Neutral Citation Number: [2021] EWCA Civ 72

Case No: B6/2019/3030

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT
SITTING AT BRISTOL
HIS HONOUR JUDGE BROMILOW
SO16D02805

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2021

Before:

LORD JUSTICE LEWISON
LORD JUSTICE MOYLAN
and
LORD JUSTICE NUGEE

- -

Between:

Tessa Finch	**Appellant**
- and -	
Barry Baker	**Respondent**

- -
- -

Mr M Evans QC (instructed on a direct access basis) for the **Appellant Wife**
Mr C Hyde QC (instructed by **Goodman Ray Solicitors**) for the **Respondent Husband**

Hearing date: 16th November 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am 28th January 2021.

Lord Justice Moylan:

1. The wife appeals from the order made on 18 November 2019 by His Honour Judge Bromilow ("the Judge") allowing her appeal from the final financial remedy order made on the husband's application by District Judge Watkins ("the District Judge") on 9 January 2019. The Judge reduced the lump sum awarded to the husband from £814,000 to £733,650 (respectively £630,000 and £550,000 net after payment of capital gains tax) and reduced the husband's pension share from 48.6% to 34%.

2. The effect of the Judge's order was that the wife retained approximately 73% (£1.58 million) of the non-pension assets plus the balance of her pensions which consisted almost entirely of her BBC pension (with a Cash Equivalent value at the date of the hearing before the District Judge of approximately £2 million). Although to differing extents and for differing reasons, both the District Judge and the Judge considered that this significant departure from an equal sharing of what the District Judge had found were matrimonial assets was justified.

3. For the reasons set out below, I would dismiss the wife's appeal. The only issue which has troubled me is whether we should allow the wife's appeal in respect of the pension share effected by the Judge's order. I have concluded that, in the circumstances of this case as described below, we should not.

Background

4. The husband is now aged 69 and the wife 57. They met in 1990, started living together in 1991 and married in 1993. They have two children, twins, born in 2011. The parties separated in 2012/2013 when the husband left the former matrimonial home. The wife and the children remained living there while, by the date of the hearing before the District Judge, the husband was living as a lodger in a friend's property. The husband has not sought to have any real contact with the children since the separation.

5. The wife has, for many years, worked for the BBC. The husband has not worked for some time. The extent to which he was employed during the marriage was an issue between the parties.

6. The wife issued a petition for divorce in 2016.

Proceedings

7. The husband commenced his financial application in 2017. As referred to above, the District Judge determined this application on 9 January 2019. This followed the only hearing at which the court heard any oral evidence because the subsequent appeal to the Judge was a review rather than a rehearing. I propose, therefore, to summarise the findings made by the District Judge.

8. The parties' financial resources were as follows.

9. The wife's income from the BBC was approximately £160,000 per year gross, £90,000 net. At the date of the hearing, the wife was off work because of ill-health. The District Judge found that it was "highly likely" that the wife would be made redundant when she returned to work. She believed that she might receive a

redundancy payment in the region of £95,000 but did not know whether there would also be a contribution to her pension. In fact, the wife's redundancy has not yet taken place. We were told during the hearing that she has received formal notice and will be made redundant with effect from September 2021.

10. The wife had approximately £55,000 in various accounts, part of which was a "sinking fund to deal with any problems with the (investment) properties" referred to below. She had debts of nearly £9,000.

11. In addition, the wife had a private pension with a CE value (Cash Equivalent value) of £13,000 and a very substantial BBC pension. As set out in a pension report obtained for the purposes of the proceedings, this had an estimated CE value of £1.9 million as at 13 October 2017. The District Judge, however, took the value at the date of the hearing before him as being approximately £2.1 million.

12. The husband's state pension was approximately £7,000 gross per year. He had a private pension with a CE value of £12,000, which produced an annual income of approximately £900. He had debts of about £66,000 which comprised mainly "a legal fees loan and a credit card loan".

13. The parties jointly owned a number of properties, including the former matrimonial home, the values of which were set out in an agreed schedule. The former matrimonial home had a net value of approximately £220,000 (£1 million gross with a mortgage of £750,000). The other investment properties had a combined net value of £1.95 million (after deducting costs of sale and capital gains tax of just under £370,000). The combined net total was £2.17 million.

