Neutral Citation No: [2020] NICA 41 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **McC11279** ***Delivered:*** **22/07/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE CHANCERY DIVISION

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Between:

ANTHONY QUINN

Appellant;

and

MADONNA QUINN

Respondent;

_____

Before: McCloskey LJ and McAlinden J

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McCloskey LJ ***(delivering the judgment of the court)***

Introduction

[1] This is the judgment of the court to which both members have contributed. Anthony Quinn (hereinafter "*the Appellant*") appeals against the judgment and order of Madam Justice McBride, both dated 23 October 2019, allowing in part his appeal against the anterior order of Master Sweeney, dated 05 April 2016.

[2] The parties, formerly husband and wife, have been litigating in increasingly acrimonious terms for some eight years. In the most recent phase of their litigation they have been battling bitterly over the division of certain assets. The outcome of this battle was determined by the judgment and order of McBride J under appeal. Both at first instance and on appeal the parties have essentially been unable to reach agreement about anything. This extends to virtually all minutiae, including procedural matters and the conduct of the two hearings culminating in this appeal. This court, at every stage, has invested considerable time and effort in guiding and assisting the parties with a view to converting something of a morass into a coherent and intelligible product. Regrettably both parties and the McKenzie Friend *(infra)* were stubbornly unresponsive and uncooperative. None of them displayed any appreciation of the court's efforts or the limitations of the appeal process.

Purported compliance with the court's requests and directions before, during and indeed after the appeal hearing was repeatedly seized as an opportunity to trade seemingly endless allegations and insults about the other's litigation conduct, marital conduct and post-separation conduct. As a result of this fixation the assistance and co-operation received by the court in its strenuous and conscientious efforts to resolve myriad nebulous and sometimes factually complex issues ranged from zero to minimal. The consequences of this will become apparent from a reading of this judgment.

The Underlying Proceedings

[3] It is convenient at the outset to identify two properties in particular:

(a) First, from 1998, some two years following their marriage, the parties' matrimonial home was 58 Prout Grove, London.

(b) The second is 12 Maloon Heights, Cookstown which became the parties' new matrimonial home (with the Appellant commuting to London for the purposes of work) following their move to Northern Ireland in September 2004 and until their separation in February 2012.

As noted in the history helpfully recounted by McBride J, the first intervention of the court was to make a Mareva Injunction dated 02 February 2012. The parties were divorced on 07 October 2014 on the ground of the Appellant's unreasonable behaviour.

[4] The ensuing litigation between the parties gave rise to the order of Master Sweeney in ancillary relief proceedings, which was in the following terms:

(a) The Appellant transfer the former matrimonial home situate and known as 12 Maloon Heights, Cookstown to the Respondent.

(b) The Appellant transfer the property situate and known as 58 Prout Grove, Dollis Hill, London to the Respondent.

(c) The jointly held property situate and known as 7B Springvale, Moneymore be sold and after discharge of mortgage and costs of the sale the Respondent to retain any balance. In the event that the proceeds of sale were insufficient to discharge the mortgage and costs of sale the Respondent was to discharge any outstanding liability using the proceeds of the parties' joint bank accounts and the Respondent was to retain any balance from the joint accounts.

(d) The Respondent was to receive the entire proceeds of the two Friends Life policies.

(e) The Appellant and Respondent were to otherwise each retain all assets including pensions held by them in their own names.

(f) The Mareva injunction was to be varied to facilitate the implementation of the terms of the order.

(g) The Appellant was to pay one third of the Respondent's costs of the application.

[5] The order of the Master has certain other features of note. It recites and records *inter alia*:

(a) The court was "*… satisfied that the Respondent was aware that the case was listed for final hearing today* [05 April 2016] *and further today's hearing date being agreed by and in the presence of the Respondent at the review on 22 January 2016 and the Respondent being advised by this court at that review that the case would proceed undefended today in the event that the Respondent did not appear, and the Respondent not appearing or being represented today*".

(b) The court was "*satisfied that the Respondent was put on notice of the Petitioner's proposal for resolution which was served on the Respondent in November 2016*".

(c) The court considered the "*undefended evidence of the Petitioner*" together with "*all the papers filed herein*".

(d) It was specifically ordered that service of the application (grounded in the summons dated 12 February 2015) on the Respondent was "*deemed good*".

(e) The Appellant was ordered to pay one third of the Respondent's costs of the application, to be taxed in default of agreement and "*discharged from the sole capital assets of the* [Appellant]".

(f) The Respondent was represented by both solicitor and counsel.

(g) The hearing had a substantive duration of two hours.

(h) Finally, the Appellant's address was noted as 58 Prout Grove, London.

[6] As stated in the order of McBride J dated 23 October 2019 the Appellant's appeal against the order of the Master was allowed and such order was varied in the following terms:

A. The Appellant shall transfer to the Respondent all his legal and beneficial interest in the matrimonial home, 60 Prout Grove, joint bank accounts with Barclays numbered ***898 and ***919, joint Friends Life policy and his Ulster Bank account *****083 and Barclays bank accounts numbers *****712 and *****897, and shall pay a lump sum of £34,000 (in lieu of Chapelside account ***7748) within 28 days of the date hereof and the Respondent shall take all necessary steps within her power to secure the release of the Appellant from the mortgage on 60 Prout Grove and she shall be solely responsible for payment of the mortgage from the date of transfer.

B. The Respondent shall transfer all her legal and beneficial interest in 58 Prout Grove and 8 Springvale to the Appellant who shall take all necessary steps within his power to secure the release of the Respondent from the mortgages on the said properties and the Appellant shall be solely responsible for payment of the mortgages from the date of transfer.

C. Each party to otherwise retain all assets in their respective names including pensions.

D. Each party to be responsible for own tax.

E. The Mareva injunction to be varied to enable the terms of this order to be complied with.

F. The Appellant is to pay 1/3rd of the Respondent's costs in respect of the lower court. Costs to be agreed or taxed in default of agreement. Otherwise each party is to pay his or her own costs.

G. The Appellant to be provided with the following contents from the former matrimonial home: bible, some photographs, tools and his financial documents. Otherwise the Respondent is to retain all contents in the former matrimonial home.

The Appellant challenges this order by further appeal to this court.

The Appeal Proceedings

[7] Both parties were unrepresented before McBride J. The Appellant had the assistance of Mr John Junk *qua* "McKenzie Friend". This continued during this further chapter of the litigation. This court granted enhanced "McKenzie" status to the McKenzie Friend, with the result that he presented the Appellant's case both at

certain case management hearings and at the substantive hearing stage. The grant of this facility was not based upon any assessment by the court of any incapacity or disability, medical or otherwise, on the part of the Appellant. It was rather precipitated by the court's assessment that this would enhance the efficient and expeditious conduct and resolution of the appeal.

[8] Case management hearings were the dominant feature of this appeal from its inception. The court proactively managed the appeal with a view to ensuring that it was conducted as efficiently, expeditiously and fairly as possible. This was rendered necessary by *inter alia* both parties unrepresented status (with the qualification noted) and the polarisation of their respective approaches. Indulgences were sought periodically on behalf of the Appellant in particular and were largely granted by the court. In this context we refer to, but do not repeat, [2] above.

[9] The most recent phase of the appeal proceedings was overshadowed by the Covid 19 pandemic. This moved the court to place a heavy emphasis on the written dimension of the parties' respective arguments. With appropriate judicial prompting and emphasis, this mechanism proved efficacious. The court was also able to arrange live *inter-partes* hearings, attended by both parties and the McKenzie Friend, for the purpose of receiving oral submissions. Each party was given a time allocation of half a day, on staggered dates, for this purpose. The McKenzie Friend was permitted to provide a written rejoinder on behalf of the Appellant. The court having received, and acceded to, a belated request from the Appellant for certain transcripts of the hearings before McBride J, further facilities were granted to each party for additional written submissions. In the interests of expedition and with a view to ensuring the integrity of the product, the preparation of these transcripts was, at our direction, undertaken by court administration. We have more to say on this topic: see [115] *infra.* In this context we refer also to one particular aspect of the post-oral hearings phase: see [92] – [95] *infra*.

The Judgment of McBride J

[10] The appeal hearing before McBride J was spread across some nine dates, with many of the listings entailing less than full days, spanning a period of almost six months. The first substantive listing was on 07 January 2019 and the last on 27 June 2019. The annual court vacation then intervened and judgment was given some two months later. One of the exercises undertaken by this court, painstakingly so, was to provide the parties with a breakdown of the judgment of McBride J. The central purpose of this exercise was to focus the parties' attentions on the findings of the judge. The findings of the judge which in this way we listed for the benefit of the parties are the following:

(i) The Appellant's claim that he had not worked since 2011 was rejected.

(ii) The Appellant had been in receipt of large amounts of cash and cheque payments since 2011, some made by a company owned by his brother Kevin which the judge attributed to work done by the Appellant.

(iii) The Appellant had also received other cash payments in respect of other work done by him.

(iv) The Appellant is presently able to work and is able to earn wages.

(v) The Appellant has a steady source of work from his very successful property developer brothers who have previously employed him.

(vi) During the parties' married life in London the Appellant had received a substantial income, being approximately £40,000 in 2012/2013, which level of income was expected to continue into the future.

(vii) The Appellant was in receipt of net rental income in respect of 60 Prout Grove, London of £600 monthly.

(viii) This rental income may increase in the future.

(ix) The Appellant has also had continuous rental income in respect of 58 Prout Grove, London for a number of years.

(x) The rental income for 58 Prout Grove, London is £1,550 monthly.

(xi) The Appellant was also in receipt of 20% of the rental income in respect of numbers 8 and 10 Chapelside, London, £5,600 per annum being 20% of the annual rental income of £28,000 per annum.

(At this point, the judge, summarising, made an omnibus finding that the Appellant had a total earning capacity of £71,400 per annum.)

(xii) Following the parties' move from London to Northern Ireland in September 2004, the Respondent had the role of carer for their two children and in consequence was economically disadvantaged in the labour market, working part time only and losing career progression opportunities, which economic disadvantage continues.

(xiii) Initially the Respondent worked part time for a construction company and from 2009 was employed part time by Women's Aid.

(xiv) The Respondent's total income comprises earnings from Women's Aid, Tax Credits and Child Benefits, the total being £1,945.91 per month equating to £23,340 per annum.

(xv) The Appellant's claim that the Respondent received the rental income in respect of the four aforementioned London properties was rejected: this income was paid into the parties' joint account and was used to pay joint household bills.

(xvi) The Respondent's only other source of income was the rental income in respect of 7 Springvale, Moneymore which was employed almost entirely to discharge the mortgage.

(xvii) The Respondent suffers from cancer and is undergoing chemotherapy with an uncertain prognosis. She was returning to work in a phased manner and her future earning capacity is unclear.

(xviii) It is unlikely that the Respondent will ever return to full time employment.

(xix) In the unlikely event that she does, it is improbable that her income earning capacity will be as before.

(xx) The Appellant's claim that 58 Prout Grove, London was purchased for a reduced consideration was rejected.

(xxi) 58 Prout Grove, London was the matrimonial home from 1998 until 2009 and the rental income subsequently generated was devoted to paying joint household bills.

(xxii) 58 Prout Grove has a gross market value of £692,500, reducing to £636,829 net to reflect the mortgage redemption amount of £55,571.

(xxiii) The property at 12 Maloon Heights, Cookstown became the parties' Northern Ireland matrimonial home, purchased in their joint names and where the Respondent continues to reside with the two children (now aged 15 and 18 years respectively). Its market value is £207,500.

(xxiv) The property at 7 Springvale, Moneymore was purchased by the parties jointly as an investment. It is now in negative equity in the amount of £54,500.

(xxv) The two Barclays accounts have balances of £3,548 and £361.51 respectively.

(xxvi) The Friends Life policy has a value of £1,714.

(xxvii) The Barclays Wealth Fund is worth £67,000, to be paid equally to each party.

(xxviii) The Respondent has bank accounts with a total credit balance of £34,337.24.

