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Neutral Citation Number: [2023] EWHC 1626 (Fam)

Case No: FA-2022-000260/261 and
CZ19D00032

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

-

The Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 30 June 2023

Before :

Mr Justice Moor

- -

Between :

Zhaolong Li (known as Nathan Li)

Appellant

-and-

Oliver Benjamin Simons

Respondent

- -
- -

Mr Simon Calhaem for the **Appellant**
Mr Harry Campbell for the **Respondent**

Hearing date: 15 June 2023

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JUDGMENT

MR JUSTICE MOOR:-

1. I have been hearing an appeal against the order of Recorder Chandler KC dated 6 September 2022. On 3 March 2023, Morgan J gave permission to appeal on four out of the six grounds raised. The appeal has been conducted on the basis of the written documentation and oral submissions alone.

2. Earlier this year, I gave judgment in another appeal, Teasdale v Carter [2023] EWHC 490 (Fam). I said that I considered the litigation in that case was one of the most regrettable pieces of litigation I had ever come across. The costs there were entirely out of proportion and, in all probability, ruinous to the future financial well-being of the parties. Exactly the same can be said of the litigation in this case. I take the view that it could not have been handled more disastrously if the parties had tried to do so. There is no doubt whatsoever that, regardless of the merits of the appeal, virtually the entire blame for that lies with the Appellant.

The relevant history

3. The Appellant is forty six years of age. The Respondent is aged forty. The Respondent says that the parties met in 2008 and commenced a relationship shortly thereafter. The Appellant says it was considerably later, but I do not need to resolve the issue as it is not relevant to what I have to decide. They married on 30 September 2016. Their matrimonial home was a property in Beckenham, Kent but they also owned two other properties in London.

4. They have one child, K, who is five years old. He was born in the United States of America following a surrogacy arrangement. A parental order was made in favour of both fathers in February 2019.

5. At around exactly the same time, the marriage broke down and the parties separated. There was a brief reconciliation in May 2019 but that was subsequently found by Hayden J to have been a sham on the part of the Appellant. A decree nisi was pronounced on 21 October 2019 and made absolute on 8 August 2020.

6. On 20 May 2019, the Appellant abducted K to the United States of America. The Respondent's case was that the intention was to continue on to China. In any event, Hayden J made a summary return order on 21 May 2019 and the Respondent collected K from America the following day. Since then, K has lived with the Respondent but there is an order made by Hayden J on 13 January 2021 for the Appellant to have contact to K six days out of every fourteen. As the Appellant now lives in China, it is hard to see how he can take up all of this contact. I was told that he has seen K for approximately five

weeks this year, which is around one week per month, in blocks of contact, which is clearly sensible.

7. The Respondent issued an application for financial remedies on 23 May 2019. In his Form E, the Appellant deposed to a net income of £11,613 per month. He is employed in a business that recruits office staff. The parties reached an agreement on the application on 14 April 2020. Chandler DDJ, as he was then, made an order in the terms of the agreement on 14 July 2020. In his statement of information for the court, dated 24 June 2020, the Appellant said that his net income was £9,866 per month, made up of £1,750 per month from China and £8,116 per month from Hong Kong.

8. The consent order dated 14 July 2020 dealt with capital issues as well as income. Whilst I am not directly concerned with the capital arrangements, it is right to note that the family home in Beckenham and a further property were both sold, with the Respondent receiving the vast majority of the proceeds of sale of both properties to enable him to rehouse himself and K. The Appellant retained the third property, a flat in Canada Water. There was an interim order as to maintenance, pending the sale of the properties. Thereafter, the Appellant was to pay to the Respondent for the benefit of K periodical payments at the rate of £2,900 per month until K finished Year 2 of Primary School. He was then to pay £2,400 per month until the commencement of Year 7. Thereafter, he was to pay £1,900 per month. There was a nominal spousal periodical payments order in the sum of £1 to increase if a CMS assessment was obtained in a lower figure than the maintenance. It is right to note that there was a recital that it was acknowledged and recorded that the Covid-19 pandemic may negatively impact both parties earned income and, in those circumstances, may make it necessary to review and vary the periodical payments.

