Neutral Citation Number: [2023] EWHC 2303 (Fam)

Case No: FA-2023-000140

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
On appeal from Mr Recorder Samuels KC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 September 2023

Before :

MR JUSTICE PEEL

- -

Between :

JOHN HARRY DITCHFIELD	**Appellant**
- and -	
SANDRA DITCHFIELD	**Respondent**

- -
- -

Stuart McGhee (instructed on a public access basis) for the **Appellant**
Tina Villarosa instructed (instructed on a public access basis) for the **Respondent**

Hearing date: 11 September 2023

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APPROVED JUDGMENT

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This judgment was handed down remotely at 10.30am on 20 September 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

Mr Justice Peel :

1. In this judgment I shall refer to the Appellant Husband as "H" and the Respondent Wife as "W".

2. Pursuant to permission granted on 27 June 2023, H appeals a final order made by Recorder Samuels KC, sitting in the Central Family Court, which was finally approved on 15 August 2023, although the terms were clear when permission to appeal was granted as the judge had given judgments dated 13 April 2023 and 6 June 2023.

3. On the judge's findings:

   i) The total net assets are £339,000.
   ii) W earns £40,000pa gross, and H's earning capacity is in the region of £150,000-£180,000pa gross.
   iii) On a clean break basis he divided the assets as to £211,000 to W (68%) and £128,000 to H (32%). W's share is liquid, and H's share illiquid.
   iv) W on those figure is able to buy a 2-3 bedroom property for not less than £350,000, requiring a mortgage of up to £157,000 which W established to the judge's satisfaction that she is able to obtain. H and his partner are able to continue renting until he is in a position to purchase accommodation.

   Additionally, and to my mind of some significance, the judge recorded that after separation H withdrew from his new business ventures via director's loan some £530,000 and that "…the lack of disclosure [H] has provided prevents clear identification of where that has gone". Upon me asking questions, I was told by H's counsel that after separation he paid the mortgage on the FMH and a rental property. The parties could not agree how much that was; W thought he paid a total of about £50,000 towards the mortgage(s) over the years since separation whereas H asserted nearer £150,000. I had no evidence on this, but it seems to me that even on H's case, he extracted getting on for £400,000 over 52 months which was used for his own purposes.

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).

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.

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)**.

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.

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."

9. The cautious approach to be adopted before interfering with findings of fact applies similarly to the evaluation of those facts and inferences drawn from them: **Fage UK Ltd & Anor v Chobani UK Ltd & Anor [2014] EWCA Civ 5**, at paras114 to 115.

The general background

10. At the time of trial in April/May 2023, W was 55 years old and H 49. They have two children aged 17 and 13. One lives mainly with H, and one with W. The marriage lasted from 2004 to 2019, some 15 years. H has a new partner with whom he lives and who earns about £80,000pa gross.

Intervenor

11. The reason for the judge delivering two judgments is that he first disposed of a claim by H's sister in respect of £100,000 provided by her to H in 2016 to assist in buying a new marital home for H and W ("London Property 2" as I shall term it), on the basis that the previous marital home ("London Property 1") would be retained as a rental investment. On her case, and that of H, she was entitled to a commensurate beneficial interest in London Property 1.

12. The judge made a number of clear findings; W knew nothing about the arrangement or the monies advanced; H was dishonest in his evidence; H had manipulated events, deceiving both W and his sister. In the end, the judge concluded that it was a loan, which he described as repayable but "soft" in the sense that H's sister will require the money, but probably not for some time. These were primary findings of fact by a

judge who had the benefit of seeing and hearing the totality of the case, and I see no reason to interfere with them.

13. The judge then adjourned the proceedings part heard to consider the s25 criteria in the light of those conclusions. He discharged the Intervenor. I am told that she was aware of this appeal, but has not attended, been represented, or communicated with the court about it.

The judge's findings about the parties

14. It is inescapable for H that the judge made a number of trenchant findings about his litigation misconduct, non-disclosure and general dishonesty. The judge considered H to be an unreliable witness, harbouring controlled anger towards W, and that the lack of disclosure was deliberate.

