IMPORTANT NOTICE

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

Neutral Citation Number: [2022] EWFC 79

IN THE FINANCIAL REMEDIES COURT
SITTING AT BRIGHTON

Date: 12th July 2022

Before :

HHJ Farquhar

- -

Between :

X	**Applicant**
- and -	
C	**Respondent**

- -
- -

Gavin Howe for the **Applicant**
The Respondent in person (assisted by a McKenzie Friend

Hearing dates: 11th & 13th April 2022

- -

JUDGMENT

HHJ Farquhar :

1. This is an application for financial remedies by the Applicant Wife against the Respondent Husband. The Applicant was represented at this final hearing by Mr Howe of counsel and the Respondent represented himself but was assisted throughout by a McKenzie Friend. This is a case in which the capital either just meets the needs of the parties or is not sufficient to meet the needs of the parties depending upon decisions that are made in terms of the needs of each of the parties and what assets are to be considered for distribution.

2. The matter has been listed before myself due to the fact that a matter came out of my list and I was able to hear it 3 months earlier than a District Judge as set out in the body of the judgment. The case is published following the guidance provided by the President of the Family Division in which it is stated that each Family Judge should aim to publish 10% of their judgements. There is also a lack of reported Financial Remedy cases other than those that involve individuals that are either wealthy or extremely wealthy and this case does not fit into such categories.

Factual Background

3. The Applicant is aged 46 and is a Senior Nursing Sister working 28.7 hours per week and earns £35,143 gross per annum. The Applicant is also in receipt of Universal Credit in the sum of approximately £1,300 every 4 weeks and Child Benefit of £140.60 every 4 weeks. There is also child maintenance paid by the Respondent. The Applicant is presently living in rented accommodation together with the 7 year old child of the parties and her three daughters from her previous marriage who are aged 19, 17 and 13 years old. The eldest of those daughters is currently at University and resides with the Applicant out of term time and will also be spending considerable time whilst she is undertaking her placements for her degree. These children also spend 50% of their time with their father in the previous former matrimonial home held in the joint names of the Applicant and her first husband.

4. The Applicant has significant debts which she states have been amassed primarily to pay for the costs of the litigation between the parties. This encompasses these Financial Remedy proceedings but also the Children Act proceedings which are still ongoing. These debts include £36,347 on credit cards, £7,626 loans from banks and £33,358 loans from friends and family. The costs attributable to the Financial Remedy application are stated to be £22,612, of which £16,966 have been paid, leaving a shortfall of £5,646 still to be paid. It is stated that there has also been a shortfall form her income to meet her outgoings which has caused an increase in liabilities.

5. The Respondent is aged 50 and works in IT with a gross income of £70,400pa. He continues to reside in the former matrimonial home together with two of his children from a former marriage who are both in their twenties and in full-time employment.

At present the child of the parties has no contact with the Respondent, although, as stated, there are continuing Children Act proceedings on this issue. He also has a daughter from his first marriage who is aged 22 and is living independently with her partner. The Respondent sets out his liabilities as £11,645.04, the largest part of this is comprised of a bank loan in the sum of £9,061 which he states was used to clear a joint debt. It appears that the Applicant accepted in her oral evidence that this loan was raised to fund a joint overdraft.

6. The parties met in March 2012 and commenced cohabitation in October 2012 before marrying in Spring 2013. The former matrimonial home was purchased in June 2013. The parties separated in October 2019 when the Applicant left the property to live in a confidential address, having made allegations of domestic abuse against the Respondent. Those allegations have not been referred to within these proceedings nor have any allegations that were raised within the Children Act proceedings. I have not taken such issues into account for the purposes of this judgment.

7. The Respondent filed a petition in October 2019 and obtained Decree Absolute in the spring of 2020. The Applicant commenced these proceedings in February 2020 which were not issued until June 2020. A First Appointment was listed in September 2020. At that stage the lists were still being triaged by myself as they were all being held remotely and upon reviewing the file it appeared that neither party had filed their Forms E which caused me to vacate the hearing. In fact, the Applicant had filed a Form E but the Respondent had not. Following the orders of the court the Applicant filed further Forms E but the Respondent did not file his document until 11th June 2021. The Respondent states this was because he had never been served with the relevant documents. The FDR was heard by a Deputy District Judge in the summer of 2021. No settlement was achieved but directions were made including further questionnaires, statements dealing with conduct, valuations and updating disclosure and s.25 statements. The matter was listed for a final hearing before a District Judge in April 2022.

8. The Applicant filed an application in which it was stated that the Respondent had not complied with the orders made in July 2021. That application was heard by myself in November 2021 at which I made further directions. At that hearing I noted that a case that had been in my diary had recently settled meaning there was presently availability in my diary to list this matter in January 2022 and ordered that the hearing in April 2022 be vacated and the matter listed before myself. The Applicant agreed to the matter being brought forward but the Respondent objected stating that there would be insufficient time to prepare for such a hearing. I made the order and the Respondent sought permission to appeal that decision. I refused permission to appeal, and the Respondent pursued the matter but Arbuthnot J refused permission to appeal on the basis that it was “totally without merit”.

9. The final hearing was due to be heard before myself in January 2022. The parties had filed their section 25 statements and the Respondent had provided written questions for me to put to the Applicant in compliance with the ground rules made in relation to special measures for the Applicant. However, that hearing did not take place as the Respondent sent an email to the Applicant's solicitors on the day before the hearing was due to commence timed at 16:44 stating that he had tested positive for Covid 19 and he enclosed the email he had received from NHS Covid 19 notification which was timed at 14:56. This was due to be an attended hearing.

10. An order was made adjourning that hearing to April and the costs of the hearing were reserved pending the outcome of the Respondent's PCR test. That test was negative. The matter then came to hearing on 11th and 13 April 2022 before myself. The Applicant provided the electronic bundle for the January hearing which totalled 355 pages. The documents that were produced following that hearing including valuations which had not previously been available, the PCR test result, the order of that hearing and an updated case summary and schedule of assets as required within the Efficiency Statement were all added to the bundle taking the total pages to 400. The Respondent made a complaint to the solicitors acting for the Applicant in relation to the size of the bundle, it being greater than permitted pursuant to PD27A as well as the order made by myself. He sent an email on 8 April 2022 stating that he requested an adjournment of the final hearing "to allow sufficient time for the bundle to be made fully compliant and to enable the proceedings to be do disposed of justly". I stated to the Respondent that a pragmatic approach was required and continued with the hearing.

11. In preparing for this hearing, I have read all of the relevant documentation including the s.25 statements of the parties. The only oral evidence came from the Applicant and Respondent. In compliance with the ground rules ordered previously, the Applicant was provided with a separate waiting area and screens were provided in court. I asked all of the questions of the Applicant which were prepared by the Respondent in advance.

12. The Assets

13. The parties have prepared an ES2 setting out the assets. Those of significance are:

- The former matrimonial home valued at £500,000 with a mortgage of approximately £230,000 leaving a net figure of £245,000 - £258,000 depending on the precise mortgage figure and any early redemption penalty. This property is in the sole name of the Respondent.
- The property owned by the Applicant and her first husband with equity of £85,000 to £105,000 depending on the precise valuation and whether CGT should be taken into account.

- The Woods – valued at £45,000, which the Respondent states has been gifted to his son.
- The Applicant's pension with a cash equivalent of £230, 835
- Various vehicles and number plates which the Applicant states are owned by the Respondent with a total value at £35,000 but which the Respondent states have been gifted to his son and have a much lower value.

14. Open Offers

15. The Applicant proposes that the former matrimonial home is sold and the Respondent would receive £50,000 with the remainder being paid to the Applicant. Each party would retain all other assets in their possession and there would be an order for nominal spousal periodical payments until the child ceases full-time education.

