

ENGLAND AND WALES / JUDGMENT

Anne Morag Fotheringham v Antony David Nelson

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Neutral Citation Number: [2026] EWHC 632 (Ch) Appeal Court Ref: CH-2025-LDS-000017 IN THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS IN LEEDS APPEALS (ChD) ON APPEAL FROM MR RECORDER PRITCHARD KC K80LS105 Fourth Floor, West Gate, 6 Grace Street, Leeds, LS1 2RP Date: 27/03/2026 Before: HH JUDGE KLEIN SITTING AS A HIGH COURT JUDGE

- ----- Between: ANNE MORAG FOTHERINGHAME

- and - ANTONY DAVID NELSON Appellant Respondent

- -----

- ----- Elizabeth Darlington (instructed by Direct Access) for the Appellant Harry East (instructed by Hill Dickinson LLP) for the Respondent Hearing date: 10 March 2026

- ----- Approved Judgment This judgment was handed down remotely at 10.30am on 27 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives HH JUDGE KLEIN HH JUDGE KLEIN Approved Judgment HH Judge Klein: Fotheringham v. Nelson 1. 2. 3. This is my decision following the hearing of the appellant's appeal from the decision of Mr Recorder Pritchard KC ("the judge") made on 4 September 2025 to declare that 2 Greentop, Pudsey, Leeds, LS28 8JW ("the property") has been held by the parties on trust for themselves beneficially in the following shares: the appellant - 80.7%, the respondent - 19.3%. At the same time, the judge permitted the appellant to buy out the respondent's interest in the property and further ordered the property's sale in default. The judge also gave consequential directions. He dismissed the appellant's counterclaim by which she had sought to recover outstanding child maintenance payments from the respondent. Leech J (the Supervising Judge of the Business & Property Courts for the North Eastern Circuit) gave the appellant permission to appeal in part on 20 November 2025, and he released the appeal to me for determination. On the appeal, as at trial, the appellant has been represented by Ms Darlington of counsel, and the respondent has been represented by Mr East of counsel. I am grateful to them for their submissions, all of which I have considered. This judgment sets out the reasons for my decision to dismiss the appeal.

Background

4. 5. 6. 7. The parties cohabited from about 1992/3 until January 2003, when they separated. The appellant then remained living in the property with the parties' three children, the youngest of whom was born after the separation. The first property the parties had bought was 28 Warrels Place, Bramley, Leeds. The deposit for that purchase was a gift from the appellant's mother ("the Warrels Place deposit"). The balance of the purchase price was funded by a joint mortgage. In 2000, the Warrels Place property was sold and the property was bought. The parties have both been the registered proprietors of the property. Although the transfer of the property records that it was to be held by the parties for themselves as beneficial joint tenants, the transfer was not signed by them. The purchase price for the property was funded from the net sale proceeds of the Warrels Place property and by a loan, secured by a legal charge, from Northern Rock Building Society ("the Northern Rock mortgage"). The Northern Rock mortgage was a part repayment, part interest-only arrangement. The interest-only part was further secured by a joint endowment policy from an insurer. Shortly after the purchase, a partial lump sum payment was made to the building society. The payment was from the appellant's inheritance from her grandmother ("the inheritance"). In October 2002, shortly before the parties' separation, they borrowed more money, secured by the legal charge, to be spent on renovations to the property. In June 2003, the respondent began a claim, under the Trusts of Land and Appointment of Trustees Act 1996, principally for a determination of the extent of his beneficial interest in the property and for an order for sale. HH JUDGE KLEIN Approved Judgment The judgment Fotheringham v. Nelson 8. Following a trial in which the judge had heard from the appellant and the respondent, he handed down a reserved judgment and, when doing so, made the following findings which are not challenged (save for the penultimate matter below, in respect of which Leech J refused permission to appeal, so that the parties remain bound by it): i) ii) iii) iv) v) vi) vii) viii) ix) x) the parties' income and expenditure were pooled during their cohabitation (see
- [7] of the judgment); the Warrels Place deposit was a joint contribution to the purchase of that property (see [8], [41(d)] of the judgment); there was apparently, at the time, no discussion or agreement between the parties that the inheritance was not one of the parties' "pooled resources" or that it was "ring-fenced" to the appellant alone (see [12] of the judgment) (and the judge later found that the inheritance was a joint contribution by the parties to the property's purchase (see [41(d)] of the judgment); the appellant obtained three valuations of the property in about January 2003, but there was no evidence before the judge that, following them being shared with the respondent, the parties discussed what shares they would have in the property thereafter (see [19(c)] of the judgment); the evidence before the judge was consistent with the parties having not discussed, at the time of their separation, the respondent's continued liability in respect of the Northern Rock mortgage (see [19(d)] of the judgment); in April 2003, the parties' joint bank account, into which their wages had been paid (see [7] of the judgment), ceased to operate as such and, from then on, the appellant was solely responsible for property-related expenditure (for example, mortgage