(xxix) The Respondent has a further bank account for the two children with a credit balance of £11,257.58.

(xxx) The Respondent has a Barclays pension with a CETV of approximately £340,000.

(xxxi) The Respondent has a separate Women's Aid pension with a CETV of approximately £13,000.

(xxxii) The properties at 8 and 10 Chapelside, London will be redeveloped by the Appellant's brothers without contribution from him and he will continue to receive 20% of the future rental income.

(xxxiii) The Appellant's claim that his interest in the aforementioned two properties was of no value, being akin to a minority company shareholding, was rejected.

(xxxiv) The Appellant's 20% capital share in the two aforementioned properties was assessed at £530,000.

(xxxv) The net market value of 60 Prout Grove was assessed at £412,500.

(xxxvi) The Appellant had several pension policies contracted during the parties' cohabitation or marriage with an assessed value of £87,000 approximately.

(xxxvii) The Respondent's claim that the Appellant had undeclared monies of £16,000 was rejected.

(xxxviii) The "Chapelside account" held by the brother received the rental income in respect of the two properties, having a balance of some £16,000 with the Appellant's 20% share equating to £3,200.

(xxxix) The Appellant removed the entire contents of a matrimonial safety deposit box, the amount being in the order of £20,000 to £40,000.

(xl) The contents of two specified Barclays accounts, amounting to £105,000 (or £98,000?) originated from the Appellant's earnings and/or rental income from other properties and were part of the matrimonial assets.

(xli) The rental income for the two Chapelside properties was paid into the Chapelside account and not the aforementioned Barclays accounts.

(xlii) Following the parties' separation, the Appellant withdrew £100,000 from the Barclays accounts in an attempt to dissipate matrimonial assets.

(xliii) The Appellant encashed some £3,500 emanating from a Legal and General account.

(xliv) The Appellant (following the imposition of an earlier Mareva injunction) had an authorised expenditure of £10,000 from the Credit Union account.

(xlv) The Appellant had dissipated assets totalling £153,500 subsequent to the parties' separation.

(xlvi) The Respondent dissipated a total of £140,000 following the separation.

(xlvii) The Respondent had accounted for all of her bank accounts to the court.

(xlviii) Following the order of Master Sweeney, the Respondent dissipated assets totalling £71,000.

(xlix) The first act of such dissipation entailed encashment of the Friends Life policy, while the second was the withdrawal of monies from the Chelsea Building Society for the purpose of purchasing a car required for the joint needs of the Respondent and the children.

(l) The Appellant's post-separation dissipation of matrimonial assets was assessed at £153,000 while that of the Respondent was assessed at £104,000, with the result that employing the equal division technique £24,000 was due from the Appellant to the Respondent.

(li) Neither party was guilty of a failure to make discovery of documents amounting to conduct which it would be inequitable for the court to disregard.

(Finally)

(lii) The Appellant had failed to attend the hearing before Master Sweeney without any good reason, having deliberately absented himself by going on holidays without having instructed solicitors to represent him.

[11] As appears from the foregoing the judge made a total of 52 specific findings. This court, at the outset of the appeal hearing, escorted the parties and the Appellant's McKenzie Friend through the judgment identifying each of these

findings *seriatim*. The court then granted the McKenzie Friend's request for a short adjournment to enable him to take further instructions from the Appellant.

[12] The judge, drawing together the aforementioned findings, then summarised the capital assets as follows:

(i) The total value of the parties' joint assets was £795,452.

(ii) The total value of the Respondent's assets was £491,000.

(iii) The total value of the Appellant's assets was £1,216,500.

The grand total is £2,502,952. The judge then gave consideration to Lord Wilson's summary of the applicable principles in *Scatliffe v Scatliffe* [2017] AC 93 at [25]. She observed that the parties' marriage had been a long one, of some 21 years duration. Next she concluded that the properties at 8 and 10 Chapelside were non-matrimonial property, on account of their date of acquisition and the nature of the Appellant's interest therein. Thus these would fall to be taken into account only if required to meet identified "needs". In this way the judge excluded numbers 8 and 10 Chapelside from the pool of matrimonial property.

[13] The judge then gave consideration to the legal principles relating to the division of matrimonial capital assets. She concluded that all of the joint assets constituted matrimonial property. Applying the criterion of fairness the judge considered that all of these assets, with the exception of the matrimonial home, should be divided equally between the parties, *ditto* the negative equity in the Springvale property, adding:

> "*No one disagreed with this approach.*"

[14] Next, the judge specifically applied the 50/50 division to the Barclays Wealth fund, rejecting the Appellant's claim that 80% of the contributions to this asset had been made by him. The judge then recorded the Appellant's acceptance that the equity in the matrimonial home should be divided 60/40 in the Respondent's favour to reflect her role as carer of the two children. Next the judge concluded that all of the Respondent's assets were matrimonial property and therefore fell to be divided equally. Her ensuing conclusion was that the property at 60 Prout Grove, together with all of the Appellant's assets in his sole name (having previously excluded numbers 8 and 10 Chapelside), were matrimonial assets and, thus, to be divided equally between the parties. Furthermore, everything dissipated by the parties consisted of matrimonial assets. Finally, the two Chapelside properties would remain excluded from the "pot" as other assets sufficient to meet the Respondent's housing needs and to make her self-sufficient in other respects were available.

[15] The judge next highlighted the Respondent's role of primary carer of the two children of the marriage post-separation. She noted that notwithstanding her financial dependency on the Appellant, he had failed to pay any spousal or child maintenance subsequent to separation. This had rendered it necessary for the Respondent to liquidate certain capital assets in the amount of some £105,000. This yielded the specific conclusion that the Respondent was "*… entitled to a lump sum payment to reflect a capitalisation of arrears of periodical payments due to her*". Next, having regard to the capital assets which would become available to her it was not necessary to make an order for future periodical payments in favour of the Respondent.

[16] The judge then turned her attention to the amount due by the Appellant to the Respondent in respect of past periodical payments. Having outlined the applicable legal principles, she found this to be £20,000 per annum to which a multiplier of six would be applied "*… given that the parties have been separated since 2012 (to reflect discount for capitalisation), producing a lump sum of £120,000*".

[17] The next issue addressed by the judge was that of pensions. She noted the parties' agreement that this should be determined by the mechanism of a lump sum rather than pension sharing. The judge espoused this approach. Noting that the total pension pot was £440,000 she concluded that the Appellant's entitlement would be 35% "*… to reflect the age of each party, the ill health of the wife, the length of the marriage, the disadvantage the wife has suffered in the labour market, the contributions each has made to the pension pot and the need to discount for an immediate lump sum payment*". This would amount to £154,000. Given that the Appellant's pension assets had a value of £87,000 the Respondent would be ordered to pay £65,000 to the Appellant.

[18] The final issue addressed by McBride J was that of litigation misconduct. The judge expressed her conclusion in the following terms:

> "*Given my findings that the Appellant blatantly breached court orders and deliberately absented himself from the hearing in the lower court I consider that it is appropriate that he is fixed with the original order of the court whereby he was ordered to pay 30% of the costs of the original hearing. Otherwise I make no order as to the costs of this appeal.*"

The omnibus conclusion of the court, which is set forth in [4] above, was that a total payment of £737,250 was due to the Respondent by the Appellant. The judge added that the parties would have to engage solicitors in order to execute the order of the court (set out in [4] above).

The Grounds of Appeal

[19] This court's identification of the grounds of appeal is to be viewed from two perspectives in particular. The first is the intensive case management noted above.

The second is the need for a certain degree of judicial construction, a feature common to many appeals. These prefatory observations made, the court has identified in the detailed skeleton argument of on behalf of the Appellant a total of 15 grounds, some of which embody more than one complaint. The grounds of appeal listed in the immediately succeeding paragraph were formulated by the court in these terms in advance of the oral hearing and provided to the parties.

[20] The grounds of appeal thus identified are the following:

(i) "*Serious procedural or other irregularity in the proceedings before McBride J*". This ground embodies five discrete elements: the alleged misconduct of an unnamed male person who, it is said, was permitted by the judge to accompany the Respondent during the hearings; the judge's erroneous assessment of the Appellant's "*evidence and demeanour*"; the assertion that "*… the trial and supplemental bundles were not before the court for the vast majority of the …. hearings*"; the unfair reception of certain evidence provided by the Respondent "*… after the Appellant had part given his oral evidence to the court*"; and, fifthly, the discrete decision of McBride J not "*… to make any determination regarding the complaints made by the Appellant in respect of the hearing which took place before Master Sweeney*".

(ii) The judge's finding that the Appellant had earnings of £70,000 per annum was "*completely incongruent with the evidence*".

(iii) The judge's finding that the Respondent was economically disadvantaged in the labour market and had lost career progression opportunities was based on "*a misunderstanding of the evidence*".

(iv) The judge's award of child maintenance to the Respondent was "*unjust and unfair*".

(v) The judge "*erred in fact and law*" in her assessment of the valuation of the properties at 58 and 60 Prout Grove, London.

(vi) The judge "*erred in fact and law*" in her treatment of the inheritance in the property at 60 Prout Grove, London.

(vii) The judge "*demonstrably erred in material fact*" in her finding that the monies in the Barclays accounts did not consist of rental income.

(viii) The judge "*fell demonstrably into error in law and fact*" in her assessment of the valuation of the Chapelside properties.

(ix) The judge's finding that the Appellant had removed of the order of £20,000 - £40,000 from the matrimonial home contradicted what had allegedly been "*determined and dismissed*" by another judge (Weir J) in Mareva injunction proceedings on an issue which had become *res judicata*.

(x) The judge "*… demonstrably erred in fact in not awarding the Appellant the inventory of chattels from the former matrimonial home that had been agreed to by the …. Respondent.*"

(xi) The judge "*failed to consider the liabilities of the Appellant at all*".

(xii) The judge "*erred in fact*" and committed "*demonstrable error in fact and law*" by "*… making no adverse finding with the weight of the evidence against the Respondent for her non-disclosure of assets before the lower courts*".

(xiii) The specific award of a lump sum of £34,000 to the Respondent is "*wrong*" as it "*double counts Chapelside*".

(xiv) The judge "*erred in law and discretion*" in making an order for costs against the Appellant.

(xv) The judge "*erred in law*" in not making a costs order against the Respondent.

[21] The terms in which the grounds of appeal are couched are instructive. With reference to the judge's findings and conclusions the grounds are replete with language such as "*demonstrable error in fact … demonstrably and plainly wrong in fact … error in material fact … plainly wrong … cannot be sustained … clearly incongruent … a demonstrable error of critical fact … erred in law and facts … an impermissible finding … a misunderstanding of the evidence … has plainly not relied upon evidence … findings cannot be sustained and are demonstrably incorrect … did not have due regard to all the evidence …* [and] *plainly wrong*". This appeal, therefore, entails in the main a frontal attack on the findings of the judge.

Governing Principles

[22] The principles which govern an appeal of this *genre* were rehearsed in the recent judgment of this court in *Kerr v Jamison* [2019] NICA 48:

> ***"Governing Principles***
>
> *[35] Some basic dogma must be recognised at this juncture. This is not a court of first instance. It is rather an appellate court. The adjectives perverse, irrational and aberrant have a*

legal grounding, being traceable to a series of principles to be derived from the decided cases. The jurisdiction of the Court of Appeal to review findings of both fact and law is clear. See for example Ulster Chemists v Hemsborough [1957] NI 185 at [186] – [7]. Where invited to review findings of primary fact or inferences the appellate court will attribute weight to the consideration that the trial judge was able to hear and see a witness and was thus advantaged in matters such as assessment of demeanour, consistency and credibility: see for example Kitson v Black [1976] 1 NIJB at 5 – 7. The review of the appellate court is more extensive where findings are made at first instance on the basis of documentary and/or real evidence. However even where the primary facts are disputed the appellate court will not overturn the judge's findings and conclusions merely because it might have decided differently: White v DOE [1988] 5 NIJB 1. The deference of the appellate court will of course be less appropriate where it can be demonstrated that the first instance judge misunderstood or misapplied the facts. See generally Northern Ireland Railways v Tweed [1982] 15 NIJB at [10]–[11].