15. The judgment in the court below must be seen firmly in that light. The potential consequences of failure to disclose have been clearly set out in a series of cases summarised in **Moher v Moher [2019] EWCA Civ 1482.** The law is clear. The court is entitled, in the absence of full and frank disclosure, to draw adverse conclusions where appropriate, and to the degree of specificity or generality deemed fit. A non-disclosing party cannot complain if the lack of disclosure leads the court to make an order which by necessity is based on less secure foundations than the court would wish; that is the fault of the miscreant party. As Thorpe J (as he then was) said in **F v F [1994] 1 FLR 359**:

> "…if in consequence the obscurity of my final vision results in an order that is unfair to [the husband] it is better that than that I should be drawn into making an order that is unfair to the wife".

The resources as found by the judge

16. The judge analysed thoroughly the capital and income resources of the parties. He was right to do so, as there were clear disputes between the parties, and H was painting a bleak (and, as the judge found, dishonest) picture of his finances.

17. In broad terms, H has had a successful career as a financial adviser specialising in responsible investment. In 2019, at about the time of the marital break-up, he left his then employment with access to a client list taken in place of a £351,317 settlement payout. He started a new business, SSL Ltd., carrying out advisory work for one particular client. 65.1% of the shares were owned by H and W names (there were two or three other investors and interested parties) but clearly H was the operational driver.

18. The judge had before him written expert evidence dated December 2022 which valued the combined business interest of H and W at about £270,000 net. The valuation report recorded that the business had an operating profit of over £229,000 in the most recent accounting year. However, the valuer was informed by H that earnings from the principal client would end on 31 March 2023. The valuer carried out an alternative valuation on that basis at £92,000 net, it being left to the judge to determine value on one or other basis.

19. The judge at trial did not hear evidence from the valuer but had before him H's evidence as to the loss of this principal client. As recorded in the judgment, H produced no documentation from the client to this effect, and was unable to explain to the judge's satisfaction why the arrangement had come to an end. Such documents as H did produce were, as the judge put it, "carefully worded".

20. Apart from the opaque developments with SSL Ltd, H had set up in November 2021 a new company, ILFP Ltd., licensed by the Financial Conduct Authority in October 2022 to conduct regulated functions. H told the judge that the business had about 30 clients and manged funds of £5m. I note the judge's findings that H had not fully developed ILFP Ltd because of these proceedings and the possibility that to do so would assist W. Looked at in the round, it is clear that the judge considered that H's business interests across the board would continue as had been the case up to December 2022, or would restart if in fact income from the principal client had come to an end; in either case, not necessarily through SSL Ltd but through some other vehicle, including ILFP Ltd. The judge found that any apparent loss of income or diminution of business value at the date of trial was engineered by H. It follows that the judge viewed the business value in terms of the pre December 2022 performance and assessed the resources going forward by that metric, not by the asserted dip at the final hearing.

21. The judge found that H had historically been a high earner. From 2009 to 2014, his income ranged between £130,000 and £225,000pa gross. Although figures for his employment from 2014 to 2019 are not set out, it seems that his income then was in similar territory. His settlement figure on leaving his employer in 2019 tends to support that suggestion.

22. From 2019 onwards, the judge found that H had extracted from his businesses, principally through repayment of his director's loan account, about £530,000 (of which, as I have indicated, some was utilised for the mortgage on the family home). The judge concluded that "It is difficult to detect any real reduction in the Husband's standard of living since separation" and refused to accept H's case that his livelihood had disappeared or significantly diminished. He found that H had "deliberately reduced his earnings as they appear on paper and drawn down on his capital investment in the businesses with the intention of defeating W's claim". At the same time, as the judge also found, H terminated W's access to funds; she was summarily dismissed from her paid position as administrator for the companies, her access to his credit cards ceased, and he paid no maintenance, despite the fact that, as the judge found, W "was wholly financially dependent upon him prior to separation and had no access to any savings".

