ISSN 2754-5717 (Online)

ISSUE 1 SPRING 2022

FINANCIAL REMEDIES JOURNAL

CLASS LEGAL

FRJ Financial Remedies Journal

www.financialremediesjournal.com

PUBLISHED BY CLASS LEGAL

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@fr_journal

ISSN 2754-5717 (Online)
Cover design: Ninepoint Design Ltd

For any queries regarding the Journal, email frjeditor@classlegal.com

Contents

Notes on the Launch of the Financial Remedies Journal

Hon. Mr Justice Mostyn

At last a journal has been launched to fill what seems to me to be a gross and obvious gap in the market. It has always struck me how our existing family law journals tend to treat financial remedies law and practice as the poor relation. Developments in public and private law children work, and in international children work, always seem to be given priority, bestowing on the money cases a Cinderella status. This is both understandable and at the same time surprising.

It is understandable because it cannot be gainsaid that the subject matter of children work is fundamentally more important than the subject matter of money work. This is to state the obvious.

It is surprising because virtually all other private law litigation in the civil sphere is ultimately about money, or money's worth, or about private property. And even in the public law field most of the disputes litigated in the Administrative Court are often *au fond* about money or property. As long ago as 1844 Karl Marx blasted the 'rights of man' proclaimed in the French Revolution as camouflage masking the true nature of the bourgeois social order. He wrote: 'the practical application of the human right to freedom is the human right to private property.' That the movement in house prices is perennially the third most popular press item (after the weather and Princess Diana) suggests that he may have had a point.

In the civil world reams are written in numerous journals about mercantile, pecuniary or proprietary disputes. So why is there this strange reluctance by the publishers of family law journals to give prominence to equivalent disputes between two people who had been married to each other?

Thus the arrival of the *Financial Remedies Journal* (FRJ) unquestionably fills a gap. And it is not as if its subject matter is uninteresting or unchanging, as the contents of this first issue so clearly show.

Here, Sir James Munby writes with his customary wonderful clarity about the conception, gestation, birth and development of the FRC. It is a most fitting overture for the journal.

I am expecting that contributors will write in future issues about the numerous legal and procedural initiatives both close inshore as well as on the horizon.

In the course of 2022 we can anticipate the following, at least:

- The decision on the proposal for enhanced transparency in the FRC will be made. On any view the current system is illogical, and probably unlawful.
- The new FRC Efficiency Statement and Primary Principles Paper will be rolled out.
- The memoranda on drafting orders, expert evidence, and drafting witness statements will be implemented.
- The Rule Committee will consider the proposal of the Farquhar Committee to move small money cases into the fast track.
- A significantly improved enforcement process will be piloted.
- The standard orders will be given a comprehensive makeover.
- The new Form D81 will be introduced.

The pace of change is extraordinary, yet commentary on it outside social media and the blogosphere is extremely limited.

I am expecting to read articles from practitioners and academics which examine all of these initiatives with the closest critical attention.

I am an avid reader of *Private Eye*. My favourite part of that magnificent organ is the letters pages. The honouring by the correspondents of the tradition that every letter must say that the writer should get out more and that it continues on page 94 always makes me laugh. I hope that the FRJ will develop a quirky letters page. Letters, mediated by the editors, will make for much better reading than twitter outpourings. (Oh yes, judges do read Twitter feeds, which the legal twitterati would do well to bear in mind.)

The flow of judgments from High Court judges sitting in the Family Court, and from the Court of Appeal, continues unabated for which I must bear some responsibility, although I would say in my defence that my motive has only ever been to maintain constitutional orthodoxy.

Thus in *NB v MI* [2021] EWHC 224 (Fam) and *BT v CU* [2021] EWFC 87 I sought to explain that the Law Commission had clearly recommended, respectively, restrictions on the power to make declarations and the power to order variations of lump sums; and that Parliament had in each instance enacted without material alteration the Law Commission's recommendations. Yet in each instance, judicial fidelity to the clear statutory, democratic, intention has not been wholehearted, to put it mildly.

In *BT v CU* [2021] EWFC 87 I also pointed out that the whole of the so-called *Thwaite* jurisdiction violated the principle of *stare decisis*, a fundamental constitutional principle in the administration of justice.

And I pointed out in *BT v CU* and in *A v M* [2021] EWFC 89 that the current practice of anonymising almost all published financial remedy judgments had no historical constitutional validity; and certainly violated the high constitutional principle of open justice declared in *Scott v Scott* [1913] AC 417. In that case Lord Shaw of Dunfermline was of the opinion that the practice of hearing a nullity suit in camera, with the result forever shrouded in secrecy, represented 'the gradual invasion and undermining of constitutional security'; it was 'exactly the same result which would have been achieved under, and have accorded with, the genius and practice of despotism'; and it acted 'to shift the foundations of freedom from the rock to the sand'.

I was, to use idiomatic language, 'just saying'.

I anticipate that the pages of FRJ will contain lively op-ed pieces which address these issues from first principles. Speaking for myself, I have no problem at all with serious, well-thought-out criticism being meted out if judicial opinions are considered to be wrong. Judges are not shrinking violets, and I have no doubt that they keep in mind Lord Clarke's comments in *Dhooharika v The Director of Public Prosecutions (Mauritius)* [2014] UKPC 11 at [28], quoting respectively Lord Brown and Lord Carswell, that when judges are unjustly criticised their usual response should be a 'wry smile'; and that they just have to 'shrug their shoulders and get on with it'.

A consequence of the implementation of the recommendations made in the report **'Confidence and Confidentiality: Transparency in the Family Courts'** (29 October 2021) will be that far more financial remedy judgments at district and circuit judge level will be reported. This will enable a much better understanding to be gained of what is happening at the coalface of daily practice in the FRC rather than in the ivory towers occupied by High Court judges.

I am anticipating that the reports of these judgments will be the centrepiece of each issue of the FRJ. To be able to write a really good précis of a judgment is a considerable skill, and I am expecting that FRJ will have high quality reporters doing just that. Imitation is the sincerest form of flattery and I hope that FRJ will take a leaf from *Family Law* by having a commentary immediately following each judgment précis. I urge FRJ's editors to ensure that the judgments are reported without any significant delay following their placement on Bailii. A delayed judgment précis is seriously devalued, in my opinion.

In the early part of 2022 the revised Form D81 will come into use. This form sets out with clarity the financial positions of the parties both before and after the implementation of the consent order. This should bring about a very considerable alleviation of the workload of the district judges dealing with consent orders. The present form is simply unfit for purpose and could not be less helpful to a district judge seeking to do his or her statutory duty to consider the proposed consent order in detail. This will completely change with the use of the new form.

The new form when completed will contain valuable data showing how parties are settling cases. There is no reason why that data cannot be scanned, converted into Excel format, and then anonymised. The combination of data thus captured from consent orders and data derived from published judgments should enable academic analysts to be able to say pretty quickly how cases at varying levels are being settled or judged and whether there are regional variations. Ultimately it is my ambition, and that of the Law Commission, that the results of such analysis should be published and made accessible to litigants so that they can have a clear steer on how their case is likely to be dealt with. I am confident that FRJ will be in the vanguard of publishing commentary from academics and practitioners about this process.

In my opinion, this is a wonderful initiative. Class Publishing has assembled an editorial team of the highest intellectual quality. They will ensure that the FRJ becomes the periodical of choice for financial remedy practitioners. I wish the project well. No doubt I will suffer a certain amount of apprehension immediately before each issue hits the stands, but that is as it should be.

Introduction

HHJ Edward Hess

Chair of the Editorial Board

I am proud and delighted to introduce the first edition of the *Financial Remedies Journal* (FRJ). The paper journal sits alongside and complements its own website. Both the paper journal and the website are led by an interdisciplinary Editorial Board and are published and administered by Class Legal. Rhys Taylor acts both as Vice-Chair of the Editorial Board and Journal Editor and Hannah Smith (from Class Legal) acts as Journal Manager.

Our plan is to produce the paper journal three times per year – in the spring, summer and autumn – the Spring 2022 edition is our first. The mission of the paper journal is to promote serious and high-level debate and thought about the workings of the world of financial remedies, both substantively and procedurally and inside and outside of court. It is perhaps anomalous that there has not been such a specialised journal to date.

We are fortunate to have attracted for this issue some really excellent, thought-provoking, informative and substantial contributions from some of the most influential players in the field of financial remedies. From the judiciary we have pieces from three leading figures in this field: Sir James Munby, Sir Paul Coleridge and Mr Justice Nicholas Mostyn. Additionally, there are some thought-provoking papers on deferred remuneration, valuation, tax, pension offsetting, overseas divorce claims and no fault divorce. The journal is bolstered by articles which we hope to turn into regular features: a Tech Corner, a Money Corner, a DR Corner, a Case Round-Up and an interview with a leading figure in the field, for this edition Sir Jonathan Cohen. We are already burgeoning with ideas for contributions to the second edition, but very much welcome further ideas and contributions from across the range of professionals who have their business with the Financial Remedies Court.

The journal articles will also be available online on the FRJ website, but the website will also benefit from a number of other features. Importantly, there is instant and right up to date hyperlink access to a wide range of judgments in the field produced by our Case Editor, Polly Morgan, and her team. Unlike many databases this will include judgments by judges lower than High Court level, reflecting the President's 10% Transparency ambition and the fact that the judgments by High Court judges and above in this area tend to deal only with very big money cases, which are not necessarily typical of the daily bread and butter of family court life. These are arranged in a way which recognises the importance of topicality, with the most recent decisions at the top, each case having a concise explanation of the significant dicta of the case; but can also be searched by subject matter or judge.

There is immediate hyperlink access in the FRC corner to all FRC relevant guidance (national and local) as well as to the most recent version of the Standard Family Orders.

There is a topical FRJ blog led by our Blog Editor Emily Ward and her team. We envisage this to be the electronic equivalent of a financial remedies Speaker's Corner or the soapbox in the public square. If you have something to say about financial remedies, please do get in touch and get it off your chest on the blog. Whilst huge strides have been made in the creation of the Financial Remedies Court in the last few years, the system continues to evolve and we accept that some may want to voice frustrations and constructive criticisms, alongside (we hope!) occasional praise.

The FRJ has also launched an innovative facility to allow for the creation of a private FDR directory under the direction of Deborah Dinan-Hayward. The success of the private FDR is reflected both in their increasing deployment in those cases where the parties can afford to use this option and also in the recent Financial Remedies Court guidance, which supports and endorses this modern and effective method of dispute resolution. However, the market is evolving and one serious and well-made criticism is that the shortlists for the appointment of pFDR tribunals are not always as diverse as they perhaps should be. It is hoped that if interested practitioners post their details on the directory, there will develop a resource which the profession can use as a 'go to' tool when compiling pFDR tribunal shortlists. Please do consider posting your credentials on the site so that a comprehensive and diverse pFDR directory can evolve.

Our aim as an Editorial Board is to produce a journal and website of the highest quality, a go-to source of information for all financial remedies practitioners. You can also follow us on Twitter as @fr_journal. Let me commend it to you.

Non-Matrimonial Property – Valuing the Family Business

Nicholas Allen QC

29 Bedford Row

> "Marriage, it is often said, is a partnership of equals. … The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: 'unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid, not a rule."[1]

It was perhaps inevitable that suggesting to the fertile minds of family lawyers that there may be a 'good reason to the contrary' when it comes to equal sharing would green-light 20+ years of arguments over what is or is not 'non-matrimonial property' and 'matrimonial property' and whether the former has been 'mingled', 'churned', or otherwise 'matrimonialised'.

The issue can be a particularly complex one in the context of valuations of private businesses: it is well known that current valuations of such companies when there is no evidence that it is in the throes of sale are an art and not a science and hence inherently fragile[2] – but how should a valuer approach the task of providing not a current but an historic valuation and how should a court then treat the same?

The alternative approaches

There appear to be three alternative approaches that a valuer might adopt in relation to historic valuations.

The first approach is for the valuer to place him or herself in the position a valuer would have been in if asked to value the company at the date of marriage (or prior 'seamless' cohabitation) and provide a valuation on that basis. This is the 'classic' approach. In *E v L* [2021] EWFC 60 Mostyn J observed that:

> '[55] It is an iron principle of pure valuation theory that when advancing a historic valuation of an item the valuer has to be transported back in time to the date of that valuation and must formulate his/her opinion about the future maintainable earnings (the multiplicand), as well as the multiplier, using only the data available at that time. The valuer is not allowed to use actual knowledge of subsequent events to influence, let alone determine, the historic valuation being undertaken.'

The second approach is a 'straight line' apportionment as used by Mostyn J in *WM v HM (Financial Remedies: Sharing Principle: Special Contribution)* [2018] 1 FLR 313. Such an approach plots the value of the company at the date of incorporation (i.e. zero) at one end of a graph, the value of the company at the date of final hearing at the other end, and draws a straight line between the two. Mostyn J justified such an approach on the following basis:

> '[16] … a linear or arithmetical apportionment based on the respective periods of time before and after the marriage … seems to me to provide a useful heuristic[3] basis for analysing the issue, which if commonly adopted would have the beneficial side effect of eliminating arid, abstruse and expensive black-letter accountancy valuations of a company many years earlier at the start of the marriage.
>
> [20] The linear approach … resonates with fairness. It reflects my opinion of the true latency of the business at the time that the marital partnership was formed, and that, intrinsically, value is (at least) as much a function of time as it is of work or market forces. In argument, I asked "how could it be said that a day's work in 1980 in creating this company was less valuable than a day's work last week?". In my judgment, the answer is that it could not.'

On appeal (*Martin v Martin* [2019] 2 FLR 291) it was held that Mostyn J had not been wrong to adopt such an approach. Moylan LJ stated as follows:

> '[127] Whilst it would be an improper fetter on a judge's discretionary powers to elevate this approach above others, I agree with Mostyn J's general observation about "the beneficial side effect of eliminating arid, abstruse and expensive black-letter accountancy valuations of a company many years earlier at the start of the marriage". I also agree that, as he said, it "resonates with fairness" because it takes an overarching view of the weight to be attributed to the husband's contributions to the business throughout its existence. I would add that it is also an approach which would be consistent with the overriding objective not

> least because it would save expense by limiting the scope for expensive and time-consuming investigations of the development of a business. It may be too frequent a refrain in this judgment, but the court is engaged on a broad analysis of fairness.'

It is of note, however, that in *Jones v Jones* [2011] 1 FLR 1723 Arden LJ (as she then was) rejected a linear approach stating as follows:

> '[60] … as a matter of principle, when valuing the non-matrimonial assets at the end of a marriage, the court should so far as it can look at what has actually happened and not at what might have happened. In parenthesis, I would add that, because of this principle of "reality", I would reject the graphs provided by Miss Stone seeking to establish the values of the company at certain dates based on an artificial assumption of a straightline growth up to eventual sale …'

In *WM v HM* Mostyn J (at [16]) cited this paragraph and then noted that the other two judges (Sir Nicholas Wall P and Wilson LJ (as he then was)) did not mention this argument and stated that 'I am surprised that it was so lightly dismissed or disregarded'. However the linear approach was also rejected by Baker J (as he then was) in *XW v XH (Financial Remedies)* [2019] 1 FLR 481:

> '[241] … As Arden LJ noted in *Jones v Jones*, the court must try to look as far as it can at the reality of what actually happened rather than proceed on an artificial assumption of a straight-line growth from the date of foundation of the business up to the eventual sale.'

The third approach is that adopted in *SK v WL (Ancillary Relief: Post Separation Accrual)* [2011] 1 FLR 1471 by Moylan J (as he then was) when he held that an historic valuation should be conducted with the benefit of hindsight as to what from the perspective of the historical valuation would be future events:

> '[30] … Valuations, when required, should be based on real and known events. This approach ensures that valuations are more likely to be closer to the reality of any given situation than the result achieved by ignoring known history. It is difficult also to see how the latter approach, of ignoring known facts, could be consistent with the court's obligation to achieve a fair outcome based on the factors set out in section 25 of the Matrimonial Causes Act 1973. As Wilson LJ said in *White v Withers LLP and Dearle* [2010] 1 FLR 859, if the court is to discharge its **duty** (I emphasise) under the Act, it must be "furnished with true information about the parties' resources".'

In *WM v HM* Mostyn J expressed support for this methodology observing (at [14]) that 'the evidence is certainly not confined to a strict black-letter accountancy exercise. It involves a holistic, necessarily retrospective, appraisal of all the facts and then the application of a subjective conception of fairness, overlaid by a legal analysis.' He also cited (at [11]) an unreported decision of his own (*WL v HL* [2017] EWHC 147 (Fam)) in which at [41] he had agreed with Moylan J in *SK v WL* stating that 'it is not merely legitimate but is realistic and right to use hindsight when making in family proceedings a historic valuation'.[4] As noted above Arden LJ (as she then was) expressed a similar view in *Jones v Jones* at [60].

Mostyn J returned to this issue in *E v L*. He noted (at [56]) that 'in financial remedy cases actual knowledge of subsequent events is generally used in order to fix a historic value of the asset in question' but acknowledged that '[t]his is regarded by valuation purists as little short of heresy'.

This third approach is in many ways counterintuitive insofar as a hypothetical purchaser at the time would not have known what the future held. Hence its rejection by 'valuation purists'. However, as Mostyn J stated in *E v L*:

> '[63] Blinding oneself to the knowledge of subsequent events, whilst conforming to the purity of valuation theory, obviously risks serious injustice. It must never be forgotten that the exercise has as its endgame a calculation which results in an award of hard cash to the claimant …
>
> [66] I regard it as unreal, and a likely source of real injustice, for calculations to be undertaken to work out the scale of acquest (and thence the wife's award), on historic figures which with hindsight are shown to be completely wrong. It is not consistent with "a broad analysis of fairness".'