[36] There is a valuable exposition of the role of this court in Heaney v McAvoy [2018] NICA 4 at [17]–[19]:

> *"[17] Generally an appeal is by way of rehearing. The rehearing is conducted by way of review of the trial, including any documentary evidence, and the trial testimony is not re-heard. In most appeals the hearing consists entirely of submissions by the parties and questions put to the parties by the judges. New evidence is not generally admissible unless it can be shown that it is relevant and that the evidence could not with reasonable diligence have been brought before the original trial.*
>
> *[18] The Court of Appeal is entitled to review findings of fact as well as of law but the burden of proof is on the appellant to show that the trial judge's decision of fact is wrong. On a review of findings made by a judge at first instance, the rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The first instance hearing on the merits should be the main event rather than a try-out on the road to an appeal.*

> *[19] Even where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and contemporaneous documents without oral testimony, the first instance judgment provides a template and the assessment of the factual issues by an appellate court can be a very different exercise. Impressions formed by a judge approaching the matter for the first time may be more reliable than the concentration on the appellate challenge to factual findings. Reticence on the part of the appellate court, although perhaps not as strong where no oral evidence has been given, remains cogent (see DB v Chief Constable [2017] UKSC 7)."*

The judgment continues at [20]:

> *"The foregoing principles are clearly of material significance in this case. The trial judge had the advantage of hearing the oral evidence of the appellants on the Tomlin Order issue. He considered the appellants to be both unreliable historians eager to mould the facts to their objective as opposed to telling the unvarnished truth. He gave examples in respect of the Order that they said the Court of Appeal had made and the alleged admission by their former solicitor that he was guilty of misrepresentation. There is no indication that the judge did not take all the circumstances surrounding the evidence into account, that he misapprehended the evidence or that he had drawn an inference which there was no evidence to support. In light of the judge's conclusions we see no basis upon which we could interfere with his refusal to set aside the Tomlin Order."*

> *[37] This was noted and applied in a comparatively recent decision of this court: Herron v Bank of Scotland [2018] NICA 11 at [24]. This court's formulation of the correct approach in Heaney v McAvoy took cognisance of the guidance contained in DB v Chief Constable of PSNI [2014] NICA 56 at [78] – [80]. There Lord Kerr stated at [80]:*

> > *"The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent."*

> > *To paraphrase, reticence on the part of an appellate court will normally be at its strongest in cases where the appeal is based to a material extent on*

> *first instance findings based on the oral evidence of parties and witnesses."*

[23] We observe in passing that during the case management phase of this appeal the above principles were brought to the attention of the parties.

First Ground of Appeal

[24] As noted above, this ground partakes of five distinct elements. The gist of the first of these, as construed by the court, is that the Appellant did not have a fair hearing before McBride J by reason of the permitted presence and ensuing conduct of the Respondent's male companion. This analysis is particularly clear from the following extract from the McKenzie Friend's skeleton argument:

> "*The presence of the non-McKenzie Friend directly affected the Appellant by his proximity, observation and gesticulation when he was giving evidence in plain sight and further by his verbal abuse of the Appellant within the court. This further affected the Appellant's mental ill health and high trait anxiety during the proceedings given* [that] *this person had previously harassed and intimidated him on previous occasions.*"

[25] This court acceded to the Appellant's formal application for the transcription of the initial phase of the hearing before McBride J. As noted in [9] above, the transcript was prepared by court administration. The next step, pursuant to this court's direction, was to send it to the judge for possible editing. The judge, with commendable speed, replied that no editing was considered appropriate. The transcript was then transmitted to the parties with the offer of a facility to make further written submissions. Each party availed of this facility and the court has considered the additional submissions received in consequence.

[26] In very brief compass the transcript of the initial listing before the court (on 07 January 2019) records that the Respondent was accompanied by a male companion whom we shall identify as Mr M. The presence of Mr M was raised by the judge. The Respondent, in reply, reminded the judge "*you had said I could bring someone*". The judge approved of the gentleman's presence with the reminder that –

> "*… a McKenzie Friend is someone who can assist you with your papers and if there's something maybe she's forgotten to ask or you want to remind her, you can talk to her … I'm happy to appoint you then as the McKenzie Friend ….*"

The McKenzie Friend on behalf of the Appellant then objected to this on the sole and specific ground that Mr M "*… has a personal interest in the case*", elaborating "*he was one of two people who attempted to break into 58 and 60 Prout Grove and the police are actually investigating that matter in London at the moment*". The judge then established

that Mr M was not seeking McKenzie Friend facilities and, in terms, revoked her earlier ruling. In response the McKenzie Friend asserted that during a court recess Mr M had called the Appellant a "*Pinocchio*". The judge's response was that she would "*monitor the conduct of the proceedings*". It is to be noted from the transcript that the Appellant made several unsolicited interjections during this initial phase of the appeal hearing.

[27] At the hearing before this court the McKenzie Friend, gratuitously disparaging the judge, characterised Mr M the "*McBride friend*". He suggested that there had been a contravention of the guidance of the Lord Chief Justice dated 03/2012, drawing attention to **paragraph 4.3.** This states that it will not be appropriate for a duly appointed McKenzie Friend to -

> "*…(iii) Exercise a right of audience by addressing the court, making oral submissions or examining witnesses unless this has, in very exceptional circumstances, been authorised by the court…..*
>
> *It is a criminal offence to exercise rights of audience or to conduct litigation unless properly qualified and authorised to do so by an appropriate regulatory body or with leave of the court. The very exceptional circumstances in which a McKenzie Friend can apply for rights of audience or to conduct litigation are set out in paragraphs [14-18] below."*

[28] There is not a shred of evidence before this court, whether in the form of transcripts or newly admitted affidavit evidence or otherwise, supporting the suggestion that there was misconduct on the part of Mr M depriving the Appellant of a fair hearing. This discrete aspect of the first ground of appeal resolves to bare, unsubstantiated assertion. It is also confounded by the transcript of the first day of hearing which the court ordered in the circumstances set out in [9] above. It is manifestly devoid of merit and is rejected accordingly.

[29] It is appropriate to add that the McKenzie Friend, in substance, attempted to give evidence to this court of what he saw and heard during the hearings before McBride J. This court (with the narrow exception noted *infra*) refused to permit this, reminding the McKenzie Friend more than once that the roles of advocate, or McKenzie friend (on the one hand) and witness (on the other) are fundamentally distinct and drawing attention to the central theme of the decision in *BW (Advocates: Evidence)* [2014] UKUT 00568 (IAC) at [5]:

> "*In these circumstances, the following guidance seems appropriate:*
>
> *(i) In certain circumstances, it is appropriate for a legal representative to make a witness statement of this kind,*

particularly where the grounds of appeal are based, in whole or in part, on how the first instance hearing was conducted and events which unfolded therein.

(ii) The cases in which a witness statement of this type materialises between first instance hearing and appeal are likely to be rare. In practice, this course is most likely to occur where it is contended that the litigant was deprived of his right to a fair hearing by reason of events which occurred at the hearing itself. One far from fanciful illustration which comes to mind is a case where it is considered necessary to present, as part of an application for permission to appeal, evidence relating to the circumstances in which a late application for an adjournment materialised and how such application was handled by the Tribunal if the Tribunal's determination does not speak for itself on this discrete issue.

(iii) Those compiling applications for permission to appeal must be alert to the important distinction between legal submissions and arguments (on the one hand) and evidence (on the other). This distinction must not be blurred.

(iv) Where it is decided that a witness statement of the kind which materialised in the present case must be made, the legal representative concerned should, as a general rule, not present the appeal before the Upper Tribunal. The roles of advocate and witness are distinct, separated by a bright luminous line. An advocate must never assume the role of witness. This conflict may be avoided if, for example, the facts bearing on the judicial aberration in question are undisputed. Otherwise, the appellate advocacy function must be relinquished to another representative.

(v) In every rule 24 response, care must be taken to set out the Respondent's position in relation to a witness statement of this kind. Thus, if the contents of the statement are undisputed, this should be simply stated. Alternatively, any controversy regarding the contents must be highlighted."

[30] To summarise, in any case where there is a material issue of procedural fairness stemming from how a hearing at a lower judicial tier was conducted and the relevant facts are neither agreed nor readily and confidently ascertained from a reliable objective source such as a transcript advocates and McKenzie Friends must reflect carefully on how any relevant ensuing ground of appeal is to be presented and, more specifically, whether there is any impermissible overlap of the roles of advocate and witness. They must also give studious consideration to the question of whether an application to the appellate court for the reception of fresh evidence in a

specified form is appropriate. Furthermore an appreciation of the legal principles rehearsed in [20] above is essential.

[31] The second element of the first ground of appeal entails a challenge to the following passages in the judgment of McBride J at [22] – [23]:

> *"[22] I found the Appellant to be dishonest, shifty, evasive, rude, obstructive, unhelpful and disrespectful to the court. He stated that he had "memory loss" associated with his medication which meant he was unable to answer a number of questions posed by his wife. The husband however failed to produce any medical evidence to support his memory loss. I found that when he gave his evidence his memory loss was very selective. When asked challenging questions he said that he had no memory. In contrast he appeared to have an excellent and detailed memory stretching back many years in respect of matters which were supportive of the case he was making. I found his evidence in respect of a number of specific matters to be totally unreliable. For example, in 2011 he said that he was unaware that he held a 20% interest in 8 & 10 Chapelside London. HMRC records produced by him relating to this period however show that he had declared on his tax returns that he had received rental income from these properties. I further found his evidence that he had no idea whether the properties at Chapelside were the subject of redevelopment to be totally incredulous given that he collected the rent for these premises; regularly attended at the premises and regularly spoke to his brothers who are property developers. I further disbelieved his evidence that he resided at 58 Prout Grove, London. When his wife put to him that she had on a number of occasions seen a man living at the premises and whom neighbours had advised her was a tenant of the premises, the husband contended that this man was a friend called "Kevin", (whose surname he did not know) and that Kevin stayed at the premises to "look after them" only when the husband was absent from them. I further do not accept the husband's evidence that he has not worked since 2012. The evidence shows that he did not claim benefits until 2017. When challenged about how he could afford to live without income between 2012 and 2017 he stated his brothers gave him income. He accepted under cross examination however that during this time he went on more than one holiday per year, owned a 5 series BMW and owned a work's transit*

> *van. He denied using the van for work saying he had signed a SORN declaration. No such document was provided to the court. I found all of this evidence to be totally unconvincing and it is my view that he was working throughout this period. When asked about his ability to file tax returns he stated he was unable to do so as his wife held all the documentation. It transpired in evidence however, that he had had his mail redirected many years earlier and the tax returns which he had failed to return covered the period when his mail was redirected. I am therefore satisfied that the husband in all these matters was less than forthright with the court. As a consequence the court gives little weight to his evidence generally.*
>
> *[23] In contrast I found that the wife did her best to answer the questions posed by her husband's representative and the court openly and honestly. I found her to be a straightforward witness who exercised considerable restraint given the husband's frequent unsolicited and provocative comments made during her evidence."*

[32] The core of this discrete complaint is that the judge failed to consider the evidence of the Appellant "*… through the lens of his ongoing mental disability*". It was further contended that the judge's assessment of the Appellant could not be reconciled with the medical evidence before the court. The court's attention was drawn to the Equal Treatment Bench Book, coupled with the statutory benefits which the Appellant had been receiving. In response to a question from the bench, the McKenzie Friend confirmed that the sole medical evidence to be considered was a report from a General Medical Practitioner dated 04 May 2012, consisting of nine lines, in these terms:

> "*Our patient Anthony Quinn has been seen many times over the last two to three months concerning anxiety and depression. Events leading up to this has* [sic] *been marital difficulties and now his wife wants a separation. He has two children. Anthony has indeed been distraught in recent weeks. He has become highly anxious and stressed out. Anthony is unable to concentrate properly. His sleep pattern has become totally disturbed. Sequence of events has thrown our patient into a moderate severe depression. At present a court attendance would be difficult because of his state of mind. He has been commenced on anti-depressants. We are now monitoring his progress.*"

The Appellant's submission, extraordinarily, characterised this report of eight years vintage "*updated*". We do not overlook the other medical evidence in the appeal bundle: a different General Medical Practitioner's letter dated 10 October 2016 stating that the Appellant "*.. normally works as a site electrician but has not been working for the last six months …*" and was taking a specified medication to treat "*low mood and anxiety*", having been tearful and anxious on unspecified dates; another very brief letter/report from a different medical practice noting that the same medication had been prescribed for the Appellant on an unspecified date in 2016 and was increased in dosage on 11 January 2019 due to "*an exacerbation of his stress and anxiety*"; and, finally, a brief letter from a psychotherapist dated 23 April 2019 based on "*an initial assessment session*" embodying the suggestion that the Appellant required a minimum of 48 sessions of counselling at the rate of £45 per hour totalling £2,160.