14. A report was obtained in respect of the parties' pensions. It was dated 12 March 2018 and, as expressly stated in the report, the calculations in it were "based on the gross benefits as at October 2017". The report also made clear its limitations. The author noted that he did not have details of the wife's "tax liability for being in excess of the annual allowance" and that the calculations could be updated if this was provided. There was also reference to the lifetime allowance in respect of which the expert was asked only one question, namely as to the effect of a pension sharing order on the wife's "potential tax liability". It was also noted that "CEs are quite volatile" and attention was drawn to the fact that, in the event of a pension sharing order being made, "if the CE is different at the time of implementation then the amount that [the husband] will receive [will] also [be] different". It was further stated that, because of the nature of the BBC scheme (specifically that the wife's pensionable salary is capped), "any pension sharing order is likely under normal circumstances to reduce the pension accrued to date by a higher proportion than the percentage that is stated in the pension sharing order".

15. The pension report contained a schedule setting out the effect of each 1% pension share, giving the gross annual pension income which the husband would receive "immediately" (based on annuity rates) and the gross annual pension which the wife would receive at ages 60 and 65.

16. The wife's case before the District Judge was that the husband should receive a pension share of £600,000 which would provide him with a capital sum of £150,000 and an income of £28,500 (in addition to his other income). Apart from this, all the

parties' assets should be transferred to her and she would indemnify the husband in respect of capital gains tax payable on the transfers. The husband's case was that he should receive a lump sum of £900,000 and a pension share of 48.6%.

17. It is apparent from the District Judge's judgment that two significant issues raised before him by the wife were the husband's conduct and, what she claimed was, the imbalance between their respective contributions. As a result, "much of the oral evidence was focused" on these. In respect of conduct, although the District Judge "accepted what the wife says about the husband's behaviour towards her", he was "not satisfied that this should be reflected in the adjustment of the parties' finances". As to contributions, the District Judge found that the husband had made a "modest" contribution during the marriage and that the "burden of the care of the children will rest upon the wife for many years into the future". He concluded that the "significant factor in this case is the issue of contributions, both past and future".

18. The District Judge assessed the parties' respective capital and income needs. He was critical of both parties' asserted needs. He rejected the husband's proposed housing need and concluded that the wife's income needs were "something of a wish list".

19. The District Judge found that all the parties' non-pension assets were matrimonial property and also found that the wife's BBC pension "was generated during the marriage". However, he decided that, in respect of the non-pension assets, a significant departure from equality was justified to enable both parties to meet their needs and awarded the husband a lump sum of just under £814,000 (being 37.5% of the non-pension assets). In contrast, in respect of the pensions, the District Judge decided that it would be unfair "other than (to) make an order that provides to the parties the same income in retirement". This required the husband to be awarded a 48.6% share of the wife's BBC pension. Based on the schedule in the pension report, the latter would provide the husband with an immediate gross annual pension of £32,000, with the wife's pension at age 60 being just under £33,000. The District Judge concluded that this division of the parties' assets would enable them to meet their respective needs, including those of the children.

20. The wife applied for permission to appeal from the District Judge's order, advancing six grounds. Roberts J gave permission only in respect of four of these. She refused permission to the wife to appeal in respect of the grounds headed "Conduct" and "Contributions". By the former, the wife sought to challenge the District Judge's decision, in effect under section 25(2)(g) of the Matrimonial Causes Act 1973 ("the 1973 Act"), that it was not inequitable to disregard the husband's conduct. By the latter, the wife challenged the District Judge's assessment of the husband's contributions and contended that the District Judge's finding that the husband "had made a 'modest' contribution was wrong" and that he should have found that the husband's "contribution was significantly negative". Although Mr Evans QC, as referred to below, sought to re-argue matters related to conduct and the extent and nature of the husband's contributions in this appeal, he is not entitled to do so as a result of Roberts J's decision.