interest, council tax, and property repairs and maintenance) and for all payments in respect of the joint endowment policy (see [19(e)] of the judgment); from April 2003, the respondent's only contribution to the household's finances were child maintenance payments (see [19(f)] of the judgment); although the parties were in regular contact after their separation, because they had shared parental responsibility for their children, at least until 2018 they did not have any discussion about financial matters (see [20] of the judgment); in 2018, the respondent wanted to bring his liability relating to the Northern Rock mortgage to an end, which the appellant resisted following which the respondent's liability continued (see [23] of the judgment); in October 2023, an ISA in the respondent's name, which was part and parcel of the joint endowment policy, was sold by him following which he retained all the net sale proceeds, without telling the appellant, even though she had been contributing to it as part of the joint endowment policy, particularly since 2003 (see [24] of the judgment); HH JUDGE KLEIN Approved Judgment *Fotheringham v. Nelson* xi) xii) xiii) the appellant had evidence showing she had spent £6,918 in relation to work done to the property. The judge accepted that she had made a substantial contribution to the upkeep of the property. He rejected her claim that she had improved the property (see [32(b)] of the judgment); when the property was purchased, the parties' common intention was to hold the property "on trust in equal shares between them and [they] had an equal beneficial interest in" the property (see [41] of the judgment); both parties' cases have been that they formed a common intention, following their separation, that the size of their respective shares of the property would change (see [43] of the judgment); xiv) the respondent's child maintenance payments "undoubtedly assisted with running the family home" (see [54] of the judgment). 9. As I have said, the appellant counterclaimed for outstanding child maintenance payments from the respondent. The counterclaim was dismissed on limitation grounds and the judge made no findings about how much was outstanding. He said, at [59]-

[60] of the judgment: "It is unnecessary, given my finding on the time bar below, to deal with this issue at length. However, against the event that this matter goes further, I shall set out my conclusions. These are:

- a. the calculation is as set out by the CSA in 2003;
- b. prima facie any deductions that are explicitly listed there are deductions that the Claimant was entitled to make if and insofar as they were properly pleaded and proved, however,
- c. the Claimant has insufficiently proved the deductions that should be made in relation to the following headings and these therefore cannot be taken into account: (a) "Relevant Children" and (b) "Travel costs". If necessary, I will hear oral submission in relation to a final table of the payments." There is no challenge to this aspect of the judge's decision either and the judge was not asked by the parties to decide the amount of the outstanding child maintenance payments. 10. Before reaching his conclusions about the parties' shares of the property, the judge correctly summarised the applicable legal principles (see [37] of the judgment); in particular, by quoting verbatim, in part, from *Jones v. Kernott* [2012] 1 AC 776

at [51]. What Lord Walker and Lady Hale said there is as follows: “In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of a cohabiting couple who are both HH JUDGE KLEIN Approved Judgment Fotheringham v. Nelson responsible for any mortgage, but without any express declaration of their beneficial interests.

- (1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.
- (2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.
- (3) Their common intention is to be deduced objectively from their conduct: “the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party’s words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party” (Lord Diplock in *Gissing v. Gissing* [1971] AC 886, 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v. Dowden*, at [69].
- (4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, “the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property”: Chadwick LJ in *Oxley v. Hiscock* [2005] Fam 211, at [69]. In our judgment, “the whole course of dealing ... in relation to the property” should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties’ actual intentions.
- (5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).”
11. What the judge could also have explained is that, when a court is imputing to parties their shares of a property (that is, when a court is determining what is the parties’ fair shares in a property having regard to the whole course of dealing between them in relation to that property), the court is determining “what [the parties’] intentions as reasonable and just people would have been had they thought about it at the time” (per Lord Walker and Lady Hale in *Kernott* at [47]). HH JUDGE KLEIN Approved Judgment Fotheringham v. Nelson 12. The judge could also have emphasised that, when imputing to parties their shares of a property, a court’s focus is on “the whole of the course of dealing between them in relation to the property” (per Chadwick LJ in *Oxley* at [69]) (emphasis added). In *Stack v. Dowden*