9. The Appellant applied to vary the periodical payments and remit arrears in the autumn of 2020. I have found three separate dates for this application in the papers, namely 6 October 2020, 25 October 2020 and 30 November 2020 but the exact date does not matter. Whichever date is taken, a court is entitled to be highly circumspect about such an early application. The Appellant sought an order that the payments be halved on the basis his income had fallen to £6,030 per month in May 2020. It is, of course, noteworthy that his statement of information for the consent order giving a figure of £9,866 per month was dated a month later than May 2020.

10. By 12 January 2021, the Appellant was saying that he was only working part-time, three days per week. The reason given was the effect of the Covid pandemic on his employers and his health, as he was suffering from hypertension and myocardial ischaemia. He said that his income had, in consequence, further reduced to £4,011 per month net. From this point, he paid periodical payments of £500 per month rather than the sum of £2,900 pursuant to the order.

11. The application was heard by HHJ Gibbons over two days on 7 and 8 June 2021. By then, the Respondent had, not surprisingly, made an application to enforce the order. HHJ Gibbons reserved judgment.

12. The Judgment was handed down on 14 September 2021. She refused the application and was very critical of the Appellant. She noted that he divides his work between China and Hong Kong. The Respondent is employed part-time as a business developer manager. The Judge found that the Appellant had deliberately sought to mislead both the Respondent and the court as to his financial circumstances. The Appellant had told her that he had committed to the consent order because he had believed that the reduction in his salary would only be temporary. She said that the costs were wholly disproportionate. The Appellant's costs were £103,000, whereas the Respondent's were £36,000. She gave herself a Lucas direction. She then noted what I have been told were approximately twenty five inconsistencies in the Appellant's evidence. She made many findings of fact against him and drew various adverse inferences. She noted that there had been no sworn evidence from Joan Zhou, Human Resource Director at the Appellant's employers. The Respondent had challenged her evidence on the basis that the Appellant is her boss. The judge noted that there had, eventually, been a letter from a doctor as to the Appellant's myocardial ischaemia. She found that there was no risk of redundancy if he had not reduced his hours and that his commitment to K did not prevent him working full-time. She was not satisfied that he was working part-time but, if she was wrong about that, he was not maximising his earning capacity. She therefore found there was no change in his income. There was, however, a small reduction downwards in the maintenance as the Respondent's income had risen modestly. She ended her judgment by noting that the last thing needed was further litigation. Very regrettably, the opposite has occurred.

13. On 15 October 2021, the judge decided to make a costs order against the Appellant. Her final order is dated 6 December 2021. The variation, as noted above, reduced the immediate periodical payments to £2,185 per month until the end of K's Year 2. The payments would then be £2,076 per month until 15 November 2029 and then £2,400 per month until K commences Year 7 and then £1,900 per month. Arrears of £15,638 were to be payable at £1,500 per month from 15 November 2021 to 15 October 2023. It follows that the Appellant's monthly total payments were to be £3,685 per month. The Appellant did not seek permission to appeal this order at the time.

14. On 14 February 2022, the Appellant's second child, X was born. I was told that the new baby was two months' premature and initially unwell, but I have not been told that this remains the position and I assume the baby is now fit and well. It is the Appellant's case that he supports X and X's mother, his new partner. His new partner does not work. They live in China at her parents' address in Beijing.

15. On 21 February 2022, the Respondent applied to enforce maintenance arrears. The Appellant then applied, on 28 February 2022, to vary the order. This was

only some twelve weeks after the previous order of HHJ Gibbons had been perfected.

16. There were two directions hearings. The first was before HHJ Judith Hughes QC on 14 April 2022. She stayed the Respondent's enforcement application on the basis of the further application to vary. The second was before Judge Gibbons on 30 May 2022. She set the application down for hearing in September 2022 with a two day hearing. A recital to her order said that the sole ground for a variation is the birth of X and whether that provides sufficient basis to vary.