16. The Respondent proposed that each party retain their assets and he would pay a lump sum of £25,000 within 3 months. This would be on a clean break basis. In his closing submissions he amended this to an immediate lump sum of £15,000 together with a further £500pm for 5 years to make the total up to £45,000 without affecting any Universal Credit claim.

17. The Law

18. The law to be applied within a Financial Remedy claim was helpfully set out by Peel J in the recent case of **WC v HC 2022 EWFC 22** and I can do no better than set it out in full:
"The general law which I apply is as follows:
i) As a matter of practice, the court will usually embark on a two-stage exercise, (i) computation and (ii) distribution; ***Charman v Charman [2007] EWCA Civ 503.***
ii) The objective of the court is to achieve an outcome which ought to be "as fair as possible in all the circumstances"; per Lord Nicholls at 983H in ***White v White [2000] 2 FLR 981****.*
iii) There is no place for discrimination between husband and wife and their respective roles; ***White v White*** *at 989C.*
iv) In an evaluation of fairness, the court is required to have regard to the s25 criteria, first consideration being given to any child of the family.
v) S25A is a powerful encouragement towards a clean break, as explained by Baroness Hale at [133] of ***Miller v Miller; McFarlane v McFarlane [2006] 1 FLR 1186.***
vi) The three essential principles at play are needs, compensation and sharing; ***Miller; McFarlane****.*
vii) In practice, compensation is a very rare creature indeed. Since ***Miller; McFarlane*** *it has only been applied in one first instance reported case at a final*

hearing of financial remedies, a decision of Moor J in ***RC v JC*** ***[2020] EWHC 466*** *(although there are one or two examples of its use on variation applications).*
viii) Where the result suggested by the needs principle is an award greater than the result suggested by the sharing principle, the former shall in principle prevail; ***Charman v Charman.***
ix) In the vast majority of cases the enquiry will begin and end with the parties' needs. It is only in those cases where there is a surplus of assets over needs that the sharing principle is engaged.
x) Pursuant to the sharing principle, (i) the parties ordinarily are entitled to an equal division of the marital assets and (ii) non-marital assets are ordinarily to be retained by the party to whom they belong absent good reason to the contrary; ***Scatliffe v Scatliffe*** ***[2017] 2 FLR 933*** *at [25]. In practice, needs will generally be the only justification for a spouse pursuing a claim against non-marital assets. As was famously pointed out by Wilson LJ in* ***K v L*** ***[2011] 2 FLR 980*** *at [22] there was at that time no reported case in which the applicant had secured an award against non-matrimonial assets in excess of her needs. As far as I am aware, that holds true to this day.*
xi) The evaluation by the court of the demarcation between marital and non-martial assets is not always easy. It must be carried out with the degree of particularity or generality appropriate in each case; ***Hart v Hart*** ***[2018] 1 FLR 1283****. Usually, non-marital wealth has one or more of 3 origins, namely (i) property brought into the marriage by one or other party, (ii) property generated by one or other party after separation (for example by significant earnings) and/or (iii) inheritances or gifts received by one or other party. Difficult questions can arise as to whether and to what extent property which starts out as non-marital acquires a marital character requiring it to be divided under the sharing principle. It will all depend on the circumstances, and the court will look at when the property was acquired, how it has been used, whether it has been mingled with the family finances and what the parties intended.*
xii) Needs are an elastic concept. They cannot be looked at in isolation. In ***Charman (supra)*** *at [70] the court said:*
"The principle of need requires consideration of the financial needs, obligations and responsibilities of the parties (s.25(2)(b); of the standard of living enjoyed by the family before the breakdown of the marriage (s.25(2)(c); of the age of each party (half of s.25(2)(d); and of any physical or mental disability of either of them (s.25(2)(e)".
xiii) The Family Justice Council in its Guidance on Financial Needs has stated that: "In an appropriate case, typically a long marriage, and subject to sufficient financial resources being available, courts have taken the view that the lifestyle (i.e "standard of living") the couple had together should be reflected, as far as possible, in the sort of level of income and housing each should have as a single person afterwards. So too it is generally accepted that it is not appropriate for the divorce to entail a sudden and dramatic disparity in the parties' lifestyle."

*xiv) In **Miller/McFarlane** Baroness Hale referred to setting needs "at a level as close as possible to the standard of living which they enjoyed during the marriage". A number of other cases have endorsed the utility of setting the standard of living as a benchmark which is relevant to the assessment of needs: for example, **G v G [2012] 2 FLR 48** and **BD v FD [2017] 1 FLR 1420**.*
*xv) That said, standard of living is not an immutable guide. Each case is fact-specific. As Mostyn J said in **FF v KF [2017] EWHC 1093** at [18];*
"The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise".
*xvi) I would add that the source of the wealth is also relevant to needs. If it is substantially non-marital, then in my judgment it would be unfair not to weigh that factor in the balance. Mostyn J made a similar observation in **N v F [2011] 2 FLR 533** at [17-19]."*

The Issues as to the Assets

19. There are a number of issues which the parties have each raised in their statements and oral evidence which I do not intend to comment upon within this judgment. This does not indicate that I did not take note of those issues, but simply that I have not considered that it was necessary to make findings on such matters in order to reach just conclusions in this case.

20. There are a number of issues in relation to the assets upon which findings are required:
    - How should the former matrimonial home be considered;
    - How should the Court consider the Wife's previous matrimonial home;
    - Should certain assets be considered as still in the ownership of the Husband;
    - The pension in the Applicant Wife's name;
    - The Mortgage Capacity of each party;
    - Litigation Conduct.

21. The Former Matrimonial Home.

22. It is submitted by the Respondent that he provided the deposit of £80,000 for the property which came from his divorce settlement from his previous marriage. This is accepted by the applicant. The Respondent urges the court to consider this as a premarital contribution and also that there has been significant growth on that original investment which should also be taken into account. The Respondent calculates that the growth on the deposit would mean that the deposit is now worth £113,510 and that this should not form part of the matrimonial assets.

23. The reality is that in a needs case such as this the court needs to take into account all of the assets, but it is accepted that the premarital contributions made by either party cannot be ignored. However, the matrimonial home is considered somewhat differently to other assets as it has a unique place within the parties' relationship (per **Miller/McFarlane)** and is almost always considered as a matrimonial asset. There can be no question in a 'needs' case such as this of the Court being able to 'ring-fence' any asset as pre-marital and not considering it for distribution between the parties.

24. It is further noted that there is a disagreement in the schedule of assets (the ES2) as to the relevant mortgage. The applicant states it should be £226,930 whereas the Respondent claims the correct figure should be £232,908. I note that the mortgage figure at May 2021 was in the sum suggested by the Respondent and as this is a repayment mortgage amounting to £1,115 per month it is difficult to see how the mortgage would still be at the same level as one year ago. The lower figure seems to be the correct one. The respondent also includes an early redemption penalty of £6,987. If there is such a penalty and the property is required to be sold then naturally that will have to be taken into account but I have yet to see any evidence in relation to that figure.

25. The Applicant's First Matrimonial Home.

26. This is a property which is still in the name of the Applicant and her first husband. The Applicant states that this is due to the fact that the three children off that marriage spend half of their time with their father and half of their time with the Applicant. The only way that this could take place was if her first husband was able to retain their jointly owned property as he would not have been able to afford to obtain alternative accommodation. At the time of her separation from her first Husband the Applicant moved in with the Respondent and consequently her housing needs were fully met.

27. The Respondent makes the argument that the Applicant has diverted funds away from the matrimonial assets and towards her previous matrimonial home as she continued to contribute to the mortgage on that property. It was put by the Applicant that she paid £100 per month towards this property throughout her second marriage but the Respondent disputes this figure and says that it was nearer £200. It does not seem to me that this difference has any impact upon the decision that needs to be made in this case and is symptomatic of the Respondent's approach to every single issue. There must be some proportionality applied to the issues that need to be considered by this Court.