[2007] 2 AC 432, Lord Walker explained, at [34]-[36]: “In those cases (it is to be hoped, a diminishing number) in which such an examination [of the whole of the course of dealing] is required the Court should in my opinion take a broad view of what contributions are to be taken into account... The law should recognise that by taking a wide view of what is capable of counting as a contribution towards the acquisition of a residence, while remaining sceptical of the value of alleged improvements that are really insignificant, or elaborate arguments (suggestive of creative accounting) as to how the family finances were arranged. ...[In] *Oxley v. Hiscock* [2005] Fam 211, Chadwick LJ summarised the law as follows...: “But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have - and even in a case where the evidence is that there was no discussion on that point - the question still requires an answer. It must now be accepted that (at least in this court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And, in that context, ‘the whole course of dealing between them in relation to the property’ includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home.”” (emphasis added). Lady Hale said, in the same case, at [61], of the citation from Chadwick LJ’s judgment in *Oxley*: “The passage quoted is very similar to the view of the Law Commission in *Sharing Homes* (2002, op cit, para 4.27) on the quantification of beneficial entitlement: “If the question really is one of the parties’ ‘common intention’, we believe that there is much to be said for adopting what has been called a ‘holistic approach’ to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended.” HH JUDGE KLEIN Approved Judgment *Fotheringham v. Nelson* That may be the preferable way of expressing what is essentially the same thought...” (emphasis added). 13. The judge’s key conclusions (at [44]-[47] of the judgment) were as follows: “44. The evidence shows that position the parties reached by April 2003 was as follows:

- a. their financial interests were separated.
- b. going forward the Claimant’s direct contribution to the House ceased. Those costs were taken up by the Defendant and included all interest payments on the mortgage together with the linked financial instruments.
- c. ...It seems to me that the proper conclusion (i.e. the conclusion that reasonable and just people would have been (sic) had they thought about it at the time) was that the parties approach (sic) the matters of equity, sale and mortgage in this manner because they jointly wished to ensure the family home could be maintained.

- d. ...As I have already stated, I have insufficient information on which to conclude that leaving the Claimant on the mortgage was an essential step to maintaining the family home. However, it seems to me that is not the point here. The point is that the step was taken in order to assist with the preservation of the family home and was done in circumstances where on any view the Defendant was not flush with money.
- e. the Defendant's payments in relation to maintenance do not evidence any increase in her share on the basis that she has done no more than properly maintain the house rather than materially add to its value.
- f. the Defendant's payments in relation to the capital of the mortgage are, and were intended, to be hers. My current view is that the ISA sum withdrawn by the Claimant is to be deducted from his overall share. Insofar as he has any entitlement to this sum it is because it represents a part of the equity due to him.
- g. the Defendant solely paid mortgage interest from April 2003. This is a significant factor in terms of expense – however, it is also an expense which a) relates to the outstanding 81.7% capital which over time accumulates to solely to the Defendant and b) can be considered at least in part is the effective price of occupation of the property by the Defendant.
- 45. Taking all these matters together, it seems to me that correct conclusion is that the parties formed a common intent that going forward the Claimant would be entitled to a share in HH JUDGE KLEIN Approved Judgment Fotheringham v. Nelson the House equivalent to a 50% share in the net value of the House at the point of separation.
- 46. Nothing which happened after 2003 establishes that the parties' common intent changed again. It is in particular clear to me that the discussions that took place in 2018 and thereafter were discussions (sic) and do not evidence either a) the common intent in 2003 or b) a change in that intent thereafter. They were discussions made in the course of seeking a settlement to this dispute.
- 47. The Claimant is therefore entitled to 19.3% interest in the overall value of the property..."
- 14. What did the judge decide in these paragraphs of his judgment? 15. The 2025 White Book explains, at note 52.21.5: "Reasons for judgment will always be capable of having been better expressed. A judge's reasons should be read on the assumption that the judge knew (unless they have demonstrated to the contrary) how they should perform their functions and which matters they should take into account (Re C (A Child) (Adoption: Placement order) (Practice Note) [2013] EWCA Civ 431; [2013] 1 W. L. R. 3720, CA, at [39] per Sir James Munby P; Pigłowska v. Pigłowski [1999] 1 W. L. R. 1360, HL, at 1372 per Lord Hoffmann)..." 16. 17. 18. There are two aspects of paragraphs 44 to 47 of the judgment which the judge might have expressed better. First, although the judge began paragraph 44 by suggesting that the sub-paragraphs which followed related to the period up to, and not beyond, April 2003, it is clear that the judge was in fact considering in that paragraph the parties' dealings well beyond April 2003, with no end date specified. So, in paragraph 44(b), the judge recorded that the

