

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20/12/2013

**Before:**

**THE HONOURABLE MRS JUSTICE ELEANOR KING**

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**Between:**

**H**  
**- and -**  
**W**

**Appellant**

**Respondent**

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**Mrs Rebecca Bailey-Harris** (instructed by **Dawson Cornwell Solicitors**) for the **Appellant**  
**Mr Mark Johnstone** (instructed by **Anthony Clapp Solicitors**) for the **Respondent**

Hearing dates: 8 November 2103  
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**Judgment**

THE HONOURABLE MRS JUSTICE ELEANOR KING

This judgment is being handed down in private on 20 December 2013 It consists of 10 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

**Mrs Justice Eleanor King:**

1. This is an appeal by the Appellant husband (H) against part of an order made by DJ White on 20 March 2013 and thereafter amplified by a supplementary judgment in relation to an application for permission to appeal on 20 March 2013.
2. The Order made in financial remedy proceedings following divorce provided for:
  - i) The former matrimonial home to be sold; from which W was to receive £403,561 + 50% of any excess in the event that the property sold for more than £670,000 gross

- ii) The H to retain (i) an American property in which there was negative equity and (ii) an investment property in the UK
  - iii) The W to have a pension share of the H's pensions of 81.3%
  - iv) W to have periodical payments on a joint lives basis at the rate of £3,750 pcm
  - v) W to be paid a sum equal to 25% of all H's annual bonuses (net of tax and National Insurance) also on a joint lives basis.
3. Although contracts have yet be exchanged, it is now agreed that the former matrimonial home is likely to be sold for rather more than had been hoped, giving (in round figures), W £454,000 and H £50,000, Once the negative equity in the American property is taken into account and the pension share included, the final capital position is that W has capital of £967,170 (of which £100,000 relates to household contents) and H capital of £250,362.
4. The H filed an Appellant's notice on 10 April 2013 by which he sought to appeal :
  - i) against the order for periodical payments on a joint lives basis seeking the substitution of a non extendable term of maintenance until H attains the age of 60
  - ii) the order providing for the payment of 25% of H's annual bonus to W which he sought to be removed in its entirety.
5. Unfortunately for the parties the matter has been cursed with delays not of their own making. The hearing took place on 18 & 19 July 2012 with written submissions submitted afterwards by Counsel. The judgment is dated 20 October 2012. District Judge White responded to requests for clarification of the judgment on 4 December 2012 and he refused permission to appeal his order on 20 March 2013. The matter came on for an inter partes permission to appeal hearing in front of Mostyn J on 26 June 2013.
6. Mostyn J gave permission in relation to Ground 1 only of the grounds of appeal that:

“The learned District Judge erred and was plainly wrong in awarding the wife 25% of all the husband's net bonuses on a joint lives basis”
7. Mostyn J concluded his permission judgment saying:

“If the interpretation advanced by Professor Bailey-Harris is the right one and that the percentage award of the bonuses was formulated solely on a sharing basis, then I do believe that that gives rise to an issue of legal principle which I have identified in my earlier decision of *B v S* and that does most certainly warrant appellate review. If Mr Johnson's interpretation is the correct one then I would have given conditional permission namely, that the only aspect that can be advanced on appeal is whether there should have been a numeric or monetary cap on the sum received under the percentage sharing award.”

8. In the course of his judgment Mostyn J gave a strong 'steer' that in his view the right solution was for there to be a cap on the share received by W on the H's bonus. To this end he directed that the parties engage in mediation to see if the matter could be resolved consensually and H agreed to bear the costs of the mediation in the first instance. In the event that the mediation was unsuccessful, Mostyn J directed that he would deal with an application by W for a legal costs order in relation to the appeal on paper.
9. The mediation did not take place as agreement could not be reached as to the identity of an appropriate mediator and W accordingly made an application for a legal costs order. On 30 October 2013 Mostyn J refused her application, saying in his ruling that the W had been unreasonable in her approach to the mediation; first in her insistence on using *a top-drawer and top-price mediator* and secondly that her insistence on attendance of legal representatives at mediation was *neither necessary nor reasonable; in my experience this would be unusual and arguably unhelpful*. Mostyn J pointed out that there was still time for mediation to take place. Unfortunately it has not done so and out of this modest matrimonial pot H's costs of the appeal are £22,320 and W's £25,372.