28. It must be right that this asset is taken into account as an asset in the Applicant's name as, if it had been realised at the time the parties purchased the matrimonial home, then the Applicant would have been able to make a significant contribution towards the purchase and she was not able to do so as her assets were still tied up within her

original matrimonial home. To that extent the argument put forward by the Respondent in relation to the deposit that he paid for the former matrimonial home is somewhat stronger than it would be in other cases.

29. A further point made by the Respondent is that the claim that the Applicant makes in relation to capital gains tax relating to her original former matrimonial home is not one which should impact upon the Respondent. In oral evidence he said: “that is not my problem”. His argument is that if it was sold when the Applicant and her original husband first separated then there should be no capital gains tax and he should not be financially impeded by that decision. However, I am satisfied that the decision not to sell that property was a reasonable one bearing in mind the needs of the three children of that family and that the Applicant should not be criticised for that decision. The respondent also raises an issue as to the calculation of the capital gains tax claiming that it does not include the annual exemption allowance which presently stands at £12,300. I have not seen the calculation for capital gains and cannot comment but clearly the applicant would be expected to mitigate the tax to the fullest extent possible which would need to be calculated as at the time the property is sold and the gain realised. For the purposes of this judgement I am satisfied that the correct figure to take into account would be in the region of £90,000 equity depending upon the CGT calculation.

30. Finally, in relation to this property there is the question as to when the Applicant is going to be able to realise her interest. At present the property is occupied by her first husband and her 3 daughters (for half of the time) and the Applicant has considered that this was appropriate ever since she vacated that property in 2012. Her youngest daughter is presently aged 13. In her oral evidence the Applicant stated that she had discussed financial settlement with her first husband on separation but they had not discussed it since and that as their youngest daughter was 13 it is unlikely that they are going to be able to do anything for 8 years. The Applicant did add that if and when she was in a position to buy a property then she would have a discussion with her former Husband and he may be able to cohabit and buy her out.

31. The reality is that the evidence points to the position that the Applicant is not going to be realising her interest in this property any time in the foreseeable future. She has been living in rented accommodation for over two years now and states that she is only just able to make ends meet, yet she has not suggested at any time that any pressure should be placed for this property to be sold. There is simply no evidence to suggest that this will change at any point in the near future. The finding is that this asset, which is certainly pre-marital, by definition, will not be realised any time soon and the Applicant will not be able to utilise it to assist in the purchase of any alternative property at present.

32. **Husband’s assets he states have been gifted to his son**.

33. The Applicant states that the Respondent still has the benefit of certain assets which he claims have been transferred to his son. The most valuable of these assets is an area of woodland which has been valued at a figure of £45,000 by a firm specialising in woodland sales. The Respondent disputes this figure, but I am content that this is a figure upon which the Court can rely.

34. The Respondent did not include this area of woodland within his Form E. The reason for that is set out in his reply to questionnaire in which he states that the woods were purchased in 1999 and were retained by him in his divorce settlement with his first wife. He adds that "*I orally gifted the woods to my eldest son on 31st March 2013 and told him it would need registering at the Land Registry. I confirmed this in writing on 16th September 2017.The woods are not my asset.*" There is no reference to the woods within his s.25 statement. In the Applicant's s.25 statement, it is stated that the verbal transfer referred to by the Respondent was the day before these parties were married and that his son had just turned 17. The written evidence which is in the form of a letter dated 16th September 2017 was witnessed by an individual who has subsequently died. This was the same date that the Applicant had gone to the Police in relation to allegations against the Respondent. Further, the property remains registered in the name of the Respondent as at the date of this hearing.

35. In his oral evidence the Respondent stated that he had gifted certain items away as the Applicant had been to the Police to make allegations and he had seen someone for advice and transferred these assets away as he wanted to do so. He added that a family member had also advised him to dispense with his assets to ensure that they were not included within the marriage break up and that "*I am entitled to give things away to my son.*"

36. It is not necessary or appropriate to spend a great deal of time on this issue as the evidence is overwhelming. The only decision that can be reached is that the Respondent is still the legal and beneficial owner of the woods in question. I have to be satisfied of this issue to the civil standard. That is to say 'on the balance of probabilities' (more likely than not) and the onus of proving this is upon the Applicant. I am so satisfied. The reasons for reaching such a conclusion include the following:

- The suggested transferee was a minor at the date of the original purported transfer and is not able to legally own land save for by trust and the Respondent does not suggest that any trust was set up;
- The contract for land must be evidenced in writing and the document that has been produced is at best scant;
- The dating of the original purported transfer (day before wedding) and the written document (day that the Applicant went to the Police making allegations against the Respondent) are at least suspicious;

- The Respondent openly accepts that the reason for transfer was to avoid the property being considered within these proceedings;
- If the Applicant had made an application to set aside any purported transaction pursuant to s.37 matrimonial Causes Act 1973 (and no criticism is made of the lack of application as it would not have been a proportionate act) it would have been successful. This is notwithstanding that the 'transfer' took place more than 3 years prior to the application. This simply means that there is no presumption that the intention was to defeat the claim, but the Respondent has made it abundantly clear that this was the intention behind the transfer and as such the test would have been satisfied.
- The woodland is still in the registered ownership of the Respondent and it does not appear that any steps have been taken to alter that position.
- No evidence has been provided by the suggested recipient of this gift.

37. The other assets which the Applicant alleges should be included within the Respondent's assets are a couple of personalised number plates and some vehicles/motorbikes. The Applicant has provided 'valuations' of similar vehicles and number plates and claims that they are worth a total of £35,000. The Respondent repeats the position in relation to these items as with the woodland, namely that they were gifted to his son on 16th September 2017. He also disputes the value of many of the items. I do not intend to repeat the issues set out above in relation to these items but would simply add the following points:
    - In relation to one of the number plates the Respondent stated that he is not the owner as it is owned by the Ministry for Transport!;
    - He accepted that the number plate is still on his vehicle but he would provide it to his son whenever he wants to have it – he added that there is no need to transfer it into his son's name as the act of giving does not require a transfer;
    - The Respondent gifted a vehicle to his son but he accepted that the V5 is till in his name. He added that the V5 is not proof of ownership but just who is the registered keeper;
    - None of the V5s for the vehicles were in his son's name;
    - The vehicles were still stored by the Respondent.

38. As with the land, the evidence is overwhelming that the Respondent still maintains ownership and control of all of these items, and they are to be credited to his name for the purposes of this hearing. The evidence of the Respondent was simply not credible and not supported by a single document. I am satisfied on the balance of probabilities that these items are all owned by the Respondent.

39. The Respondent disputed the values ascribed to these items by the Applicant but has provided no evidence of his own as he has always disputed ownership. He further adds that he has not been able to challenge the figures provided by the Applicant as

the first time he was able to do so was when the figures appeared in the ES2 schedule and he simply stated that the items had been gifted to his son.

40. There can be little sympathy with the approach taken by the Respondent as his version of events has not been accepted and his evidence does not bear any scrutiny. Further, all of the 'valuations' were annexed to the Applicant's s.25 statement which was dated 22nd December 2021 and the issue was also raised in the Applicant's questionnaire. The Respondent has not provided any counter evidence whatsoever despite being on notice that this was the case being put forward by the Applicant. In his oral evidence the Respondent disputed the quality of the vehicles as compared to the ones in the valuations provided by the Applicant and I am satisfied that he may be correct in some of what he said. I must not reach the conclusion that just because I do not accept the Respondent's evidence on certain points (as I clearly do not) that he is wrong on every aspect of the case. Having no counter evidence at all makes it difficult to alight upon the correct figure and it is tempting simply to accept the only evidence that has been provided. However, the Court must always strive to achieve a fair figure and 'doing the best I can' and accepting some of what the Respondent stated in oral evidence I will state that the items in question should be valued at £25,000.