appellant paid all the household expenses and Northern Rock mortgage-related payments from April 2003 and, in paragraph 44(e), the judge considered the appellant's expenditure on the property's maintenance after April 2003. Secondly, the judge referred, in paragraph 45, to the parties having "formed a common intent". It might be thought that, here, the judge was inferring that the parties intended to change the size of their respective shares of the property on their separation and that he was also inferring their actual intention as to the extent of that change. On the second point, that would not be right. It is clear to me that, in paragraphs 44 to 47 of the judgment, the judge was imputing to the parties their respective (changed) shares in the property because he could not determine the parties' actual intention about the extent of the change to those shares based on the evidence or on inference. I have come to this conclusion for the following reasons: i) prima facie, paragraphs 44 to 47 of the judgment have to be read on the assumption that the judge knew how he ought to proceed; HH JUDGE KLEIN Approved Judgment Fotheringham v. Nelson 19. ii) iii) iv) v) vi) only a few paragraphs earlier in the judgment, the judge had correctly summarised the applicable legal principles (that is, by reference to Kernott); the judge had also earlier recorded the absence of evidence of any relevant discussions (see [19(c)], [20] of the judgment in particular); as Kernott demonstrates, at [47], [51], even when the court is imputing to parties their shares of a property, the court is giving effect to what may be described as a deemed "common intention"; in paragraph 44(c) of the judgment, when the judge was considering how the parties approached the "equity" in the property, his conclusion was expressed by reference to the language of Kernott at [47] where Lord Walker and Lady Hale explained what a court does when it imputes to parties their shares of a property; nowhere in paragraphs 44 to 47 of the judgment did the judge say, in terms, that he was reaching a conclusion about the parties' shares of the property by inference. Taking into account what I have said, and noting too what the judge concluded elsewhere in the judgment (as I have summarised in [8] above), it is clear that, having concluded that the parties' intention, when the property was purchased, was that they should be beneficial owners of the property in equal shares and that that intention changed on their separation, in paragraphs 44 to 47 of the judgment the judge came to the following conclusions (or, the appellant would say, purported to do so): he could not conclude from the evidence or infer what the parties' actual intention was as to the extent of the change in their shares of the property. He therefore had to, and did, impute to them what the size of their respective shares should be by considering what their intentions, as reasonable and just people, would have been had they thought about it at the time, taking into account the whole of the course of dealing between them in relation to the property. He concluded that, fairly, their shares should be 80.7% to the appellant and 19.3% to the respondent, and, in making that decision, he expressly took into account that, following the parties' separation, the appellant paid all the Northern Rock mortgage-related payments including mortgage interest and council tax, and that she also paid for all property repairs and maintenance (see [44(b)] of the judgment, which has to be cross-referenced to [19(e)] of the judgment, and also see [44(f)], [44(g)] of the judgment). Admittedly, the judge appears not to have given much weight to the appellant's expenditure on the repair and maintenance the property, because, he found, she had not

improved it. 20. By fixing the parties' shares of the property as he did, the judge was effectively confining the respondent's beneficial interest in the property to what he had elsewhere concluded were, or should be treated as if they were, the respondent's direct contributions to the property's purchase price, with the appellant getting the whole of the benefit of her discharge of the Northern Rock mortgage-related payments after the parties' separation, even though the respondent had contributed to the household finances by the child maintenance payments he did in fact make. 21. In the circumstances of this case, the only reason why, in money terms, the value of respondent's share of the property is greater than it was in 2003 (taking into account HH JUDGE KLEIN Approved Judgment Fotheringham v. Nelson 22. 23. the judge's conclusion about property improvements) is apparently because of the general increase in property prices since then. It is not unconventional for a party with a beneficial interest in a property to enjoy the increase in the value of that beneficial interest attributable to any increase in property prices generally. In *Walker v. Hall* [1984] FLR 126, where the Court of Appeal had to consider whether the beneficial interests in the property of cohabitees who had separated should be quantified, in money terms, according to the property's value at the date of their separation, as an earlier Court of Appeal decision, *Hall v. Hall* [1982] 3 FLR 279, might have suggested, Dillon LJ said, at pages 132-3: "In *Gordon v. Douce* [1983] 2 All ER 228, this court had to examine *Hall v. Hall*. Fox LJ who gave the leading judgment noticed that Lord Denning had treated the date for valuation as a matter for the discretion of the judge, and Fox LJ concluded that *Hall v. Hall* cannot, as a matter of authority, be regarded as establishing a rigid rule that the date of valuation of the shares in cases concerned with mistresses must be the date of separation. I respectfully agree with that analysis. It is to my mind strongly supported by the fact that Lord Denning in *Hall v. Hall* found support for his decision in that case, and guidance, in the unreported case of *Munday v. Robertson* decided on 18 April