17. Nevertheless, in a statement dated 25 July 2022, the Appellant raised a whole series of additional points. He said his income had reduced, although he accepted his monthly salary had not changed since January 2021. He asserted that the Respondent's position had improved due to a further increase in his income; an inheritance from his mother; and a reduction in his outgoings. The Appellant asserted he could not afford the maintenance ordered due to the costs and arrears burden.

18. He finally provided a statement from Joan Zhou on 23 August 2022. I have read the statement provisionally. It confirms that the Appellant is a part-time employee and gives his salary in HK$ and CNY. I have to say that I cannot understand why this statement was so late, given the specific reference in HHJ Gibbons' judgment to the absence of such confirmation. Mr Calhaem argues that it was only in a statement from the Respondent dated 11 August 2022 that the Appellant realised that the Respondent was challenging his income but I cannot accept that as it is clear that the Respondent has challenged the Appellant's income throughout. It may, in fact, have been more to do with the recital to the order of HHJ Gibbons dated 30 May 2022 that the only issue was the birth of X.

19. The variation application was heard by Recorder Chandler KC over two days on 5 and 6 September 2022, as Judge Gibbons was unable to hear the case. The variation application was dismissed. By then, the Appellant had incurred further costs of £32,448 and the Respondent costs of £33,734. The Respondent's enforcement application was withdrawn on the basis that the Appellant pays arrears of £13,695 at £1,500 per month from 15 September 2024 until 15 May 2025. He was to pay the Respondent's costs of the variation application in the sum of £23,994, which were to be payable at £1,500 per month from 15 June 2025.

20. The Judge gave a preliminary ruling that he would not admit the statement of Ms Zhou because there had been no direction for third party witness statements, despite two directions hearings and it was not fair or acceptable to introduce a new witness into the case at the eleventh hour.

21. His main judgment rightly begins by saying that the legal costs of the case are grossly disproportionate. He makes the point that the Appellant has spent £135,448 on the two applications, which amounts to approximately five years' maintenance. The judge notes that the Appellant's case is that he should pay

nominal periodical payments for K, but will pay £1,500 per month towards the arrears and, from 1 November 2023, he will pay £345 per month, which he says is the CMS calculation for his maintenance for K.

22. The Judge then, inevitably, raises the issues of principle, namely to what extent the Appellant can relitigate the issues that were fully and carefully resolved last year. He asks whether reissuing the application based on largely the same arguments amounts, rather than to appeal, to an abuse of process. He notes that the argument before Judge Gibbons was that the Appellant's income had reduced from £9,866 per month to £6,030 per month and then £4,011 per month. The Appellant had said then that he was only working part-time and he had relied on ill-health. The Recorder quotes extensively from the judgment of HHJ Gibbons and makes the point that these were findings of fact, which were not appealed. He refers to the recital to HHJ Gibbons' order of 30 May 2022 and notes that, if the application had been articulated more broadly, it would likely have faced an application to strike out on the basis that it was an abuse of process.

23. The Judge then sets out the law as to applications to vary pursuant to section 31 of the Matrimonial Causes Act 1973. He notes that the court exercises a broad discretion and quotes from the judgment of Moylan J in the Court of Appeal in Morris v Morris [2016] EWCA Civ 812 where he said at [87]:-

> *"On a variation application, is the court required to consider the matter de novo? In my view, the simple answer is that it is not. The court must conduct an exercise which is proportionate to the requirements of the case. They might warrant a complete review but they can also justify…a light touch review".*

24. Both Moylan J in Morris and Ward LJ in Flavell v Flavell [1997] 1 FLR 353 agreed with what Cazalet J said in Garner v Garner [1992] 1 FLR 573 at 581:-

> *"Almost invariably, an application to vary an earlier periodical payments order will be brought on the basis that there has been some change in the circumstances since the original order was made; otherwise, except in exceptional circumstances, the application will, in effect, be an appeal. If an order is not appealed against, or is made by consent, then the presumption must be that the order was correct when made. If it was correct when made, then there will usually be no justification for varying it unless there has been a material change in the circumstances."*

25. The Recorder applies this dicta and reminds himself of the need for proportionality, given the careful review of the evidence and the factual findings one year before. No criticism is made of his approach to the law. Indeed, I am clear that he sets the law out correctly.

