pension income would simply serve to augment the figures which he had calculated to meet her needs. However, notwithstanding the wife's relatively young age, I do not agree that the value of her pension should be considered gross for the purpose of any calculation, rather, adopting Mr Chamberlayne's alternative figures, and rounding, I will deduct the sum of £60,000 from the amount of the income fund which the husband must provide, so that the figure becomes £2.3m.

45. **Interest.** The judge dealt with this (Ground 3) most clearly in his clarifications post-judgment. Asked about the possibility of pro-rata reduction in periodical payments in the event of part payment of the award, he replied:

'H has given me no evidence as to how he would fund any payment and I have already indicated my dissatisfaction about that lacuna in his evidence. I have concluded that he has assets which can be sold, quite apart from a significant ability to raise capital through the bank which he himself must have believed was in excess of £2.3m. Anyway the first £1.25m (approx..) will do no more than provide W with capital to discharge her loan and buy a suitable property and will not provide her with any income'.

Then, asked whether interest was envisaged as well as continuing maintenance he said:

'Yes, for the reasons set out above. W will still need income while awaiting payment and the evidence does not indicate any reason why payment should not be made in accordance with the order.'

46. The judge had ordered periodical payments at the underlying rate of the Duxbury calculation - £8,333pcm – until the lump sum was paid. Thus, the wife had security for that part of the lump sum which provided for her maintenance; indeed, as the lump sum due would not reduce with late payment, any delay in payment of that element

would have provided greater than simple compensation to the wife, provided that the maintenance sums were received as ordered. This is because once received, the full sum would include provision for periods already covered by maintenance payments. In those circumstances, a court would not usually direct that, in addition to the continuing maintenance obligation until payment, interest payments on the income element of the fund would also accrue.

47. However, different considerations apply to the balance of the lump sum, intended to meet debt and provide a housing fund. Whilst Mr Chamberlayne made the point that the wife could until payment remain in the family home, and so could postpone use of her housing fund, the judge was certainly entitled to determine that interest should apply in the event of late payment of those elements of the fund. It would have been very unfair for the wife to have been left indefinitely waiting to move on because of the husband's late payment, with no sanction as to that element of the award. And in relation to the debt, whilst a part of the husband's obligation was to meet the interest charged up to the date of payment by the litigation funders, the judge was quite entitled to determine, especially in the absence of evidence that the husband could not make the payments in time, that late payment should attract separate interest on the balance of his obligation to the wife.

48. There is thus no sufficient merit in the appeal under Ground 3 insofar as it applies to interest on those elements of the award not intended to provide the wife's income fund. As to that final element, however, the issue is more finely balanced. The judge was certainly entitled to determine that there was no good reason why payment should be made late, as he did. However, in circumstances where (i) the monthly sum to be produced by the fund was already separately provided for until payment, where (ii) there was no provision for reduction of that maintenance level in the event of part payment, and where (iii) the amount due was also remaining static until payment, even though if paid late the initial payments that it was calculated to cover may have already been paid as maintenance, I have to consider whether that discretionary determination exceeded even the generous bounds permitted to the trial judge.

49. I am satisfied that it did. Even taking into account that the judge was entitled to exercise his discretion in light of his findings about the husband's evidence so as to go

as far as might be permissible in securing the wife's award, and providing appropriate sanction in the event of late payment, I am clear that interest in addition to maintenance and an irreducible fund goes beyond what is appropriate, notwithstanding the court's findings. I will therefore allow the appeal in respect of Ground 3 only in respect of that income element of the award.

50. The result of this will be that the interest, which the judge ordered in the event of late payment after the due date on 20 March 2024, should run on any part of the unpaid lump sum up to those amounts covering debt and housing, which should be deemed to be the first elements received in the event of any part payment, and the last element will be the income fund which will be in the adjusted figure of £2.3m, pursuant to my above determination in relation to the pension. There will be no pension sharing order.

51. In any event, I should add that I anticipate that this final element of the appeal will not in fact impact financially on either party, as the husband will pay the lump sum as adjusted when it falls due later this month.

52. I will leave it to counsel to produce a draft order reflecting my judgment, and will consider any submissions from them on the question of the costs of this appeal, in writing, to be exchanged and submitted please by 4pm on Friday 8 March 2024.

53. That is my judgment.