1973. *Munday v. Robertson* was a husband and wife case in which the court had exercised its statutory discretion under the Matrimonial Proceedings and Property Act 1970. That discretion was only available as between husband and wife and not as between man and mistress; but fact that *Munday v. Robertson* was a discretion case emphasises that *Hall v. Hall* was also a discretion case and does not lay down any rule of law. *Munday v. Robertson* is of assistance in a further respect. Mr Whitaker, in his submissions for Mr Hall, put forward as the reason why Mrs Walker's share should be valued as at July 1973 when she left 33 Foxberry Road that "the trust had then come to an end". In *Munday v. Robertson*, Buckley LJ dealt with such an argument. He said: "The learned judge in his judgment, according to the notes of the judgment, says that on the wife leaving the home her interest then came to an end. Now that is a view which as a statement of the law I do not think can be maintained. She remained at that time still entitled under the trust which was contained in the conveyance to her - as a joint tenant with her husband". As it seems to me, the true position is that, when Mrs Walker left 33 Foxberry Road and her cohabitation with Mr Hall ceased, the purpose of the trust, in the sense of the purpose for HH JUDGE KLEIN Approved Judgment Fotheringham v. Nelson which 33 Foxberry Road was bought, came to

an end in that 33 Foxberry Road would no longer be used as a family home for Mr. Hall and Mrs. Walker and the children. But the trust for sale, imposed by statute as a result of the transfer of the property into joint names, did not come to an end, but would inevitably continue until either the property was sold in execution of the trust for sale in order to satisfy the beneficial interests of the parties, or one party, by buying the other out, became solely and absolutely entitled to the property in equity. A fortiori the beneficial interests of both parties, established by their contributions to the original purchase of the property, would not automatically cease or be quantified as fixed sums on the cesser of cohabitation. Unfettered by Hall v. Hall I see no reason, in the circumstances of this case, why Mrs Walker's interest in 33 Foxberry Road should be valued or quantified at the date when she left. It should be valued at the present time, if Mr. Hall is to buy her out, or she should take the appropriate fractional share of the actual proceeds of sale if the property is sold. I see no hardship to Mr Hall in this, since he too will benefit proportionately from the rise in the value of the property from 1973 until now." 24. On this appeal, the appellant has effectively contended, nevertheless, as a stage in her quantification of her share of the property, that the whole of the increase in the property's value attributable to the general increase in property prices since 2003 should be allocated to her (see paragraphs 67-70 of Ms Darlington's supplemental appeal skeleton argument, where she referred to Allen v. Webster [2024] EWHC 988 (Ch), which is a case where the result was consistent with the appellant's contention. In that case, the judge was not apparently referred to Walker and his judgment does not expressly contain a rationale for his approach). The grounds of appeal

25. When giving permission to appeal, Leech J considered each paragraph of the appellant's grounds of appeal as a separate ground. This is not what the appellant had intended. Indeed, Ms Darlington did not present the appeal on the basis that, as set out in paragraphs 1 to 4 of the appellant's grounds of appeal, the appellant has four grounds of appeal (Leech J having refused permission to appeal on paragraph 5 of the grounds of appeal (which he characterised as ground 5)). Rather, Ms Darlington advanced two grounds of appeal; namely: i) when imputing (or, on the appellant's case, when purporting to impute) to the parties their shares of the property having regard to the whole course of dealing between them in relation to the property, the judge failed to take into account the following matters; namely, (a) that, following the parties' separation, the appellant alone paid the mortgage interest payments due with respect to the Northern Rock mortgage, the buildings insurance and contents insurance relating to the property, the council tax relating to the property and for all the repairs to the property and (b) that there have been outstanding child maintenance payments; HH JUDGE KLEIN Approved Judgment Fotheringham v. Nelson ii) "the learned judge wrongly categorised the [appellant's] case as one in which the size of the [respondent's] interest "reduced" post-separation (paragraph 36) when her position was that the presumption of joint tenancy in law and equity was displaced at the time of separation and that the parties' intentions in respect of the size of their beneficial interests changed" (see paragraph 4 of the grounds of appeal). The first ground of appeal (see paragraph 25(i) above) 26. 27. In determining, by imputation, what the parties' shares of the

property have been, the judge was making an evaluative judgment. The 2025 White Book explains, at note 52.21.5, how an appeal court should approach an appeal from a judge's evaluative judgment: "Authoritative guidance on the approach that appellate courts should take when called upon to assess a trial judge's evaluation of facts was given by the Supreme Court in *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 W. L. R. 1911...The authorities, and particularly *Re B*, are well-summarised in *Prescott v. Potamianos* (also known as *Re Sprintroom*) [2019] EWCA Civ 932 in a judgment of the court (McCombe, Leggatt and Rose LJ) at [72]-[78]. The proper approach in the light of the authorities was (at [76]) that "...on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.'" ... There are some cases where the first instance judge has made a decision which involved the assessment and balancing of a large number of factors, for example determining whether an action constitutes abuse of process. Such a decision is not an exercise of discretion, because there is only one right answer to the question before the judge. The Court of Appeal is reluctant to interfere with such a decision. However, the Court of Appeal will interfere if the judge has taken into account immaterial factors, omitted to take into account material factors, erred in principle or come to a decision that was impermissible: see *Aldi Stores Ltd v. WSP Group Plc* [2007] EWCA Civ 1260;