26. The Recorder then deals with the abuse of process argument. He reminds himself that there must be finality in litigation and that a party cannot seek to challenge factual findings by the back door to avoid the appellate threshold of

showing that the first judge was wrong. He quotes from Lewison LJ in Fage v Chobani UK Ltd [2014] EWCA Civ that "*a trial is not a dress rehearsal. It is the first and last night of the show"*. He then disagreed with Mr Calhaem's interpretation of the judgment of Charles J in G v G [2002] EWHC 306 (Fam); [2003] 2 FLR 71. He took the view that the judge was saying that a party could fill any evidential gap in evidence at a final hearing, not by making repeated applications to vary thereafter.

27. The judge then reviews the evidence he heard. He notes that the Appellant was saying his income was now £4,300 per month due to changes in exchange rates. The Appellant accepted that his employers have done well, increasing sales by 15% and profits by 500%. He said that he was working part-time for the foreseeable future because he needed to help his partner, who does not work, with their new baby. I note that he did not say that this was due to ill-health or his employers being unable to offer him full-time work. He said he did not want to rent out his apartment in Canada Water as he might need it for future contact with K. He asserted a legal obligation to support his parents to the tune of £500 per month. The Recorder found certain of his answers lacked credibility. He was not impressed by the Appellant's evidence for not returning to work. He clearly did not accept that it was reasonable for one parent to work only three days per week when the other parent was not working. He was also not impressed by his explanation for not renting out his London apartment.

28. The Recorder then said that, following the findings of fact of HHJ Gibbons that the Appellant's income was £9,866 per month net, the Appellant had the "*steepest of climbs to invite the court now to conclude otherwise*". Recorder Chandler KC had, however, not closed his mind on the issue. He had listened to the evidence. The Appellant had provided more documentary evidence, including a new employment contract, but "*these do not provide grounds for me to reach a fundamentally different conclusion to HHJ Gibbons, who concluded that [he] had deliberately sought to mislead the respondent and this court"*. He added that, having heard the evidence, he had reached similar conclusions as to credibility and the documentation remained unpersuasive. In essence, he was clear that the Appellant was seeking to relitigate the matter and that this had no merit. He therefore adopted the income figure of £9,866 per month net. He therefore dismissed the application and said it amounted to an abuse of process. He went on to say that to issue the application so shortly after the first one was little short of vexatious.

29. The judgment then rejects the assertion that the nominal maintenance order in favour of the Respondent is void. Mr Calhaem relied on the decision of the Court of Appeal in Dorney-Kingdom [2000] 2 FLR 855 in which Thorpe LJ commented that, in order for a Segal order to be legitimate, the order must contain a substantial ingredient of spousal support. The Recorder notes that the parties had agreed this structure which was global maintenance for the Respondent and K, so the purpose was different to that in a Segal order.

30. The Appellant filed a Notice of Appeal on 23 September 2022. It sought permission to appeal the order of Recorder Chandler KC and permission to

appeal out of time from the order of HHJ Gibbons. The Grounds of Appeal were:-

(1) Both judgments were predicated on the "*counter-factual*" basis that the Appellant's income was £9,866 per month net, when it was actually £4,300 net per month as shown by his bank statements; his payslips; certified letters from his employers; and his contract of employment. It was wrong of Recorder Chandler KC to proceed on the basis that the Appellant needed to prove the decision of HHJ Gibbons was erroneous.

(2) The Recorder was wrong not to allow a payor of a maintenance order to fill an evidential void.

(3) The Recorder was wrong not to permit the Appellant to rely on the evidence of Joan Zhou, the Human Resources Director of his employers. This evidence had been filed after the Respondent had asserted that the Appellant's income was unclear and HHJ Gibbons had based her decision in part on the fact that Ms Zhou had not filed evidence.