[33] This ground of appeal encompassed also the judge's rejection of the Appellant's assertion that he had not worked since 2011. There can be no sustainable suggestion that the judge failed to consider the medical evidence bearing on this discrete factual issue. Nor can this court overlook the judge's unique position of factfinding tribunal in the context of a protracted hearing involving extensive *viva voce* evidence from *inter alia* the Appellant. If one is seeking some objective evidence relating to this issue it is readily found in the General Practitioner's letter of 10 October 2016 quoted above. On that date the history recorded was that the Appellant "*… has not been working for the last six months …*" viz since circa April 2016. One juxtaposes this with his claim in evidence to the judge that "*… he has not worked since 2011*": see [28]. In rejecting this claim the judge *inter alia* considered certain evidence of bank accounts. Also of note is the May 2012 doctor's report (considered above) which, significantly, (a) contains no suggestion, even oblique, of inability to work and (b) links the Appellant's self-reported subjective stress to the ongoing matrimonial court proceedings.

[34] The Appellant's arguments also placed some emphasis on the statutory benefits which he had been receiving from time to time. This is clearly a factor which the judge took into account, stating at [30]:

> "*He relied upon the fact that he was in receipt of State benefits as proof of his inability to work.*"

The judge then balanced this with the available medical evidence. It was not submitted – correctly – that receipt of certain State benefits amounted to conclusive evidence of inability to work during any particular period. There is a manifest lack of merit in the Appellant's argument pertaining to this discrete issue.

[35] The arguments of the Appellant further suggested that the judge's assessment of the Appellant, reproduced in [28] above, was in some way incompatible with the decision of this court in *Galo v Bombardier Aerospace UK* [2016] NICA 25. In that case the Court of Appeal considered the fair hearing rights of a

litigant suffering from a disability. Gillen LJ, delivering the unanimous judgment of the court, stated at [53]:

> *"(1) It is a fundamental right of a person with a disability to enjoy a fair hearing and to have been able to participate effectively in the hearing.*
>
> *(2) Courts needs to focus on the impact of a mental health disability in the conduct of litigation. Courts must recognise the fact that this may have influenced the claimant's ability to conduct proceedings in a rational manner.*
>
> *(3) Courts and Tribunals can, and regularly do, have regard to general, non-binding guidance and practical advice of the kind given in the Equal Treatment Bench Book published by the Judicial College (Revised 2013) (hereinafter called "the ETBB") in considering how best to accommodate disabled litigants in the court or tribunal process. It is clear, therefore, that courts and tribunals should pay particular attention to the ETBB when the question of disability, including mental disability, arises.*
>
> *(4) The ETBB provides helpful information for judges about the problems experienced by such litigants in accessing the courts or tribunals or participating in proceedings. The authors point out that "this may lead to erroneous perceptions such as that the person is being awkward or untruthful and inconsistent. In fact the problem may come down to a difficulty in communication or understanding." The ETBB has regularly been revised and updated. It has a section dealing with mental disabilities describing the different ways in which mental disability may arise and manifest itself. It points out that adjustments to court or trial procedures may be required to accommodate the needs of persons with such disabilities. Memory, communication skills and the individual's response to perceived aggression may all be affected. Practical advice is given to particular situations when they arise. Decisions concerning case and hearing management "…. should address the particular needs of the individual concerned insofar as these are reasonable. The individual should be given an opportunity to express their needs. Expert evidence may be required." (para [20]). It is recognised that if a litigant has a condition that is worsened by stress, the difficulties will almost certainly become greater if he/she is acting in person (paragraph [25]).*
>
> *(5) The presence of a McKenzie Friend in civil or family proceedings or an independent mental health advocate in a*

Tribunal should be encouraged in order to help locate information, prompt as necessary during the questioning of witnesses and provide the opportunity for brief discussion of issues as they arise. A more tolerant approach to the use of a lay representative may assist.

(6) A modified approach may be necessary when seeking to obtain reliable evidence from a person with mental health problems especially those who are mentally frail. It is necessary to ascertain whether any communication difficulties are the result of mental impairment. Section 7 of the ETBB stresses the need for particular assistance to be given in relation to those with mental disabilities, specific learning difficulties and mental capacity issues.

(7) An early "ground rules hearing" is indicated in the ETBB at Chapter 5. Such a hearing would involve a preliminary consideration of the procedure that the tribunal or court will adopt, tailored to the particular circumstances of the litigant. Thus, for example, the Tribunal may consider:

- *The approach to questioning of the claimant and to the method of cross-examination by him/her. Adaptions to questioning may be necessary to facilitate the evidence of a vulnerable person.*

- *How questioning is to be controlled by the Tribunal.*

- *The manner, tenor, tone, language and duration of questioning appropriate to the witness's problems.*

- *Whether it is necessary for the Tribunal to obtain an expert report to identify what steps are required in order to ensure a fair procedure tailored to the needs of the particular applicant.*

- *The applicant under a disability, if a personal litigant, must have the procedures of the court fully explained to him and be advised as to the availability of pro bono assistance/McKenzie Friends/voluntary sector help.*
- *Recognition must be given to the possibility that those with learning disabilities need extra time, even if represented, to ensure that matters are carefully understood by them.*

- *Great care should be taken with the language and vocabulary that is utilised to ensure that the directions given at the ground rules hearing are being fully understood.*

- *As happened in the Rackham case, consideration should be given to the need for respondent's counsel to offer cross-examination and questions in writing to assist the claimant with the claimant being allowed some time to consult, if represented, with his counsel. These were deemed "reasonable adjustments".*

The Tribunal must keep the adjustments needed under review."

[36] As the decisions in *Galo* and kindred cases demonstrate, it is trite that at the appellate level any complaint of an unfair hearing based on an asserted failure to take adequate account of or make sufficient accommodation for a litigant's disability will invariably require a sufficient evidential foundation. As appears from our analysis in [31] – [35] above, no such foundation is established in the present case. Bare and unsubstantiated assertion is the hallmark of this ground of appeal (and, in passing, many others). This aspect of the Appellant's submissions must fail accordingly.

[37] The third discrete element of the first ground of appeal entails the purely factual assertion that "*… the trial and supplemental bundles were not before the court for* ***the vast majority*** *of the part heard hearings*", giving rise to a suggested "*serious procedural and other irregularity*". The three words which we have highlighted are of some importance, as will become apparent. A further aspect of this ground entails the assertion that the Appellant "*… had to give evidence in the absence of the core bundles and supplemental bundles which had been filed and which McBride J did not have before her*". It is suggested that this was the subject of repeated complaint to the court.

[38] This court accepts, without determining (being an appellate tribunal), the factual dimension of this discrete aspect of the Appellant's case. Thus, it is accepted by this court that certain bundles of evidence did not become available to the Appellant and his McKenzie Friend until a stage of the hearing at first instance when the Appellant was still giving evidence. We are unable to formulate this acceptance with any greater particularity as the substance of the "*missing bundles issue*" was not presented to this court with the desired clarity. See further [42] *infra.* Furthermore this court notes from the transcript of the first day of the appeal hearing before McBride J (*supra*) that, notwithstanding the judge's plainly assiduous anterior case management, the state of the papers before the court was far from satisfactory. Being disposed to make the aforementioned assumption this court, in response to the Appellant's requests, was of the opinion that, with one exception, to

order the preparation of transcripts at an extremely belated stage designed solely to make good an assertion which the court is prepared to accept would be a manifest waste of time and costs. See further [115] *infra*.

[39] Given the foregoing approach, we consider that the fundamental question to be addressed is whether the unavailability to the Appellant of certain papers until a late stage of the series of hearings conducted by the judge wrought any material unfairness to him. In determining this question this court takes into account that this was one of the issues ventilated in a "*judicial complaint*" communication from the Appellant to the court on 09 January 2019 (the third day of the appeal hearing). This court further takes into account that on 05 June 2019, in advance of the scheduled final dates of hearing, the Appellant's McKenzie Friend lodged a comprehensive written submission, consisting of 38 pages and did so without the slightest murmur relating to the unavailability of any hearing bundle/s. Furthermore neither at the stage of completion of the underlying hearing nor thereafter was there any correspondence/electronic communication of the foregoing kind noted. These observations relate to a context in which, in the graphic experience of this court, the Appellant and his McKenzie Friend have repeatedly resorted to the mechanism of written communication with the court embodying all manner of allegation and complaint generally.

[40] This court has searched with care, and in vain, for any clear indications of procedural unfairness to the Appellant arising out of this discrete aspect of the first ground of appeal. We make two inter-related conclusions. The first is that there is no such material. The second is that the available material points firmly to the conclusion that the Appellant's right to a fair hearing was not compromised. For these reasons this element of the first ground of appeal is rejected.

[41] The fourth aspect of the first ground of appeal entails the complaint that the Appellant's right to a fair hearing was impaired as a result of the judge "*… allowing the admission of prejudicial evidence by the Respondent* ***after*** *the husband had part given his oral evidence to the court*" (the emphasis being the Appellant's). We refer to all that we have said above insofar as material. This court, exceptionally, permitted the McKenzie Friend to elaborate on this ground, to the extent of effectively authorising him to give evidence about the matter. His elaboration was that the five trial bundles filed by the Respondent's solicitors (prior to the withdrawal of their instructions) "*went missing*" at some unspecified stage. The McKenzie Friend confirmed, importantly, that he and the Appellant had copies of these bundles at all times, while suggesting that two further bundles containing certain contentious documents were filed by the Respondent. In his written submissions the McKenzie Friend used the language of "*ambushing*". At the hearing it appeared to this court that the term "*part given*" (*supra*) was of some potential significance. In response to judicial questioning the McKenzie Friend confirmed that all bundles before the court were available to the Appellant and him prior to the completion of the Appellant's evidence. We consider that this disposes of this discrete complaint of procedural unfairness.

[42] The fifth and final element of the first ground of appeal is encapsulated in the headline "*Serious procedural or other irregularity in the proceedings before Master Sweeney*". The foundation of this complaint rests on [16] – [17] of the judgment of McBride J:

> *"[16] Appeals from the Master are generally dealt with by way of a rehearing. As noted by Girvan J in National & Provincial Building Society v Williamson & Another [1995] NI 366 at 372 however:-*
>
> > *"The judge 'will of course, give the weight it deserves to the previous decision of the master, but he is in no way bound by it' (see Evans v Bartlam [1937] AC 473 at 478 per Lord Atkins). The judge is not fettered by the previous exercise by the master of his discretion."*
>
> *[17] In the present appeal the court permitted new evidence to be admitted which consisted of additional affidavits, details of additional assets and updated valuation evidence. In light of the admission of this new evidence and in light of the general rule that this appeal is a 'de novo' hearing I consider that it is unnecessary for this court to make any determination regarding the complaints made by the husband in respect of the hearing which took place before Master Sweeney."*

The ingredients of this discrete ground entailed the oft repeated complaint that the order of the Master was not based upon any judgment and there is no available transcript of the relevant hearing.