41. Applicant's Pension

42. The present figures for the Applicant's pension amount to a total Cash Equivalent of £230,835. This breaks down to £171,257 in the pre-2015 scheme and £59,578 in the post 2015 scheme. In Court the Respondent raised the reasonable point that this is almost £30,000 less than the figure declared in the Applicant's Form E which totalled £259,965, broken down as £213,257 and £59, 578 respectively. There is no pension expert instructed in this case to explain this reduction, but it is noted that the Applicant entered into a salary sacrifice scheme for an electric vehicle in 2020 by which a total of £7,376 has been sacrificed per annum. On the basis that the NHS scheme is a defined benefit scheme which is calculated according to income, it may well be that the fact that there has been such a salary sacrifice would explain this difference.

43. The Respondent argues that he does not have a pension anywhere approximating to that of the Applicant (his CE totals £4,308) and he will never be able to achieve the level of pension that is available to the Applicant. He also raised the point that he was not clear as to how the Court would approach the fact that part of the pension was earned prior to the marriage.

44. In relation to pensions in Financial Remedy proceedings the starting point is always that which is set out in the Report of the Pension Advisory Group in 2019. In terms of a 'needs' case such as this it is stated that "*In a 'needs' case the Court can have resort to any assets to meet the parties' needs ; in such cases it is rarely appropriate to apportion the pension based on the length of the marriage and the existence of the*

pension". As such it is not hugely important in this case to carry out any complicated or precise calculations as to what percentage of the Applicant's pension was accrued prior to/post the marriage.

45. However, it is a matter that has been raised by the Respondent, I note that the Applicant commenced her employment with the NHS in 1999, some 23 years ago and this marriage (when pre-marital cohabitation is included) last approximately 7 years. This equates to just over 30% of the period of employment. There are a number of methods of calculating an appropriate apportionment but the simplest, and probably most appropriate in these circumstances would be the 'straight line' method. If it was relevant in this case that would result in a figure of just under £70,000 of the cash equivalent being attributed to the period of relationship of the parties.

46. Mortgage Capacity

47. An order was made in the following terms; "*The parties are to file details of their mortgage capacity providing documentary evidence of the information provided to the mortgage broker by 4.00pm 12th March 2021.*" At the hearing the parties each set out their mortgage capacity. The Applicant stated that at present she would be able to borrow £173,000 and this could rise to over £200,000 once her debts were paid off. The Respondent stated that could raise £250,000. The parties each took issue with the figures provided by the other.

48. At the hearing the documents that had been provided to the mortgage brokers were not available and I have asked for them to be produced subsequently. The replies were not impressive. The Respondent stated "*We used the government online calculator below which I was able to use due to me only having one residential mortgage, PAYE job. There is no letter of instruction to a specific broker, who when I contacted them said due to my circumstances I should use the government site in the first instance. The figures used were my salary less the CMS payments, mortgage years up to my state retirement age of 67 (as I don't have significant personal pension allowing me to retire early).*"

49. This is effectively a totally self-serving statement. The Respondent decided what information to provide in terms of his income, his outgoings, the number of years of the mortgage and the interest rate. It is also not in compliance with the order, which clearly contemplated the use of a mortgage broker. It is difficult to attach any great weight to the result that is provided which states that he could borrow between £164,000 and £247,000. As the present mortgage is in the region of £226,000 this would suggest that the Respondent would not be in a position to raise any further capital to be in a position to buy out the Applicant as he has suggested he would wish to do.

50. The information from the Applicant is also not in good order. The email trails that have been provided make reference to some debt and also to the impact of the car lease scheme (a salary sacrifice scheme) in which the Applicant is involved. No precise figures as to the level of the loans to friends and family are included meaning it is impossible to know the full information that has been provided. There is also no mention of the fact that the Applicant is still jointly liable on the mortgage on her original matrimonial home with her first husband in the sum of £167,040. Further, one of the 'Decisions in Principle' that was included within the trial bundle was refused, although it is understood that this was to indicate what could be obtained if the Applicant had no debt. The figures provided (for what they are worth) is that the Applicant could borrow £173,000 at present and £210,000 if she was free of debt. Indeed, within her s.25 statement the Applicant states that "*I therefore expect to have to remain in rental accommodation for a period of time whilst my credit score improves*".

51. The effect of this poor evidence is that the Court is left with very little information as to the true current borrowing capacity of the parties. The Applicant will undoubtedly be hindered in obtaining a mortgage whilst she remains liable on her original property and whilst the personal debt of £77,330 remains. Thereafter she will be able to enter the mortgage market, but it is presently not known when that might be. As far as the Respondent is concerned, it is likely that he could obtain a larger mortgage offer, if he stated he was willing to work beyond the age of 67, as many people will be required to do these days, and by actually providing a mortgage broker with all of his information in order to discover what deals are out there for him. It is unfortunate that the Respondent failed to do this as it means that the Court is bereft of this important information. However, a Court can only deal with the evidence that is placed before it by the parties and not the evidence that is not provided.

52. Litigation Conduct

53. The Applicant has set out her position in relation to litigation conduct following a Court order of 7th July 2021 in a short statement dated 9th August 2021. The Respondent was given permission to file a statement in response but failed to do so. At the hearing he stated that he had assumed that he could provide his comments in his oral evidence and that as he was a litigant in person, he was not aware of the need to set out his position within a statement. This explanation is not accepted as the wording of the order was clear instating that "*Each party has permission to file a statement in answer, if so advised by…*"

54. The allegations set out by the Applicant can be summarised as follows:
    a) The Respondent has deliberately prolonged the proceedings;
    b) The Respondent failed to comply with orders and did not file his Form E for many months;
    c) The Respondent returned mail which had been sent to the correct address;

d) The Respondent blocked e-mails from the Applicant's solicitor;
e) The Respondent's failure to file documents caused the Applicant to make an application for a penal notice to be attached to the order;
f) The Respondent failed to disclose the assets referred to above;
g) The Respondent caused the final hearing in January 2022 to be adjourned claiming that he had tested positive for Covid 19, only for the PCR test to come back negative.

55. The Respondent denies all of these issues but failed to set any of them out in a statement, despite an order being made for this to occur. He denied the matters in cross examination. As set out above the test for considering factual issues in dispute in the Family Court is whether the Applicant has satisfied the Court (the onus being upon the Applicant) on the balance of probabilities (that it is more likely than not) that her version of events is correct.

56. I am satisfied that it is highly likely that the aim and intention of the Respondent has been to do all that he can to prolong these proceedings and to make it as difficult as possible for the Applicant and the Court to get this case to a final conclusion. On the issue of the notice for the First Appointment on 10th June 2020 the Respondent sent an e-mail directly to the Applicant stating "*I am in absolutely no rush to reach financial settlement and I have no problem going to Court which will no doubt be a very long drawn out process.*" He was good to his word.

57. I do not intend to deal with all of the delaying tactics applied by the Respondent but they caused the First Appointment to be non-effective and the Applicant has had to file 3 different Forms E whilst awaiting a first one from the Respondent which still failed to provide a lot of the basic information which is required. The Respondent states that he was not aware of the hearings or orders. All notices and orders were sent to his address and he has received some of them, and I have not heard any issue with the notices in the Children Act proceedings in which he is seeking to be able to spend time with his son. Further, there are letters returned from the correct address, and e-mails from both the Solicitors of the Applicant and the Court have been blocked for some reason. It is always possible for there to be one document going astray, or one problem with e-mails, but when there as many as must have occurred in this case for the Respondent's position to be correct then that becomes highly unlikely. I am satisfied that the Respondent has done all he could to block documents getting into his hands. It was due to this issue being highlighted that I took the extraordinary step of ensuring that my clerk personally e-mailed all of the documents directly to the Respondent to ensure that the same issue could not be raised again (the terms of a restraining order prevented direct communication between the parties). Indeed, despite the Applicant's Form E and enclosures having been e-mailed by my clerk to the Respondent on 13th July at 14.30 he still claimed not to have received it causing me to order in November that it was e-mailed by my clerk again and also to his McKenzie friend as well as being posted to his address. This is indicative of the extra

burden placed upon the Applicant and the Court in having to deal with such a deliberately obstructive approach.