#### Background

10. At the date of the hearing H was 43 and W was 55 years of age. The parties started to cohabit in about 1992 marrying on 7 May 1997 and separating on 7 January 2011. There was therefore a total period of cohabitation of about 19 years.
11. There is one child of the marriage who was born on 15 June 1993. The child is no longer in education but lives at home with her mother. Decree Nisi was pronounced on 22 November 2011.
12. Since May 2010 the H has been the managing director of bank. In the financial year to April 2011 he had an income of £250,000 gross (£11,441 net pcm) plus a bonus of £225,000 gross of which £67,500 was deferred, giving him a net income of £214,467. (£17,872 pcm net). In the year ending April 2012 his income was £250,000 gross plus a bonus and cash deferral award of £195,750 + £18,000 of shares vesting over three years from April 2013.
13. When asked about future bonuses in cross examination the District Judge recorded at paragraph 25 that *the Russian holding company had made an injection into the bank which had made a significant loss. His anticipation was that in the future he would receive a very low bonus or nothing at all. Indeed it was a surprise when his latest bonus statement fell through the letterbox*"
14. Given the delay in the proceedings "bonus time" had come round again by the time the matter came on. Both sides agreed that I should be told that the H's pessimism was unfounded and he in fact received a bonus very similar to that which he had received in the preceding two years namely approximately £200,000. The pattern for the 3 years H has been at the Bank has therefore been a salary package of in the region of £450,000; made up as to Salary of £250,000 and a non guaranteed bonus made up of cash and deferred cash and shares of about £200,000.

15. The wife was until the later 1990s a legal secretary but has not worked for about the last 15 years. The District Judge noted that W's original budget (£12,154 pcm) and revised budget (£6,352 pcm equated to a gross income in excess of £100,000) merely transposed the costs of the substantial matrimonial home [para35 & 36] and W had said a few days prior to the hearing [para41] that *my budget is based on the court allowing me to retain my home. These are the other bills I know of. I would not be able to prepare a list based on a property I am not in.*
16. The wife's open position in relation to maintenance was periodical payments of £4,500 pcm together with 35% of all net bonuses each upon a joint lives basis.
17. In dealing with capital the District Judge referred to the H's offer of capital (effectively all the net proceeds of sale of the former matrimonial home as they were thought to be at that time) as *clearly generous*. The District Judge was critical of the wife for running up costs in respect of allegations of non-disclosure for which there was no evidence, which had not ultimately been perused and had the effect of derailing negotiations. He was equally critical of W for running an 'add back' case at trial which was not, on any level, made out.

## The Law

### *The Law: Appeals*

18. The new Family Procedure Rules 2010 apply to this appeal. FPR 2010r30.12 provides:
  - (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.
  - (3) The appeal court will allow an appeal where the decision of the lower court was –
    - (a) wrong; or
    - (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

(4) The appeal court may draw any inference of fact which it considers justified on the evidence.

(5) At the hearing of the appeal a party may not rely on a matter not contained in that party's appeal notice unless the appeal court gives permission.

19. This appeal has to be considered in accordance with the principles laid down by Thorpe LJ in *Cordle v. Cordle* [2001] EWCA Civ 1791; [2002] 1 WLR 1441; [2002] 1 FLR 207 where Lord Justice Thorpe restated the test laid down in the *G v. G (Minors) Custody Appeal* [1985] 1 WLR 647; [1985] FLR 894 by saying:

*[32] .....any appeal from a decision of a district judge in ancillary relief shall only be allowed by the circuit judge if it is demonstrated that there has been some procedural irregularity or that in conducting the necessary balancing exercise the district judge has taken into account matters which were irrelevant, or ignored matters which were relevant, or has otherwise arrived at a conclusion that is plainly wrong*