[2008] 1 WLR 748, CA, at [16]; [2008] 1 WLR 748. The Court of Appeal will also interfere if the judge's decision was HH JUDGE KLEIN Approved Judgment *Fotheringham v. Nelson* "plainly wrong": see *Stuart v. Goldberg* [2008] EWCA Civ 2;

[2008] 1 WLR 823, CA, at [76] and [81]." 28. 29. As a matter of fact, in making his evaluative judgment, the judge did take into account the mortgage interest payments the appellant made (see [44(b)], [44(g)] of the judgment) as well as her payment of council tax (see [44(b)] of the judgment, when read with [19(e)] of the judgment) and her expenditure on the maintenance and repair of the property (see [44(e)] of the judgment). On these matters, the appellant would have to challenge the weight the judge attached to them if her appeal is to succeed. Although Ms Darlington did not make oral submissions challenging the weight attached to these matters, most favourably to the appellant I will consider such a challenge, because, as set out in paragraph 2 of the grounds of appeal, the appellant's complaint has been that the judge failed to take into "proper" consideration the appellant's expenditure. The appellant's reference, in paragraph 2 of the grounds of appeal, to a failure by the judge to take "proper" consideration of her expenditure is consistent with her challenging the weight the judge attached to that expenditure when determining the parties' shares of the property. 30. A challenge to the weight a judge has attached to particular material is hard to sustain. In *Volpi v. Volpi* [2022] 4 WLR 48, Lewison LJ explained (in an appeal on fact, albeit that what he said has equal force in this case), at [2], that: "...The trial judge must of course consider all the material evidence

(although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him. An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable." 31. The judge did not say expressly that, in making his evaluative judgment, he was taking into account the appellant's expenditure on buildings insurance and contents insurance, or the outstanding child maintenance payments. However, on the question of insurance, when referring to property-related expenditure in paragraph 19(e) of the judgment, which cross-refers to paragraph 44(b) of the judgment, the judge expressly listed certain heads of expenditure as examples. In this context it is important, therefore, to have in mind what Lewison LJ also said in *Volpi* at [2]; namely: "An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it." 32. Bearing in mind what the judge said in paragraph 19(e) of the judgment, I am not satisfied that, in making his evaluative judgment, the judge did not consider the appellant's expenditure on insurance. It follows that, in respect of this category of HH JUDGE KLEIN Approved Judgment *Fotheringham v. Nelson* expenditure too, the only challenge the appellant might make is to the weight the judge attached to that expenditure. 33. I accept that, in imputing to parties their shares of a property, outstanding child maintenance payments owed by one party can be taken into account. As Lloyd Jones LJ explained in *Barnes v. Phillips* [2016] 2 FLR 1292, at [41]: "In view of the very wide terms in which the House of Lords in *Stack v. Dowden* and the Supreme Court in *Jones v. Kernott* described the relevant context, I consider that, in principle, it should be open to a court to take account of financial contributions to the maintenance of children (or lack of them) as part of the financial history of the parties save in circumstances where it is clear that to do so would result in double liability..." However, the grounds of appeal make no complaint that the judge failed to take into account (or did not properly weigh), in making his evaluative judgment, that the respondent has not paid the child maintenance payments which have been outstanding. Indeed, I was not referred to any part of Ms Darlington's closing submissions where she contended (nor, indeed, was I referred to any other document where it was contended, at trial, on the appellant's behalf) that outstanding child maintenance payments should be taken into account by the judge when determining the parties' shares of the property. It is difficult to see, therefore, how the appellant can now be critical of the judge for not taking into account (or not properly weighing), in reaching his evaluative judgment, the respondent's partial failure to make child maintenance payments. In fact, note 52.21.5 of the 2025 White Book has something to say on this subject too, as follows: "In determining whether the decision of the lower court was "wrong" for the purposes of r.52.21(3)(a), regard must be had to the way in which the parties' cases were formulated below: see *King v. Telegraph Group Ltd* [2004] EWCA Civ 613;

[2005] 1 W. L. R. 2282, CA, at [54]."