[43] We consider the fundamental question for this court to be whether the approach formulated by the judge in [16] – [17] of her judgment (*supra*) discloses any error of law. We are unable to identify any such error.

Second Ground of Appeal

[44] By this ground of appeal the Appellant challenges the judge's finding that he has "*a total income or earning capacity of £71,400 per annum*". The contentions advanced were that this was "*a demonstrable error in fact*" and "*completely incongruent with the evidence before the court*". In the written submission the Appellant claimed that the judge had "*…. Failed to consider or rely on the relevant evidence in determining the husband's income prior to separation*".

[45] As formulated, this ground of appeal both distorts and neglects the relevant exercise carried out by the judge and the main finding thereby yielded. In a discrete section of her judgment, at [26] – [34], the judge considered the inter-related issues

of the Appellant's income and his earning capacity. This assessment did not culminate in a finding (as represented in the grounds) that the Appellant "*earned total £70,000 per annum*" (verbatim). Rather the judge made a finding that the Appellant "*… has a total income or earning capacity of £71,400 per annum*". *En route* to this central finding the judge considered various pieces of evidence and made individual, incremental findings. These are rehearsed at [8] (i) – (xi) *supra*.

[46] The court received an amalgam of submissions in support of this ground of appeal: the judge's finding of earning capacity should have been based on the Appellant's tax return for 2010/2011 prior to the parties' separation, being the Appellant's self-assessed tax return purporting to show a gross turnover of circa £18,000 and a "*net business profit for tax purposes*" of circa £10,000 in respect of the year in question; the judge's income earning capacity finding should have been based on the income declared by the Appellant in his income tax returns in respect of years 2012 – 2016, which purported to show gross turnovers, in round figures of £1,300, £36,025, £27,420 and £1,323 sequentially; the judge disregarded the fact that the Respondent had received the rent for 58 Prout Grove between 2012 and 2015; the judge failed to consider evidence about a redirected mail delivery address; the judge should have found that certain of the Appellant's mail was wrongly withheld by the Respondent; the Appellant had not claimed to have been unemployed continuously since 2011; the judge erred – in some un-particularised way – in her consideration of the medical evidence; her main finding was at odds with evidence from the Social Security Agency concerning the Appellant's receipt of "ESSA", i.e. employment and support allowance (a brief pause: this evidence consisted of two SSA letters, written in April 2012 and February 2017 respectively, pointing out that a medical certificate relating to periods totalling two months and seven days respectively had either expired or was about to do so); the judge should have believed the Appellant's evidence bearing on the issue of his earnings and income earning capacity; and the judge had no basis for her assessment that employment was available to the Appellant from his brothers.

[47] In essence, the Appellant's contention is that the only finding open to the judge was that his income earning capacity must be measured on the basis of his 2010/2011 tax return. The second central plank of the Appellant's case is that the judge should have believed every assertion made by him relating to this subject: periods of employment, income, earnings declared in self-assessed income tax returns, periods of incapacity for work, present capacity for work and so forth. The third main plank of the Appellant's case is that the judge should have preferred his evidence to that of the Respondent on the issue of whether the properties at 58 and 60 Prout Grove, London had been yielding rental income of which he was the beneficiary. The fundamental flaw in all of these contentions is that the judge's findings in respect of the income earning capacity of the two parties was based on a measured consideration of all material evidence giving rise to manifestly unassailable consequential findings. The Appellant claimed that the judge in some way discriminated against him. This fanciful and improper suggestion typifies many aspects of the appeal presented to this court.

[48] This court has juxtaposed the submissions on behalf of the Appellant with the relevant passages of the judgment under appeal. Those passages extend beyond the discrete chapter noted above to incorporate, in particular, the lengthy [22]. This court has also considered all of the documentary evidence invoked by the Appellant in support of this ground of appeal. Having conducted this exercise, we can identify no error in the approach, reasoning or relevant findings of the judge. This ground of appeal exposes clearly the interface between a court of trial and an appellate court, which we have addressed at [22] above.

[49] For the reasons given the court concludes that the second ground of appeal is devoid of merit and substance.

Third Ground of Appeal

[50] As rehearsed in [18](iii) above, this ground of appeal involves the contention that the judge misunderstood the evidence in finding that the Respondent was economically disadvantaged in the labour market and had lost career progression opportunities. Duly analysed, the several submissions advanced on behalf of the Appellant in support of this ground do not develop it in any way.

[51] The judge, as noted in [8](xii) – (xix) above – made a series of discrete findings relating to the Respondent's employment history and earnings and the evolution brought about by her responsibilities *qua* sole carer for the two children of the family and her later serious illness, which continues. The only discernible challenge to these findings is that they in some way discriminate against the Appellant to the Respondent's advantage. This suggestion merits precisely the same condemnation as set forth in [48] above. The Appellant's arguments focus substantially on the freestanding issue of rental income from the properties at 58 Prout Grove, London, and 7B Springvale. These arguments are manifestly unconnected with the judicial findings noted immediately above and the ground of appeal as formulated. The judge's findings in relation to these properties were the product of appropriate consideration of the evidence and are unimpeachable. The further allegation of unfair treatment of the Appellant by the judge invites precisely the same condemnations as set forth in [39] and [47] above.

[52] Finally, we adopt with such modifications as may be appropriate our analysis in [48] above. For the reasons given we reject this ground of appeal.

Fifth Ground of Appeal

[53] The complaint enshrined in this ground is that the judge "*erred in fact and in law*" in her findings concerning the valuation of the properties at 58 and 60 Prout Grove, London. These include specific findings, as rehearsed at [8] (xxii) and (xxxv) above, that 58 Prout Grove has a net market value of £636,829 and 60 Prout Grove has a net market value of £412,500. The judge dealt with these discrete issues under the rubric of "Joint Assets", at (as regards 58 Prout Grove) [42] – [46] of her

judgment considered. The parties' competing "*market for sale*" figures were remarkably similar: £685,000 (the Appellant) versus £700,000 (the Respondent). The judge observed that neither of the documents purporting to vouch these figures was a proper property valuation. She continued:

> "*They are however the only documents available to the court setting out any figures in respect of the value of the property and therefore the only documents available to assist the court in determining the valuation of the property. Having regard to all the available material I consider that a fair value is £692,500 ….*
>
> *In the absence of oral evidence and any other reasons being given to the court to undermine or challenge one or other of the earlier letters, I consider that it is appropriate to value the property at the mid-point value of £692,500. The mortgage redemption of January 2019 was £55,571. I therefore find that there is an equity of £636,829 in this property*".

[54] The explanation of the description "*earlier*" emerges in the immediately preceding passage. There the judge recorded that following the conclusion of the trial the Appellant produced a further letter from the same source (Warwick Estate Agents) purporting to reduce their "Property for Sale" figure from £685,000 to £650,000 and their "Offers expected" figure from £650,000 to £625,000. The judge analysed this new evidence in this way:

> "*This letter, which is not a valuation, sets out no reasons why the agents have changed their earlier expressed views. I consider that this document was obtained by the husband after the hearing in a bid to reduce the valuation of the matrimonial assets. I therefore do not intend to rely on this letter.*"

This letter, in common with the two preceding letters, was not the subject of sworn evidence to the court.

[55] The judge's consideration of the value of the second of these two properties, 60 Prout Grove, is found at [61] – [62] of her judgment. These passages must be considered in conjunction with the material findings of fact rehearsed at [18] and which we have tabulated at [10] above. The judge reasoned and found at [62]:

> "*The property was 'valued' at £700,000 to £725,000 by Warwick Estate Agents engaged by the husband on 19 January 2018. The husband produced a further letter from Warwick after the conclusion of the hearing, which stated that this property would be expected to receive offers in the region of £640,000. This letter does not set out any reasons why the likely offers would be less than the figures set out by this estate*

> *agent in January 2018**. I consider that it was obtained by the husband to reduce the valuation. I therefore propose to rely on the earlier letter provided by Warwick as it is more likely to be accurate. The wife provided no valuation of this property. The mortgage redemption is approximately £300,000. Taking a mid-value of £712,500 means there is an equity of £412,500."*

[** The second, and lower, of the two Warwick valuations was provided approximately ten months after the first.]

[56] Of what do the judge's asserted "errors in fact and in law" consist? The first point to note is that the various arguments formulated on behalf of the Appellant relate to 58 Prout Grove only. They draw attention to the following aspects of evidence:

(i) The Warwick letter of 19 January 2018 to the Appellant expressing the opinion that "*… we would expect to receive offers in the region of £650,000 plus on a Freehold basis, subject to contract and would advise marketing the property at £685,000*". This is preceded by a series of qualifications. The agent's opinion is stated to be "*… based on the current market and mortgage trends, which of course can fluctuate greatly …*"

(ii) A later letter from the same agent, dated 21 November 2018, in identical terms with the exception that the "property marketing" figure is altered from £685,000 to £675,000.

(iii) A third letter from the same agent, dated 23 July 2019 (post-trial), proffering a "property marketing" figure of £650,000 and an "expected offers" figure of £625,000.

To summarise, in the first two letters the "offers expected" figure was stated to be £650,000, while in the third this became the somewhat lower figure of £625,000. The third of these documents is accompanied by a third line letter from the author stating "*… since my last valuation in November 2018 the market has dropped by around 5% …*"

[57] The substance of the argument advanced on behalf of the Appellant is that the judge was bound to accept and act upon the contents of the third of the three documents on their face emanating from Warwick Estate Agents. The Appellant makes no attempt to engage with the reasoning of the judge in the passages reproduced above. This court finds the judge's analysis and reasoning to be irreproachable. Her evaluation of the available evidence and resulting findings manifestly lay within every trial judge's margin of appreciation. Precisely the same must be said of the judge's assessment that the Appellant was deliberately attempting to deflate the value of the property. This statement (which is not to be characterised a "finding") falls to be considered in the context of the judgment as a

whole, which includes the judge's withering assessment of the Appellant's reliability and credibility at [22]. Finally, these aspects of the judgment have nothing whatsoever to do with "*unfair treatment of the husband*" as argued by him. They are paradigm illustrations of the kind of evidence evaluation and balancing exercises carried out day and daily by judges in all manner of litigation contexts. This further, discrete complaint is also manifestly without foundation on the grounds set forth in [31] and [36] above.

[58] For the reasons given this ground of appeal is rejected.

Fourth Ground of Appeal

[59] This ground recites that the judge's award of child maintenance to the Respondent was "*unjust and unfair*". It embodies two identifiable complaints. First the judge should not have awarded child maintenance in respect of periods "*… when the husband was in receipt of benefits and making statutory assessed payments through CSA/CMS in both 2012 and 2017 – present*". Second, the judge "*… erred in not off-setting the sole rental income the Petitioner/Respondent retained from February 2012 to October 2014 – which totalled £35,000 in lieu of any child maintenance. This more than amounts to double counting*".

[60] As to the first element of this ground, we have already highlighted – in [41] above – the acutely limited evidence relating to the Appellant's receipt of statutory benefits. This is the first, and striking, evidential deficit in this ground. The second is the bare assertion that the Appellant had been making child support/child maintenance payments. The judge stated unequivocally at [110] that the Appellant had not made <u>any</u> such payments since the parties' separation. In passing, we have not identified this as a free standing <u>finding</u> of fact as it was evident from the abundance of written materials and the presentation of the parties' cases that the Appellant did not – and could not – assert the contrary. The judge's assessment of this issue is unaffected by the indications in the materials presented to this court that at a late stage of the post-separation period (with no date specified) the Appellant began to make the frankly pitiful payments of £3.40 per child per week.