20. Furthermore, in considering whether or not District Judge White has been plainly wrong in whole or in part of his decision-making process, I take into account and apply the principles to be found in the speech of Lord Hoffmann in *Piglowska v Piglowski* [1999] 2 FLR 763 at 784. I do not propose to cite the whole of that passage, all of which I have borne in mind and propose to apply. I would, however, in particular draw attention to the observation of Lord Hoffmann at page 784, that the reasons given by the District Judge:

*Should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.*

21. I also bear in mind that, as Lord Hoffmann observed, cases of this sort inevitably involve value judgments upon which reasonable people may differ and it is therefore inevitable that there will be some degree of diversity in the outcome of cases such as this.

The District Judge's findings:

22. In paragraph 69 of his judgment, the District Judge considered, as he was required to do so under S25 MCA 1973, the needs of the wife. Her budget of £6,352 had been predicated on the basis that she wished to remain in the former matrimonial home. The District Judge analysed her budget as follows:

*She has simply taken again the details of expenditure over the former matrimonial home and repeated them as her expenditure. She had claimed other items such as alcohol although she does not drink, she claimed for pool and gardener and garden plants. It is clear that her schedule was based on her desire to remain in the former matrimonial home. She claimed £820 a month for The child but.... The child is not, for the purposes of this application a dependant. She claimed £150 for hairdressing and £100 for cosmetics and toiletries. The total was £6,352 or over half the husband's net salary. When the husband's mortgage contributions... are deducted the wife is seeking more in terms of budgetary expenses than is the husband.*

23. The District Judge ordered a sale of that property and at paragraph 71 set what he described as a *fair budget for the wife* at £4,250 pcm. The District Judge attributed an earning capacity of £500 pcm and therefore concluded that *I place an appropriate figure for her maintenance at £3,750 pcm.*
24. In determining this *fair figure* the District Judge noted that the H's mortgage commitments mean that it is *abundantly clear* that he required more of his net income to meet his justifiable expenses than the wife who *will have no mortgage costs and can make significant savings in the expenses that she claims which are based on the former matrimonial home and she will in practice be occupying a smaller property..... By the time the husband has paid his mortgage costs and in particular the finance costs on the American property and the sum of £3,750 per month he will effectively be reduced to a similar figure to the wife to live on.*
25. In relation to H's bonuses, the District Judge said that they are unknown and that *I have not included them in my maintenance computation.* At paragraph 73 the District Judge said:

*This is a long marriage case, however, and the wife is entitled to full maintenance which historically has included bonus payments, share options and the like. I appreciate that going forward the wife would be making no contribution towards such bonuses and in my order her basic needs are met, but I do consider it legitimate that she has an interest in his income going forwards.*

26. The District Judge went on to say:

*.. consider it reasonable going forwards on the basis that this is indeed an ongoing maintenance case that the husband should pay to the wife 25% of all future bonuses going forwards. The wife's proposal for 35% is too high bearing in mind the divorce and that the parties are going their own ways.*

27. Mrs Bailey-Harris on behalf of H, submitted that this is the language of 'sharing' and not of needs as the District Judge had found her *fair budget* to be £4,250 pcm and that the continuation of a share of bonuses after the end of the marriage can only be as part

of a needs assessment or of a ‘run off’ in a capital and income clean break or deferred clean break case.

28. Mr Johnstone submits that paragraph 73 is capable of an alternative interpretation when set alongside paragraphs 3 & 6 of the supplementary judgment where the District Judge says:

*As is common in the financial world this Husband’s income has historically comprised both basic salary and bonus. This immediately poses a problem for a Judge at first instance, trying to make an order which is both realistic in terms of past household income and affordable in respect of future income. [para3]*

*I refer in my order to the wife’s “basic” needs being met. This is far from needs being “generously interpreted”. I would certainly have made a higher periodical payments order had the husband not denied the probability of future significant bonuses. The fairer solution was to give the wife a modest proportion of the husband’s future bonus if he received any. If not then both would have to live more frugally than would otherwise be the case. [para 6]*