The author is unaware of any reported first instance decision other than *SK v WL* where this methodology has been adopted in the sense of *actual* later, known specific business-related events being used to inform a retrospective analysis. It is not the approach adopted in either *WM v HM*, *Jones v Jones*, or *Robertson v Robertson*[5] [2017] 1 FLR 1174 although it should be noted that:

(i) in *WL v HL* [at [41] (cited in *WM v HM* at [11]) Mostyn J stated in relation to the use of hindsight when making a historic valuation in family proceedings 'the pass has been sold in this regard when we uprate a historic figure with passive growth. For passive growth is obviously a post valuation event'; and
(ii) in *E v L* at [59] Mostyn J stated that in *Jones v Jones* the doubling referable to the movement in the FTSE All Share Oil and Gas Producers Index 'was an application of passive growth, which was unquestionably a post-valuation event'.

It is also of note that *SK v WL* is a 'post-separation accrual' case resulting in a reduction in the wife's award as a consequence of the husband developing and then selling his business several years after the parties' separation (the business's turnover had risen from £1.9m in the year of separation to £13m some four years later, due, in part, to the husband's efforts).[6]

Latent value and passive growth

Quite separately to the issue of valuation the court will have to consider the issues of latent value and passive economic growth.

Latent value is the argument that because of the 'heavy lifting' in the development of the business prior to cohabitation/marriage, any snapshot value as at that point needs separately to identify (and then include) its springboard potential and hence the valuation should be subject to some form of indexation to reflect how it grew in value of its own momentum.[7]

Passive economic growth is where, without activity on his or her part, the company has substantially increased in value during marriage. Passive growth is to be contrasted with growth as a result of contributions of one sort or

another made during the marriage, i.e. of activity, irrespective of whether such is achieved with the assistance of a springboard already in position or not (the latter activity/contribution over the marriage being a contribution to the marital assets (arguably) matched by the other party's contributions in the course of the marriage).

An analysis of the case-law on this issue starts with *Jones v Jones*. After the breakdown of the marriage, the husband sold a company with net proceeds of sale of £25m which was (broadly speaking) the parties' net assets at the date of the final hearing. On appeal Wilson LJ – at [33]–[51] – adopted the following approach so as to effect a division of the £25m into the part reflective of non-matrimonial assets and that reflective of matrimonial assets:

(i) the starting point was the valuation of the company as at the date of marriage, upon which the respective accountants were ultimately agreed – i.e. £2m net;

(ii) adjust (at [39]) 'for the concept of latent potential or, in the judge's word, the spring-board'. However it is important to note that Wilson LJ added:

> 'I am concerned lest our decision in this case were to be misunderstood as generally encouraging an enquiry into whether the professional valuation of a company at a specified date should be subject to increase by reference to the presence within it at that date of springboard. Mr Pointer correctly submits that a professional valuation calculated by reference to future maintainable earnings will generally reflect the value of any such spring-board. But there will be rare cases in which a judge may be persuaded that it has failed to do so; and in the present case this court must work on what in my view are clear findings by the judge, not subject to appeal, that at each of two different dates [i.e. the date of marriage and separation] there were spring-boards in place in the husband's company which the respective professional valuations failed to reflect.'

The value of the company at that date was therefore taken as being £4m rather than £2m.[8]

(iii) adjust for passive economic growth.

Wilson LJ applied to the sum of £4m an increase representing the percentage increase in the relevant stock exchange index (the FTSE All Share Oil and Gas Producers Index) between the date of the marriage and the date of the sale, thereby lifting the figure from £4m to £8.7m (which was rounded up to £9m), which led to an award to the wife of £8m (i.e. £25m less £9m equals £16m which was divided in two).

It is of note that Arden LJ, whilst agreeing with Wilson LJ's conclusion, disagreed with his treatment of the issue of passive and active growth, saying:

> '[60] However, I would query whether what Wilson LJ proposes in his judgment is really passive growth and reject the notion that the only growth that can be taken into account is passive growth. … if only passive growth is taken into account, the law rewards the spouse who buries her non-matrimonial assets in the ground rather than the spouse who actively manages them. The correct analysis in my judgment, in circumstances of the present, is that, where a spouse has a non-matrimonial asset of the present kind, he is entitled to that element of the company at the end of the day which can fairly be taken to represent the fruits of the non-matrimonial assets that accrue during the marriage, even if the fruits are the product of activity by him or on his behalf.'

Notwithstanding the above observation it is usually (but not always) the case that passive growth on pre-marital assets is non-matrimonial and active growth is matrimonial, whereas passive growth after separation on matrimonial assets is matrimonial whereas active growth is non-matrimonial. In relation to assets which are in place at separation see *JL v SL (No. 2) (Appeal: Non-Matrimonial Property)* [2015] 2 FLR 1202 per Mostyn J:

> '[41] … They remain matrimonial property but the increase in value achieved in the period of separation *may* be unequally divided. I emphasise *may*. Obviously passive growth will not be shared other than equally, and there will be cases where on the facts even active growth will be equally shared, as happened in *Kan v Poon* [(2014) 17 HKCFAR 414].'

It is sometimes said that the easiest method of calculating passive economic growth is to use an index of inflation although of course, as Wilson LJ observed in *Jones v Jones* (at [48]) 'an increase reflective only of inflation would not be an allowance for growth in real terms at all'.

If inflation is to be used, be wary of RPI. The formulation of the RPI fails to meet international standards and has not been classified as a 'national statistic' by the ONS since March 2013 for a number of reasons including that it uses an arithmetic mean to calculate the inflation figure, while CPI uses a geometric mean (which normally results in the inflation figures calculated by RPI being higher than those under CPI). As the ONS's National Statistician, John Pullinger, said at the time:[9]

> 'Overall, RPI is a very poor measure of general inflation … Our position on the RPI is clear: we do not think it is a good measure of inflation and discourage its use. There are other, better measures available and any use of RPI over these far superior alternatives should be closely scrutinised.'

In cases where the pre-matrimonial asset is a small business which requires active management by the spouse it may well be difficult and somewhat artificial to value passive growth as was done in *Jones v Jones*. However a FTSE (or similar) index in a relevant industry may still be an appropriate tracker even where there will be differences between the fortunes of a small company and the large companies tracked by the index – *Jones v Jones* per Wilson LJ at [45]–[50].

It has to be acknowledged that the doubling of the value of the company to allow for its latent potential was (as Wilson LJ acknowledged at [43]) 'highly arbitrary'. In *WM v HM* at [11] Mostyn J cited from his unreported judgment in *WL v HL* as follows:

> '[42] … *Jones v Jones* is a good example of the exercise of discretion in that the doubling of the initial figure £2 million to £4 million seems to be based more on instinctive feelings of fairness rather than being referable to any particular piece of evidence.'

Similarly in *XW v XH (Financial Remedies: Business Assets)* [2020] 1 FLR 1015 (overturning Baker J in *XW v XH*) Moylan LJ stated:

> '[114] … It is well-recognised, but worth repeating, that although the court in *Jones* started with this [£2m] valuation, the figure was then doubled because the judge had found that there was, what was called, "a springboard in place (which was) not reflected in the valuation", at para [41]. The doubling of the valuation by Wilson LJ was, as he acknowledged, "highly arbitrary", at para [43].'

In *IX v IY (Financial Remedies: Unmatched Contributions)* [2019] 2 FLR 449 Williams J (after referring to *Jones v Jones*, *Robertson v Robertson*, and *WM v HM*) stated:

> '[59] The weight of authority would support an approach which seeks to identify and to take into account any latent potential that a business asset had when it was brought into the marriage by a party. The authorities would also support an allowance for the passive growth of that latent potential during the course of the marriage. How that is to be done will depend on the facts of the individual case.'

Based on *Jones v Jones* it would seem that the issues of (possibly) latent value and (certainly) passive economic growth are ones for the court rather than the valuer. As Wilson LJ noted in the context of the latter (at [44]), '[t]his was not a subject canvassed before the judge or at the time of the hearing before us so, at our request, counsel have made short submissions in writing upon it' although a court's conclusion on these issues may be informed by having both an historic and current valuation for a company.

The court's approach

The court is not bound to adopt any one of three approaches to historic valuations set out above. As ever each case turns on its own facts. In *Martin v Martin* Moylan LJ analysed how the court should look to utilise these valuations once received. He said:

> '[113] … a judge has an obligation to ensure that the method he or she selects to determine this issue leads to an award which, to quote Lord Nicholls in *Miller; McFarlane*, at [27], the judge considers gives "to the contribution made by one party's non-matrimonial property the weight he considers just … with such generality or particularity as he considers appropriate in the circumstances of the case". This provides the same perspective as Wilson LJ's observation in *Jones v Jones* about "fair overall allowance", at [34]. This was why Holman J was entitled in *Robertson v Robertson* to reject the "accountancy" approach, not only because it seemed unfair to the husband, but because he did not consider that this fairly reflected the relevant considerations in the "overall exercise of (his) discretion", at [59]. Both of the latter cases concerned the development of trading companies and, in my view, these observations apply with particular force in such circumstances.
>
> [125] … the exercise on which the court is engaged is not restricted to a single route to determining how the wealth is to be characterised for the purposes of the application of the sharing principle. The judge was not bound to adopt the approach adopted in *Jones v Jones* just as he was not bound to adopt the approach taken in *Robertson v Robertson*.'

These views build on earlier ones that Moylan LJ had expressed in *Hart v Hart* [2018] 1 FLR 1283 where (at [93]–[96]) he concluded that there is no single route to determining what assets are marital.

Similarly in *XW v XH (Financial Remedies: Business Assets)* [2020] 1 FLR 1015 (overturning Baker J in *XW v XH*) – having considered the approaches taken in *Robertson v Robertson*, *WM v HM* and *Martin v Martin* – the same judge said the following (original emphasis):

> '[114] What is being undertaken is a *retrospective* analysis to determine, by making (to repeat) "fair overall allowance" or by giving the weight the court considers just, what part of the *current* value of the asset should be treated as marital property for the purposes of the application of the sharing principle. … However, because the analysis is undertaken with the benefit of hindsight, a court is not bound to adopt the mathematical route adopted in *Jones* based on a prospective valuation as at the date of the marriage (ie one that ignores later, known, events) …
>
> [117] … *Martin* not only endorsed the approach taken by Holman J in *Robertson* but also endorsed the approach taken by Mostyn J at first instance (in *WM v HM*). He had been "entitled" to adopt a straight line apportionment to the value of the company when determining what element of its current value was marital property, at para [125]. He was not "bound to adopt the approach adopted in *Jones* just as he was not bound to adopt the approach taken in *Robertson*", at para [125]. It follows from this that, if Baker J had had the decision in *Martin*, I very much doubt that he would have rejected both the approaches as adopted in *Robertson* and *Martin* on the basis that to "insist on a linear or arithmetical approach would be to fall into the error identified (in my judgment in) *Hart*", at para [241]. Contrary to Baker J's conclusion, these approaches were not examples of the "imposition of constraints which are not needed to achieve, and which deprive the court of the flexibility required to achieve a fair outcome", as referred to in *Hart v Hart* [2018] 1 FLR 1283, at para [97]. Rather, they are examples of the court undertaking the "broad assessment" endorsed by *Hart*, at para [96] and can be seen to be consistent with the principle that there is no "single route to determining what assets are marital": *Hart*, at paras [93]–[96] and *Martin v Martin* [2019] 2 FLR 291, at para [112].'

Similarly in *WM v HM* Mostyn J stated:

> '[42] … It must be remembered that in this respect the court is exercising a pure discretion and whilst the case of *Jones v Jones* [2012] Fam 2 supplies a valuable guideline (that is to say it indicates the direction of travel) it is not supplying a tramline (that is to say a predetermined destination).'

As King LJ stated in *Versteegh v Versteegh* [2018] 2 FLR 1417 at [94] it is the following observation of Lord Nicholls in *Miller/McFarlane* 'which continues to carry the day':

> '[26] This difference in treatment of matrimonial property and non-matrimonial property might suggest that in every case a clear and precise boundary should be drawn between these two categories of property. This is not so. Fairness has a broad horizon. Sometimes, in the case of a business, it can be artificial to attempt to draw a sharp dividing line as at the parties' wedding day …
>
> [27] Accordingly, where it becomes necessary to distin-

guish matrimonial property from non-matrimonial property the court may do so with the degree of particularity or generality appropriate in the case. The judge will then give to the contribution made by one party's non-matrimonial property the weight he considers just. He will do so with such generality or particularity as he considers appropriate in the circumstances of the case.'

Notes

1 *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186 per Lord Nicholls at [16].

2 *H v H* [2008] 2 FLR 2092 per Moylan J (as he then was) citing *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186 per Lord Nicholls at [26]. See also *SK v WL (Ancillary Relief: Post-Separation Accrual)* [2011] 1 FLR 1471 per Moylan J (as he then was) at [64] and [65] and *Versteegh v Versteegh* [2018] 2 FLR 1417 per Lewison LJ at [185].

3 A heuristic, or heuristic technique, is any approach to problem-solving or self-discovery that employs a practical method that is not guaranteed to be optimal, perfect or rational, but is nevertheless sufficient for reaching an immediate, short-term goal or approximation.

4 In *WM v HM (Financial Remedies: Sharing Principle: Special Contribution)* [2018] 1 FLR 313 at [15] Mostyn J said that in this unreported decision, 'I decided that 25% of the value of the business was non-matrimonial. That was a decision that was favourable to that wife since the company had been founded 17 years before the marriage, which itself had lasted for the lesser period of 14 years.'

5 In *Robertson v Robertson* [2017] 1 FLR 1174 Holman J had an historic valuation of the ASOS shares at the time that the parties commenced their cohabitation, adjusted for passive growth, of around £4 million. As at the date of final hearing they were worth £140 million net of latent tax. Having regard to subsequent events, as well as to the overall justice of the case, he held at [63]: 'In my view, not as an accountancy exercise, but in the exercise of broad judicial discretion, the only fair way to treat the remaining pre-existing shares … is to treat them as to half as the personal non-matrimonial property of the husband, and as to half as the matrimonial property of the parties to be evenly shared.' His decision that half the value of ASOS was non-matrimonial was a favourable decision to the husband, given that the business was founded only two years before the marriage, which went on to last 14 years.

6 The business was incorporated in 2001, some three years before the separation, and sold in 2008, approximately three and a half years after the separation.

7 The concept of the 'springboard' should not be used to include a capitalised sum representing the spouse's earning capacity: 'We are concerned only with the value to be attributed to the spring-board in place at that date, not with the value to be attributed to the subsequent activity of the diver or gymnast upon it' – *Jones v Jones* per Wilson LJ at [42]. See also *Waggott v Waggott* [2018] 2 FLR 406 per Moylan LJ at [125].

8 In 1997, just a year after marriage, the husband received an offer to purchase the company for between £6m and £7m. As Wilson LJ observed at [41] this 'may reasonably have helped to precipitate the judge's inquiry in this regard'.

9 As recorded in the Release dated 8 March 2018.

A Beginner's Guide to Deferred Compensation (and Other Forms of Remuneration)

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Introduction

For most people earned income means periodic salary payments, received net of tax, from an employer. However, for a comparatively small cohort of people, earned 'income' can look a lot more complicated and uncertain. It might take on a different form to that of a simple cash payment. It might be received some time after the period in which it is earned. It may be wholly or partly dependent on some future event or performance.

Financial remedy practitioners must be ready to deal with parties who benefit from more complex pay structures. That can be a daunting task. In our experience, these remunerative structures can be intimidating and inscrutable to outsiders, despite being common and comprehensible to people in certain sectors of industry. Indeed, they are often defined with jargon and acronyms (RSUs, LTIPs, RSOs, PSOs etc.) that might sound like gibberish to the uninitiated.

These remunerative structures have multiple attractions for employers and are increasingly common. They help to align the motivations and fortunes of the employer and employee. By linking the value of the employee's pay packet to the fortunes of the employer company, they can incentivise performance. Deferring payment of future remuneration and making it subject to continued employment (or more specific performance conditions) gives employees a motive to stay put and keep up their hard work, which will hopefully assist the long-term performance of the business.

It is for this reason that the term 'Long Term Incentive Plan' ('**LTIP**') is sometimes used to refer to deferred compensation arrangements comprised of periodically granted parcels of equity instruments in the employer company (e.g. shares or options). Typically, these LTIPs have a built-in delay in receipt, contingent on continuing employment and sometimes linked to specific individual and/or company performance conditions.

In this article, we explore these deferred compensation structures, as well as other related forms of remuneration, and how they might be approached by financial remedy practitioners. We attempt to:

(1) Introduce and define the term 'deferred compensation';
(2) Define, in broad terms, common forms of deferred compensation and consider how they can be ascribed value. We also raise specific considerations for each form of deferred compensation in the context of financial remedy proceedings; and
(3) Outline the court's general approach to deferred compensation in financial remedy cases and discuss some remaining areas of uncertainty.

What do we mean by deferred compensation?

For ease of reference, we use the generalised term 'deferred compensation' to refer to pay structures with an element of delay or uncertainty to their receipt.[1] In this article, we consider:

(1) Restricted Stock Units ('**RSUs**');
(2) Options;
(3) Carried Interest (or '**Carry**');[2] and
(4) Co-Investment.

Throughout this article we refer to the payers of compensation as 'employers', and the recipients as 'employees'. We appreciate that this is an oversimplification, and that the formal taxonomy of remunerative relationships between payer and recipient can be more complex.