(4) The Recorder had failed to attribute weight to the change of circumstances.

(5) The decision involved an arbitrary and discriminatory approach as it bears no recognisable relationship to the amount which would be payable under a CMS assessment.

(6) It was wrong not to dismiss the nominal order for spousal periodical payments, given the decision in Dorney-Kingdom.

31. On 30 September 2022, Morgan J refused permission to the Appellant to appeal out of time from the order of HHJ Gibbons. I consider this was not in the least bit surprising given that there had been no attempt to appeal this order at the time.

32. On 3 March 2023, Morgan J gave permission to appeal on Grounds 1, 2, 3 and 6 above but refused permission on Grounds 4 and 5. In her reasons, she said that there was a real prospect that the appellate court would find that the Recorder fell into error by pursuing the matter as an appeal, rather than a variation application. The refusal to consider the evidence of Ms Zhou as per Ground 3 warranted consideration on the appeal. The attribution of weight to the matters set out in Ground 4 was a matter squarely for the Recorder. Ground 5 had no real prospect of success.

33. Mr Calhaem, who appears on behalf of the Appellant filed an amended Skeleton Argument on 14 June 2023. I decided to read it, but I make the point that there was no order giving permission for such an amended Skeleton and that, in general, appeals proceed on the basis of the Skeleton filed initially.

34. Mr Calhaem's first point is his client's contention that his obligations to pay periodical payments, arrears and costs, currently amounts to £3,685 per month out of a net income of £4,336 per month. He relies on the evidence filed in support of this figure. On this basis, the Appellant's obligations amount to 85% of his net income. I note, however, that, if he was working five days per week, the position would be very different. If his income was increased in exactly the same proportion to three days per week, he would be earning approximately £7,166 per month net. The maintenance obligation would then be 60%.

35. Mr Calhaem next argues that the judge failed to conduct a review of the circumstances in any material way and the hearing proceeded as though it was an appeal, not a variation application. He then asserts that there were no positive findings made by Judge Gibbons, such that a future court could not be bound by them. I cannot accept that submission. Judge Gibbons made a clear finding that there had been no change in the Appellant's income. Mr Calhaem then makes the point that the findings were made following a hearing in June 2021 whereas the Recorder was dealing with the case in September 2022. He submits the Recorder was wrong not to follow G v G. He was wrong to refuse permission to allow the statement of Joan Zhou, which was a response to the Respondent's statement of 11 August 2022 that claimed the Appellant's income was unclear and Judge Gibbons had drawn adverse inferences from a failure to provide such a statement. The CMS figure would be only £345 per month.

36. The Respondent's Skeleton, drafted by his counsel, Mr Harry Campbell, is dated 12 April 2023. He submits that the appeal is entirely without merit. He adds that the Judge was entitled to adopt a light touch review and to rely on Judge Gibbons' factual findings which are final. The Recorder was not required to hear further evidence although he did so. The decision in G v G related to an interim application for maintenance pending suit and litigation funding, not to applications to vary final periodical payments orders. The Judge was entitled to refuse to admit the evidence of Ms Zhou. There was no requirement for his client to object in advance. The Appellant should have dealt with this at one or other of the directions hearings and sought permission to file a short statement in reply. Whilst the decision in Dorney-Kingdom does require a substantial ingredient of spousal support, it had been agreed that there would be a nominal order in this case and the Appellant should be held to the agreement.

The law on appeals

37. The Family Procedure Rules 2010 provide at Rule 30.3:-

> *"(7) – Permission to appeal may be given only where –*
>
> *(a) The court considers that the appeal would have a real prospect of success; or*
> *(b) There is some other compelling reason why the appeal should be heard*".

38. In Re: R (A Child) [2019] EWCA Civ 895, the Court of Appeal resolved the issue as to how to apply this Rule. There must be a realistic, as opposed to a fanciful, prospect of success. There is no requirement that success should be probable, or more likely than not.