21. Roberts J gave permission in respect of grounds headed "Pension", "Date of Calculation", "Welfare of Children" and "Needs". In some respects, these grounds overlapped: in substance, they raised three points. First, the wife argued that the District Judge had failed to take into account the fact that the value of her BBC

pension and of "the properties" had increased since the parties had separated and that it was "unfair, illogical and wrong" to award the husband "the benefit of these increases". Secondly, the wife contended that the District Judge's order failed properly to reflect her greater financial needs (which included those of the children) and, as a result, failed to give due weight to the welfare of the children. As formulated in the grounds, it was argued that the order "wholly fails to recognise" that there "was a vast disparity in current and future needs of the parties, not least because of the obligations to the children". Thirdly, the issue of needs was raised specifically in respect of the pension sharing order which was said to have ignored "the vastly different obligations and liabilities of the parties particularly with respect to the" children. It was also suggested that the pension sharing order "ignored the age difference between the parties" and, as a result, that to award the husband such a large share of the BBC pension was an "inefficient use of resources".

22. It is important to note that no application was made for permission to adduce further evidence for the purposes of the appeal to the Judge. Further, it is relevant to note this exchange which took place at the permission hearing before Roberts J, in the course of the post-judgment discussions:

> "**Mrs Justice Roberts**: Well, I do not think that the substantive appeal should be delayed beyond September of this year. There is no application for permission to produce fresh evidence. I do not think you need fresh evidence in this case, it is all argument there is going to be no oral evidence.
>
> **Mr Evans**: Yes."

It can be seen that the question of fresh evidence was thus clearly flagged at the outset of the appeal from the District Judge. Inevitably as a result, the order made by Roberts J on 13 March 2019 contained no provision for further evidence. I mention this also because, during his submissions to this court, Mr Evans sought to suggest that a "request" made by the wife early in 2019, for the pension report to be updated, had been refused. It is clear that no formal application was made to the court.

23. The parties exchanged settlement proposals following the grant of permission to appeal. The husband proposed that the lump sum be reduced to £774,000 (less a sum in respect of capital gains tax) and the pension share to 40%. The wife proposed that the husband should receive a lump sum of £435,000 (based on her assessment of his needs excluding his debts) and a pension share from her BBC pension which would give the husband an annual gross income of £22,000. I return to the effect of the wife's pension sharing offer below.

24. The wife's appeal came before the Judge on 27 September 2019. The wife had still made no application in respect of fresh evidence. There was some discussion between the Judge and Mr Evans relevant to this issue. The Judge asked Mr Evans whether he was being asked to exercise his discretion on the basis of the evidence before the District Judge. Mr Evans said that he was. A little later in the transcript this exchange took place:

> "**Judge Bromilow**: But you are not asking me to receive any further evidence.

Mr Evans: No, I am not asking…"

The Judge was, therefore, required to determine the appeal on the basis of the existing evidence including the pension report.

25. In his judgment of 4 October 2019, the Judge reduced the lump sum award to £774,000 which, after payment of capital gains tax estimated at £184,000, would leave the husband with approximately £590,000. At the outset of his judgment, the Judge calculated that this would leave the wife with assets (apart from her pensions) worth £1.2 million net but, as demonstrated by Mr Hyde QC in his skeleton argument for this appeal, the net value of the properties retained by the wife would, in fact, be £1.58 million. The amount referred to by the Judge did not reflect the fact the properties were worth £2.17 million *after* the payment of estimated capital gains tax (of £370,000) and that the husband would be paying half of this. I would also just say that the Judge's reference to the wife retaining £1.2 million was clearly a slip because, later in his judgment, he noted that, under the District Judge's order, the wife retained non-pension assets of £1.356 million.

26. The Judge also reduced the husband's pension share to 34% based, as I have said, on the evidence available to him and in accordance with what he understood to be the share which the wife had offered.

27. The Judge varied the District Judge's award because he considered that it did not sufficiently reflect the wife's contributions to the welfare of the children and her and the children's future needs. The Judge decided that the husband required no more than £590,000 to enable him to meet his capital needs. He considered that the wife's "proposal of a pension sharing order of 34% … is both fair and realistic". This would provide the husband with £22,280 per year gross in addition to his state pension and his private pension income, which after payment of tax and child support, would enable him to meet his income needs. This division of the assets would enable the wife to remain in the former matrimonial home which was in the best interests of the children. If the wife redeemed the mortgage on that property, her "further capital will be needed to meet the requirements of the children during the likely period of employment/income uncertainty" and to supplement her pension income from the age of 60. The Judge clearly considered that this was a fair distribution of the parties' assets which would be sufficient to enable them to meet their needs within the constraints imposed by the extent of the available assets.