Before we are branded as heretics, a word about Carry and Co-Investment. We know that many would argue that Carry and Co-Investment are not properly classified as deferred compensation. That said, both have features in common with more conventional forms of deferred compensation, and both are often inextricably linked to the terms of an 'employee's' engagement. They are thus included in the scope of this article: we will get to their distinguishing features in due course.

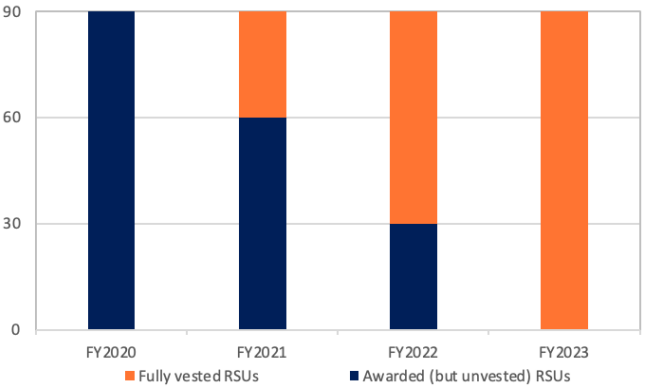
Finally, this article self-identifies as a 'beginner's guide'. It is intended to be a high-level introduction. It includes a few medium-depth detail dives, but there is a limit to how specific or prescriptive an article of this nature can be. Whilst we attempt to identify common threads, deferred compensation schemes are often bespoke to individual employers and/or employees. As such, it is ultimately the employer and employee who are best placed to resolve any ambiguities about their operation. More on this later.

(1) Restricted Stock Units (RSUs)

What are they?

RSUs are units of stock (shares) in the 'employer' company that are awarded on a given date (the 'grant date') and vest, sometimes periodically, over a pre-determined time period.

RSUs are often granted as part of a wider package of total compensation in a given earning year. RSUs are 'restricted' during the vesting period which is dictated by specific terms that attach to the RSUs. Typically this is a set time period. Three years is a common vesting period, but it can be longer or shorter than this and the vesting periods may differ for different tranches of RSUs. This is illustrated in the figure below.



Generally, the recipient employee cannot realise or deal with the shares during the vesting period. At the vest date, the shares become realisable and are effectively released to the recipient. Often, tax is payable at the point of vesting, and a portion of the shares are sometimes withheld by the employer to meet any tax falling due. The recipient employee will then receive the net balance of the shares, which they can sell at the prevailing share price to realise cash.

From an administrative perspective, RSUs (vested and unvested) are sometimes held in a nominee third party portfolio account, set up to receive the RSUs from the employer. Generally, RSUs do not pay dividends prior to their vesting, although occasionally employers might grant the equivalent of dividends to accrue in an escrow account.

How are they valued?

For RSUs granted in a publicly traded company, the current listed share price provides a helpful and indicative starting point as to their value. For RSUs in privately held companies, things are more complex. To form a reliable view as to the value of the RSUs, it is first necessary to have an understanding of the value of the company as a whole, having specific consideration to its differing classes of shares, including the RSUs, which may in turn require expert business valuation evidence.

However, as a practical point, it is common for businesses to perform valuations, whether these are undertaken by management or third-party advisors, when implementing share schemes and RSU grants. Requesting such valuations or other relevant information can be a helpful step when assessing the value of RSUs in privately held businesses.

Regardless of whether the RSUs are in publicly listed or privately held companies, from a pure valuation standpoint, the specific terms of their restrictions will also dictate the extent to which valuation discounts should apply to reflect a lack of marketability. In both cases, there are relevant studies that are informative when approaching this issue. That said, the approach of the Family Court in applying discounts to RSUs for illiquidity, contingency and/or future endeavour is inconsistent, and will very much depend on the particular facts of a given case. Discounting may not arise at all if RSUs are to be subject to *Wells* sharing. Their net value can then be estimated by deducting any notional tax at the applicable rate. The specific tax treatment of RSUs is outside the scope of this article.

Specific considerations…

Often there is argument about the extent to which RSUs constitute shareable matrimonial property. If granted during the marriage, they will generally be viewed as matrimonial property even if subject to deferred receipt over a vesting period. The fact of deferral makes *Wells* sharing of RSUs an attractive option.

If they are *not* being *Wells* shared, practitioners should be wary of simplistic current valuations, which may chime with an atypically high or low stock price. If their vesting is subject to continuing specific performance conditions,[3] then there may be justification for discounting or departure from equal sharing even if granted during the marriage. In these circumstances a notional straight-line apportionment of the RSU value over the grant-vest period *may* be a sound method for identifying the 'matrimonial' element – more on this shortly. There is a distinction between performance-related vesting conditions and the more basic condition of continuing employment. The latter is less likely to justify a departure from equal sharing.[4]

There may also be debate about how the scheme operates in practice. The actual nature of performance conditions is often a hot topic. In the first instance, disclosure of the scheme rules may provide clarity, failing which a letter from the applicable department of the employer company may be appropriate.

(2) Options

What are they?

Call options are a form of financial derivative that gives the holder of the option the right, but not obligation, to purchase a given quantity of stock (the '**Underlying**'), at a given point in time (the '**Exercise Date**' or '**Expiry Date**'), at an agreed price (the '**Strike Price**' or '**Exercise Price**').[5]

Unlike RSUs, options are not a grant of stock ownership to an employee and if the option is not 'exercised' prior to its Expiry Date, then it will lapse and will have nil value. By way of example, if the share price of the 'Underlying' is lower than the Strike Price (sometimes referred to as being '**Out of the Money**') at the point of exercise, then the holder of the option will not exercise the option and let it 'lapse' instead. In contrast, if the share price exceeds the Strike Price, then the holder will exercise the Option and crystalise a windfall, equal to the share price less the Strike Price, multiplied by the number of options held.

As with RSUs, options can also be awarded with differing maturity dates, becoming exercisable over a given period of time, as dictated by the rules of the scheme. By way of example, an employee may be granted 90 options, with 30 becoming exercisable after year one, a further 30 after year

two, and the final 30 in year three, as illustrated in the figure above.

The vesting of options may also be linked to specific performance conditions or simply continued employment. Often the exercising of the option amounts to a simultaneous purchase and sale of the stock, with the profit paid out to the employee subject to tax. Like RSUs, options are also sometimes 'held' in a nominee third party investment portfolio account.

How are they valued?

The valuation of options is complex and is often informed by esoteric financial models, the most popular of which is the Black-Scholes-Merton Option pricing model, for which Merton and Scholes received the 1997 Nobel Prize for Economics.[6] Importantly, from the perspective of finance theory, options can never have nil value. That is, even if the option is currently 'out of the money', it will still have a positive value to reflect the possibility that the option, may, come back into the money at expiration. Of course, the probability of such a likelihood will reflect both the current share price and time to expiry, and may be vanishingly small.

For the Black-Scholes-Merton pricing formula itself, whilst complex, its inputs are relatively straightforward comprising only five variables: (i) time to maturity; (ii) the risk-free interest rate; (iii) the volatility of the Underlying; (iv) the current price of the Underlying; and (v) the Strike Price. It follows, therefore, that if reliable estimates can be made of the requisite parameters, an estimate can be made as to the value of the options. However, it may be necessary to seek input from a reliable forensic accountant with experience of performing such calculations.

One additional consideration when estimating the value of Options held by a given individual is the specific criteria that attach to the options. By way of example, options are often granted to incentivise and reward employees for growth in the employer firm. To put this in context, if the current share price of Company A is £1, then the 'Strike Price' of the granted options might be, say, £1.20, to incentivise the employee to contribute to growing the value of the firm by 20%. However, without knowing the current value of the business, the agreed 'Strike Price', set at some historical point in time, tells you relatively little as to the actual, current value of the business. As such, information provided alongside any grant of options should be scrutinised with care.

Specific considerations…

The same considerations apply to options as to RSUs. First, consideration will need to be given to the grant date, vesting date, any attached continuing specific performance conditions, and the reliability of their ascribed present value if they are not being *Wells* shared.

In our experience, the more rigorous valuation approaches outlined above are routinely overlooked. Practitioners and judges often take the more simplistic approach of ascribing the gross value as the share price at trial less the strike price, multiplied by the number of options, before perhaps applying an (often arbitrary) discount. We were famously reminded by Moylan J (as he then was) in *H v H* [2008] EWHC 935 (Fam) that the computation phase in financial remedy cases is not supposed to be a 'detailed accounting exercise' to achieve 'mathematical/accounting accuracy which is invariably no more than a chimera'. The degree of valuation rigour required will be a case-specific question and will need to be balanced against the potential value of the options in question. That said, we warn that the 'simplistic' approach above may sometimes be inappropriate, especially in cases with proportionately large quantities of options that are not to be *Wells* shared in specie.

(3) Carried Interest

What is it?

The right to participate in, and receive, Carried Interest or '**Carry**' is typically awarded to senior individuals, often partners and fund managers, in Private Equity, Venture Capital and Hedge Funds. It is often governed by a percentage share (which may change over time) of the overall 'carry pool' generated by the fund or firm. Given the option-like nature of Carry,[7] it can be large and may amount to an individual's largest single form of remunerative benefit in any one year, or over a given period of time.

As we flagged at the outset, many would argue that Carry is not really a form of deferred compensation, but rather a performance linked profit-sharing arrangement to reflect excess returns generated by the investment professional. It most commonly takes the form of a performance-contingent fee, expressed as a percentage of a return on an investment or fund above a certain benchmarked annual level, compounded annually (typically referred to as the '**Hurdle Rate**'). If the Hurdle Rate is not met, then no Carried Interest entitlement will arise.

By way of a (simplified) worked example, if a fund raises capital for investment with a target rate of return for investors of, say, 8% and an entitlement to Carry of, say, 20%, then 20% of any returns over 8% will be shared by the employees and partners of the investment firm or Hedge Fund that are entitled to Carry. Let us say that 'Fund A' raises £100 million from investors and invests it with the same criteria as set out above (8% Hurdle Rate, 20% Carry entitlement). After three years, Fund A is worth approximately £140 million, representing an investment return equivalent to approximately 12%. In this scenario, the total Carry pool entitlement for Fund A would be equal to approximately £2.9 million.[8]

How is it valued?

Given the option-like nature of Carry, its valuation can be highly complex. It may require expert forensic accountancy evidence and much will depend on the investment stage of the fund.

On the one hand, the fund in which an individual holds an entitlement to Carry may be well established, with a long-documented track record of investment performance. In such scenarios, and especially where the fund is reaching the end of its life, an indication of the value of any Carry to be received may be undertaken by reference to a simple algebraic equation along the lines of:

(1) current value of fund; *less*
(2) the implied value of the fund, had it only achieved its Hurdle Rate; *multiplied by*
(3) the investment fund's entitlement to Carry; *multiplied by*

(4) the individual's percentage share of the total Carry Pool

On the other hand, there can be significant uncertainty as to the potential value of future Carry where a fund is newly formed and its investments are at the beginning of their life cycle. In our experience, in these circumstances investment professionals who hold entitlement to Carry in early-stage funds can be unwilling to place any value on its potential receipt at some stage in the future, citing the significant uncertainty that accompanies it.

Nonetheless, a reliable estimation of Carry is still necessary for the purposes of financial remedy proceedings and there are options available to the parties in such scenarios. One method is computational modelling, sometimes referred to as Monte-Carlo simulation. This allows for tens of thousands (or more) of simulations to be run, using parameters and inputs based on historical investment returns generated by the fund (or other similar funds) and the wider markets in which the fund invests. With these multiple simulations, a probability distribution can then be generated to allow for conclusions to be drafted to varying degrees of confidence, in the form of: there is an ***X***% chance that Carry of between £***Y*** million and £***Z*** million will be paid out.

It goes without saying that this type of financial modelling is complex and, as with the more rigorous approach to valuation of Options, it will not be appropriate for all cases. It also requires forensic accountants and business valuation experts with specific experience in preparing and analysing such computational models. Nevertheless, very substantial sums might be at stake when Carry is in issue, so this kind of expert evidence may be necessary.

At the time of writing, carried interest is generally taxed at capital gains rates in the UK. However, the tax treatment of carried interest is a controversial topic and is beyond the scope of this article.

Specific considerations…

As should be clear, cases involving carried interest entitlements will require considerable care.

Readers should be aware that if the hurdle is met in one year, but the fund underperforms in subsequent years, a scenario can arise where the recipient may have to pay back some or all the carried interest they have received to date. This is known as a 'clawback provision'. This can mean that a recipient's final entitlement may only be known at the end of a fund's lifecycle. Carried interest often vests over a number of years, and sometimes only at the closing of a fund.

When identifying the 'shareable' matrimonial element of an as yet unvested Carry entitlement, Mostyn J has recently endorsed a straight-line apportionment as a possible appropriate method in *A v M* [2021] EWFC 89. He set out his workings with characteristic clarity at [15] – the marital portion of the Carry was 'C', calculated as A/B (A being the period in months from fund establishment to date of trial, and B being the period of months from fund establishment to what he found to be the likely fund end date).

(4) Co-Investment

What is it?

Like Carry, we concede that Co-Investment is not, technically, a form of deferred compensation. Nevertheless, given its close relation and the frequency with which it occurs alongside other forms of Deferred Compensation, we address it here.

Co-Investment is exactly what it sounds like: a requirement that the 'employee' joins the 'employer' (often a partnership) by making a minority co-investment into the entity or fund which the employer manages and/or has invested in.

Again, like Carry, Co-Investment requirements are most common in certain areas of finance. In some cases, Co-Investment can go hand in hand with Carry entitlement, with Co-Investment being the required quid pro quo: the rationale being that it ensures that the employee (typically a senior partner or fund manager) has 'skin in the game'. Those fund managers who have invested their own personal capital by way of Co-Investment will probably be highly incentivised to ensure that the venture is a success.

Co-Investment is often illiquid and rarely capable of extraction prior to the realisation of the entity or maturity of the underlying fund. The tax treatment of Co-Investment interests can be complex and specific advice should be sought, where necessary.

How is it valued?

Co-Investment typically follows the form of investments made into the fund. That is, Co-Investment receives a net return achieved by the fund manager, similar to that which an external investor might receive. However, the specific terms can vary from Co-Investment to Co-Investment in respect of whether Carry is deducted or what management fees, if any, are charged on the sums Co-Invested. As with other forms of Deferred Compensation, the employer and employee are often best placed to provide information on the current value of Co-Investment.

Specific Considerations

Where the principal investment is made from matrimonial funds, Co-Investment will often be treated by the court as a matrimonial asset. In *B v B* [2013] EWHC 1232 (Fam), Coleridge J described Co-Investment as 'in the nature of capital saved out of annual income'. *Wells* sharing may be appropriate, or if a reliable valuation exists at trial (or settlement) it may be more appropriate to 'cash out' the recipient spouse from other liquid assets. If Co-Investment is to be *Wells* shared, there may be argument about a departure from equal sharing to reflect post-separation endeavour.

The law

For several years, the court's approach to deferred compensation in financial remedy cases has been criticised as arbitrary and inconsistent. This article is being written today, in January 2022, in response to a handful of cases determined in the last few years at Court of Appeal and High Court level. The effect of these has been to make the court's position on the treatment of deferred compensation as clear as it has ever been. That said, there is still a sizeable area of uncertainty, which needs to be navigated with caution.

In the following section, we:

a) Draw out propositions from the jurisprudence that constitute the court's 'general approach' to deferred compensation; and
b) Discuss the main remaining points of uncertainty.

Basic propositions – the court's general approach

(1) A party's earning capacity cannot amount to a matrimonial asset subject to the sharing principle. For that reason, a maintenance order can only be made against income earned post-separation if required by need or (very rarely) to reflect an element of compensation.[9] *Waggott* [2018] EWCA Civ 727, *SS v NS* [2014] EWHC 4182.

(2) By way of exception, in some cases fairness may justify a bespoke percentage-based sharing of discretionary future cash bonuses. If reasonable needs cannot be fairly met from a maintenance award paid from basic salary alone, then it might be fair to apportion a receiving party's reasonable needs between a budget for 'ordinary expenditure', and a further budget for 'additional discretionary items which will vary from year to year'. The former might be met by periodical payments from basic salary. The latter might be met by a *capped* share of an annual discretionary bonus. The share must be capped to avoid inadvertent sharing of income. *SS v NS*, *H v W* [2015] 1 FLR 75.

(3) For the purposes of carrying out the computation exercise required by s 25, save in cases where there has been undue delay between separation and determination, assets are valued as at the date of trial. The court must attempt to place a notional value on all assets, including those asserted to be non-matrimonial, and elements of deferred compensation that have been earned but may not yet have vested or become payable. *Cowan v Cowan* [2001] 2 FLR 192, E v L [2021] EWFC 60.

(4) Unspent income (in whatever form) earned within the marriage should generally be treated as a matrimonial capital asset subject to division between the parties, even if its actual receipt is deferred and subject to continuing employment. Such compensation should generally not be shoehorned into the category of a future income stream if it has been earned within the marriage. That said, readers should note that there is an alternative opposing view that has been peripherally endorsed by the Court of Appeal, although in our experience it has been generally ignored. More on this shortly. *SS v NS*.

(5) The features of deferral and conditionality will often justify separate treatment. Deferral makes *Wells* sharing apt, and specific performance conditions (over and above simply continuing to turn up to work) might justify a departure from equal sharing. They may alternatively result in discounting at the computation stage, as discussed earlier in the article. *SS v NS*.