39. I entirely recognise that Morgan J has concluded that the appeal has a real prospect of success, but I must decide whether the appeal should be allowed or not. Rule 30.12 applies:-

> *(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.*

40. The appeal proceeded as a review on oral submissions only. There was no oral evidence. I must decide whether to admit the evidence of Ms Zhou, although I made it clear in court that I had read the statement provisionally. This is not a decision based on Ladd v Marshall [1954] 1 WLR 1489 as the evidence was before the lower court. The court simply decided not to admit it. I will decide on this issue when I consider Ground 3 of the appeal.

Litigation misconduct

41. Before reaching my conclusions, I want to make it clear that I have immense sympathy for the position of the Respondent to this litigation. Through absolutely no fault of his own, he has been put through two years of contentious and, at times, wholly unmeritorious litigation. The Appellant agreed an order and then reneged almost immediately, leading to the expensive round of litigation that ended with HHJ Gibbons' judgment. Rather than appeal, the Appellant applied back for a further variation virtually immediately. He then agreed a recital to the May 2022 order of HHJ Gibbons that he was only relying on the birth of his new child in relation to the second

variation application but he then reneged on that as well. He has spent over £130,000 on this litigation, which is the equivalent of five years' maintenance. Regardless of the outcome of this appeal, I am clear that all these points will be relevant to the question of the costs of the appeal and the costs below.

Ground One

42. I have found most of the submissions made to me in this appeal very easy to deal with. I have, however, found Ground 1 difficult. I accept that it is the Appellant's own case that his income has not changed since January 2021. The Respondent, therefore, says, with some force, that the Appellant is bound by the findings of fact of HHJ Gibbons. Moreover, he argues that the Appellant cannot challenge those findings before me as he has been refused permission to appeal out of time against that order by Morgan J.

43. The difficulty, as I see it, is that it is tolerably clear to me that his income is in the order of £4,300 per month net. On that basis, I accept that the combined periodical payments and arrears/costs amount to around 85% of his income. I recognise that there is an un-appealed finding, based on evidence taken in June 2021, that his income was, at that point, £9,866 per month net. It is now two years since then. I have to ask myself for how long it is right for a court, which must act justly, to hold him to that figure due to what is, effectively, his litigation misconduct in bringing the matter back to court rather than appeal.

44. Faced with his payslips, his bank statements, his contract of employment and, if it is admitted, the evidence of Ms Zhou, it is hard to see how a court, directing itself correctly, can come to any conclusion other than that £4,300 net per month is his net income. If his income was still £9,866 per month net, all these documents would have to be fraudulent, presumably, on the basis that the additional salary is paid into an undisclosed account. Whilst a court can, and in this case did, make adverse inferences, they must be proper ones to make on the evidence. I do not consider such findings now would be safe. This is not, of course, the end of the matter. There are two particular aspects that I will return to later in this judgment, namely his part-time work and the flat in Canada Water.

45. I also make it clear that I have come to this conclusion with a very heavy heart. I have enormous sympathy for Recorder Chandler KC. He was faced with an application that he found, for reasons that I entirely understand, to be an abuse of process, given that it was made so shortly after the un-appealed judgment of HHJ Gibbons. Moreover, the Appellant had nailed his colours to the mast by accepting a recital that he was only relying on the birth of the child as a change of circumstances. I fear this was done simply to avoid a strike out application. Having said all that, Recorder Chandler KC did not strike the application out. He proceeded to determine it, albeit on the basis of the light touch approach that he was undoubtedly entitled to take. He heard oral evidence. I have come to the conclusion that, having done so, he did have to find Appellant's income was as he said it was, in the absence of making findings that the Appellant and his employers had deliberately concocted payslips and contracts to pervert the course of justice. He did not make such

findings so I find it impossible to see how I can fail to allow the appeal on Ground 1, even though I can entirely understand why the Recorder came to the conclusion that he did.