28. Following receipt of the Judge's judgment both Mr Evans and the wife sent what were said to be requests for clarification. The wife's appears, in all, to comprise 27 pages. She sought to raise a number of issues including in respect of the proposed pension share, capital gains tax, "Property valuations" and a number of points about the proposed "Distribution of Capital". Mr Evans' request also raised a number of issues. No formal application was made to admit fresh evidence but both requests proposed that an updated report should be obtained from the pension expert because his report was "significantly out of date". In his request, Mr Evans submitted that this report was required "to demonstrate how the court's intention to provide" the husband with the proposed income of £22,280 "can be accurately achieved".

29. In his response, the Judge referred to the "various emails and written documents" he had received and said that, having "considered the materials provided", he had

concluded that they were not a request for clarification but "a critique of the judgment and an attempt at further argument" which were "not permissible". Although not expressed in these terms, the Judge clearly decided that it was too late for further evidence to be adduced.

30. During the course of the hearing of this appeal, Mr Evans told us that he had told the Judge, during the course of the hearing below, that the pension report was "out of date". This is not borne out by the transcript. First, in the course of his submissions, Mr Evans referred extensively to the report and made clear that he was not "going behind" it or seeking to put "any gloss on anything" said in it. Secondly, as referred to above, Mr Evans accepted in response to questions from the Judge that he was not asking the Judge to receive any further evidence and accepted that the Judge's discretion "must be exercised on the basis of the evidence that was before the district judge". Thirdly, Mr Evans commended the wife's offer to the Judge, an offer which was, as referred to below, based on the evidence in the expert report.

31. The only point at which Mr Evans raised a query was in his submissions in reply when he suggested that the Judge should "not define a percentage in the judgment of the pension fund" but should determine what income the husband should have and then the pension share could "be calculated by the pensions themselves … at the time that the calculation is made". As the husband's then counsel, Mr Miller, pointed out in response, the legislation does not permit this approach to be adopted. When making a pension sharing order, the court is required to specify "the percentage value to be transferred" *in* the award: section 21A(1)(B) of the 1973 Act.

32. One issue raised during the course of the hearing of this appeal was whether, as submitted by Mr Evans, the Judge had misunderstood the effect of the wife's pension offer, in particular what pension share it proposed. I do not think he did. It is clear that her offer was based on the effect of the percentage shares set out in the schedule in the expert's report. The offer referred to an annual income for the husband of £21,250 as representing "a 32% pension share of my BBC pension". It also stated that the wife's offer of a pension share "amounting to £22,000" per year would reduce her annual gross BBC pension to £44,745. These, and other, figures were all derived from the schedule. Further, the schedule set out that, to provide the husband with an immediate pension of £21,625 and the wife, from the age of 60, with £44,745 gross per year, would require the husband to receive a pension share of 33%. Finally, in the course of the submissions made by the husband's then counsel, he submitted that the wife's offer was equivalent to a 34% pension share. The Judge took the latter figure, which had not been challenged by Mr Evans in his submissions in reply but, in any event, the difference between 33% and 34% was immaterial.

Appeal

33. There are 11 Grounds of Appeal. They are diffuse. Among other matters, they seek to challenge the Judge's assessment of the parties' respective needs and assert that the Judge either failed to evaluate the net effect of his order or undertook an evaluation which was "seriously flawed and wrong". They contend that the Judge misunderstood the wife's pension sharing offer (as referred to above), failed to take into account tax liabilities in respect of the wife's BBC pension (the annual allowance charge and the lifetime allowance charge) and calculated the pension share in "reliance on out of date pension sharing figures" which meant that the order was

"wrong by a substantial margin" which the Judge had "declined to correct". The Judge is also said to have failed to deal with the "Date of Calculation" ground of appeal, namely that the District Judge had failed to take into account the fact that the values of the wife's BBC pension and of the parties' properties had increased since the parties had separated. The Grounds also seek to raise issues relating to the husband's conduct and the effect of his "negative contributions".