(6) Where such adjustment is appropriate, be wary of double discounting. Different judges have taken different approaches to whether difficulties in realisation should be reflected at the computation stage (by applying a discount to the valuation – see Mostyn J in *WM v HM* [2017] EWFC 25), or at the distribution stage (by departure from equal sharing – see Bodey J in *Chai v Peng* [2018] 1 FLR 248). That said, in *Martin v Martin* [2018] EWCA Civ 2866 (*WM v HM* on appeal), the Court of Appeal took the view that even where an asset is discounted at the valuation stage to reflect illiquidity/risk, the court might still assess that discounted value as having different 'weight' to the value of other safer assets like a matrimonial home. Moylan LJ said that this would not be to 'take realisation difficulties into account twice', but rather to acknowledge the 'difference in quality between a value attributed to a private company and other assets' which might be a 'relevant factor when the court is determining how to distribute the assets between the parties to achieve a fair outcome'. Moylan LJ's words in *Martin* appear to leave open the possibility of reflecting realisation difficulties at both the computation and distribution stage, although he emphasised this was not to 'mandate a particular structure'…

(7) The question of whether a tranche of deferred compensation was earned inside or outside the marriage is one of fact. It is an important distinction. If earned within the marriage, subject to the points above it will probably be a matrimonial asset subject to the sharing principle. If it was earned post-separation, it is prima facie non-matrimonial property that should not be shared, but might be invaded if required to meet needs, or in very rare circumstances to reflect an engagement of the compensation principle. *C v C* [2019] 1 FLR 939.

(8) When assessing whether a tranche of deferred compensation amounts to non-matrimonial property, the court must conduct the three-stage exercise set out by Moylan LJ in *Hart v Hart* [2016] EWCA Civ 497. That is to (1) case manage appropriately to ensure the issue is properly dealt with, (2) make such determinations as the evidence permits, and (3) cross-check the arithmetical output of those determinations in a 'holistic assessment of fairness'. In some cases it will be possible to draw a 'clear dividing line' to identify the perimeters of matrimonial and non-matrimonial property, in others a 'more complicated continuum' might exist, and the court will have to do its best with a broad assessment to carry over to the final discretionary stage. *Hart*, *C v C*.

(9) In those cases where the vesting period of a portion of deferred compensation straddles the date of separation and is subject to continuing performance conditions, a straight-line apportionment might be an appropriate tool to calculate the notionally matrimonial portion of the asset (subject always to the third, discretionary stage of the *Hart* exercise). This method plots the accrual of the asset as a straight line between £0 and its notional trial value over the period in which it is earned: the matrimonial portion is the section of the line falling within the marriage. This type of approach has been deployed by Mostyn J (twice) and Roberts J and has withstood scrutiny from the Court of Appeal. *WM v HM*, *C v C*,[10] *Martin v Martin* and *A v M* [2021] EWFC 89.

Linear apportionment schematic

Matrimonial portion: (15 months / 60 months) x 100 RSUs = 25 RSUs

(10) Carried interest is properly viewed as a 'hybrid' species of asset – something between a return on a capital investment and an earned bonus with characteristics of both. Insofar as it has not crystallised at the point of separation, it will often be part product of matrimonial endeavour and partly the product of endeavours post-separation. Straight-line apportionment can also be an appropriate tool to calculate the matrimonial portion of an as yet uncrystallised carried interest entitlement, as discussed above. *A v M, B v B* [2013] EWHC 1232 (Fam).

(11) *Wells* sharing of deferred compensation (including carried interest entitlements that have yet to fall in) may be appropriate. However, *Wells* sharing has fallen out of favour with the Court of Appeal in recent years and is thus to be limited where possible. *A v M*, *SS v NS*, *Versteegh v Versteegh* [2018] EWCA Civ 1050.

Capital or future income stream?

At point four above, we say that unspent income earned during the marriage, including in the form of unvested deferred compensation, should generally be treated as a capital asset rather than a future income stream. There is an alternative school of thought. In *Lawrence v Gallagher* [2012] EWCA Civ 394, Thorpe LJ treated deferred compensation as a future income stream rather than capital. At first instance, Parker J had awarded the wife a 45% *Wells* share of unvested deferred bonuses earned during the marriage (albeit she wrongly believed them to be vested). She described them as 'part of the assets acquired during the partnership'. Thorpe LJ overturned this aspect of Parker J's judgment, saying at [52] 'these were bonuses deferred in collection and conditional on performance. They were not capital assets but part of the appellant's income stream upon which he is taxed at top rate'.

Mostyn J was highly critical of this approach in *SS v NS* and said at [12] of his judgment that there would have to be 'special features present' before earned but deferred monies/assets were excluded from the divisible pool. Mostyn J's approach has generally been followed by other High Court judges, including Roberts J in *C v C* and Francis J in *O'Dwyer v O'Dwyer* [2019] EWHC 1838 (Fam). In *O'Dwyer* Francis J said at [28] of his judgment 'if a bonus is earned during the marriage but not paid out until after the marriage has ended then there is every reason to treat it as matrimonial property in the true sense'.

Lawrence v Gallagher is difficult to sweep under the proverbial carpet. It is a Court of Appeal authority, and Thorpe LJ's treatment of the deferred compensation, whilst case-specific, cannot be dismissed as obiter. *Lawrence v Gallagher* came before the *Waggott* watershed, where a much clearer line was drawn between capital and income. That said, in *XW v XH* [2019] EWCA Civ 2262, a husband had been awarded £28m of RSUs and Options during the marriage, which were largely unvested at the date of the trial, although for a significant proportion vesting was only contingent on continued employment (and not specific performance). At first instance, Baker J (as he then was) excluded all the RSUs and Options from division, as Thorpe LJ had done in *Lawrence v Gallagher*.

This specific element of the judgment was challenged on appeal. The authors understand that the court was referred to the tension between *SS v NS* and *Lawrence v Gallagher* in submissions.[11] The Court of Appeal declined to overturn that element of Baker J's judgment and dealt with the point very briefly at [165]. Moylan LJ noted that 'although the judge dealt with the RSUs and options very briefly', he had 'not been persuaded that he was wrong to decide that they were "dependent on future performance" and should, therefore, be "disregarded". This was a decision which he was entitled to reach and takes them outside the scope of marital property'.

Where does that leave us? Despite the conspicuously cursory manner with which the point was addressed, we do not think *XW v XH* necessarily endorses the treatment of unvested deferred compensation granted during the marriage as a future income stream. The Court of Appeal simply declined to interfere with Baker J's exclusion of the deferred compensation from division. Whilst the *Lawrence v Gallagher* approach (income rather than capital) appears to have been largely ignored in practice, the assessment will always be fact specific. As Mostyn J accepts – 'special features' in a given case might justify such treatment. In our experience Mostyn J's characterisation in *SS v NS* is far more commonly adopted by judges and practitioners alike.

'Run off' – still a sound concept?

Waggott closed the door on any residual misapprehension that an earning capacity can be subject to sharing. As noted by Roberts J in *C v C*, the logical consequence of the *Waggott* principle was to exclude post-separation earnings from the reach of the sharing principle. This applies whatever form those post-separation earnings might take (cash savings, investments or 'any tangible accretion to future capital wealth'). It is thus pertinent to the treatment of deferred compensation.

There is a problem. There are three pre-*Waggott* High Court level authorities that *appear* to endorse some limited sharing of post-separation income. These are *Rossi v Rossi* [2007 1 FLR 790, *H v H* [2007] 2 FLR 548 and to a lesser extent *CR v CR* [2008] 1 FLR 323.

In *Rossi*, Nicholas Mostyn QC (then sitting as a deputy High Court judge) opined that an asset representing the proceeds of a bonus or other earned income should not be properly classified as non-matrimonial unless it related to a working period which commenced at least 12 months post-separation. He acknowledged an 'element of arbitrariness' in his proposed cut off point. He approved a point made previously by Coleridge J, which is that 'during a period of separation, the domestic party carries on making her non-financial contribution but cannot attribute a value thereto which justifies adjustment in her favour'. This proposition was explicitly rejected by Roberts J at [40] of her judgment in *C v C* as a justification for sharing post-separation income:

> 'Whatever regime was then put in place by the parties in relation to their mutual and ongoing contributions to

> their children's welfare and the financial support of the family, it was not an ongoing marital partnership. For this reason, and absent arguments about needs and compensation, I do not accept the wife's proposition that her ongoing contributions to the general welfare of the family matched those of the husband's and/or gave rise to any entitlement to an equal share in the husband's post-separation earnings. However, and it is an important caveat, that does not necessarily mean that those contributions were, or are, irrelevant as part and parcel of the over-arching circumstances of the case in terms of an assessment of needs or fairness of outcome.''

In *H v H*, Charles J decried the 12-month post-separation cut-off approach adopted in *Rossi* as arbitrary and lacking 'regard to the realities and circumstances of a given case'. Charles J instead awarded the wife decreasing uncapped percentages of the husband's bonuses earned in the three years post-separation (1/3rd, 1/6th, and 1/12th). He described this as a 'run off' award. One might consider his approach to be more arbitrary than that in *Rossi*. He said at [111] of his judgment:

> 'To my mind it is in particular the concept of an award in respect of the loss of a share in the enhanced or greater income or earning capacity created by the contributions, lifestyle and spadework of the parties during the marital partnership, and thus an award in respect of that fruit or product of the joint endeavours of the parties during the marital partnership, that provides the answer to the general question. In my view that rationale could be classified as either compensation or sharing.'

Waggott renders the reasoning at [111] of Charles J's judgment completely unsustainable. A spouse has no entitlement to share in the post-separation fruits of an earning capacity, even if said earning capacity was built during a marriage.

In *CR v CR*, Bodey J made a £9m award to a wife out of a £16m asset base. The £1m departure from equality was justified by including a £5m Duxbury fund within the wife's award (in addition to her retention of the family home and a holiday home at £4m aggregate). Bodey J made clear that he intended within his award to give some recognition to the 'big income imbalance' between the parties going forward: the product of an earning capacity assisted by the wife's 'past contributions'. That said, Bodey J's award was nonetheless predicated on a generous assessment of the wife's future needs and a determination that it was unfair for her to amortise her non-Duxbury capital when the husband would have recourse to his substantial future earnings. Whilst generous, Bodey J's approach was ultimately pinned to needs. When viewed retrospectively, it probably doesn't fall foul of the *Waggott* principle.

All three of these cases were referenced in *Waggott*, not least because Mr Waggott himself had offered Mrs Waggott a declining share of post-separation bonuses: a 'run off'. Macdonald J raised these authorities with the husband's counsel as anomalies. Nigel Dyer QC for the husband explained Mr Waggott's offer of 'run off' as an 'example of pragmatism, namely the goal of achieving an end resolution'. The Court of Appeal applauded this aim but asked whether any of the three 'run off' cases supported the proposition that the post-separation fruits of an earning capacity could be shared. It answered its own question at [122]: 'the clear answer is that it is not'.

The Court of Appeal did not go so far in *Waggott* as to say that the three 'run off' cases had been wrongly decided. Nonetheless, post *Waggott* and *C v C*, many thought that the notion of 'run off' was dead, and that the approaches deployed to share post-separation earnings in *Rossi* and *H v H* had been disapproved and consigned to history. However, in *E v L* [2021] EWFC 60, Mostyn J re-affirmed his *Rossi* approach of drawing the non-matrimonial income boundary line at an earning period commencing no less than 12 months post-separation.

On one level, one can see how it is difficult to draw a 'clear dividing line' where an annual tranche of compensation (in whatever form) is granted by reference to an earning year overlapping with the marriage. That said, in *E v L*, Mostyn J refers to 'earnings made during separation' and not just *annual* bonuses/compensation awards. Does Mostyn J intend the same approach to apply to the residual proceeds of monthly salary income earned up to 12 months post-separation? If so, wouldn't that incentivise an earning party to spend at a higher level to avoid paying their ex-spouse half of any savings made from income earned post-separation? What of clear breaks in an employment continuum? Hypothetically, would a sign-on bonus received on commencement of an entirely new role within 12 months of separation fall subject to sharing?

The idea that the sharing principle applies to all proceeds of income accrued within one earning year of separation is difficult to reconcile with *Waggott*. It creates an artificial one-year grace period in which the *Waggott* principle does not apply. Further, even in relation to annually granted tranches of compensation, the linear apportionment approach discussed and illustrated earlier in this article seems a more rigorous analysis. Remuneration is not 'banked' at the beginning of a financial year – it is accrued over the course of the earning period. *Hart* obliges the court to make such factual determinations as the evidence permits. A straight-line apportionment of annual compensation referable to a period straddling separation is a straightforward calculation and may be an appropriate tool with which to carry out the second stage of the *Hart* exercise.

Our view is that caution is required where this point arises. Those seeking to share the fruits of income earned proximately post-separation will cite *Rossi* and *E v L* in support, those resisting will cite *Waggott* and *C v C. Waggott* is obviously the higher binding authority, and it is telling that the Court of Appeal dealt with *Rossi* head on and withheld endorsement of its approach. The extent to which the *Rossi/E v L* 12-month grace period can be reconciled with the ratio of *Waggott* is a matter for debate.

Notes

1 We do not include cash bonuses as deferred compensation.
2 'Promote payments' are similar in structure to Carry and are often used in Real Estate finance.
3 Such shares are sometimes separately classified as 'PSUs' (Performance Stock Units).
4 Although there is conflicting authority on the point – see the discussion below about *Lawrence v Gallagher*, *SS v NS* and *XW v XH.*
5 For 'European' options, the exercise date and the expiration

date are one and the same. However, financial options are an exotic equity instrument and can take a myriad of forms, the discussion and explanation of which is beyond the scope of this article.

6 Fischer Black was ineligible for the prize as it is not awarded posthumously, following his death in 1995.

7 By 'Option-like', we mean that in certain scenarios, where the required performance metrics are achieved, Carry can be large, whereas in situations where the Hurdle Rate is not met, its value will be nil.

8 20% x ((£100 million x (1 + 12%)^3) – (£100 million x (1 + 8%)^3) = £2.9 million.

9 That is, the compensation principle birthed by *Miller; McFarlane* and explored recently by Moor J in *RC v JC* [2020] EWHC 466 (Fam).

10 It seems that Roberts J endorsed a version of this approach in *C v C*, although the precise methodology is not entirely clear from the judgment. It appears from paragraphs [19], [52] and [54] that each tranche of the husband's RSUs was subject to a 56-month 'earn-out' period. Applying this 'formula' to the RSUs the husband calculated the matrimonial portion of both vested and unvested RSUs.

11 Although they are not referred to in the list of authorities relied upon in the Family Law Report…

The Origins of the Financial Remedies Court – an Insider's View

Part 1

Sir James Munby

The introduction of the Financial Remedies Court (FRC), which has just come of age, marks an important milestone in the development of the family justice system. The story of how this came about requires to be recorded before it all recedes into half-remembered history. An account from one who was involved in the gestation of the FRC, and who is proud to think that he was its midwife, perhaps has some added value.[1] I leave it to others to say.

The immediate origins of the FRC are to be found in a fundamentally important paper written in the autumn of 2016 by HHJ Edward Hess and Joanna Miles, the well-known Fellow of Trinity College Cambridge and leading academic expert on the subject. But their paper has to be viewed in the context of the family justice reforms of 2013–2014 and, in particular, the arrival of the new family court.

The family court, which came into existence on 22 April 2014, was important for two quite distinct reasons. First, because it subsumed within one court all the family work previously conducted in the Family Division (subject to two classes of reserved cases), the County Court and the Family Proceedings Court. Secondly, and more significant for present purposes, because it was a single court wherever it sat, unlike the various county courts and the Family Proceedings Courts each of which had had a separate legal existence. This meant that, for the first time, it was possible to organise family justice on the basis of a single national system, capable, especially in terms of its administration, of being rationalised and, in due course, regionalised and even centralised.

A striking example of the way in which the system operated prior to 2014 was in relation to divorce and therefore ancillary relief. The effect of FPR 7.5(1) and s 33 of the Matrimonial and Family Proceedings Act 1984 was that a petition could be filed in any divorce county court (of which there were a very large number) irrespective of the address of either the petitioner or the respondent. This system, it might be thought, was neither sensible nor efficient. Moreover, as illustrated by the amazing case of *Re 180 Irregular Divorces, Rapisarda v Colladon* [2014] EWFC 35, [2015] 1 FLR 597, it facilitated abuse of the system for purposes of fraud.

There were many who, even in 2013, looked forward (in both senses of the expression) to the day when the implementation of modern IT would mean the introduction of the paperless court – where the issue of proceedings, the court file and the trial bundle would all be electronic. Rapid implementation of modern IT was, of course, at the heart of the ill-fated Court Modernisation Programme, introduced with such fanfares and high expectations in September 2016. So much for all the great hopes and ambitions. Court Modernisation has achieved far too little of what was envisaged. Future generations will, with every justification, condemn us for our failure. Significant failures and ongoing delays have proved a bitter disappointment to those who had hoped for so much.

One bright exception was the digital online divorce project which began as a pilot in 2017 and launched nationwide in 2018: [2017] Fam Law 273, [2018] Fam Law 649. After a very bumpy start in the pre-pilot phase – largely due to the absurd conditions under which those planning it were forced to operate: the so-called agile approach which was mandated for them was the very antithesis of sensible project management – online divorce has turned out to be a triumphant success.

In '*Reform and the future of family justice: where is the court modernisation programme heading?*' [2018] Fam Law 1426, 1430, I referred to the online divorce project as 'a triumphant success … which holds out the real and imminent prospect of transformation across the whole system'. I went on:

> 'Now this, of course, is simply the public-facing side of the system. Work is progressing rapidly, and, as I can tell you (for I have been shown much that is not yet generally known), with great success, not merely to expand the existing digital processes so that they can be used by respondents as well as petitioners, so that can be used, for example, for civil partnerships and in cases of judicial separation and nullity, and so that they can be applied to financial remedy proceedings, but also so as to transform the "back office" processes. In particular, much impressive and innovative work has gone into devising systems – designed for use across the board; not just in divorce cases – to enable judges to deal with paper applications and "box-work", online and without recourse to the paper file, whilst giving them full access, if they need it, to the entire electronic court file.'