23. Weighing up the evidence, the judge concluded that the expert valuation in December 2022 at £270,000 net was a fair figure to take for the business resources.

24. He found that H's earning capacity is between £150,000pa and £180,000pa gross, to be derived from such business interests.

25. As for W's position, she has done little paid work during the marriage. Creditably, she has since separation retrained, and is now working as a Build Manager for a

design/architectural company earning £40,000pa gross with the prospect of increasing that figure to £55,000 in the next two years.

Assets

26. I tabulate the assets as follows, in accordance with the judge's findings:

i)	London property 1:	£110,000 net equity
ii)	London property 2:	£110,000 net equity
iii)	Rent in bank account:	£41,000
iv)	Business interest:	£270,000
v)	Husband pension:	£43,000
vi)	Wife debts:	-£50,000
vii)	Husband debts:	-£85,000
viii)	Loan from H's sister:	-£100,000
	Total	**£339,000**

The judge's decision

27. The judge concluded that W needs about £350,000 for a 2-3 bedroom property, and has a mortgage capacity of between £99,000 and £157,000. As for H, he too needs suitable accommodation. His partner can be expected to contribute from her income. The judge found that H is younger than W, has a greater earning capacity and will be able to purchase in a few years time. In the meantime, he and his partner have ample resources to rent property, as they are doing at the moment at £3,500 pm.

28. Having covered, as I see it, all the relevant factual territory, the judge then addressed in turn the s25 criteria. He concluded that H should be responsible for repaying the loan to his sister, given that W knew nothing of it and is in no position to meet all or any part thereof. He declined to make a 5-year spousal periodical payments order, as sought by W. He declined to make the order sought by H, under which the proceeds of the two London properties should be divided equally, H to retain the business interests. Instead, he divided the assets on a clean break basis as follows:

Wife

Proceeds of London property 1:	£110,000
Proceeds of London property 2:	£110,000
Rental monies:	£41,000
Less debts	-£50,000
Total	**£211,000**

Husband

Business interest net	£270,000
Pension:	£43,000
Debts	-£85,000
Loan from sister	-£100,000
Total	**£128,000**

29. That is a 62/38 split in W's favour. Clearly, H is left with the less liquid assets, as the judge recognised. It reflected, so it seems to me on reading the judgment, the following factors of particular relevance:

i) H's deficiencies in disclosure, his manipulative and dishonest approach in the litigation, and his deliberate downplaying of his resources.

ii) H's better prospects for the future. He is younger than W, has strong earning potential, and has a successful track record.

iii) H has the assistance of his partner who can contribute to their family household. This is not to say that she is responsible for W in any way, but it is reasonable to expect her to alleviate in part H's financial needs by making a full contribution to their joint economy.

iv) H's withdrawal of over £500,000 since about the time of separation. Even allowing for the mortgage payments, the total sum is at a level far above that which W was able to enjoy, and at a time when W was left financially stranded by H. It seems to me that in so doing, H was able to benefit from significant resources unavailable to W. The case was not put on a formal **Vaughan** addback basis. To do so would have been unrealistic given that the money was simply not there; it cannot be recreated as Mostyn J pointed out in **BP v KP and NI [2013] 1 FLR 1310**. But it is plainly a relevant factor in this case and, in my judgment, compellingly so.

30. H's submission on appeal is that the £100,000 loan repayable to H's sister should be deducted from the proceeds of the properties and therefore attributed to W's side of the balance sheet. W would thereby exit with £100,000 less, and H with £100,000 more, specifically:

i) Wife: £111,000
ii) Husband: £228,000.

31. I turn to the individual grounds of appeal. Although I reach these at the end of this judgment, I make plain that they have been at the forefront of my mind throughout.