34. Following the grant of permission to appeal, King LJ gave directions dealing with the wife's application for permission to file an updated pension report. I note that neither the Appellant's Notice nor the grounds of appeal contain any application for permission to adduce fresh evidence. It appears that, at some stage, an informal application was made to which King LJ's most recent response was as follows:

> "… given the shortness of time prior to the hearing, the Court will permit the Appellant to obtain a report on the basis of her proposed letter of instructions. The Court will consider the report de *bene esse* in the first instance and will hear and consider any submissions from the Respondent as to which part or parts of the report should or should not be taken into account by the court in determining the appeal."

35. Very shortly before the hearing (which had been adjourned first from March and then from October 2020), the wife provided certain documents which were said to comprise the updated pension report dated 9 November 2020. In fact, they also included evidence from chartered financial planners dealing with the potential tax charges in respect of the wife's BBC pension (related to the annual and the lifetime allowances). The wife has no permission to file such a report. It also emerged during the hearing that a schedule of the purported effect of "Various percentage pension sharing orders" had been prepared not by the pension expert, as it appeared, but by the wife. This was plainly not acceptable.

36. The report from the pension expert, as previously, contains a schedule of the estimated effect of each 1% of value of the wife's BBC pension transferred to the husband by a pension sharing order (from 1% to 78%). It also states that the CE value of the pension, as at 9 September 2020, is £2.7 million.

Determination

37. As referred to above, as part of his case Mr Evans sought to raise the husband's conduct and the nature and extent of his contributions on the basis that they are "indivisible", are part of "the history of the case" and that the court cannot "ignore the effect" of the husband's conduct and his negative contributions.

38. With all due respect to Mr Evans, this was a hopeless submission. Roberts J refused the wife permission to appeal on these grounds and it is simply not open to her to seek to reargue them in this appeal. As was made clear in *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 the relevance of conduct is to be determined in accordance with the provisions of section 25(2)(g) of the 1973 Act. As Lord Nicholls said, at [65], it cannot alternatively be brought into account "under the guise of having regard to all the circumstances of the case"; see also Lady Hale at [145] and Lord Mance at [161]-[164].

39. Equally, it is clear that, as submitted by Mr Hyde, to seek to allege that one party has made a "negative contribution" is also no more than an attempt to argue conduct under a different guise. Wilson J (as he then was) described the expression "negative contribution" as an "unhelpful oxymoron" and made clear that, if a party sought to assert that the other party had behaved in a way which it would be inequitable to disregard, the allegation should be put in those terms, namely under section 25(2)(g): *W v W* [2001] Fam Law 656. This was endorsed in *Charman v Charman (No 4)* [2007] 1 FLR 1246, at [72], by Sir Mark Potter P giving the judgment of the court:

> "[72] The inquiry required by the principle of sharing is, as we have shown, dictated by reference to the contributions of each party to the welfare of the family (s 25(2)(f)); and, as we make clear in para [85], below, the duration of the marriage (the other half of s 25(2)(d)) here falls to be considered. Also conveniently assigned to the sharing principle, no doubt dictating departure from equality, is the conduct of a party in the exceptional case in which it would be inequitable to disregard it (s 25(2)(g)). Mr Singleton argued to the judge that the husband's generation of substantial wealth was not only a special contribution on his part to the welfare of the family but conduct which it would be inequitable to disregard. We think, however, that it is as unnecessarily confusing to present a case of contribution as a positive type of conduct as it is to present a case of conduct as a negative or nil type of contribution: see *W v W* [2001] Fam Law 656."

40. I next deal with the challenge to the Judge's assessment of the parties' respective needs and the contention that he either failed to evaluate the net effect of his order or undertook an evaluation which was "seriously flawed and wrong".

41. As set out above, the District Judge found that all the assets in this case comprised marital property. I can see an argument, certainly in respect of the wife's BBC pension, that this might not be right because part of the pension had accrued since the parties separated. However, once the District Judge had determined that conduct was not a relevant issue, the determinative principle in this case was that of needs not sharing. I say this because it is clear that the assets were no more than sufficient to meet the financial needs of the parties and the children, determined at a level having regard to the relevant section 25 factors, and there was no scope for the application of the sharing principle. It is, therefore, difficult to see how there was much scope for other issues to have any significant impact on the outcome.