This last point is fundamental, demonstrating that, with

proper IT, box-work can be removed altogether from the physical setting of a particular court building and that the District Judges and other judges doing box-work can thus be utilised as a single national resource irrespective of where they happen to be.

But the reality in 2013 was that the family court had to be planned around the continuing existence of the traditional paper file. And it was this reality which determined what one might call the geography of the family court, as it was being planned in 2013. The detail was set out in *The Single Family Court: a Joint Statement by the PFD and HMCTS*, issued in April 2013, [2013] Fam Law 600. (For London the detail was set out in *The Single Family Court in London: a Joint Statement by the PFD and HMCTS*, also issued in April 2013, [2013] Fam Law 740. See also, *View from the President's Chambers: the process of reform: London* [2013] Fam Law 1137.)

For present purposes what matters is that family court was planned by reference to the 40 or so areas for which a Designated Family Judge (DFJ) was responsible for judicial leadership and management. In each DFJ area there was to be (subject to local variations where circumstances required) one central location – the Designated Family Centre – where, so far as material for present purposes, the DFJ would be based and at which there would located (i) a 'single point of entry' for the issue of process for the entire DFJ area and (ii) a centralised and unified administration, including a centralised 'back office', for the entire DFJ area.

If much of the thinking and planning at this time necessarily focused on children cases, the need for reform in relation to divorce and ancillary relief was not overlooked. In *In the President's Court: 29 April 2014* [2014] Fam Law 820, the speech from the Bench I gave to mark the implementation of the family justice reforms and the coming into existence of the new Family Court on 22 April 2014, I remarked, in the course of a general tour d'horizon, that in relation to ancillary relief:

> 'We need to reconsider practice and procedure so as to facilitate the use of out-of-court methods of resolving financial disputes, whether by mediation, arbitration or other appropriate techniques, at the same time further reforming the court processes in such cases to bring to bear all the techniques of judicial continuity and case management which have been so successful in children cases. Our aim, as with every aspect of the family justice system, must be to simplify and streamline the process so as to make it more user friendly for litigants in person and cheaper for all.'

I went on to muse about divorce:

> 'Has the time not come to legislate to remove all concepts of fault as a basis for divorce and to leave irretrievable breakdown as the sole ground? Has the time not come to uncouple the process of divorce from the process of adjudicating claims for financial relief following divorce, just as we have finally uncoupled the process of divorce from the process of adjudicating disputes about the children following divorce? Indeed,[2] may the time not come when we should at least consider whether the process of divorce still needs to be subject to judicial supervision?'

I elaborated my thinking on this in my *13th View from the President's Chambers: The process of reform: an update* [2014] Fam Law 1259, 1260–1261, in the course of which I referred to two important initiatives.

One, which was to prove highly successful and influential, was my decision in June 2014 to ask Mostyn J and Cobb J to chair a new Financial Remedies Working Group to review matters of practice and procedure. Their task was two-fold: to explore ways of improving the accessibility of the system for litigants in person and to identify ways of further improving good practice in financial remedy cases: *12th View from the President's Chamber: The process of reform: next steps* [2014] Fam Law 978, 978–980. The FRWG reported with enviable speed and in impressive detail; its initial report was dated 31 July 2014 and the final report followed on 15 December 2014: [2014] Fam Law 1311, [2015] Fam Law 196.

The other, which unhappily turned out very much less well, was the introduction of Regional Divorce Centres (RDCs). As I explained in my *12th View* [2014] Fam Law 978, 979, I wished to:

> 'explore the feasibility of uncoupling the process of divorce from the process of adjudicating claims for financial remedies following divorce. With the recent repeal of section 41 of the Matrimonial Causes Act 1973, we have finally uncoupled the process of divorce from the process of adjudicating disputes about the children following divorce. What I propose is a sensible next step. The majority of divorce petitions proceed without any financial claims. From the perspective of HMCTS it surely makes sense to have completely separate files for divorce petitions and for financial remedy claims. It will also facilitate the ongoing process, which I fully support, of reducing the number of court offices handling divorce petitions. Divorce, as a process, is in large measure administrative, albeit conducted judicially by District Judges and, for the future, also by Legal Advisers. It is a process which lends itself to handling in a few places and perhaps, eventually, in a single national processing centre.'

In my *13th View* [2014] Family Law 1259, 1262, I announced that:

> 'HMCTS is, with my active support, proceeding to centralise the handing of divorce petitions, concentrating this work in a limited number of locations where petitions will be issued and all special procedure divorces will be processed. Ultimately, it may be that the process could be centralised in a single national centre. These administrative changes – desirable in terms of streamlining the process, making more efficient use of resources and reducing administrative costs – can surely be facilitated and enhanced by the administrative uncoupling of the two processes.'

In *Re 180 Irregular Divorces,* para 99, I said:

> 'The fraud in these cases was, I have no doubt, facilitated by rules which … enabled the architects of the fraud to spread the issue of 180 petitions very thinly across no fewer than 137 different county courts. For reasons unconnected with what this case has uncovered, that facility is shortly to be very drastically curtailed. [Having referred to my *13th View*, I continued:] I anticipate that by this time next year there will be fewer than twenty, possibly as few as a dozen, places at which a divorce petition can be issued.'

In the event there were to be 11 RDC. The first, in the North East, opened in November 2014. The process was complete

by October 2015, an important milestone having been reached in July 2015 with the transfer of all the work from London and the South East Circuit to the Bury St Edmunds RDC: see the illuminating materials published in [2015] Fam Law 870, 955, 958, 961.

The RDCs were not a success, as I explained in '*Reform and the future of family justice: where is the court modernisation programme heading?*' [2018] Fam Law 1426, 1429:

> 'The introduction of Regional Divorce Centres was, I emphasise, an interim solution pending the complete roll-out of the online divorce project. It was a solution which had my full and enthusiastic support. It was plainly the right thing to do. But it has been marred by the failure of HMCTS to provide adequate numbers of both administrative and judicial personnel, in particular at the largest of the RDCs, at Bury St Edmonds, which serves London and the whole of the South-East. Utterly predictably, and entirely justifiably, these failings have led to strong criticisms from the professions. The reputational damage to HMCTS has been severe.'[3]

An equally damning assessment by a solicitor, Lindsay Yateman, can be found in '*Underfunding centres failing the divorce process*' [2018] Fam Law 1493.

My successor, Sir Andrew McFarlane P, said much the same in his Keynote address to the Resolution Conference on 5 April 2019, *Living in Interesting Times*:[4]

> 'On any view the Regional Divorce Centres have not worked well, indeed, some, particularly Bury St. Edmunds, Liverpool and Bradford have provided a wholly unacceptable service.'

He repeated this in his *View from the President's Chambers* on 7 May 2019, [2019] Fam Law 844:

> 'I would again refer to my words to the Resolution Conference in which I fully acknowledged and apologised for the failure, despite the best efforts of the individual staff employed there, of the 11 Divorce Service Centres spread around the country to provide an adequate service for the progress of divorce petitions and the making of Financial Remedy consent orders. These centres are being phased out during the current 12-month period and replaced by an online system based in the new national Civil and Family Service Centre at Stoke on Trent. I am confident that the senior staff at HMCTS are entirely clear that the unacceptable service levels currently experienced from the paper-based centres is not to be repeated as Stoke gradually takes on more and more of this work.'

Meanwhile, and whatever the failings of the RDCs, the online divorce project was moving steadily forward. In his *View from the President's Chambers* on 18 December 2019, [2020] Fam Law 162, 166, Sir Andrew was able to report:

> 'Since the summer, litigants in person have been able to start and finish their entire divorce proceedings online and almost 80% of them are choosing the use the new system over the old paper route. Following a successful pilot, including over 100 firms, the divorce service has recently been opened to up publicly for all legal professionals to use.'[5]

Jumping ahead, with effect from 13 September 2021 all new applications for divorce were required to be made via the online portal, though this did not include applications for nullity, dissolution of civil partnership and judicial separation, still required to be filed at the Bury St Edmunds RDC.

As we can now better appreciate, the failings in the RDCs had a particularly deleterious effect on the handling of financial remedy cases, because I had allowed the RDCs to be set up without first insisting on the need to uncouple the processes of divorce and ancillary relief. This was a serious mistake. When first set up, if a contested financial application was made the entirety of the proceedings, divorce and financial, were transferred from the RDC to a local court, building in delay for court users and additional work for HMCTS.

In 2017, what was called 'Administrative De-linking of Financial Remedy Applications from Divorce Proceedings' was introduced, so that the main divorce proceedings could remain in the RDC with staff and judiciary at the local hearing centres working independently on the contested financial proceedings. However, this was itself only an unsatisfactory half-way house, for consent financial applications remained at the RDC: '*Administrative de-linking of financial remedy applications from divorce proceedings*' [2017] Fam Law 585.[6] Far too often there were wholly unacceptable delays in the processing by RDCs of even the simplest financial remedy consent orders. I return to this topic below.

So much for the general background. I must now sketch in what was happening in relation to financial remedies litigation:

- In 2013 I had asked Mostyn J to be the judge in charge of the RCJ 'money' list. I chose him because of his intellectual skills, his enormous energy, and his enthusiasm for innovation. I was not to be disappointed. On 5 June 2014 he released, with my authority, a *Statement on the Efficient Conduct of Financial Remedy Final Hearings Allocated to be heard by a High Court Judge whether sitting at the Royal Courts of Justice or elsewhere* [2014] Fam Law 1031. A revised edition was released on 1 July 2015. The current edition is dated 1 February 2016 and can be found in *At A Glance*.
- Also in 2013 I had asked Mostyn J to undertake what became known as the Family Orders Project. As I explained in my *4th View from the President's Chambers: The process of reform: an update* [2013] Fam Law 973, 977:

  > 'Inordinate amounts of time and money are spent – wasted – in the process of drafting orders that could, and therefore should, be standardised. I have appointed a small drafting group under the determined leadership of Mostyn J to provide us with a comprehensive set of orders the use of which will in due course become mandatory in the Family Court and the Family Division. Work has begun and is well advanced … As part of this work, Mostyn J has formulated a set of "House Rules" … which are to apply to every order. They are not yet in final form and are published for comment and discussion. We shall welcome and value your views.'

  It is no reflection on Mostyn J and his team that in the event this project took much longer to come to fruition than either he or I would have hoped. As I observed in my *12th View* [2014] Fam Law 978, 983:

  > 'The family orders project continues under the leadership of Mostyn J. I remain convinced of the

> necessity of producing a comprehensive set of forms of order for use in the Family Division and the Family Court, though conscious in the light of recent events that this is complex work which cannot be rushed. I repeat what I have said before, that this important work has not been put on hold indefinitely. There has merely been a necessary slowing of the tempo. Implementation will be staged. Recent experiences demonstrate that in the long run this project is critically dependent upon the availability of proper up-to-date IT in the courts. FamilyMan, the system with which HMCTS continues to have to struggle, has long been obsolescent and is now obsolete. It will be some time before an adequate replacement for FamilyMan is available. In the meantime District Judge Geoff Edwards has agreed to update his invaluable templates, which have long been appreciated by so many judges, to provide an interim solution for some of the most immediately pressing problems. In the medium and long term, however, something more radical is surely required.'

- With effect from 2 January 2014 financial remedy cases at First Avenue House – then the home of the Principal Registry of the Family Division but shortly to become the Central Family Court – started to be heard by the newly-established specialist Financial Remedies Unit co-ordinated by HHJ Martin O'Dwyer and, as he then was, DJ Edward Hess: see, for the details of this innovative scheme, HHJ Martin O'Dwyer and DJ Edward Hess, *The Financial Remedies Unit at the Central Family Court* [2014] Fam Law 344, *Pilot Scheme for an Accelerated First Appointment Procedure in Financial Remedy Proceedings in the Financial Remedies Unit at the Central Family Court* [2014] Fam Law 887, and *Guidance Note: Financial Remedies Unit at the Central Family Court* [2015] Fam Law 964.
- On 22 April 2014 I issued *President's Guidance: Financial Proceedings, cases to be allocated to a judge of the High Court* [2014] Fam Law 1033.
- In my *12th View* [2014] Fam Law 978, 981, I explained:

> 'In its February 2014 report, *Matrimonial Property, Needs and Agreements*, the Law Commission recommended (paras 3.75–3.120) that authoritative guidance on "needs" be produced by the Family Justice Council. The Commission recommended (para 3.89) that "the guidance prepared by the Family Justice Council be addressed primarily to the courts, but … it should be produced additionally in a plain English format and made widely available to the public" … I am entirely supportive of the Commission's recommendations in this respect and seek their early implementation. I have asked Roberts J to chair a Family Justice Council Working Group tasked with carrying this project forward in consultation, I very much hope, with Advicenow.'

Roberts J and her team produced an exemplary document *Family Justice Guidance on Financial Needs in Divorce* in two versions, one for the professions and the judiciary and the other for litigants in person, in June 2016: [2016] Fam Law 1056. A second edition was published in April 2018: [2018] Fam Law 769.

- In June 2014, as we have seen, I asked Mostyn J and Cobb J to chair the Financial Remedies Working Group, which reported on 31 July 2014 and 15 December 2014.
- On 30 November 2017, the family orders project came to fruition when I issued *Practice Guidance: Standard financial and enforcement orders* [2018] Fam Law 89. As I said in the *Guidance*:

> 'My ambition … is that the standardised orders should be available to everyone electronically. The use of standard orders produced at the press of a button will obviate the need for drafts from counsel and solicitors scribbled out in the corridor. It should assist greatly in reducing the time judges and court staff spend approving and completing orders. And the existence of a body of standardised and judicially approved forms of order will go a long way to assisting judges and others – mediators for example – faced with the increasing number of litigants in person who cannot be expected to draft their own orders.'

Tempering ambition with painful reality, I continued:

> 'In the long run, this project is critically dependent upon the availability of modern, up-to-date, IT in the courts. At present, the full use of standardised orders is still impeded by the inadequate state of the IT available to judges and courts. FamilyMan, the system with which HMCTS continues to have to struggle, has long been obsolescent and is now obsolete. Although it may, I fear, still be some time before an adequate replacement for FamilyMan is available, the steady implementation of the ongoing court modernisation programme gives real cause for optimism that we will fairly soon be seeing real changes in our IT as the digital court of the future becomes a reality.'

In January 2018, Class Publishing, the publishers of *At A Glance*, published the *Standard Family Orders Handbook: Volume 1 – Financial and Enforcement* by HHJ Edward Hess.

- On 28 February 2018 I issued *President's Guidance: Jurisdiction of the Family Court: Allocation of Cases Within the Family Court to High Court Judge Level and Transfer of Cases from the Family Court to the High Court*: The *Family Court Practice 2019*, para 5.382. An amended version (the amendments helpfully shown in red) was issued on 24 May 2021, [2021] Fam Law 901.
- In July 2019 the comprehensive *Guide to the Treatment of Pensions on Divorce* was published by the Pension Advisory Group co-chaired by Francis J and HHJ Hess: [2020] Fam Law 166. As the President justly observed in his *View from the President's Chambers* on 18 December 2019 [2020] Fam Law 162, 'The guide should be on the desk or laptop of every financial remedy judge and lawyer. Its aim is to tease out, demystify and describe all aspects relating to pensions which may figure in a financial remedy dispute. It is written in plain accessible narrative and should do much to improve our practice in this area.'

Meanwhile, what of the FRC?

For me the story of the FRC began with an email out of the blue on 26 September 2016 from Edward Hess and Jo Miles, attaching an unsolicited article which they had written and asking rather diffidently what I thought: 'We

would be interested to hear your views on these suggestions … No doubt you will (politely) tell us if you think the idea a non-starter!' My immediate response, in an email on 1 October 2016, was an enthusiastic call for its immediate publication: 'This is a VERY interesting idea which enthuses me considerably. Can I suggest that you get it published in *Family Law*?'

So, it was published in the November 2016 issue of *Family Law*: Hess and Miles, *The recognition of money work as a specialty in the family courts by the creation of a national network of Financial Remedies Units* [2016] Fam Law 1335. It was an incisive and powerfully compelling account of what was wrong, of why we needed specialist financial remedy courts (what the authors referred to as Financial Remedy Units), and – this was perhaps its greatest importance – of the necessary solutions. It needs reading in full. Here I merely draw attention to two important points. Hess and Miles highlighted the 'curious' fact that, whereas no Circuit Judge or District Judge could hear a children case unless they had the appropriate 'ticket', there was no such requirement in relation to financial remedies work – with the consequence that such cases could be and often were heard by judges (including Deputy District Judges) who had little or sometimes no experience of or expertise in what they were trying, a 'system' hardly productive of either efficiency or, more especially, consistency of approach. Their other invaluable contribution was an analysis, based on such data as was available, suggesting that 12 FRUs might be needed. Whether or not this figure was correct – in the event, as we shall see, we have ended up with 18 – it indicated that the necessary structure, the proposed 'network' of FRUs, would not fit comfortably within the 40 or so existing DFJ areas and that a separate structure would therefore be necessary.

In a Note dated 4 October 2016 which accompanied the article ([2016] Fam Law 1340) I said that 'Their analysis is compelling and their proposals attractive … I suspect that many will agree the pressing need for change. Our present arrangements are probably untenable.'