58. The most egregious example of the Respondent wishing to cause delay is in relation to listing this final hearing. This matter was listed before me on 15th November 2021 in order to deal with applications relating to failures to comply with orders. At that time the final hearing was listed before a District Judge in April 2022. A matter of days before this hearing my main Financial Remedy case listed before me in January had settled causing there to be time to hear this matter 3 months earlier than would otherwise be the case. I offered the parties, who were both in person at the time, the earlier date which the Applicant accepted on condition that disclosure had been made. The Respondent argued that it would not be possible to obtain all of the evidence required in that short time – it was just under 2 months away and the case had already taken 17 months to reach that stage. I ordered the case to be listed for 2 days before myself on 11th and 12th January 2022 as well as many other directions and a 'compliance hearing' on 17th December to ensure all orders had been complied with by both parties.

59. The Respondent sought permission to appeal the decision to bring the final hearing forward to January which I refused stating "*It is considered that there is sufficient time for all of the evidence to be produced and it is in the best interests of all of the parties for this matter to be heard sooner rather than later. If the McKenzie Friend of the Respondent is not able to attend, the Respondent has sufficient time to arrange an alternative McKenzie Friend. This being a case management decision the, Respondent must file an Appellant's Notice within seven days i.e. by 22nd of November 2021*." The Respondent did lodge an appeal which was refused by Arbuthnot J as being "Totally without merit."

60. The Respondent then complied with many of the orders, including providing me with all of the questions which he wised me to ask of the Applicant, as per the order for special measures. Then as set out above, on the late afternoon the day before the hearing the Respondent stated that he had a positive lateral flow test for covid-19 and he further stated that he was not well enough to attend remotely. In the circumstances I had no option other than to adjourn the hearing at great cost to the Applicant who had incurred counsel's fees for the hearing. I ordered the Respondent to supply the Court with the results of a PCR test as the Applicant considered that it was possible, or even likely, that the Respondent did not in fact have covid-19 and simply used this as another method of causing delay. The PCR test came back negative. The Respondent still states that he felt very poorly that week and was not able to work and consequently could not have been able to attend a Court hearing.

61. I am satisfied on the evidence before me that the Respondent did not have covid-19 at the date of the hearing listed in January and that he could have attended. It is noteworthy that the order made was in the absence of the Respondent as he states he

was not well enough to attend and it included the following : "*2. UPON the court being informed by the Respondent's McKenzie friend that the Respondent has tested positive for covid-19 and is unable to attend the final hearing. 3. AND UPON the court noting that the NHS guidance provided by the Respondent is to take a different follow-up test (normally a PCR test) as soon as possible and within 2 days to confirm the result*."

62. The Respondent, through his Mckenzie friend responded with the message : In response to point 3 :"*As we were not in court we did not provide any such guidance. Should this be the Applicant ? We are not aware of any such guidance. Please update accordingly and provide published guidance***."** And: "*We are not aware of any such NHS recommendation of a test within 48 hours. Please provide such guidance? The PCR test was taken as soon as possible but was not within 48 hours due to circumstances outside of my control***."**

63. The information set out within the order came directly from the e-mail sent by the Respondent to his McKenzie friend at 14.45 on 10th January 2022 and forwarded by his McKenzie Friend to the Applicant's solicitors at 16.44 on the same day. This makes it surprising that he was unaware of the guidance. Further the Court is satisfied that the Respondent's actions in failing to attend that hearing fit with his 'modus operandi' throughout these proceedings and it is not satisfied that his stated health position was correct. The information that has been provided is fully self-serving and has been contradicted by the PCR test. The Applicant should not have to bear the costs of that aborted hearing.

64. The s.25 factors. In considering this case the Court must take into account all of the circumstances of the case and in particular the following factors set out within s.25 Matrimonial Causes Act 1973.

65. **The Income, Earning capacity, property and other financial resources.** The present incomes and the assessment of the parties' assets are all set out above and will not be repeated. The only issue that has not been considered above relates to the Applicant's future income. At present she works 28.7 hours pw due to her childcare responsibilities. The child of the parties is nearly 8 years old and her other children are 13, 17 and 19. It is likely that the Applicant will be able to increase her hours over the years such that her income will increase. This is against a backdrop that her overall net income will reduce if she is the recipient of any significant lump sum as this will have an impact on the Universal Credit that is presently being received.

66. I do not state that the Applicant will be able to instantly work full time but that this will gradually occur over the next few years. The child of the parties will be at Secondary School in 3 years' time and by that stage her youngest daughter will be 16. If the Applicant was able to work full time hours (37.5 hours pw) then this would be equivalent to a 30% increase on her present income. Even with the reduced income of

the Applicant due to the salary sacrifice car scheme, the 30% increase would take her income up to a figure in excess of £45,000pa. The Applicant is aged 46 and consequently still has more than 20 years to work prior to being entitled to her state pension.

67. **The Needs and Obligations of the Parties.** There was no dispute between the parties that the housing needs of the Applicant would require a property in the region of £425,000 which would require a housing fund of £450,000. This would be a 3-4 bedroomed semi-detached property. It is noteworthy that in her oral evidence the Applicant stated that she did not believe she would be able to purchase a property outright but that as she is a NHS worker she would be able to purchase a part buy/part let property. No details of such properties have ever been provided. The Respondent states that his needs would require a similar sized property as he has his two adult children living with him and he would wish to be able to have the child of the parties stay with him, although there is presently no contact taking place. The Applicant states that the housing needs of the Respondent could be met by a 1 or 2 bedroomed flat at a cost of £180,000.

68. The Respondent makes the point as to why he should make his children homeless when the Applicant is intending to ensure that she can house all of her children. The answer to that plea is contained within s.25 Matrimonial Causes Act as it states that "*first consideration being given to the welfare* ***while a minor*** *of any child of the family who has not attained the age of eighteen."* It follows that the statute sets out the criteria which must be first considered and that only relates to those children that are under 18. However, it is correct to say that the Court must consider "*all the circumstances of the case"* and that must include the impact upon the other adult children.

69. I take the view that the figure put forward by the Applicant for the Respondent is extremely low and he makes the point that he has never lived in a flat and it would not be reasonable to force him to do so now. The difficulty, as ever in these cases, is that there is simply no information provided as to the cost of housing between the top and bottom figures. That is no reason not to make a decision upon the information that is presently before the Court -see ***AR v ML [2019] EWFC 56*** and I intend to provide a final judgment without any request for further evidence being provided as to the costs of alternative properties.

70. The reality is that each of the parties could live in a property that is smaller than the one that they seek, and they could also live in a different area which would not be as expensive. They have simply provided the Court with the cost of their ideal property and if that is not capable of being achieved a lesser and cheaper property will have to be purchased, or alternatively rented for a period of time.

71. The adult children of the Respondent will, no doubt, wish to be able to leave home at some point in the next few years and the children of the Applicant may also leave her household. The factual situation and need of each of the parties could be significantly altered in the next few years.

72. In terms of obligations the Applicant has set out liabilities totalling £77,330 of which a total of £43,973 are 'hard' debts to banks and credit cards. There is a further £5,646 owing on costs which brings the total of such debt to £49,619. In terms of the other debts to family and friends it was the evidence of the Applicant that she would wish to repay the debt to one friend of £8,000 as soon as possible and there is another debt in a sum in excess of £13,000 to a friend which is on a low interest credit card in his name which the Applicant pays. The Applicant fairly accepted that she would hope that none of these individuals would be likely to pursue her for these monies through the Court. I accept that the monies were borrowed and that the Applicant would wish to pay them back if she were able to do so.