42. I also consider that, despite Mr Evans' sustained submissions, there was no basis for the Judge interfering with the District Judge's criticisms of the wife's asserted needs. A judge is well able to assess a party's income needs without, as Mr Evans suggested, them being subject to detailed cross-examination. The wife's needs had clearly been put in issue by the husband (as referred to during the hearing before the Judge) and a judge is well-placed to assess what is achievable and what is fair without any such, frankly often banal, cross-examination.

43. It is clear that the Judge took into account the parties' respective needs when determining what order to make. Although the Judge expressed his conclusions

succinctly, they are not very surprising given that the wife had effectively offered the pension share which the Judge ordered and that the lump sum award gave the wife £155,000, or 7% of the non-pension assets, less than she had offered. Indeed, in his written submissions for the hearing before the Judge, Mr Evans had expressly submitted that the wife's offer "is a good starting point for the Court". Further, as Mr Hyde pointed out in his submissions, the wife's offer made no provision for the husband's liabilities which, by the date of the hearing before the Judge, amounted to about £115,000.

44. Accordingly, I reject the wife's contention that the Judge's evaluation of the parties' respective needs and the net effect of his order were flawed. The Judge's assessment of the husband's capital and income needs was one which was plainly open to him. The Judge can be seen to have considered the wife's housing and income needs and determined that she would have sufficient resources to meet them. He expressly considered both the period between her ceasing to be employed by the BBC and when her BBC pension would start (at the age of 60) and the subsequent years. As he said, she would have sufficient capital to redeem the mortgage on the former matrimonial home and "to meet the requirements of the children" with her "further capital" and her income resources. That the wife's "further capital" will be £580,000, rather than the figure taken by the Judge of £200,000, makes the wife's attempt to challenge the Judge's conclusions even less meritorious.

45. I, finally, turn to the pension share. This is the only issue which, in one respect, I have not found it easy to determine. I have found it difficult because, on a *simple* analysis, if the updated pension report is admitted, it can be argued that the order made by the Judge does not achieve what he considered it would achieve. This is because a pension share of 34% would provide the husband with a greater income than £22,280. This in part reflects the greater CE value which the pension now has, and would have had at the date of the hearing before the Judge, and because the income the husband will receive has been calculated by the expert on the basis of annuity rates which will typically improve as the husband's age increases.

46. I say, in one respect, because I do not consider it would be right to admit any new expert evidence relating to the other tax issues raised by the wife in respect of the annual and the lifetime allowances. The wife referred to the annual tax allowance charge in her offer, made for the purposes of the appeal to the Judge, and there were passing references to this and the lifetime allowance in the expert's report (as referred to above) but neither featured as an issue in the proceedings below. In particular, as submitted by Mr Hyde, at no stage during the hearing before the Judge was any reference made to, or an analysis of, the effect on the wife of the pension tax charges. There was only a passing reference made by Mr Evans to the annual tax charge when he was taking the Judge through the wife's offer. There was no expert evidence on the effect of the tax charges and there had been no application for such evidence at any time during the course of the proceedings until *after* the Judge had provided his draft judgment. It was too late to raise that at that stage of the proceedings and it is, clearly, far too late to seek to raise it in this appeal.

47. I would also add that the potential effect of the tax consequences, in particular in respect of the lifetime allowance, on the wife's financial resources is not entirely clear. It would require also consideration of the effect of the wife's redundancy taking place later than was clearly anticipated during the proceedings below. One

consequence has been a significant increase in the CE value of the wife's BBC pension. Further, the tax consequences of the lifetime allowance will be reduced as a result of the implementation of a pension sharing order. Accordingly, there is, in my view, nothing in the further evidence provided by the wife which demonstrates with any degree of clarity that these factors would impact significantly on the Judge's assessment of the husband's income needs or, in particular because of the increase in the value of the pension, the Judge's conclusion that the wife would be able to meet her and the children's needs on the basis of his award. There is, in summary, nothing which would warrant this court permitting this part of the case to be reopened.