34. More significantly, the judge did not determine the amount of the outstanding child maintenance payments (see [59]-[60] of the judgment), and although he indicated to the parties that he would hear further submissions from them after which he would determine that issue, I was told by Mr East that that never happened. 35. 36. 37. As I have recorded, the appellant made a counterclaim to recover the outstanding payments. The counterclaim was heavily contested by the respondent. I am not in a position to say what has been the amount of the outstanding payments. Assuming that the judge did not take the outstanding payments into account in making his evaluative judgment, I cannot therefore say that they were a material factor which he ought to have taken into account. For these reasons, this aspect of the appeal cannot succeed. I consider now the remaining (larger) part of this ground of appeal, on which, as I have explained, the appellant can only succeed if she can establish that the weight the HH JUDGE KLEIN Approved Judgment *Fotheringham v. Nelson* 38. 39. 40. 41. 42. 43. judge attached to a relevant head of expenditure was “rationally unsupportable”. The judge attached significant weight to the appellant’s mortgage interest payments following the parties’ separation (see [44(g)] of the judgment). It may be true, on a fair reading of paragraph 44(g) of the judgment, that the judge may have moderated the weight he might otherwise have attached to these payments because his provisional view was that the appellant should obtain the full benefit of her discharge of the Northern Rock mortgage-related payments from 2003, so that she was thereby taking the full benefit of her mortgage interest payments. Nevertheless, he still attached significant weight to the payments. I cannot see how this conclusion might be objectionable in any way. It appears that the judge attached limited weight to the appellant’s expenditure on maintenance and repair of the property (see [44(e)] of the judgment). This conclusion is also rationally supportable, not only because that expenditure, the judge found, was for the maintenance, but not the improvement, of the property, but also because the expenditure was small (£6,918) in money terms over more than twenty years. Even on the appellant’s case, this expenditure amounts to no more than about 3% of relevant expenditure by the parties following their separation. The judge was entitled to place limited weight on this expenditure. Lord Walker said as much in *Stack* at [34] (see paragraph 11 above). The judge did not expressly say what weight he attached to the appellant’s payment of council tax and for insurance. Most favourably to the appellant, I proceed on the basis that the judge attached limited weight to these factors too. Council tax is primarily a liability for a person’s occupation, rather than their ownership, of a property. As I have explained, what a court is trying to do, when it imputes to parties their respective shares of a property, is to determine what their intentions, as reasonable and just people, would have been had they thought about that matter at that time, and, for that purpose, the court takes into account the parties’ dealings in relation to their property, or, to put it another way their conduct which throws light on the question of the (deemed) intended shares (as Chadwick LJ explained in *Oxley*, and as Lady Hale explained in *Stack* (see paragraph 12 above)). Because council tax is primarily a liability for a person’s occupation, rather than their ownership, of a property, I cannot say that the judge’s (assumed) attribution of limited weight to the appellant’s council tax payments is rationally unsupportable. I have reached the same conclusion in relation to

the appellant's payments for contents insurance. Those payments were, principally at least, for insurance of her, and her children's, personal belongings. That the appellant paid for contents insurance is unlikely to shed very much light on the parties' (deemed) intentions as to their shares of the property. The judge cannot be criticised therefore if, when making his evaluative judgment, he attached limited weight to the appellant's payments for contents insurance. The judge did not make any findings about the amount the appellant paid for buildings insurance from 2003. I am not aware that he was asked to make any findings about that. Even on the appellant's case, she paid £10,249 for buildings insurance over more than twenty years. On the appellant's own analysis, this equates to 5% of the parties' total property-related expenditure over the period, and, if it is HH JUDGE KLEIN Approved Judgment Fotheringham v. Nelson appropriate to adjust the appellant's analysis to take into account the child maintenance payments the respondent did in fact make, this would equate to less than 4% of the parties total property-related expenditure over the period. It appears, from paragraph 44(g) of the judgment, that the judge had formed the provisional view that the appellant's fair share of the property was substantial (81.7%) because she had made almost all the Northern Rock mortgage-related payments following the parties' separation. In those circumstances, it may be said that the appellant's payments for buildings insurance was largely to protect her own property. In any event, in the light of the judge's provisional view, I am not satisfied that it was objectionable for him to attached limited further weight, if that is what he did, to the appellant's payments for buildings insurance. 44. For all these reasons, this ground of appeal fails. The second ground of appeal (see paragraph 25(ii) above) 45. The appellant's criticism of the judge's characterisation of her case, in paragraph 36 of the judgment, is misplaced.

46. What the judge actually said in paragraph 36 is this: "The Defendant's [(the appellant's)] case is that the Claimant's [(the respondent's)] entitlement is at most c. 5% of the net value of the House. Her case therefore is that on (or after) separation the parties had the common intention that the Claimant's beneficial interest would be reduced. In relation to this her case, in summary, was that the Claimant's interest was reduced by reason of, amongst other things:
- a. the shortness of time the Claimant had been in the property (2 years);
 - b. the Defendant's contribution following separation to the payment the mortgage of the property and its expenses for more than two decades, together with her role as primary carer of their three children, and
 - c. the total of just under £25,000 contribution she had made in relation to the equity using monies left to her by her mother and grandmother." The judge added this in paragraph 42 of the judgment: "The Defendant's [(the appellant's)] case is that the appropriate sum ["in the current equity in" the property] is zero, or failing that, no more than 5%."