73. **Age of Each party and Duration of Marriage.** The Applicant is aged 46 and the Respondent is aged 50. This means that the Applicant has a longer working life ahead of her in excess of 20 years whereas, the Respondent would only have a further 17 years to his present age of state retirement. The financial impact of a divorce frequently requires individuals to work to a later age than those who have not been involved in such proceedings and consequently it may be that each of the parties now have to work for longer than would have been the case if the divorce had not occurred. This will have an impact upon their mortgage capacity, which no doubt could be considered on the basis that they would each work to the age of 70 and consequently providing a 25 and 20 year mortgage period respectively.

74. **The Contributions which each of the parties have made.** It is clear that the Respondent was the main breadwinner during this relationship and he also provided the original capital required to purchase the former matrimonial home which was provided form the settlement he received from his previous divorce which was in the region of £100,000. The Applicant also worked throughout the marriage and was also responsible for much of the childcare provided to both her own children and those of the Respondent. It is also correct to note that at present the Applicant is making a greater contribution towards the welfare of the child of the parties and this is likely to continue into the future, notwithstanding the desire of the Respondent to be more involved in the life of his child.

75. There has been evidence provided as to the different levels of financial contribution made by each of the parties, but I approach the case upon the basis that they have each made a full contribution. It would be discriminatory to approach the case in any other way.

76. **Conduct of the Parties.** I have set out all of the issues in relation to litigation conduct above. There are undoubtedly other disputes as to the conduct of each of the parties during the marriage which I understand have been considered within the Children Act proceedings. I reiterate that I have not heard or read such evidence and it forms no part of the decision that I reach.

77. Conclusions

78. On the basis of the findings set out above the total non-pension assets are:

a) Matrimonial Home	£250,000
b) Applicant's former home	£90,000
c) The Woodland	£45,000
d) Respondent's Assets	£25,000
Total	**£410,000**

79. The Applicant has a CE of £230,000 in her NHS pension. There are hard debts in the Applicant's name amounting to £49,619 and I am satisfied that it is reasonable to consider that she should repay the debt of £8,000 to one friend fairly promptly and it would also be financially sensible to pay off the other debt of £13,285 to a different friend as it is on a credit card. The debt of the Respondent totals £11,645.

80. This is a 'Needs' case and as such the Court can have regard to all of the assets, including those that are clearly pre-marital, in order to ensure that those needs are met, if that produces an outcome that can be deemed fair overall.

81. The Open Offers

82. **Applicant's Offer.** In order to meet her needs the Applicant states that the former matrimonial home should be sold with the Respondent receiving £50,000 and the remainder being paid to the Applicant. This would mean that the Applicant would receive £200,000 but I am satisfied that she would not have access to any of her interest in her original property in which her 3 children still spend half of their time. This has a significant impact upon her needs as it means that she could not utilise the £90,000 that is represented by that property towards the purchase of a property at present. Further, it is unlikely that this will be realised in anything less than 5 years' time, on the evidence provided to the Court.

83. Another impact of the failure to realise the capital from the Applicant's original matrimonial property is that she will remain liable upon that mortgage which will severely impact upon her ability to obtain a future mortgage. It is almost impossible for the Court to accurately consider what mortgage, if any, the Applicant could

presently obtain as she has simply not provided any reliable evidence on mortgage capacity.

84. If the Applicant was to receive the £200,000 from the former matrimonial home that she seeks then I am satisfied that she would need to pay at least £58,000 towards her liabilities and possibly a further £13,000 which would bring the total to £71,000. That would leave a figure of £129,000 to put towards an alternative property. If she was to be able to purchase a property worth £425,000, which in turn would require a 'housing pot' of £450,000 then she would require a mortgage of £321,000. This is simply not feasible and as such the offer put forward by the Applicant at present simply could not meet the needs that she states are required.

85. Further, the impact of the Applicant's offer on the Respondent would be significant. He would be left with a sum of £50,000 from the former matrimonial home together with the £70,000 from his other assets which I have found are still in his ownership. Those other assets were all pre-marital in nature and it is accepted that he had also contributed £80,000 towards the deposit on the joint property. He is aged 50 and has next to no pension. I am satisfied that this would not produce a fair outcome for the Respondent bearing in mind all of the factors that must be taken into account. This is especially so once it is understood that such an order would still not produce a result whereby the agreed housing needs of the Applicant could presently be achieved. It could not be deemed to be a fair outcome for the Respondent to be left in such a position without it leading to the benefit of the Applicant and children being housed in a property owned by the Applicant.

86. **The Respondent's Offer.** Likewise, the offer put forward by the Respondent does not provide anywhere approaching a fair outcome. The Applicant would receive either £25,000 or £15,000 together with periodical payments for 5 years. This would not even pay off the substantial hard debt in the Applicant's name let alone place her in a position whereby she may look towards purchasing her own property in due course. I accept that the Applicant will retain her pension, but that will not assist with her housing situation.

87. In short, I am satisfied that the offers put forward by either side are wholly unrealistic and are clearly constructed with a view to the impact it would have upon the individual making the offer, without any significant thought on the impact upon the other party. The Court must approach the case in a more balanced manner.

88. **What is the Fair Order to make?**

89. The Matrimonial Causes Act s.25 makes it clear that first consideration must be given to the welfare of any child of the family. In general, that is dealt with by ensuring that a suitable property can be purchased to accommodate such children. That is simply not possible in this case. In such circumstances the Court must strive to achieve an

outcome which is fair to both parties and puts them in a position whereby they will be in the best position possible to obtain such accommodation in due course. For the Applicant in this case that requires that she is able to be debt free and, in a position to be able to obtain a mortgage once her original matrimonial home is sold in anything up to 5-8 years' time. In terms of the needs of the Respondent; the Court is satisfied that they can be met by way of being in a smaller property than the former matrimonial home as there is no duty for the Court to take into account his independent adult children, however desirable that such an outcome might be.

90. The Court must simply 'do the best it can in the circumstances' when the overall financial position is not sufficient to provide the required accommodation for both parties, whilst producing an outcome that is fair to both parties.

91. The Respondent set out in his closing submissions that the most cost effective outcome would be one that avoids a sale of the former matrimonial home. That is certainly correct but can only occur if he is in a position to raise sufficient capital to pay to the Applicant a reasonable sum. The Respondent was clear that £50,000 was the maximum that could possibly be raised in this manner and I am satisfied that this would not be a sufficient sum to produce a fair outcome as set out above as it would not even cover the hard debts of the Applicant.

92. The former matrimonial home will need to be sold. That will release a total of £250,000 equity. The sharing principle would state that the starting point would be for this sum to be divided equally between the parties, but in a 'needs' case this is not the case. I have reached the conclusion that the least that the Applicant can receive is the sum of £150,000 from the sale, which must be set out in percentage terms rather than as a set figure to allow for price fluctuation. This would mean that she would be left with approximately £80,000 upon payment of her pressing debt.

93. As set out above, this will not be sufficient to purchase a property as she has little mortgage capacity at present, due to the fact that she is still liable under a mortgage with her first Husband. It will mean that the significant sums that she has to pay out to service her debts each month will be reduced substantially. However, once the Applicant receives the lump sum her Universal Credit will cease and that is presently a figure of £1,300pm. The Respondent argued that this was why the Applicant should not receive any capital above £15,000 as it would affect the benefits the Applicant would receive. The Court cannot approach any claim in such a manner as it is contrary to public policy.