48. It is axiomatic that the issue before us is whether the Judge's decision was wrong or was unjust because of a serious procedural or other irregularity. In substance, this depends on whether he should have permitted further evidence to be adduced from the pension expert when requested to do so in response to his draft judgment. Whilst I acknowledge that he could have decided to permit the further report to be obtained, he was certainly not obliged to do so. Ultimately, I am not persuaded that his decision not to do so has been shown to be wrong. Simply expressed, in the circumstances described above, it was open to the Judge to decide that it was too late.

49. Rule 30.12 of the Family Procedure Rules 2010 provides as follows:

> "(1) Every appeal will be limited to a review of the decision of the lower court unless –
>
> (a) an enactment or practice direction makes different provision for a particular category of appeal; or
>
> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
>
> (2) Unless it orders otherwise, the appeal court will not receive –
>
> (a) oral evidence; or
>
> (b) evidence which was not before the lower court.

As referred to above, no application was made for the court to "receive" any further evidence prior to the hearing before the Judge. I have also addressed above the issue of whether the question of further pension evidence was raised during the hearing before the Judge. To repeat, Mr Evans accepted, in response to a comment made by the Judge, that his discretion "must be exercised on the basis of the evidence that was before the district judge" and, in his submissions in reply, only suggested that the pension trustees might themselves determine the pension share.

50. There was no attempt to invoke the court's power to receive further evidence until *after* the Judge had distributed his draft judgment. Both Mr Evans and the wife personally then sought to persuade the Judge that further evidence should be obtained because, as the wife said, "the 34% share you propose" to provide the husband with

an income of £22,280 "will actually deliver a significantly higher income because the pension sharing figures you looked at were significantly out of date".

51. It is relevant to note that, in every case, there will be some delay between the court making a pension sharing order and the order being implemented. The order is implemented by the "person responsible" for the pension, typically the pension trustees or managers, and it is that person who specifies the day on which the relevant pension credit and debit will be created, namely the "valuation day". By section 29(7) of the Welfare and Reform Pensions Act 1999, this is "such day within the implementation period for the credit under subsection (1)(b) as the person responsible for the relevant arrangement may specify by notice in writing to the transferor and transferee". Section 34 of that Act defines the "implementation period" as being:

> "the period of 4 months beginning with the later of —
>
> (a) the day on which the relevant order or provision takes effect, and
>
> (b) the first day on which the person responsible for the pension arrangement to which the relevant order or provision relates is in receipt of —
>
> (i) the relevant documents, and
>
> (ii) such information relating to the transferor and transferee as the Secretary of State may prescribe by regulations."

52. As set out in the Pension Sharing Annex, which must be included as part of the substantive financial remedy order:

> "THIS ORDER TAKES EFFECT FROM the later of
>
> a. the date on which the Decree Absolute of Divorce or Nullity of marriage is granted, or the Final Order of Dissolution or Nullity of civil partnership is made;
>
> b. 28 days from the date of this order or, where the court has specified a period for filing an appeal notice, 7 days after the end of that period;
>
> c. where an appeal has been lodged, the effective date of the order determining that appeal."

The first is because, as with other final financial remedy orders, a pension sharing order cannot take effect until the decree has been made absolute: section 24B(2) of the 1973 Act. The latter two provisions derive from regulation 9 of The Divorce etc. (Pensions) Regulations 2000 (SI 2000/1123):

> "(1) No pension sharing order under section 24B or variation of a pension sharing order under section 31(11) shall take effect

> earlier than 7 days after the end of the period for filing notice of appeal against the order.
>
> (2) The filing of a notice of appeal within the time allowed for doing so prevents the order taking effect before the appeal has been dealt with.

53. The result is that there will inevitably be some delay, and possibly an extensive delay, between the date of the pension sharing order and its implementation. As a result, depending on its form, the order may well have a different effect to that assumed by the court. Further, as pointed out in the expert's report, the pension trustees (or person responsible) will recalculate the CE value when implementing the order with the result that the value is likely to be different to that used when the court made the pension sharing order.

54. These factors point, generally, against allowing an appeal simply on the basis that a pension sharing order made by the court will, as implemented, not have the same effect as that assumed by the court on different figures and at a different time. This is another example of the court's powers under the MCA 1973 being exercised in a broad, discretionary manner and not necessarily with the expectation of achieving mathematical precision.