Having reflected on these ideas, and favouring taking steps straight away to begin to create a national network of what I preferred to call Financial Remedies Courts, I asked Edward Hess and Joanna Miles, together with Martin O'Dwyer, to put forward a more detailed plan as to how the ideas in the original article could be implemented. Rising magnificently to the challenge, the results were published in the June 2017 issue of Family Law: O'Dwyer, Hess and Miles *Financial Remedy Courts* [2017] Fam Law 625. Again, this impressive piece requires to be read in full.

In the same June 2017 issue of Family Law I published my *17th View from the President's Chambers: divorce and money – where are we and where are we going* [2017] Fam Law 607. I commented that:

> 'The concentration of divorce cases in a limited number of regional divorce centres, as the prelude to a completely on-line system, is putting the administration of ancillary relief under unnecessary and avoidable strains.'

I went on:

> 'there is an urgent need to begin implementing, initially by way of pilots followed by more general roll-out, the exciting plans for specialist Financial Remedies Courts first suggested by HHJ Edward Hess and Joanna Miles … and now impressively elaborated by HHJ Martin O'Dwyer, HHJ Edward Hess and Joanna Miles in their more detailed blueprint … The case they present is, in my view, unanswerable. Unsurprisingly, and surely appropriately, it builds on the thinking underlying the geographical re-organisation of the Family Court in the run-up to its formal birth in April 2014, to the judicial leadership and management structures put in place for money cases, both in the Central Family Court and the Family Division, and to the judicial leadership and management structures more recently put in place when the Court of Protection was regionalised. Early implementation of pilot Financial Remedies Courts must be a priority.'

I added:

> 'Work must proceed for the initial roll-out, as soon as sensibly possible in late 2017 or very early 2018, of the first pilot specialist Financial Remedies Courts.'

On 1 December 2017 I issued *President's Circular: Financial Remedies Courts* [2018] Fam Law 91 setting out my proposal to pilot the FRC concept in three places, starting, I hoped, in February 2018: London, the West Midlands and South-East Wales. I envisaged that further pilots would follow quite shortly on a rolling programme. Identifying three critical issues relating to the location of the proposed FRC hubs, the locations of the proposed FRHCs (see below) and the selection of the lead judge for each FRC hub, I added: 'In relation to the three pilots, local discussions on these matters are under way. Thought is also being given to where and when the next wave of pilots should begin.'

On 23 January 2018 I published my *18th View from the President's Chambers: the ongoing process of reform – Financial Remedies Courts* [2018] Fam Law 156 setting out my definitive plans for the structure, implementation and piloting of the FRC.

I set out my ambition:

> 'My core ambition for financial remedy work is to improve significantly both the application of procedural justice and the delivery of substantive justice.
>
> Procedural justice will be bettered by the appointment of a cadre of specialist judges to the Financial Remedies Court (FRC) and by a process of early allocation of a case to the right judge at the right level at the right place, so as to ensure maximum efficiency. It will be bettered by the application and enforcement of standard directions and interim orders and by ensuring that FDRs (where the majority of cases settle already) are conducted with consistency, with sufficient time being allowed not only for the hearing but also for judicial preparation.
>
> The delivery of substantive justice will be improved by an improved programme of judicial training; by the reporting of judgments in small and medium cases by the judges of the FRC to promote transparency and consistency; and by ensuring that sufficient time is allowed for the preparation and conduct of final hearings. An increase in transparency will result in increased predictability of outcome, which in turn should lead to a higher rate of settlement or, for those cases that do not settle, a reduced rate of appeals.'

I set out the structure:

> 'The basic concept of the FRC, which builds on both the

Family Court and regionalised Court of Protection models, is as follows:

- The FRC, which will be part of the Family Court, will deal with all types of financial remedy cases dealt with in the Family Court or Family Division: claims for ancillary and other relief under the Matrimonial Causes Act 1973; claims under Schedule 1 to the Children Act 1989; claims under Part III of the Matrimonial and Family Proceedings Act 1984; and, in due course, claims under the Inheritance (Provision for Family and Dependants) Act 1975 and claims under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA).
- There will be a number of regional hubs, typically two per circuit (population or geography may require more), at which both the administration (HMCTS) and the judicial leadership for the relevant hub area are based.
- There will be a lead judge for each hub area: this must be a judge (either a Circuit Judge or a District Judge) with real experience/expertise in financial remedy work.
- There will be a national lead judge with a deputy. Mostyn J and, as his deputy, HHJ Hess have agreed to fill these important positions.
- Hearings will be conducted (a) at the regional hub and also (b) at a number of Financial Remedies Hearing Centres (FRHCs) within the hub area. I emphasise (b), because it is very important. I emphasise also that parties will still be able to request, for good reason, that a particular hearing takes place at a court other than a FRHC.
- Only "ticketed" judges will sit in the FRC. All District Judges and Circuit Judge currently in post who do this work, and wish to continue to do so, will be "grandfathered" in.
- The FRC will function quite separately from the Regional Divorce Centres. Applications for a financial remedy, including for ancillary relief, will be issued at the FRC hub, not at the Regional Divorce Centre.

The FRC will initially function with paper files, as at present, but HMCTS, with my support, is already working on transition by the FRC as quickly as possible to a fully digitised model.'

I draw attention to my thinking in relation to lead judges. My view was then, and remains, that there should be two national lead judges: one a Family Division judge, who should be the same person as the judge in charge of the RCJ 'money' list, and a deputy who should be a Circuit Judge (or District Judge) with real experience of financial remedies work outside the RCJ. In relation to the lead judge of the regional hub I attached, and continue to attach, great importance to the appointment of the person most suitable for that important role, *whether a Circuit Judge or a District Judge and without any preference for the appointment of a Circuit Judge*.

In relation to the pilots I said this:

'As previously announced, and following discussions with HMCTS, the FRC will be piloted in three areas, starting in February or March 2018: London, the West Midlands (Black Country) and South-East Wales. Further pilots will follow after Easter 2018 on a rolling programme, starting with the remainder of the Midland Circuit, the North-Eastern Circuit and at least parts of the South-Eastern Circuit. The pilots will be designed to enable us to move as quickly and smoothly as possible to implementation, first in the pilot areas and then nationally, of the full FRC model as described above … As with the piloting in 2013 of the new Public Law Outline, the pilots will be continuously monitored, so that the FRC model can be "tweaked" from time to time in the light of emerging experience … The attached Table shows my current, tentative, thinking in relation to the possible "geography" of the pilot areas. None of this, I emphasise, is yet set in stone. And, as the pilots proceed, the initial "geography" will be adjusted as appropriate. Local discussions, involving HMCTS, the leadership judges and, especially, the District Judges, with their particular knowledge and experience of financial remedies litigation "on the ground", are needed to ensure appropriate consensus before the pilots commence; consensus both in relation to the "geography" and generally.'

The Table listed 10 proposed hubs, identifying, in relation to each, the locations of the proposed hub court and FRHCs: London (hub at CFC), Midland Circuit (hubs at Birmingham and Nottingham), South-East Wales (hub at Newport), North-Eastern Circuit (hubs at Newcastle, Leeds, Sheffield), and South-Eastern Circuit (hubs at Chelmsford, in the Thames Valley, and a third somewhere in Kent, Sussex and Kent).

In the event, this carefully thought through plan for a rolling programme of pilots was not to be. Forces beyond my control demanded an interruption, with the consequence that the only pilot able to proceed, in April 2018, was that in the West Midlands: *Financial Remedy Centre Pilot: HMCTS guidance* [2018] Fam Law 517. The essential obstacle, although, as we will see, there were others, was concern as to whether my plans in relation to the FRHCs were too radical and involved an inappropriate reduction in the number of such courts. Whether that of itself necessitated the delay in rolling out the pilots, not least given what I thought were the very clear assurances I had given that none of this was set in stone and that, as the pilots proceeded, the initial 'geography' would be adjusted as appropriate following local discussions, involving both HMCTS and the local judges, is a matter for others to decide. My own view, then and now, was that this delay was neither necessary nor appropriate; indeed, that it was unnecessary and most unfortunate.

On 27 July 2018, in an attempt to breathe new life into the process and to meet the objections to what I had originally proposed, I published a further announcement: *President's Circular* [2018] Fam Law 1201. It turned out to be my last official act as President.

'Following the successful initiation of the Financial Remedies Court project in the West Midlands (part), centred at Birmingham, I am pleased to announce a further roll-out of the pilot, albeit for the time being in modified form. With effect from dates in the near future, to be agreed in each case between the relevant FRC lead judge and HMCTS (nationally and locally), the pilot, in this modified form, will be extended to: (a) East Midlands, centred at Nottingham, (b) the whole of the West Midlands (including but not limited to the part in the initial pilot), (c) Cheshire and Merseyside, centred at Liverpool (the extension of the pilot to Cheshire and

> Merseyside will enable the locally developed financial remedy protocol to be placed on a more formal footing and enhanced), (d) North-east (1), centred at Sheffield, (e) North-east (2), centred at Leeds, (f) North-east (3), centred at Newcastle, (g) London, centred at the CFC, (h) South-east Wales, centred at Newport, and (i) South-west Wales, centred at Swansea.'

I added that the precise dates and sequence had yet to be determined, but the first were likely to be (a), (g) and (h). I went on to emphasise:

> 'For the time being, these further extensions will not involve the creation of any specified designated hearing centres and judges hearing financial remedy cases will not be expected to sit elsewhere than where they currently do. Cases will continue to be heard, as at present, in the premises currently used by the Family Court.'

That, as matters turned out, marked the end of the concept that there should be a limited number of FRHCs designated as such. The term itself is no longer used. And more to the point the number of courts where the FRC now sits is much greater than I had originally contemplated. In the Table attached to my *18th View*, I had listed 10 proposed hubs with a total of 45 proposed FRHCs. In the Table attached to the revised *Financial Remedies Courts: Overall Structure of the Financial Remedies Courts and the Role and Function of the Lead Judge* dated 11 January 2022 (see below), the same 10 hubs now have no fewer than 73 courts in addition to the hub courts. That apart, what has emerged from the process is, in all its fundamentals, what I had originally planned, though what I had originally called 'hub areas' are now more helpfully referred to as 'FRC Zones', each of which with a 'Zone Hub'.

In my announcement I also said this:

> 'For the time being, Forms A and applications for consent orders will continue to be processed in the regional divorce centres. The reason for this is that work is being undertaken by HMCTS to enable these applications to be issued and processed online. This work is well-advanced. I am satisfied that it would be wasteful to initiate a new, different, manual process for these applications when they are likely to be replaced by an online process in the reasonably near future.'

Despite the care with which, as I thought, I had framed this announcement, and the enthusiasm with which it was received by most, its publication drew a negative response from the naysayers. By then, I was no longer President and the future of the FRC project was in the hands of my successor, Sir Andrew McFarlane P. There was, of course, no need for concern for, following my retirement, the FRC project continued with his enthusiastic and unwavering support.

Notes

1 There is much useful material on the history in successive editions of *At A Glance*: see *At A Glance 2018–2019* Winds of Change, p vi, *At A Glance 2019–2020* Winds of Change, p iv, *At a Glance 2020–2021* p iv and Table 19: Financial Remedies Courts, pp 28-31, and *At A Glance 2021–2022* pp iii–iv and Table 19: Financial Remedies Courts, pp 33–36.

2 When I floated this idea in April 2014 I was unaware that Swift J, a King's Bench judge who sat from time to time in the PDA as well as on Circuit and who felt strongly that radical reform of divorce law was badly needed, had voiced the same idea as long ago as April 1927 when, we are told (Fay, *The Life of Mr Justice Swift*, 1939, p 143), he had proposed that the parties should simply appear before a Registrar of Births, Marriages and Deaths and record the fact that they no longer desired to be married. Matters have, of course, moved on since 2014. We now have online divorce and, with effect from April 2022, s 1 of the Divorce, Dissolution and Separation Act 2020 requires only a 'statement' by one or both of the spouses 'that the marriage has broken down irretrievably'. The court is prohibited from examining the facts and can exercise no discretion: it must make what is now called 'a divorce order'. Given that the law has now at long last caught up with what Swift J had proposed in 1927 – that the parties should simply record the fact that they no longer desire to be married – why do we still require the involvement of a court? It cannot be said that the new, essentially bureaucratic, procedure involves the exercise of anything that would normally be recognised as a judicial function. Indeed, if appropriately programmed, the computers operating the new system of online divorce could make the order without the need for any human involvement at all, other than that of the applicant(s). Why do we not adopt what Swift J proposed, that divorce be dealt with by the Registrar of Births, Marriages and Deaths?

3 In *M v P (Queen's Proctor Intervening)* [2019] EWFC 14, [2019] Fam 431, [2019] 2 FLR 813, and again in *Baron v Baron (Queen's Proctor Intervening)* [2019] EWFC 26, [2019] 4 WLR 79, [2019] 2 FLR 797, the processing of various divorce cases was seriously mishandled, to the grave prejudice of the litigants, because of errors by court staff and judges. Two issues emerged. One was the pressing need for full implementation as soon as possible of the online divorce project; the other what had been revealed of the erratic functioning of a particular RDC. As I said in *M v P*, paras [125], [127]: 'The circumstances as set out in this judgment surely serve to emphasise the pressing need to bring the online divorce project as soon as possible to a finality where it is fully operational. I understand that very considerable strides have been made … – and, I should make clear, made very successfully – but there is still some way to go … I am assured by HMCTS … that the software now in use on the online divorce system makes it impossible, if one uses the online system, to file a petition in the circumstances referred to in … this judgment. This is very welcome news, not least because it demonstrates how the introduction of modern digital technology – a vital part of the current court modernisation process – can not merely speed up but also improve the administration of justice.' In *Baron v Baron*, paras [58]–[59], having referred to the slapdash approach in two cases in a RDC, I said: 'It is, unhappily, notorious that some Regional Divorce Units have become bywords for delay and inefficiency, essentially because HMCTS has been unable or unwilling to furnish them with adequate numbers of staff and judges … The sooner the entire process of divorce is made digital from beginning to end the better.'

4 https://www.judiciary.uk/wp-content/uploads/2019/04/Resolution-Key-Note-2019-final.docx-8-APRIL-2019.pdf

5 More detail of the successive stages of the project implemented or planned for 2019 were set out in a joint letter dated 3 July 2019 from the President and HMCTS.

6 For the detail see the Joint Letters from the President and HMCTS dated 27 April 2017 and 8 June 2017 and the Joint Message from the President and HMCTS dated 12 June 2017.

The Galbraith Tables: a New Chapter for Pension Offsetting on Divorce?

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Purpose of this article

This article discusses how the thinking on the remedy of offsetting of pension rights has emerged over time, and introduces the 'Galbraith Tables', being the authors' attempt to produce transparent and accessible published tables that are suitable for the valuation of pension rights for such offsetting purposes, and without the instruction of a Pension on Divorce Expert (PODE).[1] It discusses some of the issues faced when seeking to compare pension rights with non-pension financial assets, and illustrates that even where consistent assumptions are used, a myriad of valuation figures may still emerge.

Introduction and background

Offsetting of pension rights upon divorce – being the equation of these pension rights to amounts of non-pension capital assets, for the purposes of allowing a fair settlement to be reached – remains a necessary and often deployed remedy, notwithstanding its well-documented drawbacks and the introduction of the pension sharing regime over 21 years ago. There are many cases where the specifics of the parties' assets and personal circumstances might require such an approach be adopted. It is noted also that the combination of offsetting with partial pension sharing might be deemed appropriate in some cases, but the complexities arising in such situations are beyond the scope of this article.

Nevertheless, the determination of the non-pension capital amount that one might deem equivalent to, say, £10,000 *per annum* of pension income, payable some 15 years hence and for life thereafter, is far from being an exact science, and different experts might legitimately alight on quite different amounts. This was neatly illustrated by Taylor R & Woodward H, in *'Apples or Pears? Pension offsetting on divorce'* [2015] Fam Law 1485, where various Pensions on Divorce Experts (PODEs) presented with identical sample cases produced a myriad of possible results.

Such matters were also considered some years earlier in Burrows D, *'Pensions – How Much to Offset?'* [1999] Fam Law 556, with reference being made to questions of apportionment and the meeting of needs following from the divorce. However, it is fair to say that the thinking has moved on considerably since then; this article predates (but does anticipate) the pension sharing regime that came to be in December 2000, and it relies heavily on the use of Cash Equivalents as valuations of pension rights (discussed later).

Such actuarial considerations associated with the valuation of such pension rights are further complicated by matters pertaining to the comparison of the rights with non-pension assets (including, as appropriate, equity in the Former Matrimonial Home). This – including utility considerations discussed below – is commonly referred to as 'Stage 2' in offsetting, with 'Stage 1' being the actuarial valuation of the raw pension rights absent such adjustments. In particular, it is generally accepted that it is reasonable to recognise the tax-advantageous status of non-pension monies, being the fact that the holder of such funds – *in lieu* of monies in a pension arrangement – may produce liquidity that is not subject to the income tax regime.

Nonetheless, it has been noted (in Mathieson G, *'Pension offsetting: is a consistent approach possible or even appropriate?'* [2017] Fam Law 204 *et al*) that a 'formulaic' approach to quantifying such a discount as might be made for tax is not easily found. Hay, Hess and Lockett likewise noted in *Pensions on Divorce* (Sweet & Maxwell, 2nd edn, 2013) that 'there can be no "one size fits all" solution to the offsetting problem. The fair and equitable offset will depend upon a number of factors that will vary from case to case.' Hay *et al* also suggested that anything more 'rigid' would impede a court's powers under the Matrimonial Causes Act 1973. Hay, Hess, Lockett and Taylor in *Pensions on Divorce* (Lexis, 3rd edn, 2018) presented a further revised analysis on the question of offsetting, anticipating the publication of the deliberations of the Pension Advisory Group (for which see below).