[61] Turning to the second element of this ground, there is an unmistakable lack of elaboration and particularisation. Fundamentally, there is no attempt to forge any nexus with any part of the judgment under appeal. Doing the best we can this discrete ground would appear to be based on the Appellant's <u>assertion</u> that the Respondent had the sole use of the rental income in respect of certain properties from 2012 to 2014. This assertion was unequivocally rejected by the judge in terms which are unassailable. The material finding of the judge is rehearsed at [8](xxi) above: the rental income in respect of 58 Prout Grove was devoted to the payment of joint household bills. The formulation of this ground of appeal confirms the Appellant's acceptance that the period was confined to February 2012 – October 2014. The judge's finding confounds the twofold contention that this rental income

was a substitute for child maintenance payments during the relevant period and the judge engaged in "*double counting*".

[62] Every aspect of this ground of appeal founders on the rock of the judge's key finding which we consider unimpeachable. This ground of appeal must be rejected in consequence.

Sixth Ground of Appeal

[63] By this ground the Appellant contends that the judge "*…. erred in fact and in law in her treatment of the inheritance in the property at 60 Prout Grove, London*". As rehearsed in [8](vii) and (xxxv) above, the judge first made two specific findings in respect of this property, namely that the Appellant was in receipt of net rental income of £600 monthly and the property had a net market value of £412,500. The judge then considered this property in greater detail at [61] – [62]. The challenge advanced by this ground of appeal is to [61]:

> "*The husband and his other siblings each acquired a share in this property under his mother's will. The husband 'bought out' his siblings' interests in the property with the assistance of a mortgage. According to the husband the market value of the property was £385,000. His inheritance was £102,000 and therefore 26% of the property was acquired by way of inheritance. The parties agreed that this property was rented throughout the marriage. Originally the rental income was paid into a joint account and used to cover joint family expenses until the parties separated in 2012. Thereafter the husband received the rental income.*"

The gravamen of this ground emerges from the following passage in the Appellant's written submissions:

> "*The husband argues that the source of funds, acquired through inheritance, justified an unequal division of the asset in the husband's favour as this was the husband's childhood home, purchased from his mother's estate for cheaper than market value and the property remained* ***in specie,*** *was not intermingled into the assets, remained in the sole ownership of the husband throughout, was never lived in by the parties and only very modestly contributed to the family finances as there was* [sic] *nominal residual monies after mortgage on same was discharged.*"

[64] The judge's categorisation of the various assets allocated this property exclusively to the Appellant: see [89]. The Appellant's contention, recorded at [96], was that as this property was "*acquired by him by way of inheritance from his mother*",

the division of this asset should be 70/30 rather than 50/50. The Respondent's riposte, recorded at [97], was that "*… although the property had been partly acquired through inheritance the property had become a joint matrimonial asset as the rental income was used throughout the marriage to pay joint matrimonial expenses*". The judge's resolution of these competing arguments was, at [9]]:

> "*In respect of 60 Prout Grove, this property was partly acquired by inheritance. This occurred during the marriage. The property was used as a joint matrimonial asset as the rental income was used to pay joint bills. I therefore consider that it is matrimonial property.*"

[65] This conclusion is challenged in the Appellant's submissions in the following terms:

> "*The husband … contends that the weight of the authorities suggest* [sic] *that the source of funds of over £100,000 was a reason to depart* [from an equal division of this asset] *as the property (discounted from the husband's late mother's estate) could not have been purchased otherwise …*
>
> *On the basis of the authorities and fairness, the court should have departed from* [the] *yardstick of equality in terms of this asset. The husband contends that the split should have been 65/35 in his favour.*"

[66] We have considered the various judicial pronouncements invoked by the Appellant in support of this ground of appeal. We have further considered, as the judge did, the extensive summary of the governing principles in the decision of the Privy Council in *Scatliffe v Scatliffe* [2017] AC 493 at [25] per Lord Wilson. The principles, strikingly, are framed in flexible and non-prescriptive terms. Their application will inevitably vary according to the individual case sensitive context. How they are applied in a given case will be a matter for evaluative judgement on the part of the court. Particular, but not exclusive, regard should be had to the factors of need and/or compensation.

[67] The judge noted in particular that inheritance accounted for only 26% of the funding required by the Appellant to purchase this property from his siblings. Next the judge recorded that this was not a pre-marriage acquisition, rather one which materialised following the parties' marriage. Thirdly the judge specifically found that this property was used as a joint matrimonial asset, the rental income being devoted to the payment of joint bills. This endured throughout the marriage until separation. The judge was clearly alert to the factor of the Respondent's needs: see for example [108] and, more fully, at [112] – [113].

[68] To summarise, we are satisfied that there was no error in the judge's self-direction in law and that in her application of the governing principles the judge evaluated all factors which should properly have been considered, left no material factor out of account and, ultimately, made a conclusion which, objectively was plainly tenable. The fact that other judges might possibly have reached a different conclusion is not the legal test to be applied to the sustainability in law of what is challenged by this ground of appeal.

[69] For the reasons given this ground of appeal must be rejected.

Seventh Ground of Appeal

[70] This ground of appeal embodies the contention that the judge "*demonstrably erred in material facts*" in her finding that the monies in the Barclays accounts did not consist of rental income. This ground relates to the properties at numbers 8, 9 and 10 Chapelside, London. The findings which it engages are rehearsed at [8](xi), (xv), (xxxii), (xxxviii), (xli) and (xlii) above. The judge further recorded at [55] that the Appellant accepted that he holds a 20% interest in numbers 8 and 10 Chapelside. In a reasoned conclusion at [100] the judge categorised numbers 8 and 10 as non-matrimonial assets, thus falling to be taken into account only if required to meet the Respondent's needs. At [106] the judge repeated that these two properties were not to be considered matrimonial assets and, therefore, were to be excluded from the equal division exercise. At [108] the judge made the further conclusion "*the wife has not shown that her needs require Chapelside to be taken into account*". These properties were, in this way, excluded from the "pot".

[71] While we have not found the formulation of this ground of appeal especially clear, we have disentangled from the Appellant's submissions the following: there was documentary evidence showing that rental income in respect of Nos 9 and 10 Chapelside was lodged in the Chapelside account; in contrast, rental income in respect of number 8 Chapelside <u>was not</u> lodged in this account; it was agreed that 80% of the Chapelside account balance was the property of the Appellant's brothers; this account included the rental income in respect of number 9 Chapelside, a property in which the Appellant had no interest; thus the Appellant's interest in the Chapelside account balance could not be as much as 20%.

[72] This court has considered the specific evidence to which the Appellant directed its attention in support of the several ingredients of this ground of appeal. Two sources were identified. The first was "AQ2, pages 82 – 247". A perusal of these 165 pages confirms that this reference simply makes no sense. The second source identified was pp54-66 of the core bundle. These consist of three separate documents. They appear to be schedules of sorts. They are undated and unsigned. Furthermore neither their authorship nor their provenance is disclosed. They identify the Appellant and his two brothers. The first of the documents is simply entitled "Chapelside" and does not identify the property or properties to which it purportedly relates. Its evident purpose is to demonstrate the amount owed by the

Appellant to his two brothers in respect of the period year ended 05 April 2003 to year ended 05 April 2012, the calculation being a residual debt of £19,230. The second of these two documents is a schedule in respect of year ending 05 April 2011 which does identify the three properties and purports to identify their expenses/outgoings for the year in question.

[73] On their face neither of these documents supports the Appellant's contentions rehearsed above. As already highlighted, the first of the documents does not provide any property addresses. The second of the documents throws up the mystery of why the Appellant's name would appear at all on a document which purports to demonstrate, many years after the event of acquisition, that the Appellant had no interest in No 9 Chapelside and, thus, could not secure any percentage financial entitlement from a bank account into which *inter alia* rental payments in respect of number 9 were made. This document begs serious questions which, at every stage of these proceedings, have been unexplained and unanswered. The final contention relating to these documents is that they demonstrate that rentals in respect of No 8 Chapelside were never paid into the Chapelside account. The short answer is that they manifestly fail to do so.

[74] The judge unequivocally recognised the percentage ownership interests advanced by the Appellant at [55]:

> "*The documentation before the court demonstrates and the husband latterly accepted that he holds a 20% interest in* [Nos 8 and 10 Chapelside]. *The remaining interest in the properties is held by his two brothers, Kevin Quinn and Leo Quinn. In addition one of his brothers owns number 9 Chapelside.*"

This passage unambiguously demonstrates the absence of any error by the judge regarding this issue.

[75] This ground of appeal also attempts to challenge the judge's finding relating to the evidence of an alleged payment of £100,000 by the Appellant to his brother Kevin Quinn on 15 July 2011. This is documented in the first of the two documents examined in the immediately preceding paragraphs. The judge described this as "*an unauthenticated sheet*". She dismissed its probative value:

> "*This was not proof of payment and in any event I find it significant that the monies were withdrawn at the time of the marriage breakup and that Kevin considered it appropriate to keep the monies in a separate account. I am satisfied that Kevin's evidence illustrates that he knew that he had no entitlement to these monies ….*"

The "evidence" to which the judge adverts in this passage is an affidavit sworn by Kevin Quinn on 11 May 2012. The judge's assessment and rejection of this evidence was entirely open to her. Indeed, she could have added, as this court does, that no attempt was made to elicit live sworn evidence from the deponent and the affidavit in any event suffers from impermissible opinion evidence and sworn argument.

[76] For the reasons given this ground of appeal is rejected.

Eighth Ground of Appeal

[77] This ground contends that the judge "*fell demonstrably into error in law and in fact in her approach to the valuation of Chapelside properties and further in preferring the 'valuation' offered by the Petitioner/Respondent*". As recorded in [56] – [57] of her judgment, the judge was presented with conflicting valuations:

(a) The Appellant's suggested valuation of £1.2 million.

(b) The Respondent's suggested valuation, emanating from the firm Templar Construction, of £3.65 million.

The judge's finding is expressed in [60] thus:

> "*I consider that the husband's 20% capital share in the premises is worth £530,000. This is based on a valuation of £2.65 million less £1 million being a generous estimate for the costs of development.*"

The deduction of £1 million from £2.65 million produces the figure of £1.65 million and 20% of the latter figure is £333,000. In contrast, 20% of £2.65 million is £530,000. The only sensible reconciliation is that the judge intended to write "*£3.65 million less £1 million*" and a simple typographical error has intruded. We shall proceed on this basis. The significance of this is that, on our analysis, the judge accepted the report of the Respondent's valuer in its entirety and this formed the basis of her finding that this particular asset of the Appellant was worth £530,000.

[78] The valuation evidence which prevailed is contained in a document entitled "Valuation Report" dated 02 July 2019, purporting to emanate from the firm of Templar Consultants. This documents a desktop exercise. The author explains that the individual valuations of the two properties, £2.022 million and £1.65 million respectively, were produced in accordance with the RICS standards. The methodology employed was that of "*an analysis of the available and relevant comparable evidence of similar property values in the locality*". The author of the report is self-described as a Chartered Surveyor and Registered Valuer, whose CV includes undergraduate and post graduate qualifications in relevant subjects.

[79] The author of the report evidently considered that its compilation was in response to a court order. We have noted in [8] above that the last hearing date was 27 June 2019. The report records that instructions were provided on 01 July 2019 and the report itself is dated 02 July 2019. In the Appellant's submissions it is asserted that he "*… did not have sight of, and was not able to challenge, said valuation …* [and] *… did not have sight of this document until March 2020 when the Matrimonial Office provided him with it …*" In her replying submission the Respondent states:

> "*Madam Justice McBride ordered a desktop valuation which was provided by a highly qualified and credible company, Templar Consultants ….*"

Only the Respondent could have provided this report to the court. The Respondent makes no claim that she provided the report to the Appellant. On this basis we are driven to accept the Appellant's assertions that the report was not provided to him and he first obtained it in March 2020 from the Matrimonial Office.

[80] The first element of this ground of appeal is, therefore, procedural unfairness. The second element entails a frontal attack on the valuation report comprising the following ingredients: the report contains "*neither a residual valuation* [nor a] *professional assessment of valuation of site relating to costs, interests, risk, actual development value of site ….*"; It does not employ the "*established methodology to arrive at market value*"; it purports to provide a "*development value*" without examining "*… what someone would pay for a limited minority share in a development which may never happen or could fail*"; and it proposes neither a market value nor a development value of the properties.