46. I did wonder whether my conclusion on this Ground should be different as a result of the concession made before Judge Gibbons on 30 May 2022 that the sole ground for the variation was the birth of the new baby. By the narrowest of margins, I have decided not to do so. The court has to consider all the circumstances of the case when conducting the section 31 exercise. I cannot see that, in the absence of a successful strike out, the court can hold a litigant to such a concession. It might have justified an adjournment, although I entirely see why the Respondent would not have wanted that. It undoubtedly is very relevant to costs but I have concluded that it is not sufficient to prevent me coming to the conclusion that I have on this Ground.

47. There are various other matters raised in this Ground that I reject entirely. It is said that the judge ignored concessions made in the written evidence by the Respondent that the Appellant's income had reduced and that he was working, at least at one point, on a part-time basis. This Ground attempts to cherry pick evidence. The Respondent was clearly saying throughout that he did not believe the Appellant; that he was entitled to rely on the findings of HHJ Gibbons; and that the application should be dismissed.

48. It is then said that the judge failed to consider, properly or at all, that the Respondent had raised a questionnaire of the Appellant that had not asked a single question about the Appellant's income. It is true that the Questionnaire did not do so, but this was solely because the Appellant had said, at the hearing before HHJ Gibbons on 30 May 2022, that the sole ground for the variation was the birth of the new baby.

Ground Two

49. This Ground asserts that the judge was wrong not to follow the process set out in G v G [2003] 2 FLR 71, whereby the payor of a maintenance order could fill a perceived or real evidential void by providing further or better evidence of their income position on a variation application. This submission is completely wrong. The court is resolute in upholding the need for finality in litigation. The costs incurred in this case show how essential it is to follow that principle.

50. G v G is solely directed to interim applications. The wife in G v G applied for maintenance pending suit and litigation funding. There were huge gaps in the evidence of the husband. Charles J drew adverse inferences against him, but made it clear that he could fill the gaps and apply to vary the interim order, which, by its very nature, cannot be final. I am clear that the last appropriate time to fill those gaps would have been the final hearing. A litigant cannot rely on this dicta to bring the case back after a final order has been made. Lewison LJ was entirely correct in saying that the final hearing is not a dress rehearsal.

Ground Three

51. Ground 3 asserts that the judge was wrong to refuse permission to admit the evidence of Ms Joan Zhou. Given my finding on Ground 1, this Ground has been rendered rather otiose. I should, however, deal with it. I take the view that, unless he intended to strike out the Appellant's claim, the Recorder should have admitted the evidence of Ms Zhou. The way to do justice to the Respondent would have been via an adjournment or a costs order. There were pertinent questions that could have been put to Ms Zhou, particularly as it was being said that the Appellant's income was really over twice what she and the documents said it was. It follows that the appeal is allowed on this Ground as well.

Ground Six

52. Ground six contends that the judge was wrong not to dismiss the nominal periodical payments order in circumstances where its only purpose was to create a self-varying child periodical payments order. It is said that such a structure was ruled impermissible by the Court of Appeal in Dorney-Kingdom.

53. I do not accept that there is any merit in this Ground. I do accept that a Segal order must have a substantial ingredient of spousal support. In this case, I do not understand why it is said by Mr Calhaem that there cannot be any element of spousal support. The Respondent's earning capacity is constrained by the fact that he is the primary carer of K. Mr Calhaem makes much of the fact that the CMS figure, on the basis of his client having an income of £4,300 per month and, I believe, contact six days out of fourteen, is only £345 per month. It is quite clear to me that this would be inadequate maintenance in the circumstances of this case, if the Appellant was living in this jurisdiction and therefore subject to the jurisdiction of the CMS. It must, therefore, follow that there is a substantial ingredient of spousal support. After all, the parties agreed a far higher figure of £2,900 per month only three years ago. Moreover, the order was to decrease as K got older, presumably, on the basis that the Respondent will be able to increase his earnings by then. In any event, this is what the parties agreed and it would be quite wrong to discharge the nominal periodical payments order in the light of that agreement.

My overall conclusions

54. I must now decide what to do about the terrible situation that the parties now find themselves in. It is absolutely clear that I cannot return this case for a further hearing at first instance. A permanent solution must now be found and the litigation must come to an end.