29. Mr Johnstone goes further and says that no matter how *elastic* an assessment of needs may be, it can never be met with certainty from an unquantified income source that may never materialise, such as a discretionary bonus. What he describes as a *more sensible and certain rationale* where needs cannot be met on a capital clean break basis, is that spousal maintenance entitlement in a needs case can arise through the principle of sharing in the case of an unquantified future income.
30. In my judgment the Learned District Judge undoubtedly regarded the bonus payments as an integral part of his periodical payments order setting it out as he did in the body of the order in the following ways:

*5. The Petitioner shall pay periodical payments to the Respondent at the following rates:*

*5.1 £3,750 per month payable monthly in advance....*

*5.2 A sum equal to 25% of all his annual bonuses (net of tax and National Insurance.....)*

31. Mr Johnstone explored the jurisprudence in relation to the question of whether the sharing principle is capable of applying in relation to a claim for periodical payments. Mrs Bailey–Harris replied. The submissions were erudite and powerfully put on both sides but, with respect to Mr Johnstone, having reflected on the ground of appeal, the issue in my judgment does not arise in the present case.
32. I am satisfied having read the judgment, the order and the supplementary judgment, that the learned District Judge intended to and made his order wholly in terms of

maintenance requirements and not in relation to a continuing “share” of H’s bonus outwith any maintenance.

33. Mrs Bailey – Harris suggests that paragraph 73 of the judgment reads as if the District Judge is treating the case as a ‘sharing’ as opposed to a ‘needs’ case which, she says, would in law be wrong. Taken with the other comments of the District Judge set out above, I do not read the paragraph in that way - on the contrary on an analysis of paragraph 73 the District Judge said that:
- i) The W is entitled to full maintenance payable from H’s income which has historically included bonus payments, it is reasonable going forwards (on the basis that this is an ongoing maintenance case) that H should pay to the W a percentage of future bonuses as part of her maintenance entitlement.
  - ii) her *basic* needs will be met by his monthly order
  - iii) That W will not be making a contribution going forward
  - iv) W’s proposal that she should receive 35% was too much bearing in mind the divorce and that the parties are going their own ways.
34. What the District Judge was saying, as confirmed in his supplementary judgment, was that historically the standard of living of this family (in common with many families whose income is derived from the financial sector), was dependant on H’s bonus which roughly doubled his income. Had the proportions been different, (more income less bonus), he would have made the basic maintenance award higher. As that was not the case he made a *fair* order for maintenance which, met W’s basic needs, (as opposed to the inflated needs set out in her budget), whilst acknowledging the very substantial additional expenditure the H was obliged to meet as a consequence of his generous capital provision for his wife. As the District Judge was unable to quantify the level of bonus in a way which would have allowed him to specify a specific figure with which to “top up” the basic maintenance figure he was driven to using a percentage.
35. In my judgment the court could not possibly say such an approach is, in itself wrong. In reaching this conclusion I bear in mind Moylan J’s observations in *AR v AR (Treatment of Inherited Wealth)* [2012] 2 FLR 1:
- “[71]... in my judgment the court’s task when addressing this factor is not to arrive at a mathematically exact calculation of what constitutes an applicant’s future income needs. It is to determine the notional annual income which, in the circumstances of this case, it would be fair for the wife to receive. Further in a case such as this the wife is entitled to have sufficient resources to enable her to spend money on additional, discretionary, items which will vary from year to year and which are not reflected in her annual budget....”*
36. Such an example of discretionary spend on W’s part may be personal indulgences such as spending the £250 a month on her hair and cosmetics, a figure provided for by W in her budget of £6,352 pcm but viewed with scepticism by the District Judge.

On the other hand she may choose, despite the fact that she is in legal terms independent, to give the child financial assistance over and above the help her father already gives to her. I note that W included in her budget provision for the child which, quite properly, the District Judge excluded from an assessment of her basic needs.