94. It is likely that the Applicant will have to continue to rent a property and it may well be that she will have to utilise some of her capital to assist her to do this. The mid to long term financial position of the Applicant is one that will improve. As stated above, her childcare responsibilities will reduce over the coming years and the housing need for both her and her first Husband will also reduce as her children

achieve their majority. This will mean that the income of the Applicant will increase, and the amount of capital required to meet her housing need will reduce as there would be fewer people to accommodate on a full time basis. This should lead to the Applicant being in a position to be able to purchase a property at some point in the next 5 years by which time she will still only be aged 51 and will have sufficient working life left to be able to obtain a 20 year mortgage or thereabouts. Once she is able to realise the £90,000 from her original matrimonial home together with whatever capital is left from the lump sum that she receives pursuant to this judgment then I am satisfied that there will be sufficient to purchase a property. This may be outright or on a part ownership basis.

95. The impact of such an order upon the Respondent will mean that he and his adult children would be required to leave the home that they have known for 10 years. However, I am satisfied that he would be able to purchase another property. He will have capital of close to £100,000 from the sale of the property together with the £70,000 from his other assets. It is a matter for the Respondent as to whether he decides to realise those assets or not, but in a case where the resources are as limited as they are, the Court simply has to take such assets into account. This would leave the Respondent with a deposit in excess of £150,000 and I am satisfied that he is likely to be able to obtain a mortgage in the region of £200,000, leaving him with a housing fund of £350,000. This will be sufficient for his needs, although not as great as he would desire.

96. There is agreement that each of the parties shall retain the assets in their name and it is clear from the analysis above that I have concluded that this is appropriate. This will include the NHS pension of the Applicant.

97. The Applicant has sought an order for nominal periodical payments until the child of the parties achieves the age of 18. The Respondent has sought a clean break. I accept that it is usual to make an order for nominal periodical payments when there is a young child. However, there is significant animosity between the parties, they have been (and continue to be) involved in highly antagonistic litigation and the Applicant is in well paid stable employment. The Court should strive towards a clean break if it can be achieved without being unfair to either party. I am satisfied that this can occur in this case and the parties require a total financial break from each other, save for that relating to continued payments for the child. There will be a clean break in relation to all claims.

98. Costs

99. The general rule for Financial Remedy proceedings is that there will be no order as to costs unless it falls within one of the exceptions set out within FPR 28.3 (6) & (7). The rules set out as follows:

a. FPR 28.3(5) *The general rule in financial remedy proceedings is that the Court will not make an order requiring one party to pay the costs of another party;*
b. FPR28.3 (6) *The Court may make an order requiring one party to pay the costs of another party at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (either before or during them);*
c. FPR 28.3(7) states:
'In deciding what order (if any) to make under paragraph (6) the court must have regard to—

(a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;

(b) any open offer to settle made by a party;

(c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(d) the manner in which a party has pursued or responded to the application or a particular allegation or issue.

(e) any other aspect of a party's conduct in relation to the proceedings which the Court considers relevant; and

(f) the financial effect on the parties of any costs order.'

100. It follows from the conclusions that I set out above that I am satisfied that the Respondent's litigation conduct has been such that it would justify an order for costs to be made. He has failed to comply with orders, deliberately protracted the proceedings and effectively 'cocked a snook' at the Court and the proceedings as a whole by orchestrating the adjourned hearing in January. It would be inappropriate to fail to mark this behaviour with some order as to costs. However, in reaching the decision set out above I have taken into account the hard debts of the Applicant which relate, in the main, to costs both within these proceedings and the other litigation between these parties. That was in the context of ensuring that her needs were met and not by considering any issue as to costs.

101. The least order that I can make is for the Respondent to pay the Applicant's costs of the aborted hearing in January 2022. The preparation was all required and utilised for the final hearing but there was counsel's fees and other costs which were lost. I will assess the costs in the sum of £4,000 inclusive of VAT. This sum is to be paid by the Respondent to the Applicant. In setting the figure at this amount I take into account the effect this will have on each of the parties, including the Respondent. I am

satisfied that this order will not prevent him being able to purchase a property at some reasonable level.

102. Anonymity

103. This case was heard on 11th and 13th April 2022. On 12th April 2022 the case of ***Xanthopoulos v Rakshina [2022] EWFC 30*** was published, in which Mostyn J set out in great detail in paragraphs 74-141 decision on the issue of anonymity within Financial Remedy cases. He provides a detailed historical analysis of the issue and reaches the strong conclusions that such cases should be fully reported without anonymity unless the Court has made a reporting restriction order following the Court undertaking a balancing exercise as set out in **In re S (a child) [2004] UKHL 47; [2005] 1 AC 593.** Mostyn J added that the only method by which this position can be altered is by way of primary legislation and not by an alteration of the Family Procedure Rules.

104. The final substantive paragraph of his judgment reads : "*I accept and understand that the question of open justice in financial remedy cases is a matter of some controversy on which views are far from unanimous. I express the hope that the Financial Remedies Court Transparency Group (a sub-group of the Family Transparency Implementation Group) will consider carefully the legal issues raised in this judgment."* I must add a 'personal interest' in this issue as I am chairing the sub-group that is referred to in that paragraph.

105. The law in this area is indeed in a state of flux. It is apparent from judgments that continue to be handed down by other High Court Judges that they do not adhere to the view of the law as set out by Mostyn J. This includes Peel J who has succeeded Mostyn J as the National Lead Judge for the Financial Remedies Court. On 26th April 2022, in his judgment ***VV v VV [2022] EWFC 41*** dated 13th May 2022 in which there were findings of litigation conduct by both parties, but anonymity was provided and there does not appear to be any consideration of the issue within the judgment. It is clear from recent decisions that Peel J is not alone on the High Court Bench in continuing to provide anonymity in Financial Remedy cases.

106. This causes difficulties for District Judges and Circuit Judges upon whom judgments from High Court judges are important binding precedents. It would be inappropriate for me to set out any view of the law, but I note that I am not aware of a single reported case at any level below High Court Judge in which anonymity has not taken place, although I accept that there may be one or two cases in which this may have occurred. In such circumstances it would be harsh to litigants, who had no real possibility of being aware that any reported judgment in their case would not be anonymous prior to the litigation commencing, to now make their names public. Indeed, in this particular case, the final hearing commenced the day before Mostyn J's recent decision was reported, although he had clearly signposted the path he intended

to follow in earlier judgments. It was with that in mind that I intended that this judgment should accordingly be anonymised. This is in keeping with the Guidance provided by Peel J on 13th May 2022.

107. However, the Respondent has made a request that the judgment is not anonymous save for the name of the child of the parties. In support of his submissions the Respondent makes the following points:

(a) *"I wish to exercise my right to freedom of expression under the Human Rights Act 1998 Article 10 "This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority". Article 8 and Article 10 both have equal standing in law and must be considered by the court in making decisions. I am fully prepared to defend this right through the courts.*
(b) *No case specific reporting restriction orders have been made or suggested at any time in these proceedings.*
(c) *It has never been stated or suggested that these are sensitive proceedings.*
(d) *I do not believe that these proceedings fall into or meet the requirements of the sensitive category as listed in Section 12(1) Justice Act 1960*
(e) *The financial remedy judgment has already been made and just awaits formal handing down on the 12th July 2022. Further to HHJ Farquhar's email on the 27th May 2022 "……..to vary the decision as that can only be achieved by way of an appeal", I do not believe any such restrictions can now be added without appeal.*
(f) *In line with the President of the Family Divisions calls for a "major shift in culture and process" so that openness becomes "the new norm" I believe that this judgment should be published without being anonymised*."

108. The Applicant wishes for the judgment to be anonymous, and the following points are made on her behalf:
(a) A central theme of the case relates to the child of the family;
(b) If the parties are named this will undoubtedly lead to the child of the parties being easily identified;
(c) It is accepted that whilst there is little within the case to attract media attention there is concern that the Respondent is the registered keeper of a company, the website for which includes a section titled 'Rogues gallery' and it is suggested is designed to 'name and shame' various legal professionals and judges.