47. Ms Darlington had said this, on the appellant's behalf, in her trial skeleton argument: "64. [The parties'] intention, that they would own the Property as joint tenants changed, which can clearly be objectively inferred from their conduct... HH JUDGE KLEIN Approved Judgment Fotheringham v. Nelson
65. After April 2003 it was no longer intended that the Claimant would retain a 50% interest in the Property...
76. ...the Defendant's position is that the Court can infer from the evidence that the parties intended that their interests should be 95/5 in the Defendant's favour. Alternatively, it is contended that a fair share is no more than 5% to the Claimant with the balance being retained by the Defendant." She also said this in her closing submissions: "As to the size of [the parties'] shares, again the Court can infer from the evidence or, if it finds that there is no evidence upon which to base its inference, should impute to them an intention that the Claimant's share would be no more than 5% having regard not only to their financial contributions but also the other factors set out above."
48. What Ms Darlington said in paragraphs 64 and 65 of her trial skeleton argument and in her closing submissions is consistent with the assertion, in paragraph 4 of the grounds of appeal, that "the presumption of joint tenancy...in equity was displaced at the time of separation". 49. The judge correctly characterised the appellant's case. He did so in the first sentence of paragraph 36 of the judgment (and reiterated the point in [42] of the judgment). As I have just shown, the appellant's case has been that the respondent's share of the property was at most 5%. The judge's second sentence in paragraph 36 of the judgment, which is objectionable to the appellant, is the judge's summary of the consequence if the appellant's case was right, she having accepted that, before the parties' separation, they had, and but for their separation even now would have, equal shares in the property. Whilst the judge might have expressed himself differently, I cannot see how the judge mischaracterised the appellant's case, or that the judge's summary of the appellant's case was wrong in any way. 50. Even if the judge did mischaracterise the appellant's case, where does that lead?
51. Ms Darlington submitted that, because the judge wrongly characterised the appellant's case, he wrongly imputed to the parties the size of their shares of the property. The second proposition does not follow from the first. It may be that, if a judge mischaracterises a party's case, that is indicative of an even more fundamental flaw in the judge's decision, but that a judge mischaracterises a party's case does not inevitably lead to the conclusion that their decision contains any other error. 52. In this case, the only error in the judge's reasoning and, hence, his decision (his evaluative judgment) which the appellant has expressly advocated is covered by the first ground of appeal, which has failed for the reasons I have already given. The appellant does not suggest that the judge erred in his evaluative judgment in some other specific other way. 53. For all these reasons, the second ground of appeal inevitably fails. It can never have taken this appeal any further than the first ground of appeal might have done. HH JUDGE KLEIN Approved Judgment Disposal Fotheringham v. Nelson 54. 55. In Volpi, at [65], Lewison LJ warned against appeals which seek to retry

cases afresh, which rest “on a selection of evidence rather than the whole of the evidence that the judge heard” (what he had previously referred to as “island hopping”), which seek to “persuade the appeal court to reattribute weight to different strands of evidence”, or which concentrate on “particular verbal expressions that the judge used rather than engaging with the substance of his findings”. This appeal displays all those features, more or less. Indeed, Ms Darlington suggested that if, on allowing the appeal, I could not re-evaluate all the evidence (which would effectively be to retry the case), which I could not, I should order a re-trial. The appellant might have been taking a considerable risk if I had had to re-evaluate the evidence or had ordered a re-trial. On this appeal, the starting point for the appellant’s case about what is, in fact, the parties’ fair shares of the property has been the parties’ respective property-related expenditure since their separation. On the appellant’s analysis, she contributed about 96% of the expenditure and the respondent contributed about 4%. In *Stack* at [89], Lady Hale warned of the dangers of “an arithmetical approach to ascertaining the parties’ intentions”, and, as I have demonstrated (see *Kernott* at [51(5)], and what Lord Walker said in *Stack* (above)), the court’s focus is not solely on the parties’ expenditure. Nevertheless, if the starting point in this case, if the appeal had been allowed, would, and should, have been the parties’ respective property-related expenditure following their separation, that would have had to take account of the £70,169 the respondent actually paid for child maintenance, because, at paragraphs 19(f) and 54 of the judgment, the judge found that those payments were contributions to the household income. In her calculations, the appellant has “island hopped” over those payments (or, perhaps, cherry picked only her expenditure) to make out her case. By my calculation, if the respondent’s child maintenance payments are taken into account as an adjustment to the appellant’s analysis in calculating the parties’ respective contributions to property-related expenditure, the respondent will have covered 28.6% of the expenditure, a somewhat higher percentage than the share of the property the judge determined he has had. That is not to say that the respondent’s fair share of the property might ever have been 28.6%. If such an adjustment was made to the appellant’s analysis, the appellant might have justified further adjustments to her analysis. But this exercise does demonstrate the risk the appellant has run on this appeal. It also makes out the case for Lady Hale’s warning and shows why a re-trial would have been appropriate had I allowed the appeal. 56. As it is, the appeal is dismissed for the reasons I have given.

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Prepared on 22 October 2026 · Esheria