[81] As regards the first element of this ground of appeal the relevant factual matrix is uncontentious. In short, the Respondent adduced an expert valuation report which was not provided to the Appellant and upon which the court proceeded to act, without qualification. This court is able to confidently formulate this key fact in this way having given the Respondent extensive opportunity to demonstrate that the new, post-hearing, valuation report was provided to the Appellant or his representative. This court further accepts as a matter of fact that the Appellant first came into possession of this report when a copy of it was procured by his McKenzie Friend from the relevant court office sometime after filing of the Notice of Appeal.

[82] The legal doctrine which this ground of appeal engages is the inalienable right of every litigant to a fair hearing, one constituent element whereof is the entitlement to notification of the other party's case and evidence and the opportunity to respond thereto. Copious citation of authority in identifying the governing legal principles bearing on this ground of appeal would be otiose. It suffices to quote the following short passage from De Smith's Judicial Review (7th Edition):

> "*If prejudicial allegations are to be made against a person, he must normally … be given particulars of them before the hearing so that he can prepare his answers. The level of detail required must be such as to enable the making of 'meaningful and focused representations'. In order to protect his interests, the person must also be enabled to controvert, correct or comment on any other evidence or information that may be relevant to the decision and influential material on which the decision maker intends to rely …*
>
> *If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by this, there is prima facie unfairness, irrespective of whether the material in question arose before, during or after the hearing.*"

(From paragraphs 7-057 and 7-058.)

We recognise that, as a matter of principle, there can be exceptions to this powerful general rule. However, we are unable to identify any and none was suggested on behalf of the Respondent.

[83] As decisions such as *R v Chief Constable of Thames Valley Police, ex parte Cotton* [1990] IRLR 344 at [59] - [60] especially (per Bingham LJ) make clear, having made the foregoing conclusion it is not for the court to proceed to a further stage of examining whether the unfairness diagnosed made any difference to the outcome. Rather this is a factor to be considered at the first stage of the exercise. Thus, in the abstract, it would be open to this court to conclude that the procedural irregularity which we have assessed was immaterial as its avoidance could not conceivably have influenced the outcome. In this context the "outcome" is the judge's determination of the valuation of the two properties concerned. No argument to this effect was advanced by the Respondent. While this of course is not determinative of the matter, particularly in a litigation context of two unrepresented parties, we are of the view that the unfairness which we have diagnosed cannot be dismissed as trivial, technical or peripheral. To summarise, this procedural deficiency deprived the Appellant of the opportunity to consider and respond to an unquestionably important piece of evidence relating to a high value asset. This in our judgement cannot be considered as anything other than procedurally unfair. Giving effect to the foregoing analysis we are driven to conclude that the Appellant's right to a fair hearing in this discrete respect was impaired.

[84] We do not consider it appropriate to address the substantive criticisms of the Templar Consultants valuation report noted above. This is a paradigm example of an issue belonging to the trial forum and lying out with the jurisdictional and competence of this court.

[85] This diffuse ground of appeal has two further elements, namely the contention that the judge erred in law in failing to reduce the Appellant's minority (20%) interest in these properties and similarly erred in her inter-related findings that the properties will be redeveloped via works undertaken and financed by the Appellant's brothers and the Appellant will continue to receive 20% of the subsequent rental income. In the submissions which follow there is a litany of assertions. There is no attempt in this exercise to draw together either the relevant evidence said to have been adduced before the judge or to analyse the material ensuing findings. Furthermore, contrary to the discrete submission advanced, this court is unaware of any legal rule or principle requiring the Appellant's minority interest in the properties to be reduced as a matter of compulsion. We are unable to identify any merit in these other ingredients of this ground of appeal.

[86] Giving effect to the foregoing analysis, we conclude that this ground of appeal is established. The effect of this conclusion will be reflected in the final order of the court disposing of this appeal.

[87] It is appropriate to add the following. From our consideration of all relevant material available we readily deduce that there was an expectation on the part of McBride J that the Respondent would fulfil the elementary step of ensuring service of her new expert valuation report on the Appellant or his representative. This expectation is unimpeachable. This court gave the Respondent ample opportunity to demonstrate that this step had been taken. It plainly was not. This was a failing of substantial proportions, beyond the knowledge and control of McBride J, to be lamented and deprecated. It nonetheless illustrates how issues of procedural unfairness fall to be evaluated and diagnosed by an appellate or reviewing court in a forensic, detached manner in which considerations of blame or fault have no part.

Ninth Ground of Appeal

[88] As rehearsed in [18](ix) above, this ground contends as follows. The judge's finding that the Appellant had removed of the order of £20,000 - £40,000 from the matrimonial home contradicted what had allegedly been "*determined and dismissed*" by another judge (Weir J) in Mareva injunction proceedings on an issue which had become *res judicata*.

[89] This ground on appeal relates to the judge's consideration of and findings in respect of the parties' dissipation of assets post-separation. The discrete exercise carried out by the judge giving rise to this ground entailed determination of the Respondent's allegation that the Appellant had removed between £20,000 and £40,000 cash from the matrimonial home following the separation, in March 2012. The judge summarised the Respondent's evidence relating to this issue and recorded the Appellant's response of "*prove it*" when cross examined about the matter. The judge made a finding that this allegation was established.

[90] In support of this ground the Appellant highlights that in the span of certain affidavits and her oral evidence the Respondent was not consistent in her formulation of this allegation. The judge specifically noted this inconsistency's argument in dealing with this issue. We are satisfied that the finding which she made was one open to her. The second aspect of this ground of appeal entails the assertion that in Mareva Injunction proceedings, which generated an initial order dated 02 February 2012 and a consensual variation order dated 27 February 2012, the judge (Weir J) "*twice dismissed*" this allegation. This is not recorded in either of the orders. Nor is it recorded in any written judgment of that court. Indeed, this suggestion is entirely bereft of evidential foundation. This aspect, the second, of this ground of appeal, is manifestly devoid of merit and substance in consequence.

[91] It follows inexorably that the *res judicata* dimension of this ground is similarly unsustainable. In short there is no evidence before this court that this factual issue was the subject of a conclusive previous judicial determination in terms giving rise to the application of the *res judicata* principle. It is therefore unnecessary to examine the contours of this principle and we would add that there has been no engagement with it in the Appellant's submissions.

Tenth Ground of Appeal

[92] This ground embodies the contention that the judge "*… demonstrably erred in fact in not awarding the husband the inventory of chattels from the former matrimonial home that had been agreed to by the Petitioner/Respondent in correspondence dated 01 December 2017*". The discrete aspect of the judgment which this ground engages is [116]G, in the following terms:

> "*The husband to be provided with the following contents from the former matrimonial home: Bible, some photographs, tools and his financial documents. Otherwise the wife is to retain all contents in the former matrimonial home.*"

This represented the seventh and final element of the order of the court. This is the only part of the judgment in which this issue is considered.

[93] The letter to which this ground of appeal refers was written by the Respondent's solicitors. It is dated 31 May 2017, not 01 December 2017. Its final sentence is:

> "*In respect of the list of contents forwarded to our client we enclose her response.*"

Attached to the letter is a three page appendix entitled "*Mr Quinn's Belongings in the Matrimonial Home*". This details a total of 26 items – of furniture, clothes, fittings *et al* – and the Respondent's comments in respect of each. There is a clear mismatch between [116] G of the judgment and the aforementioned schedule which contains a

series of replies couched in the terms "*he can have this*" and "*he can have these*". The Respondent's written submission – "*it is however ludicrous that the husband should expect to receive furniture, TVs etc which are all more than 8 years old, some of which has been dumped*" – neither engages with nor illuminates this ground of appeal.

[94] As presently informed the court has no basis for thinking that the Respondent is not proposing to adhere to the concessions contained in the aforementioned completed schedule. Practical realities, such as destruction or disposal, may have to be considered. It is faintly ridiculous that this appellate court should have any role, other than exhortation to the parties, in the resolution of this discrete aspect of the dispute between the parties. The court devised a simple mechanism to facilitate consensual resolution of this issue between the parties.

[95] Following completion of the oral hearing (on 17 June 2020) the court, by its further order dated 29 June 2020, directed the parties *inter alia* in the following terms:

> "*The issue raised in the **tenth ground of appeal** relates to an 'inventory of chattels' enclosed with a letter dated 31 May 2017 written by the Respondent's former solicitors. The court fully expects the parties to resolve this issue consensually. An opportunity to do so is hereby granted. Both parties will confirm to the court by 15 July 2020 at latest that this issue has been resolved.*"

The nature and quality of the responses elicited by this Order were, in hindsight, predictable. They were quite unhelpful, manifestly so. Rather than focus their energies on respecting and co-operating with the court the parties opted for yet another declaration of hostilities. These responses exhibited, fundamentally, a blunt refusal to accept and act upon this court's repeated admonition concerning the nature and limitations of its appellate function and the differences between the underlying phases of these proceedings and their appellate phase. The court's exhortations to resolve this relatively minor issue were similarly brushed aside. We repeat: it is not the function of this court to enquire into, make findings about and determine the factual disputes between the parties relating to this ground of appeal. We shall dispose of this ground in the manner indicated in the final section of this judgment.

Eleventh Ground of Appeal

[96] The complaint advanced by this ground of appeal is that the judge "*… failed to consider the liabilities of the husband at all*". The three line elaboration in the Appellant's submissions contains the assertion that the Appellant "*… has been largely unemployed and/or in respect of state benefits across periods in 2012 and late 2016 – present*" and, secondly, the complaint that the court "*… left the husband with no liquid*

assets to meet liabilities". The order of the judge, it is said, was rendered "*unfair and unjust*" in consequence.

[97] This judgment has already addressed the issues of the employment and earnings of the Appellant and his alleged receipt of statutory benefits in its consideration of other grounds of appeal, all of which have been resolved in favour of the Respondent. See in particular [40] – [45] above. Thus, the first element of this ground resolves and dissolves to nothing. The second element similarly withers as it overlooks the judge's findings – which this court has upheld – relating to the income and income earning capacity of the Appellant and, separately, his ability to liquidate certain capital assets should a pressing financial need arise. It follows that this ground of appeal has no merit or substance.

Twelfth Ground of Appeal

[98] This ground, as recorded in [18](xii) above, is in these terms:

> "*The court erred in fact by making no adverse finding with the weight of the evidence against the Respondent for her non-disclosure of assets before the lower courts. The judge failed to rely on the evidence she ought to rely on …*
>
> *This elongated proceedings and costs.*"

The outworkings of this ground draw attention to that section of the judgment entitled "Findings of Fact regarding Misconduct", at [80]–[85]. Within these passages one finds the judge's consideration of, and ultimate rejection of, the Appellant's contention that the Respondent had engaged in conduct which it would be inequitable to disregard.

[99] The judge, at [86], made findings relating to litigation misconduct on the part of the Appellant. The particulars of this finding were his failure to participate in the first instance proceedings, his non-compliance with court orders, his failure to file an affidavit, his failure to make discovery and his failure to file a statement of core issues. The judge further found that the Appellant "*… deliberately absented himself from the court hearing by going on holidays without ensuring solicitors had been instructed on his behalf to attend*". We draw attention to this aspect of the judgment simply to highlight that none of this is challenged in the grounds of appeal. It is manifestly unassailable in any event.

[100] In the elaboration of this ground it is contended that the judge committed "*demonstrable error in fact and in law*" in relying upon "*correspondence with her former solicitors*". This court has considered the letter thus identified. It was written by the Respondent's previously retained solicitors to the Appellant's previously retained solicitors. This letter attaches a "*Schedule of accounts and assets supplied by our client*". In addition it raises two questions for response by the Appellant's solicitors. The

short answer to this aspect of this ground of appeal is that in the relevant passages of her judgment, [80] – [85], the judge does not rely on any correspondence. One adds to this that the letter grounding this complaint is not "*correspondence with*" the Respondent's former solicitors.