55. I said to Mr Calhaem during his submissions that I thought it important that the Recorder had found that the Appellant should be working full time and that he should be renting out his property in Canada Water. Mr Calhaem submitted to me that there were no such findings of fact but I cannot accept that submission.

56. The Recorder says at [47]:-

> "*The applicant gave his evidence in a clear manner although I found several of his answers lacked credibility:-*
>
> *(a) I was not impressed by his evidence for not returning to work full-time. There is nothing unusual about a young father assisting with a baby at night, or providing some respite to the mother. It stretches credibility to assert that a baby requires one parent to stay at home and the other parent to work only three days per week.*
>
> *(b) I was not impressed by his explanation as to why his apartment in London had been empty for many months without him taking any steps to rent it out even if this involves a short Air BnB let."*

57. I am clear that these are findings of fact that the Appellant can and should return to work full-time and rent out his London apartment. Mr Calhaem valiantly submitted that the new contract showed that there was no full-time work available. I cannot accept that submission either. The Appellant's evidence for not working full-time was the birth of the baby not the company's position. In this regard, I propose to hold him to the concession made in the 30 May 2022 order of HHJ Gibbons. Indeed, his evidence to the Recorder was that the company was doing well; had increased turnover by 15%; and profits by 500%.

58. If he is earning £4,300 per month for three days per week, it would be £7,166 per month if he was working five days per week. I accept entirely that this is very rough and ready, but the Appellant has largely brought this upon himself by his litigation misconduct.

59. I have no idea at all how much he could rent out the Canada Water property for. I do accept that he will need accommodation when he comes to this country to see K. On balance, I suspect it would be cheaper for him to rent an Airbnb when he is here and rent out Canada Water permanently. I have no idea what the rental value is. There will be expenses of doing so, such as the Managing Agents' fees. The costs of running the property, including any mortgage, do not have to be deducted as he is paying those at present without any rental income. There will be tax on the rent and he will have to pay for the Airbnb when he is here. Doing the best I can, I propose to increase his income by a very small amount to £7,500 per month net.

60. When his income was taken by the court at £9,866 per month net, the maintenance was £2,185 per month or 22.1%. Applying the same percentage to an income of £7,500 per month, the maintenance should be £1,650 per month. That will reduce by a further £100 to £1,550 per month at the end of K's Year 2. I consider it is impossible to say what it should be in 2029, so I will just continue that order until further order.

61. I reject the suggestion that the birth of X makes any difference to the percentage. First, the birth of X post-dates the Appellant's known obligations to K and the Respondent. There is plenty of authority for the proposition that the first commitment takes precedence. Second, the Appellant is now living in China. I take the view that I can take judicial notice of the fact that the cost of living in China is considerably less than in London. The internet suggests it is around 60% cheaper.

62. I now have to consider the issue of when such a reduction should commence. I am clear that the Respondent is absolutely entitled to the benefit of the un-appealed order of HHJ Gibbons. I have decided, therefore, that the correct date to commence the lower figure is the date of the hearing before Recorder Chandler KC, namely September 2022.

63. In the same way, the arrears and costs, as ordered by HHJ Gibbons stand. I anticipate there will be further arrears pursuant to my order. Counsel must do the calculations but the Appellant will pay everything he owes at the rate of £1,500 per month as before.

64. I will have to deal with the costs before Recorder Chandler KC and myself. The Appellant should not think that, just because I have allowed his appeal, he will get his costs of the hearing before Recorder Chandler KC and of the appeal. I am clear that he has been guilty of litigation misconduct which will undoubtedly be factored into my eventual costs order.

65. I do urge the parties to come to a sensible agreement as to costs. I realise that this wish may be a forlorn hope. The matter must therefore be listed before me with a half-day time estimate for me to deal with costs and any other outstanding matters. I do, however, make it clear that I expect there to be no further litigation in this case thereafter.

Mr Justice Moor
16 June 2023

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