37. I note also Coleridge J used a percentage to determine the appropriate level of maintenance in *V v V (Financial Relief)* [2005] 2 FLR 697
38. In my judgment where the Learned District Judge fell into error was in failing to identify a figure which would represent the W's maximum reasonable maintenance entitlement taking into account all the circumstances of the case, namely a cap. In my judgment, where the family income is routinely made up of salary and bonus and the bonus represents such a significant proportion of the total that the Judge is driven to making a conventional monthly order for a sum less than that which he would otherwise feel to be appropriate, (taking into account all the s25 factors and in particular the standard of living and the totality of the income available in the foreseeable future,) he may well provide for a part of the W's maintenance to be paid from the bonus. Such payment, given the intrinsic uncertainty of bonuses, can only be expressed in percentage terms.
39. The proper approach would be for the District Judge to calculate a total figure for maintenance which covers what he finds to be her ordinary expenditure together with such sum as would provide for what as Moylan J described as *additional, discretionary, items which will vary from year to year and which are not reflected in her annual budget*. Having carried out this exercise the court will then make a monthly order to be paid for from salary at whatever rate the District Judge feels to be fair, and the balance to be expressed as a percentage, of the net bonus up to a stated maximum each year.
40. It should be made clear that such orders cannot be calculated with arithmetical precision. In determining the appropriate percentage the court will do the best it can looking at the historical pattern of bonuses to date and by factoring in such information as may be available in relation to the future prospects of H (or his company). The inherent uncertainty of bonus payments provides, in part, the reason why that the setting of a cap is essential in order to avoid the unintentional unfairness which may arise as a consequence of a wholly unanticipated substantial bonus paid to the H. Such a payment would result in W receiving a sum substantially in excess of that which the District Judge regarded as appropriate in order to maintain her maintenance at a fair level.
41. In common with most bonuses, H's bonus is made up of a number of elements in the form of stock or cash deferral. W's percentage will apply pro rata across the various elements – it would not be fair for her to be entitled to receive the entirety of her maintenance percentage from the cash element leaving the H to take the risk on stock movements and the cash flow consequences of deferred cash payments.

## Conclusion

42. I therefore allow the appeal to the extent that I find that the District Judge erred in failing to set a cap beyond which the H would not have to pay the W 25% of his net bonus.
43. I have been asked to substitute an order in the event that I allow the appeal in order to save incurring the costs of a rehearing. I am satisfied having been told that for the third year running and despite the Bank's difficulty H received a bonus of approximately £200,000 that I have sufficient information to set a cap.
44. Mr Johnstone submitted that the proper figure would be the £6,352 W put forward in her budget. He submitted that the District Judge approved that budget but was unable to make an order on H's salary alone. I do not accept that the District Judge approved that budget. He spoke of W being able to make *substantial savings* on it and commented on the fact that it simply presumed expenditure at the rate required to keep the former matrimonial home with its pool etc going.
45. From the figures recorded by District Judge White it would seem that H's total salary (depending on how deferred payments and share entitlements are worked out), is somewhere between £200,000 pa net and £235,000 pa net. His salary is £11,441 net pcm or £137,292 pa. The total anticipated maintenance for W would therefore be in the region of
  - i) £3,750 per month payable from salary
  - ii) 25% from the bonus which on the crude figures available would give W an additional £20,000 pa (£1,666 pcm) or thereabouts: (25% of £217,500 - £137,292)
46. This would give W in a year when H achieves the level of bonus which he has been receiving, a total monthly income of £3,750 + £1,666 = £5,416 say £5,500 or £66,000pa. In considering whether this is a fair figure when looked at against all the factors I look at the budget produced by W of £6,352 pcm which included a figure of £800 pcm for a mortgage which she will not have to pay and of £820 for The child. I note also that this does not take into account the income attributed to W by the District Judge of £500 pcm.
47. In my judgment, a fair cap would be £20,000pa. In those years when the H's bonus is comparable to the present level, this would give the wife a total of £65,000 pa maintenance, plus her own earnings. On any view this would provide W, living mortgage free, with a substantial income even though part of the maintenance derived from H's bonus payments will not be paid immediately but will be deferred under the terms of the bonus payment.