55. In the present case, I have concluded that, having regard in particular to the procedural history of the appeal to the Judge as set out above, he was entitled to reject the request that further evidence be obtained from the pension expert. I repeat that the issue of further evidence had been raised expressly by Roberts J at the permission hearing and by the Judge during the course of the appeal hearing. On both occasions, the court was told that no further evidence was being sought *and* it was expressly accepted before the Judge that his discretion, when reviewing the District Judge's decision, "must be exercised on the basis of the evidence that was before the district judge". The issue of further evidence was not raised until after his draft judgment had been provided. How, in those circumstances, can the Judge's decision be said to have been wrong?

56. The substantive argument advanced on behalf of the wife is that the Judge's order did not achieve what he considered it would achieve. I acknowledge that, as referred to in paragraph 45 above, on a *simple* analysis of the updated pension report, if it was admitted in evidence, it could be argued that the order made by the Judge does not achieve what he considered it would achieve. However, the first thing to note is that, as submitted by Mr Hyde, on the evidence available to the Judge, it did achieve what he intended to achieve. The second is that the Judge's substantive financial award was made in the context of the evidence and the parties' respective cases as advanced before him at the hearing. If the Judge had acceded to the wife's request to adduce further evidence from the pension expert, there is then the further question of what the effect of that evidence would have been on the Judge's substantive determination. It would have addressed only *one* aspect of the financial picture and would have demonstrated that there were more resources available. What would the Judge have done in response to this? This raises questions that we are not in a position to answer save that, in my view, it does *not* necessarily follow that the Judge would not have reviewed his proposed award more broadly. If the available resources have increased, even in just this one respect, the Judge would have been entitled to reconsider the

parties' respective needs and his proposed distribution of the assets. Further, the property valuations would by then also have been "out of date".

57. In the above circumstances, as I have said, I have concluded that the Judge's decision not to admit further evidence was one which was open to him and which has not been shown to be wrong. As referred to above, I acknowledge that the Judge could have decided to do so. I do not propose to address, more generally, the principles applicable in such circumstances because the submissions we received focused only on the facts of this case. All I would say is that parties should not expect a judge to permit further evidence to be adduced at such a late stage of the proceedings, particularly following an appeal. This would be to introduce some form of rolling litigation which would be contrary to the interests of justice. However, I recognise that there may be circumstances in which a judge might be justified in permitting additional evidence to adduced. For example, in my experience, sometimes further tax advice might be required to ensure that the order is structured in a tax efficient manner and/or to establish the tax consequences of the award proposed by the judge although I would expect these issues to have been identified in advance rather than after the conclusion of the hearing.

58. For the avoidance of doubt, I should also deal with the issue of whether this Court should give permission to the wife to admit the new report from the pension expert. The simple answer is that there is no justification for doing so at this very late stage of the proceedings. If, as I have decided, the Judge was not wrong not to do so, there is no basis on which this Court could now give permission.

59. Finally, I should also make clear that I reject other aspects of the case as advanced on behalf of the wife by Mr Evans. During the course of his submissions he suggested that, rather than a pension sharing order, the court should have considered making some other form of order, such as an attachment order or alternative capital provision. This was not the way in which the case was advanced below and there is no reason why these alternatives should be considered now by this Court.

60. There is also no merit in his submission that the Judge failed to address the "Date of Calculation" issue. In essence, this was an argument that part of the value of the assets was not marital property because it reflected increases in value which had occurred since the parties separated. In this case, this was an irrelevant issue because the outcome was dictated by needs which completely subsumed any argument there might otherwise have been as to whether any part of the wealth represented marital property.

61. Similarly, there is no merit in the suggestion, also advanced on behalf of the wife, that the hearing before the Judge was in some way rushed or shortened. Again, it is clear from the transcript that both parties had more than sufficient time to make their respective submissions which were not curtailed in any way by the Judge. In fact, without any pressure from the Judge, the hearing concluded at 1.15 pm.

LORD JUSTICE NUGEE:

62. I agree.

LORD JUSTICE LEWISON:

63. I also agree.