[101] The Appellant's remaining submissions on this ground contain the oft repeated complaint that the Respondent failed to make proper and timeous disclosure during the underlying proceedings. We have considered, and do not repeat, the terms in which the judge considered, and rejected, this complaint. This court concludes without hesitation that the judge's treatment and resolution of this issue were irreproachable. The Appellant and his McKenzie Friend should take careful note that being a party to legal proceedings does not confer a licence to level bare and unsubstantiated allegations of the utmost gravity against another party. The court deprecates their frequent resort to this tactic throughout these proceedings. This assessment extends without qualification to the final two elements of this ground of appeal, which contain allegations of fraud and criminality on the part of the Respondent.

[102] The remaining elements of the Appellant's supporting submissions are a combination of arguments which this court has rejected above, unsubstantiated assertion and the invocation of certain reported first instance decisions belonging firmly to their fact sensitive and litigation sensitive context. For the reasons given this ground of appeal is dismissed.

Thirteenth Ground of Appeal

[103] This court's conscientious attempt to interpret and understand this apparent discrete ground of appeal is set forth at [18](xiii) above:

> "*The specific award of a lump sum of £34,000 to the Respondent is 'wrong' as it 'double counts Chapelside'*."

As will be apparent from what follows this ground is far from easily comprehensible. As recorded in [8] above, the findings of the judge engaged by this ground of appeal are: the Appellant, *qua* 20% interest owner, has been receiving £5,600 per annum being 20% of the rental income in respect of numbers 8 and 10 Chapelside, London; previously this income was paid into parties' joint account and was used to pay joint household bills; these two properties will be redeveloped by the Appellant's brothers at no cost to him and he will continue to receive 20% of the future rental income; his 20% capital share in these properties was assessed at £530,000; and the Appellant has a 20% share in the Chapelside rental income bank account, equating to £3,200. In determining the allocation of assets, the judge specifically concluded, at [106] that this particular asset would not be treated as a matrimonial asset. Next, at [108], the judge further concluded that satisfaction of the Respondent's needs did not require any different approach to this asset.

[104] At [115] the judge made an omnibus assessment of the Respondent's entitlement in monetary terms, with appropriate references to corresponding assets. The Chapelside asset was excluded from this exercise. The grand total was £737,250. At [116] the judge made a mandatory order designed to give practical effect to her assessment of the Respondent's financial entitlement. This order, *inter alia*, required the Appellant to transfer certain assets to the Respondent. The relevant part of the order includes the following discrete provision:

> "*The husband* [Appellant] *…. shall pay a lump sum of £34,000 (in lieu of Chapelside account … 7748) within 28 days of the date hereof …*"

In an earlier passage in the judgment, the judge stated at [66]:

> "*The husband holds an account …. 7748 called the Chapelside account into which the rental payments for these premises* [are] *paid. As of 30 November 2017 this has a balance of over £16,000.*"

This translated to £3,200 reflecting the Appellant's 20% interest in these properties. At [71] the judge found that the rental income in respect of these properties, repeating this at [73].

[105] The single argument advanced on behalf of the Appellant is framed in terms which are far from clear. As understood by the court, it is that the Chapelside account had been reckoned by the judge when considering the issue of post-separation dissipation of assets and making appropriate findings, wrongly so. This exercise was carried out by the judge at [68] – [79]. The Chapelside account does feature in these passages. However, there is no finding of any dissipation by the Appellant of the monies in this account. Rather, in a series of carefully reasoned passages, the judge, rejecting the case made by the Appellant and the affidavit evidence of his brother, made two central findings: first, that the Chapelside rental income was paid into the Chapelside account and, second, that the monies in the Barclays accounts did not represent Chapelside rental income but, rather "*formed part of the husband's earnings and/or rental income from other properties*" thus ranking as matrimonial assets.

[106] The Appellant's argument draws particular attention to [107] of the judgment where it is stated:

> "*In relation to the monies dissipated by each party, I consider that these were all matrimonial assets and therefore to equalise division the husband owes the wife £24,000.*"

This passage is found in a section of the judgment entitled "Division of Matrimonial Assets". At the outset the judge records the parties' agreement that joint matrimonial assets should be divided equally. The arithmetic underlying the figure

of £24,000 is quite simple. At [76] and [79] the judge made findings that post-separation the Appellant had dissipated assets totalling £153,500 and the Respondent had dissipated assets of £104,000. There was, therefore, a balance of £48,500 in the Respondent's favour. At [107] the judge, applying the principle of equal division of matrimonial assets, concluded that a sum equating to almost exactly 50% of this figure (£24,000) was due by the Appellant to the Respondent.

[107] As the rather painstaking analysis in the foregoing paragraphs demonstrates, there is no question of double counting. The judge specifically found that the monies in the Chapelside account had previously been used for the purpose of defraying household expenses and bills. This was scarcely contentious: the Appellant, in our view, tacitly conceded this, while adding that this state of affairs was confined to the period 2012 – 2014. While the judge also held that the Appellant's 20% share in the properties generating this income did not rank as a matrimonial asset, the income itself did. This source of income had not been available to the Respondent since the parties' separation. The evidence, accepted by the judge, was that as of 30 November 2017 the Appellant's 20% entitlement to the credit balance in the Chapelside account amounted to £3,200.

[108] We return to the specific provision in the order of the court under scrutiny: see [4]A above. Properly construed, we consider that the judge determined to order the Appellant to pay the Respondent the discrete amount of £34,000 as an alternative to ordering him to transfer the Chapelside account … 7748 to her. This analysis we consider consistent with everything in the preceding passages of the judgment, highlighted above, relating to the Chapelside properties, the Chapelside account and the uses to which the Chapelside account monies were habitually put. We are unable to identify any foundation for this contention. This ground of appeal must be rejected.

Fourteenth and Fifteenth Grounds of Appeal

[109] These final two grounds of appeal correctly acknowledge that the judge was exercising discretion in the matter of costs. As a general principle an appellate court will accord appropriate respect to how this discretion is exercised by a trial judge. The relevant statutory provision is section 59 of the Judicature (NI) Act 1978, to be considered in tandem with RCJ Order 62, Rule 3(3) and the related legal principles are discussed in *Re Kavanagh's Application* [1997] NI 368 at 382-383.

[110] The constituent elements of these combined grounds rehearse and repeat much of what is contained in earlier grounds and supported by submissions containing impermissible elements of unsworn evidence. Properly analysed the main focus of these grounds is [86] of the judgment which, of course, is to be considered in conjunction with [22]. Within these passages one finds the judge's assessment of the evidence of the Appellant which contains descriptions such as "*dishonest, shifty, evasive, rude, obstructive, unhelpful and disrespectful to the court …*" and the overall assessment "*The court gives little weight to his evidence generally*".

These illustrations are coupled with certain specific findings, which include that the Appellant "*…. deliberately absented himself from the court hearing by going on holidays without ensuring solicitors had been instructed on his behalf to attend*". We draw attention also to the relevant passages in the order of Master Sweeney reproduced at [3] above.

[111] Our conclusion is twofold. First, there is no basis for interfering with the specific findings and evaluative assessments underpinning the judge's costs order. Second, these provided a more than sufficient basis for how the judge dealt with the issue of costs. These final two grounds of appeal are rejected accordingly.

Footnote 1: Missing Bundles

[112] Missing bundles became one of the central themes of the Appellant's prolix written submissions. As understood by this court, the Appellant attempted to establish that (a) certain hearing bundles had not been available to him at certain stages of the hearings before McBride J and (b) he had been unfairly disadvantaged in consequence. The factual aspect of this discrete complaint, rehearsed in (a), was presented to this court in a wholly unsatisfactory fashion. Furthermore, we consider that this court was misled in this matter. We say so for three reasons. First, when pressed by this court, the Appellant's McKenzie Friend was driven to concede that previously unavailable bundles became available to the Appellant at a stage when he was still giving evidence at the hearing below. In this context we refer to, but do not repeat, [35] above. Second, the book of appeal contains *inter alia* a 38 page written submission prepared by the Appellant's McKenzie Friend. This is dated 05 June 2019, preceding the completion of the hearings by some weeks. As noted in [39] above, this submission neither displays incomplete access to the full bundles of documentary evidence nor contains any hint or protest to this effect. Third, there was a manifest failure on the part of the Appellant and his McKenzie Friend to identify clearly and coherently to this court the allegedly unavailable bundles the source of this discrete complaint. In this respect, as in many others, obfuscation prevailed from beginning to end before this court.

[113] We note the Appellant's forlorn attempt to blame court staff for the alleged disappearance of certain hearing bundles. This is utterly misconceived. If this event occurred at all it unfolded at a stage when the person occupying the witness box was the Appellant, duly supported by his McKenzie Friend. Parties who choose to leave papers in court do so entirely at their own risk. Court staff have no responsibility for papers left by parties in public court rooms. The responsibility for any subsequent loss, damage or disappearance lies exclusively with the party concerned.

[114] Finally, the Appellant's post-hearing insistent invocation of the recent decision of the Supreme Court in ***Serafin v Malkiewicz*** [2020] UKSC 23 in this context was simply not to the point.

Footnote 2: Transcripts

[115] The Appellant made requests for the provision of transcripts of much of the hearing before McBride J, both before and following the final hearing in this court. This resulted in a substantial depletion of judicial and administrative resources which was wholly unjustifiable in the circumstances. As appears from [9] above, the court acceded to the Appellant's request for a transcript of the first day of the underlying hearings. This was prepared at the court's expense. The court required the Appellant to demonstrate a sufficient basis for the many other transcript requests made. Particularisation of hours and dates of hearings was also required. Having instigated and completed this exercise the court was satisfied that no sufficient basis for the preparation of any further transcripts had been established.

Omnibus Conclusion

[116] To summarise:

(a) The eighth ground of appeal succeeds: see [86] above.

(b) The issue raised in the tenth ground of appeal is quite simply resolved by varying the Order of the court below in the following terms:

> *"The Appellant is entitled, subject to continued existence and availability, to recover the chattels detailed in the three page appendix entitled 'Mr Quinn's Belongings in the Matrimonial Home'* [26 items] *attached to the letter dated 31 May 2017 written by the Respondent's former solicitors."*

(c) The other 12 grounds of appeal are dismissed.

[117] In the exercise of the power conferred by section 38(1)(b) of the Judicature (NI) Act 1978, we remit for adjudication the issues relating to the single ground of appeal which has succeeded in this court: see [86] and [116](a) above. We consider that the overriding objective will best be furthered by ordering remittal to McBride J, particularly in light of our assessment that her conduct of the hearing below was irreproachable.

Costs

[118] The following directions apply:

(i) The Appellant shall, by 29 July 2020, formulate his submissions in relation to costs above and below in the span of one A4 page, font size 12.

(ii) The Respondent shall, by 05 August 2020, respond, observing the same limitations.

(iii) The final order of this court will issue either (a) following consideration of the parties' submissions on costs or (b) in the event of either party defaulting in complying with the above directions, without more, that is to say without any further notice to, or communication with the parties or the Appellant's McKenzie Friend.

Onward Appeal

[119] The schedule specified in [118] above applies equally to any application for leave to appeal to the UK Supreme Court.

Postscript 18 September 2020

Postscript 1: Costs

[120] Having considered the parties' written submissions, the court:

[a] Affirms the costs order of McBride J.
[b] In the exercise of its discretion makes no order as to the costs of this appeal.

Postscript 2: leave to appeal to UKSC/final Order

[121] The court acceded to the Appellant's request for an extension of the time period specified in [117](i) above. No application for leave to appeal to UKSC has been received. This matter is, therefore, moot.

[123] The Appellant insisted on sending new documentary evidence to the Court of Appeal Office following promulgation of his judgment in draft, in defiance of multiple orders, directions and warnings of the court. This bordered on the contumelious and is to be condemned accordingly.

[124] The court issued an initial order dated 22 July 2020 on foot of this judgment, then in draft. A further order finalising all issues will now issue.