Ground 1: the judge erred in assessing the attributable value of H's company interests

32. Given that the judge did not accept H's evidence about the businesses, his apparently diminished earnings and the stated loss of client income, he was, in my judgment, entitled to reach a conclusion aligned with the expert report as at December 2022. Thereafter, as the judge expressly concluded, any alleged downturn (which in itself was not accepted by the judge) was for forensic presentational purposes. It was clearly open to the judge to adopt what he found to be a real figure rather than a deliberately depressed one. Net profits justified the valuation as at December 2022. The judge found that H engineered a depressed financial presentation by the time of trial in 2023. Inferentially, he concluded that once the proceedings are over the status quo ante will be restored. The judge was in my view clearly entitled to take a value, in the light of all the evidence which he saw and heard, of what his business interests (not necessarily in SLL Ltd but in their entirety) are or will shortly be. It is artificial to take, as H urges upon me, the moment of least value chosen on a self-serving basis by H. It seems to me that the judge, although making a specific finding as to company value on a snapshot basis, was essentially making a finding as to resources available to H either now or in the foreseeable future. Even if SLL Ltd was by the date of trial not trading, the judge clearly found that through that or some other medium, H would essentially pick up where he left off. There is no justification for interfering with his

conclusions. In the end, it is a matter for the court to determine value, and resources, and the judge did so.

Ground 2: The judge's evaluation of H's income and earning capacity was based on speculation and against the evidence presented.

33. H submits that it was not open to the judge to reach the conclusion which he did as to H's earnings/earning capacity. I do not accept the submission. Essentially, I am being asked to dismantle the finding made by the judge. I do not consider that there is a solid basis upon which to do so. An assessment of earning capacity is straightforward in many cases. Often, the court will simply assume the continuation of existing, secure employment with a fixed income. At the other end of the scale, the court may need to undertake a less precise exercise which is a mixture of fact finding and evaluation, within the context of the overall circumstances, and underpinned by judicial experience and a sense of that which is realistic and achievable. Where strongly adverse findings are made against a party which are directly relevant to the issue, the court will be astute to detect a deliberately understated case. That is what has happened here. The judge concluded that H had been deceitful throughout, and downplayed his resources and prospects in order to diminish W's case. The judge alighted upon a figure which was consistent with the past history of earnings, which is frequently the best guide for the court. It cannot in those circumstances be surprising to H if the court, looking at this case with realism, concluded that his prospects are far better than claimed.

34. It is suggested also that the repayment of director's loan was wrongly treated as income. I understand the point that such repayment does not necessarily mean that the business has generated profits at that level, but I am confident this experienced judge was alert to the difference. The wider point being made by the judge was that H felt willing and able to make such substantial withdrawals despite his protestations of deteriorating income. The picture, as the judge found it, was of H minimising his resources, whereas his actions and lifestyle pointed the other way. In any event, the bulk of the withdrawals were made at a time when the business had a healthy turnover and operating profit.

35. Finally, there is no substance in the suggestion that the judge ignored a possible tax liability of £60,000 to HMRC. On the contrary, it is firmly included in the figure for H's indebtedness set out above. The judge's point was that H may find a way to reduce that liability which is his calculation rather than a demand by HMRC; his eventual net position may in fact be better than as set out above, but the judge did not proceed on the assumption that it would be better.

Ground 3: The judge erred in attributing the soft loan liability, owed to the Intervenor, in the sum of £100,000, entirely upon the Appellant

36. The judge concluded that this loan was repayable but soft, such that time for payment would likely be permitted. Given that all this took place behind W's back, without her knowledge or consent, it is not unreasonable for the court to require H to repay the monies to his sister. It is important to view this specific ground within the entirety of the s25 exercise. In a sense, regardless of who is formally responsible for the loan, or how it is accounted for, the real question for me is whether the division of assets alighted upon by the judge was so unfair to H as to justify appellate reversal. In my

judgment, taking into account all the matters referred to in this judgment, and in the judgment of the judge below, it is not.

Ground 4: The judge was wrong in failing to provide for the only available cash asset, as held by [the agents], to be applied to the continued mortgage costs of the FMH pending sale.

37. The judge decided that pending sale each party should pay 50% of the mortgage, rather than pay the monies from the rental account. That seems to me to be well within the scope of reasonable judicial discretion, particularly in the light of the findings about H's false presentation, and there is no basis to interfere.