More nebulous still is the adjustment under Stage 2 that might be made in respect of utility, to take account of inter alia the accessibility of pension monies in the future relative to other assets now. To wit, how do you value jam now over jam later? Indeed, once tax and utility have been taken into consideration, the range of possible amounts to be used by the courts for offsetting widens further.

WS v WS

Such issues were brought to bear in *WS v WS (Financial*

Remedies: Pension Offsetting) [2015] EWHC 3941 (Fam), [2016] Fam Law 564, and discussed in some detail in Taylor R, *'Pensions on divorce: another witches' brew'* [2017] Fam Law 163. In short, no SJE pensions analysis was commissioned – the court disallowing a Part 25 application for a pension expert – and the figure ultimately used for offsetting in respect of the pension rights was derived with reference to the *Duxbury* tables that are most commonly used for the capitalisation of spousal maintenance.

A number of shortcomings associated with the *Duxbury* approach in the pension context have been articulated. Particular concern has been expressed about the unsuitability of the assumptions that underpin *Duxbury* to the analysis and valuation of pension rights. There was an unprecedented and forthright composite response from many of the leading pensions experts of the time, in *'WS v WS: Pension Experts' View'* [2016] Fam Law 504, which asserted that a pension income is not an 'uncertain future income stream' in the manner of an earned income (which is always subject to the vicissitudes of life) used commonly to fund orders for periodical payments. The jointly-signed article, which reflected the views of most of the key players in the PODE community at that point, noted also that considerations in respect of the Lifetime Allowance pensions tax regime had also been missed.

This was a case where input from a PODE was, in fact, necessary. Even absent this, some more suitable approach than *Duxbury* might have been used to attach a value to the pension rights being considered for such offsetting purposes.

The PAG Report

In July 2019, *A Guide to the Treatment of Pensions on Divorce* was produced by the Pension Advisory Group (PAG, with the document being colloquially known as the 'PAG Report'). This document has rapidly become the definitive guide for practitioners in dealing with pensions matters upon divorce, in particular upon how to instruct a PODE, and it was written in the hope that such a document might lead to a convergence in approaches adopted in respect of pension matters on divorce. Explicit reference to it is made in the judgment of HHJ Hess in the case of *W v H (Divorce Financial Remedies)* [2020] EWFC B10.

Part 7 of the PAG Report covers offsetting in some detail, and suggests that a PODE may be employed to calculate the value of pension rights in a divorce case for offsetting purposes. It makes comments on possible 'Stage 2' tax and utility adjustments that may be applicable to any calculated valuation of such pension rights, but suggests that such matters are for the court, to be considered under s 25 (or indeed by the parties themselves).

Appendix U of the PAG Report does however 'throw down the gauntlet' for experts in the field to produce tables for offsetting purposes, akin to *Duxbury* and also the *Ogden* tables that are used inter alia to capitalise compensation due in personal injury and fatal accident cases. In particular, it notes that 'it is worth exploring in principle whether there might be some suitable way, using Ogden-style tables, of reaching a better and more appropriate value than provided by the CE [Cash Equivalent] in cases where parties do not instruct an expert'.

Possible approaches to offsetting

The PAG Report sets out a number of different approaches that might be taken in respect of the offsetting of pension rights, and makes clear that there is seldom one definitive correct answer. Paragraph 7.24 thereof discusses inter alia the merits of using Cash Equivalents alongside more bespoke valuations of the underlying pension rights.

As alluded to above, the use of Cash Equivalents for offsetting with reference to defined benefit (final salary) pensions has been widely discredited. While the Cash Equivalents of defined contribution (money purchase) pensions typically reflect fund values – which may be treated in big money cases as 'money in the bank, but for a tax adjustment' as per the conclusion drawn by Nicholas Francis QC (then sitting as a deputy High Court judge) in *SJ v RA* [2014] EWHC 4054 (Fam) – this treatment does not generally extend to defined benefit pensions. Such defined benefit Cash Equivalents reflect solely the amount that the scheme is prepared to pay out to discharge its liabilities *immediately* – perhaps akin to the surrender value of an insurance policy – and do not usually reflect the full economic value of the underlying pension rights.

Most other expert attempts to value pension rights (at least in defined benefit schemes) will typically discard Cash Equivalents in favour of valuing the underlying benefits that the individual is to receive. This tends to be done with some reference to the 'open market' cost of the rights i.e. a determination of the monies that one might need to have today to replicate the pension promise in the scheme, whether this is a benefit in payment at present or one deferred until a later retirement date. The PAG Report introduces the concept of the Defined Contribution Fund Equivalent (DCFE), being the defined contribution funds that a party would need to hold today to replicate the rights provided in retirement by a defined benefit pension scheme. This is sometimes also referred to as the 'true value', 'fair value' or indeed 'open market value' of a pension in financial remedy cases, the final term being our preferred one, on the grounds that it reflects the cost of replicating the promised pension rights with reference to annuity purchase in the open market.

Different approaches depend upon precisely how such rights are to be valued, with two common definitions being:

- The capital values of the pensions to their holders i.e. the value of H's pensions to H and W's pensions to W; and
- The cost associated with making up the shortfall in income for the party with the lesser pension rights i.e. the value of H's pensions to W less the value of her own pensions.

This is analogous to pension sharing approaches that equalise capital values and those that equalise incomes in retirement.

The Galbraith Tables

We hereby introduce the Galbraith Tables, which may be used by practitioners in seeking to value pension rights for offsetting purposes on divorce, with the remainder of this article being devoted to the detail thereof and a discussion thereupon. However, this is very much an abridged version

of the commentary that accompanies these tables, which is to be found at https://tinyurl.com/2tj4z7fc.

These tables are intended to provide a suitable answer to the 'Stage 1' question of how to value a given *per annum* pension, payable either at present or at a later date, and likewise in respect of lump sum amounts payable upon retirement. In this way, they provide a measure of what the PAG Report called the DCFE. The tables are produced in a similar manner to *Ogden* and *Duxbury*. It is our ambition that these '*Galbraith*' Tables may be adopted by practitioners in this area of law. The *Galbraith* Tables provide the user with a figure that is to be multiplied by the pension rights being valued. Importantly, the assumptions that underpin the tables are transparent and clearly stated, which allows the figures in these tables to be reproduced and scrutinised.

In particular, the *Galbraith* Tables rely upon:

- The accumulation of funds in the period to retirement with respect to what we believe to be 'best estimate' investment returns, using net rates of -1.00% to 3.00% p.a., dependent upon the term to retirement and with lower rates being used the closer one is to retirement. This is in comparison to the 3.75% p.a. net rate used by *Duxbury*. The use of a negative net rate allows for returns on lower risk investments (e.g. cash at bank) being outstripped by price inflation, and overall the investment strategy adopted is intended neither to be too prudent nor too risk-seeking. In particular, these assumed rates of return were set with reference to the projections that leading pension providers make when producing Statutory Money Purchase Illustrations (SMPIs), with these being annual projections of what a pension fund might be worth at retirement that are provided each year to scheme members.
- The decumulation – or amortisation – of funds at retirement with reference to a prudent 'income drawdown' strategy, intended to produce income amounts that might be deemed similar to those associated with annuity purchase at retirement. In particular, the tables assume that a 60-year-old might need c.£33–36 at that point to secure £1 p.a. of lifetime pension income.

In terms of the assumptions made, it is recognised that there are many 'right' answers, and that absent a detailed analysis of the wider context of any settlement, parties' attitudes to risk, their expectations of future market conditions *ad nauseum*, it was necessary to derive something that might be deemed to be an acceptable, workable and reliable 'broad brush' approach. It is one that we believe to be both easily reproducible and readily justifiable.

The premise of explicit annuity purchase at retirement was rejected for the purpose of producing the tables, not least on the grounds that annuity rates depend upon the vagaries of pricing strategies, cashflow needs of insurers and allowances for socio-economic factors pertaining to the purchaser (often known as 'postcode analysis'). However, the assumptions made in respect of life expectancy and post-retirement investment returns are intended – at least in broad terms – to reflect those that might be used by annuity providers.

The pensions tables – but not those in respect of lump sums, which make no assumptions in respect of future life expectancy – are sex-specific, i.e. there are different tables for males and females. This provides an additional level of flexibility – and indeed replicates the approach taken in both *Ogden* and *Duxbury* – and seeks to recognise that *per annum* pension benefits payable to females might be deemed to be slightly more valuable than those payable to males on grounds of the former's enjoying better overall longevity than the latter. However, such sex-specific considerations may easily be overridden by taking the average of the male and female factors.

The standard tables also assume that pension rights to be valued are linked to the Consumer Prices Index (CPI) measure of price inflation both before and after retirement, but details are provided as to how one might allow for other such forms of indexation. Full details of the assumptions made are shown in the accompanying document, again to be found at https://tinyurl.com/2tj4z7fc. The accompanying document also provides details on how to allow for some of the complications that exist with UK pensions, including defined contribution funds, the presence of guaranteed annuity rates and other benefit promises.

Notwithstanding all of the above, the tables are intended to provide suitable valuations of pension rights *before* any adjustment in respect of tax or utility is to be considered: it remains the case that such adjustments depend very much upon the facts of the case beyond the pension rights themselves. However, we believe that such tables provide a very useful starting point for practitioners who are seeking to quantify pension rights *versus* other assets in a broad sense, prior to engaging a PODE, or indeed to determine whether any such appointment is necessary.

Some worked examples using the Galbraith Tables

We suggest that some examples of how the tables might be used will prove helpful at this point. In the first instance, we shall assume that H (age 45) has an accrued pension of £10,000 p.a. that is payable at age 60, with this pension being index-linked with reference to CPI both before and after retirement. This information is likely to be found on an annual benefit statement produced by the scheme, or it might be taken from a Cash Equivalent statement (even where the actual Cash Equivalent value is not itself used).

The *Galbraith* Table 'Factors used for the valuation of pensions payable in retirement (males)' shows a figure of 26.230 for current age 45 and retirement age 60 that we use to value the pension rights, and thus 10,000 × 26.230 = £262,300 i.e. we determine that H would require c.**£262k** today to replicate his pension rights in retirement. This is the raw valuation before any 'Stage 2' tax and utility adjustments are made.

Extract from the table is as below:

Factors used for the valuation of pensions payable in retirement (males), ages 50–69

Age at date of calculation	Assumed retirement age				
	50	...	59	60	61
20	26.803	...	15.529	14.572	13.664
...	...	...	...	...	...
44	47.145	...	27.343	25.612	23.973
45	48.092	...	28.005	**26.230**	24.549
46	49.057	...	28.684	26.864	25.141

This figure is the value of the pension to H himself, i.e.

the capitalised amount of *his* pension rights. It follows that the cost to W to replicate such an income (i.e. the value of H's pension to W) would differ where there is an age difference between the parties, not least on the grounds that the period to retirement over which monies may benefit from investment returns would vary.

Thus if W in the example above is aged 40 – five years younger than H – it follows that we refer to the other *Galbraith* Table 'Factors used for the valuation of pensions payable in retirement (females)', which gives a figure of 25.502 for current age 40 and retirement age 60, and thus 10,000 × 25.502 = £255,020, i.e. W might only need **c.£255k** to replicate such pension rights in retirement. Again, this is the raw valuation before any tax and utility adjustments are made.

Extract from the tables is as below:

Factors used for the valuation of pensions payable in retirement (females), ages 50–69

Age at date of calculation	Assumed retirement age				
	50	...	59	60	61
20	28.705	...	16.840	15.823	14.857
...	...	...	...	...	...
39	45.418	...	26.521	24.905	23.368
40	46.522	...	27.158	**25.502**	23.928
41	47.552	...	27.811	26.114	24.501

Such an example takes us back to one of the key issues associated with offsetting, being what is meant by such a term. Offsetting with reference to the capital values of pensions for their current holder may well differ from what the other party requires to match the pension rights in retirement.

Moreover, this pension will also have a Cash Equivalent available from the scheme administrators, which will reflect the assumptions set by the scheme trustees on the advice of the scheme actuary, and will differ from what is determined above. As alluded to earlier, Cash Equivalents tend to understate the costs associated with securing pension rights: were H to request this from the scheme, a figure of perhaps **£200k** might emerge in respect thereof. However, it should be noted that some private sector defined benefit schemes do provide much more generous Cash Equivalents, with there being a significant range in the generosity of such transfer-out terms. This inconsistency in the valuation of pension rights from scheme to scheme again renders Cash Equivalents of limited value for such offsetting purposes. As shown above, the Cash Equivalent plays no part in the analysis of rights that relies on the *Galbraith* Tables.

As alluded to in the PAG Report and elsewhere, still further approaches may be adopted in respect of offsetting. It is important to recognise why different offsetting amounts in respect of the same pension rights may emerge, and this is an important consideration for practitioners when looking to instruct a PODE. All too often it is easy to receive back an expert witness report that shows figures under, say, four unique methods, then subject to a rough tax adjustment and then a (somewhat spurious) utility adjustment, where the reader is then left with a vast range of possible 'acceptable' answers.

While recognising this, we respectfully question the approach suggested by Crowley P, '*Pension Offsetting on Divorce – A "Navigation" Process*', *Expert Witness Journal*, April 2021, where it is deemed suitable to take an average of the figures that might emerge from such different measures. His article provides some detail upon how defined benefit Cash Equivalents are calculated, but we take the view that such an approach to the derivation of a single offsetting figure loses the subtleties that arise under different valuation methodologies. Moreover, the averaging of such market-implied figures as might emerge above (whether via the *Galbraith* Tables or some other DCFE/true capital value measure) with a typically much lower Cash Equivalent is expected to provide an alluringly simple figure which may be open to challenge upon careful reflection.

Let us now consider another example: suppose that H is aged 67 and W aged 64; he has a pension income of £25,000 p.a. and she one of £11,000 pa, with these now being in payment. On a capital measure, and with reference again to the tables, we value the pension rights of H in excess of W as 25,000 × 23.972 – 11,000 × 30.498 = **c.£264k**, while on an incomes measure the calculation becomes (25,000 – 11,000) × 30.498 = **c.£427k**.

Extracts from the tables as below:

Factors used for the valuation of pensions payable in retirement (males), ages 50–69

Age at date of calculation	Assumed retirement age				
	50	...	66	67	68
20	26.803	...	15.529	14.572	13.664
...	...	...	...	...	...
66			25.211	24.105	23.020
67				**23.972**	22.893
68					22.762

Factors used for the valuation of pensions payable in retirement (females), ages 50–69

Age at date of calculation	Assumed retirement age				
	50	...	63	64	65
20	28.705	...	16.840	15.823	14.857
...	...	...	...	...	...
63			31.896	30.649	29.422
64				**30.498**	29.274
65					29.127

In layman's terms, when we simply look at the difference in pension incomes and 'how much W is short by', we use the 30.498 factor applicable to her at age 64. By contrast, when we value the pensions on a capital basis, we instead value H's pension using the 23.972 factor that applies to him at age 67. It can be seen that the cost to provide W with each £1 *per annum* of pension is higher than it is for H, given the three-year age difference, and in turn she requires a larger amount of non-pension capital to match his pension income today than simply to replicate the rights that he himself enjoys.

Further examples are to be found within the *Galbraith* Tables document itself.

Conclusion

It is to be hoped that the simple examples above demonstrate the ease with which such high-level offsetting figures may be determined in respect of pension rights, and that this will be of benefit to practitioners. It is to be noted that i) such results are by no means definitive, and other figures may well be deemed to be acceptable; and ii) the subtleties

and intricacies of all too many UK pension arrangements continue to make it imperative that the support of a PODE is sought.

In particular, where considerations pertaining to partial offsetting, Lifetime Allowance issues, apportionment of benefits, 'unusual' private sector defined benefit schemes amongst many others are to be entered into, it is noted that there is no substitute for the seeking of professional advice from suitably-qualified PODEs. Nevertheless, we believe that the *Galbraith* Tables can be deemed 'good enough' for the purposes set out above, and may bring considerable value to practitioners in dealing with the ever-complex question of how to compare pension rights alongside other financial assets upon divorce.