109. As set out above there is a lack of clarity on this issue from High Court Judges. It would be difficult for myself simply to state that there are a number of High Court cases in which the parties' anonymity has been preserved and I will follow suit when it is not a matter that appears to have been argued in those cases and there is no judgment on the point. There is a fully reasoned judgment from Mostyn J which states

the opposite. I must consider this issue in light of that decision and the one that has followed, to which I must also refer.

110. The judgment of Mostyn J in ***Gallagher v Gallagher [2022] EWFC 52*** has recently been published and he sets out the principles that apply to cases of this nature as follows:

5. Those principles, which apply equally to applications for anonymity and to applications for reporting restriction orders, I summarise as follows:

i) From the very start of the era of judicial divorce, proceedings had to be conducted either in open court or in chambers "as if sitting in open court". There was not the slightest hint that matrimonial proceedings would be secret save in nullity cases alleging incapacity or where the ends of justice might be defeated. The decision of the House of Lords in Scott v Scott [1913] AC 417 definitively established that the Divorce Court was governed by the same principles in respect of publicity as other courts.

ii) By FPR 27.10 and 27.11, financial remedy proceedings are heard "in private". The correct interpretation of these rules, in the light of Scott v Scott, is that they do no more than to provide for partial privacy at the hearing. They prevent most members of the general public from physically watching the case. Those rules do not impose secrecy as to the facts of the case.

iii) There is nothing in the various iterations of the Divorce Rules, Matrimonial Causes Rules, Family Procedure Rules or RSC Order 32 r. 11 supporting a view that proceedings heard in the Judge's or Registrar's chambers were secret. A chambers' judgment is not secret and is publishable. Furthermore, the change of language in the FPR 2010 from "in chambers" to "in private" did not presage that ancillary relief proceedings should become more secret.

iv) By FPR 27.11, journalists and bloggers can attend a financial remedy hearing. If the case does not relate wholly or mainly to child maintenance, and in the absence of a valid reporting restriction or anonymity order, they can report anything they see or hear at the hearing. That some of the material under discussion would have been disclosed compulsorily does not constrain their right to report the hearing. The power under FPR 27.11(3)(b) to exclude a journalist or blogger to prevent justice being impeded or prejudiced confirms the unrestricted reportability of the hearing.

v) In the absence of a valid reporting restriction order the parties can talk to whomsoever they like about a financial remedy hearing, including giving an interview to the press. But they are bound by the implied undertaking not to make ulterior use of documents compulsorily disclosed by their opponents. This means that they cannot show such documents to a journalist unless that journalist was covering the case.

vi) The standard rubric on financial remedy judgments providing for anonymity cannot prevent full reporting of the proceedings or the judgment. This is because it is not a reporting restriction injunction, not merely because none of the procedures for making such an order have been complied with, but because it manifestly is not an injunction. It is not an anonymity order under CPR 39.2(4), not merely because no process for making such an order was followed, but more fundamentally because it is not such an order. Such an anonymity order can only be made exceptionally. The general rule is that the names of the parties to an action are included in orders and judgments of the court. There is no general exception for cases where private matters are in issue. An order for anonymity (or any other order restraining the publication of the normally reportable details of a case) is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large and, indeed of the parties.

vii) The court can only prevent reporting of a financial remedy hearing or judgment, or order that the identity of the parties be obscured by anonymisation, by making a specific order to that effect following an intensely focussed fact-specific Re S exercise of balancing the Art 6, 8 and 10 rights.

viii) The Judicial Proceedings (Regulation of Reports) Act 1926 does not apply to financial remedy proceedings."

111. It follows from this judgment that I must perform a "*focussed fact-specific Re S exercise of balancing the Art 6, 8 and 10 rights"* in order to consider whether to make a reporting restriction order/anonymity order. This was set out by Lord Steyn in paragraph 17 of In ***Re S (A Child) [2005] 1AC 593*** :

> *"First, neither article has as such precedence over the other. Second, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test".*

112. The starting point is to consider 'why should anonymity be granted' rather than the reverse. In the Gallagher case Mostyn J considers the issue as to the impact of a non-anonymised judgment upon the children of the parties and decided at paragraph 48 "*I therefore reject the argument that the possibility of the indirect identification of the minor children of the litigating adults is of itself a reason for making a reporting restriction order. I do not dispute that there may be some exceptional cases where the Article 8 rights of the children themselves will come to the fore and will act to prevent publication of a news story*." It would follow that in this case the mere existence of a child of the parties, who could be identified would not be a sufficient justification to anonymise the judgment.

113. However, in this case, there are highly contested, ongoing, Children Act proceedings in which many allegations have been made either way, and upon which findings have been made by a different Judge. I am satisfied that this fact alone increases the significance of the child's Article 8 rights as they will be aware of the dispute between the parties and can only be adversely affected by any greater publicity and commotion surrounding his parents' separation. It can only cause him further interference with his right to respect for his private and family life. The question is whether that interference can be justified by the need to exert the parties Article 10 rights.

114. This is not a case in which the press has indicated any interest whatsoever. The parties are not famous, they are not fabulously wealthy, and the facts of the case are not such to have generated any public attention. It is far removed from the Gallagher case in which Mostyn J stated at paragraph 36 :" *I agree with Mr Farmer that if very rich businessmen are in court fighting at vast expense with their ex-spouses over millions, then the public has the right to know who they are and what they are fighting about*." In that case the assets were in the region of £34.5m and the costs of the parties totalled £1.67m. I am satisfied that the fact that there is no media interest in this case, and it is highly unlikely that there ever would be, reduces the weight that should be attached to the requirement that the parties should be named.

115. I accept that the issue of "What is in a name?" is important in general terms as set out within **re Guardian News and Media Ltd** [2010] 2 AC 697 at paragraph 63. However, when the name is not known to the public at large and all of the relevant information that is required to understand the decision that the Court has reached can be placed in the public domain I am satisfied that the weight of the privacy for the vulnerable child is greater.

116. I would add that I accept the point made on behalf of the Applicant that there is a risk that the Respondent may attempt to use the ability to publish the judgment in a non-anonymous form inappropriately. In reaching this conclusion, I take into account that I have made findings of dishonesty against the Respondent and I am satisfied that he is strongly motivated to cause anguish to the Applicant and, indirectly (not intentionally), upon the child. I would highlight the point referred to in ***Gallagher (above)*** that "*But they are bound by the implied undertaking not to make ulterior use of documents compulsorily disclosed by their opponents. This means that they cannot show such documents to a journalist unless that journalist was covering the case*."

117. Having said that, I do not accept the point made by the Applicant that the Respondent may wish to make adverse comment about the professionals and judges involved in his cases. It would be entirely inappropriate for any Court to seek to persuade, let alone order, any litigant not to make any comments about any member

of the judiciary or the legal profession. It is vital that the Family Court, including the Financial Remedies Court is as open as possible for all of the reasons set out by the President of the Family Division, Sir Andrew McFarlane in his quest for greater transparency. This must include the ability for an individual to be able to air their views about the professionals involved, so long as that is carried out appropriately.

118. In all of the circumstances I am satisfied that the '*ultimate balancing'* test referred to in ***Re S (above)*** falls in favour of restricting the Article 10 rights of the parties. The Article 8 rights of the child are of greater significance in this case, and it is a proportionate method of protecting those rights by restricting the competing Article 10 rights in this particular case. To that extent I grant a Reporting Restriction Order/Anonymity Order that this judgment may be published but in an anonymous form. This will enable any member of the public to have a full understanding of the issues between the parties and how and why the decision that has been made has been reached without risking further harm upon the child in the middle of the parties involved.

His Honour Judge Farquhar

12th July 2022