Ground 5: the judge's asset assessment, and subsequent division consideration, was wrong in equating the value within the company with the value of the property

38. This submission relies upon the line of authority, originating in the famous decision in **Wells v Wells [2002] EWCA Civ 476** which draws a distinction between illiquid, less easily realisable assets bound up in a company, and liquid, copper bottomed assets such as real property (I have been referred to **CO v YZ [2020] EWFC 62**, as an example of the application of the **Wells** jurisprudence**)**. There is nothing in his judgment to suggest that the judge was unaware of this well-known approach, which is likely to be very familiar to someone of his experience. On the contrary, he correctly refers to the business interest as being essentially the income producing vehicle and guarded against the risk of double counting. In any event, I consider that this factor is outweighed by the overarching matters to which I refer below.

Ground 6: The judge failed to properly consider, or at all, the rehousing needs of H and unfairly prioritised and elevated W's needs over those of H, despite H having the care of the children to a greater extent than W

39. There is a dispute between the parties as to whether the bald assertion by H that the children spend more time with him is correct, but it matters little as the judge found that their housing requirements are similar. It is not correct to assert that the judge did not consider H's needs: he plainly did so within the judgment. He reached the conclusion that W needs the liquid capital to rehouse in purchased accommodation with the benefit of a mortgage. H, by contrast, will need time to rebuild his resources so as to buy a property, but the judge found that with his earning potential he will be able to do so. In the meantime he and his partner can rent, and have ample income to pay for reasonable rented accommodation. I would only add that although it is generally desirable in financial remedy cases for each party to be able to own a property, with the attendant benefits of security and potential investment upside, it is not an iron rule. It will all depend on the facts. In this case it is not possible to do so at this stage. The judge was entitled to decide that W needs the preponderance of the assets for that purpose, and H will in due course reach that position, but is securely housed in the meantime.

Matters referable to all grounds of appeal

40. In my judgment, each ground of appeal must be looked at individually but also compositely and in the context of the case as a whole. Ultimately, so it seems to me, the question for this appellate court is whether the split of 62/38 in favour of W, on the basis that H's share is much less readily realisable, is sustainable. In looking at the case in the round, I take the view that H has only himself to blame for the findings

made against him. His deficient disclosure, and manipulative litigation conduct, inevitably exposed him to the sort of findings and evaluation undertaken by the judge. All the relevant circumstances fell to be seen through that prism. To that I would add that H's extraction of perhaps £400,000 of funds from about the time of separation onwards does not entitle him complain now that his share of the assets is less, and less liquid, than W's. Some of that may well have been applied toward basic living expenses. For example, I was told that he paid £2,500pm towards the rent of £3,500pm he shares with his partner. But looked at in the round, in my judgment H had the sole benefit of sums measured in hundreds of thousands of pounds, which easily match or exceed the difference on the judges' findings between W's net outcome of £211,000 and H's of £128,000.

41. In my view, this experienced judge very carefully considered all the evidence over a number of days of the trial. His judgment is clear, logically structured and fully reasoned. His findings of fact are unimpeachable, and his evaluative decision is firmly within the range of reasonable judicial outcomes available to him.

Other matters

42. During submissions two additional matters arose (a third was resolved after the parties, unbeknown to me but sensibly, sought clarification direct from the judge):

i) The order requires H to repay his sister the £100,000 in a specified timeframe. In my judgment, the timeframe should be deleted. H is required to indemnify W in the order, but beyond that it is a matter for him and his sister to reach agreement about the time and manner of repayment. The judge made no finding that such a timeframe was agreed between H and his sister, and he noted that she had not sought to enforce payment directly. I will delete that specific provision.

ii) The clause requiring H to pay 50% of the mortgage pending sale of London Property 2 is intended to operate by way of clean break but omits the all-important s28(1A) provision. I am confident this was an oversight.

43. The appeal is dismissed save in respect of items 44(i) and (ii) above; the order shall be amended to reflect these changes. Any stay pending the appeal is lifted.