Factors used for the valuation of lump sums payable at retirement (either sex)

Retirement ages 50–69

Age at date of calculation	Assumed retirement age																			
	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69
20	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322	0.313	0.305	0.296	0.288
21	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322	0.313	0.305	0.296
22	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322	0.313	0.305
23	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322	0.313
24	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322
25	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331
26	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341
27	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350
28	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360
29	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370
30	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381
31	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391
32	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403
33	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414
34	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426
35	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438
36	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450
37	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463
38	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476
39	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489
40	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503
41	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517
42	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531
43	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546
44	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562
45	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578
46	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594
47	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611
48	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628
49	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646
50	1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664
51		1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683
52			1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702
53				1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722
54					1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742
55						1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763
56							1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784
57								1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806
58									1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829
59										1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853
60											1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875
61												1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895
62													1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917
63														1.000	1.000	1.000	1.000	0.984	0.961	0.939
64															1.000	1.000	1.000	1.000	0.984	0.961
65																1.000	1.000	1.000	1.000	0.984
66																	1.000	1.000	1.000	1.000
67																		1.000	1.000	1.000
68																			1.000	1.000
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Retirement ages 70–88

Age at date		Assumed retirement age																	
of calculation	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88
20	0.280	0.273	0.265	0.258	0.251	0.244	0.237	0.231	0.225	0.218	0.212	0.207	0.201	0.195	0.190	0.185	0.180	0.175	0.170
21	0.288	0.280	0.273	0.265	0.258	0.251	0.244	0.237	0.231	0.225	0.218	0.212	0.207	0.201	0.195	0.190	0.185	0.180	0.175
22	0.296	0.288	0.280	0.273	0.265	0.258	0.251	0.244	0.237	0.231	0.225	0.218	0.212	0.207	0.201	0.195	0.190	0.185	0.180
23	0.305	0.296	0.288	0.280	0.273	0.265	0.258	0.251	0.244	0.237	0.231	0.225	0.218	0.212	0.207	0.201	0.195	0.190	0.185
24	0.313	0.305	0.296	0.288	0.280	0.273	0.265	0.258	0.251	0.244	0.237	0.231	0.225	0.218	0.212	0.207	0.201	0.195	0.190
25	0.322	0.313	0.305	0.296	0.288	0.280	0.273	0.265	0.258	0.251	0.244	0.237	0.231	0.225	0.218	0.212	0.207	0.201	0.195
26	0.331	0.322	0.313	0.305	0.296	0.288	0.280	0.273	0.265	0.258	0.251	0.244	0.237	0.231	0.225	0.218	0.212	0.207	0.201
27	0.341	0.331	0.322	0.313	0.305	0.296	0.288	0.280	0.273	0.265	0.258	0.251	0.244	0.237	0.231	0.225	0.218	0.212	0.207
28	0.350	0.341	0.331	0.322	0.313	0.305	0.296	0.288	0.280	0.273	0.265	0.258	0.251	0.244	0.237	0.231	0.225	0.218	0.212
29	0.360	0.350	0.341	0.331	0.322	0.313	0.305	0.296	0.288	0.280	0.273	0.265	0.258	0.251	0.244	0.237	0.231	0.225	0.218
30	0.370	0.360	0.350	0.341	0.331	0.322	0.313	0.305	0.296	0.288	0.280	0.273	0.265	0.258	0.251	0.244	0.237	0.231	0.225
31	0.381	0.370	0.360	0.350	0.341	0.331	0.322	0.313	0.305	0.296	0.288	0.280	0.273	0.265	0.258	0.251	0.244	0.237	0.231
32	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322	0.313	0.305	0.296	0.288	0.280	0.273	0.265	0.258	0.251	0.244	0.237
33	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322	0.313	0.305	0.296	0.288	0.280	0.273	0.265	0.258	0.251	0.244
34	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322	0.313	0.305	0.296	0.288	0.280	0.273	0.265	0.258	0.251
35	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322	0.313	0.305	0.296	0.288	0.280	0.273	0.265	0.258
36	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322	0.313	0.305	0.296	0.288	0.280	0.273	0.265
37	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322	0.313	0.305	0.296	0.288	0.280	0.273
38	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322	0.313	0.305	0.296	0.288	0.280
39	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322	0.313	0.305	0.296	0.288
40	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322	0.313	0.305	0.296
41	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322	0.313	0.305
42	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322	0.313
43	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331	0.322
44	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341	0.331
45	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350	0.341
46	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360	0.350
47	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370	0.360
48	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381	0.370
49	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391	0.381
50	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403	0.391
51	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414	0.403
52	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426	0.414
53	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438	0.426
54	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450	0.438
55	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463	0.450
56	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476	0.463
57	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489	0.476
58	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503	0.489
59	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517	0.503
60	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531	0.517
61	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546	0.531
62	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562	0.546
63	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578	0.562
64	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594	0.578
65	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611	0.594
66	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628	0.611
67	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646	0.628
68	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664	0.646
69	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683	0.664
70	1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702	0.683
71		1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722	0.702
72			1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742	0.722
73				1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763	0.742
74					1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784	0.763
75						1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806	0.784
76							1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829	0.806
77								1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853	0.829
78									1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875	0.853
79										1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895	0.875
80											1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917	0.895
81												1.000	1.000	1.000	1.000	0.984	0.961	0.939	0.917
82													1.000	1.000	1.000	1.000	0.984	0.961	0.939
83														1.000	1.000	1.000	1.000	0.984	0.961
84															1.000	1.000	1.000	1.000	0.984
85																1.000	1.000	1.000	1.000
86																	1.000	1.000	1.000
87																		1.000	1.000
88																			1.000

Factors used for the valuation of pensions payable in retirement (males)

Retirement ages 50–69

Age at date of calculation	Assumed retirement age																			
	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69
20	26.803	25.278	23.828	22.451	21.142	19.900	18.720	17.600	16.537	15.529	14.572	13.664	12.803	11.987	11.214	10.481	9.787	9.131	8.509	7.922
21	27.454	25.890	24.404	22.992	21.651	20.378	19.169	18.022	16.933	15.900	14.919	13.989	13.107	12.271	11.479	10.728	10.018	9.345	8.709	8.108
22	28.120	26.517	24.993	23.546	22.172	20.867	19.629	18.453	17.337	16.279	15.274	14.322	13.418	12.562	11.750	10.981	10.253	9.564	8.913	8.297
23	28.803	27.159	25.597	24.114	22.705	21.368	20.099	18.894	17.751	16.666	15.637	14.661	13.736	12.859	12.027	11.240	10.494	9.788	9.121	8.490
24	29.503	27.817	26.216	24.695	23.251	21.881	20.580	19.345	18.174	17.063	16.009	15.009	14.061	13.162	12.310	11.504	10.740	10.017	9.334	8.688
25	30.221	28.492	26.850	25.291	23.810	22.405	21.072	19.807	18.607	17.468	16.389	15.364	14.393	13.472	12.600	11.774	10.992	10.251	9.551	8.890
26	30.956	29.183	27.499	25.901	24.383	22.943	21.576	20.279	19.050	17.883	16.777	15.728	14.733	13.790	12.896	12.050	11.249	10.491	9.774	9.096
27	31.710	29.892	28.165	26.526	24.970	23.493	22.092	20.763	19.503	18.308	17.174	16.099	15.080	14.114	13.199	12.332	11.511	10.735	10.001	9.307
28	32.484	30.619	28.848	27.166	25.571	24.057	22.621	21.258	19.967	18.742	17.580	16.479	15.435	14.446	13.508	12.620	11.780	10.985	10.233	9.523
29	33.277	31.364	29.547	27.823	26.187	24.634	23.162	21.766	20.442	19.186	17.996	16.868	15.798	14.785	13.825	12.915	12.054	11.240	10.470	9.743
30	34.091	32.128	30.265	28.497	26.819	25.227	23.717	22.285	20.928	19.641	18.422	17.265	16.170	15.131	14.148	13.216	12.335	11.501	10.713	9.968
31	34.925	32.912	31.001	29.187	27.466	25.834	24.285	22.818	21.426	20.107	18.857	17.672	16.550	15.486	14.478	13.524	12.622	11.768	10.960	10.197
32	35.781	33.716	31.756	29.895	28.130	26.456	24.868	23.363	21.937	20.585	19.303	18.089	16.938	15.848	14.816	13.839	12.915	12.040	11.213	10.432
33	36.658	34.540	32.530	30.622	28.811	27.094	25.466	23.923	22.460	21.074	19.760	18.516	17.336	16.220	15.162	14.161	13.214	12.318	11.472	10.672
34	37.558	35.386	33.324	31.367	29.510	27.749	26.079	24.496	22.996	21.575	20.228	18.952	17.744	16.599	15.516	14.490	13.520	12.603	11.736	10.917
35	38.480	36.253	34.138	32.130	30.226	28.420	26.707	25.084	23.546	22.089	20.708	19.400	18.161	16.988	15.878	14.827	13.833	12.894	12.006	11.167
36	39.425	37.141	34.972	32.914	30.960	29.108	27.352	25.687	24.110	22.615	21.200	19.859	18.589	17.386	16.249	15.172	14.154	13.191	12.282	11.423
37	40.394	38.052	35.828	33.717	31.714	29.814	28.012	26.305	24.688	23.155	21.704	20.329	19.027	17.795	16.628	15.525	14.482	13.495	12.564	11.685
38	41.386	38.985	36.704	34.540	32.486	30.537	28.690	26.939	25.281	23.709	22.221	20.811	19.476	18.213	17.017	15.886	14.817	13.807	12.853	11.952
39	42.402	39.941	37.603	35.383	33.277	31.279	29.385	27.590	25.889	24.277	22.751	21.305	19.937	18.641	17.416	16.257	15.161	14.126	13.148	12.225
40	43.442	40.920	38.523	36.248	34.088	32.040	30.097	28.256	26.512	24.860	23.294	21.812	20.409	19.081	17.824	16.636	15.513	14.452	13.450	12.505
41	44.412	41.922	39.466	37.134	34.920	32.820	30.828	28.940	27.151	25.457	23.852	22.332	20.893	19.531	18.243	17.025	15.874	14.786	13.760	12.792
42	45.306	42.857	40.432	38.041	35.772	33.619	31.577	29.641	27.807	26.069	24.424	22.865	21.389	19.993	18.672	17.424	16.244	15.129	14.077	13.085
43	46.217	43.718	41.333	38.972	36.646	34.438	32.345	30.360	28.480	26.698	25.010	23.412	21.899	20.467	19.113	17.832	16.623	15.480	14.402	13.385
44	47.145	44.597	42.163	39.839	37.541	35.279	33.133	31.098	29.170	27.343	25.612	23.973	22.421	20.953	19.565	18.252	17.012	15.840	14.735	13.693
45	48.092	45.492	43.009	40.639	38.376	36.140	33.941	31.855	29.878	28.005	26.230	24.549	22.958	21.452	20.028	18.682	17.410	16.210	15.077	14.009
46	49.057	46.406	43.873	41.454	39.146	36.944	34.769	32.631	30.604	28.684	26.864	25.141	23.509	21.965	20.504	19.124	17.820	16.589	15.427	14.332
47	49.687	47.336	44.753	42.286	39.931	37.684	35.541	33.427	31.350	29.381	27.515	25.748	24.075	22.491	20.993	19.578	18.240	16.978	15.787	14.664
48	49.504	47.944	45.649	43.133	40.731	38.439	36.253	34.169	32.114	30.096	28.183	26.372	24.656	23.032	21.496	20.044	18.672	17.378	16.156	15.005
49	49.319	47.765	46.234	43.997	41.547	39.209	36.979	34.853	32.826	30.829	28.869	27.011	25.252	23.587	22.012	20.523	19.116	17.788	16.536	15.356
50	49.131	47.585	46.061	44.559	42.377	39.993	37.719	35.550	33.482	31.512	29.571	27.667	25.864	24.157	22.542	21.015	19.572	18.211	16.926	15.716
51		47.402	45.885	44.390	42.917	40.791	38.472	36.260	34.151	32.141	30.225	28.339	26.491	24.741	23.085	21.520	20.041	18.644	17.327	16.086
52			45.706	44.218	42.752	41.308	39.237	36.981	34.831	32.781	30.827	28.965	27.133	25.340	23.643	22.038	20.521	19.089	17.738	16.465
53				44.042	42.584	41.147	39.732	37.714	35.521	33.431	31.438	29.539	27.730	25.952	24.213	22.568	21.013	19.545	18.160	16.855
54					42.411	40.981	39.573	38.187	36.223	34.091	32.060	30.123	28.278	26.521	24.796	23.110	21.517	20.012	18.593	17.255
55						40.811	39.411	38.031	36.674	34.761	32.690	30.715	28.834	27.042	25.337	23.665	22.032	20.490	19.035	17.663
56							39.243	37.871	36.520	35.190	33.329	31.316	29.398	27.571	25.832	24.178	22.558	20.978	19.487	18.082
57								37.706	36.362	35.039	33.736	31.924	29.969	28.107	26.334	24.648	23.045	21.476	19.949	18.509
58									36.200	34.884	33.587	32.311	30.548	28.650	26.843	25.123	23.489	21.936	20.419	18.944
59										34.724	33.434	32.164	30.913	29.199	27.357	25.605	23.939	22.356	20.854	19.388
60											33.277	32.014	30.769	29.545	27.878	26.093	24.395	22.781	21.250	19.799
61												31.859	30.622	29.404	28.205	26.586	24.856	23.212	21.652	20.172
62													30.471	29.259	28.067	26.894	25.323	23.648	22.058	20.550
63														29.111	27.926	26.760	25.614	24.090	22.470	20.934
64															27.782	26.622	25.482	24.363	22.887	21.322
65																26.481	25.348	24.236	23.144	21.715
66																	25.211	24.105	23.020	21.957
67																		23.972	22.893	21.836
68																			22.762	21.712
69																				21.584
70																				
71																				
72																				
73																				
74																				
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83																				
84																				
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Retirement ages 70–88

Age at date		Assumed retirement age																	
of calculation	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88
20	7.368	6.844	6.350	5.883	5.444	5.029	4.638	4.270	3.924	3.598	3.292	3.004	2.734	2.482	2.245	2.024	1.817	1.627	1.451
21	7.539	7.003	6.497	6.019	5.569	5.145	4.745	4.368	4.013	3.680	3.366	3.072	2.796	2.538	2.296	2.069	1.858	1.663	1.483
22	7.715	7.166	6.647	6.159	5.697	5.263	4.853	4.468	4.105	3.763	3.442	3.141	2.859	2.595	2.347	2.116	1.899	1.700	1.516
23	7.894	7.332	6.801	6.301	5.829	5.384	4.964	4.569	4.198	3.848	3.520	3.212	2.923	2.653	2.400	2.163	1.941	1.737	1.550
24	8.078	7.502	6.958	6.446	5.962	5.507	5.078	4.674	4.293	3.936	3.600	3.284	2.989	2.712	2.453	2.211	1.985	1.776	1.584
25	8.265	7.675	7.119	6.594	6.099	5.633	5.194	4.780	4.391	4.024	3.681	3.358	3.056	2.773	2.508	2.260	2.029	1.815	1.619
26	8.456	7.852	7.283	6.745	6.239	5.761	5.312	4.888	4.490	4.115	3.763	3.433	3.124	2.834	2.563	2.310	2.073	1.855	1.655
27	8.652	8.034	7.450	6.900	6.382	5.893	5.433	4.999	4.591	4.208	3.848	3.510	3.194	2.897	2.620	2.361	2.119	1.896	1.691
28	8.852	8.219	7.621	7.058	6.527	6.027	5.556	5.112	4.695	4.303	3.934	3.589	3.265	2.962	2.678	2.413	2.166	1.938	1.728
29	9.056	8.408	7.796	7.220	6.676	6.164	5.682	5.228	4.801	4.399	4.022	3.669	3.338	3.027	2.738	2.467	2.214	1.980	1.766
30	9.264	8.601	7.975	7.384	6.828	6.304	5.810	5.346	4.909	4.498	4.112	3.750	3.412	3.095	2.798	2.521	2.262	2.024	1.805
31	9.477	8.798	8.157	7.553	6.983	6.447	5.942	5.466	5.019	4.598	4.204	3.834	3.487	3.163	2.860	2.576	2.312	2.068	1.844
32	9.695	8.999	8.343	7.725	7.142	6.593	6.076	5.589	5.131	4.701	4.297	3.919	3.564	3.233	2.923	2.633	2.363	2.113	1.884
33	9.917	9.205	8.533	7.900	7.304	6.742	6.212	5.714	5.246	4.806	4.393	4.006	3.643	3.304	2.987	2.691	2.414	2.159	1.926
34	10.144	9.415	8.728	8.079	7.469	6.894	6.352	5.843	5.363	4.913	4.490	4.094	3.723	3.376	3.052	2.749	2.467	2.207	1.967
35	10.376	9.630	8.926	8.263	7.638	7.049	6.495	5.973	5.483	5.022	4.590	4.185	3.805	3.451	3.119	2.809	2.521	2.255	2.010
36	10.613	9.849	9.128	8.449	7.810	7.207	6.640	6.107	5.605	5.134	4.691	4.277	3.889	3.526	3.187	2.871	2.576	2.304	2.054
37	10.855	10.073	9.335	8.640	7.986	7.369	6.789	6.243	5.730	5.247	4.795	4.371	3.974	3.603	3.257	2.933	2.631	2.354	2.098
38	11.102	10.301	9.546	8.835	8.165	7.534	6.940	6.382	5.857	5.363	4.901	4.467	4.061	3.682	3.328	2.997	2.689	2.404	2.144
39	11.355	10.535	9.762	9.034	8.348	7.703	7.095	6.524	5.986	5.482	5.008	4.565	4.150	3.762	3.400	3.062	2.747	2.456	2.190
40	11.614	10.774	9.983	9.237	8.535	7.875	7.253	6.668	6.119	5.602	5.118	4.665	4.241	3.844	3.474	3.128	2.806	2.509	2.237
41	11.879	11.018	10.208	9.445	8.727	8.050	7.414	6.816	6.254	5.726	5.231	4.767	4.333	3.927	3.549	3.196	2.867	2.564	2.285
42	12.149	11.268	10.438	9.657	8.922	8.230	7.579	6.967	6.391	5.851	5.345	4.871	4.427	4.012	3.625	3.265	2.928	2.619	2.334
43	12.427	11.524	10.674	9.874	9.121	8.413	7.747	7.120	6.532	5.980	5.462	4.977	4.523	4.099	3.704	3.335	2.991	2.675	2.385
44	12.711	11.786	10.915	10.096	9.325	8.600	7.918	7.277	6.675	6.110	5.581	5.085	4.621	4.188	3.783	3.407	3.055	2.732	2.436
45	13.002	12.055	11.163	10.323	9.534	8.791	8.094	7.438	6.822	6.244	5.702	5.195	4.721	4.278	3.865	3.480	3.121	2.791	2.488
46	13.301	12.330	11.416	10.556	9.748	8.987	8.273	7.601	6.971	6.380	5.826	5.307	4.823	4.370	3.948	3.554	3.188	2.850	2.541
47	13.607	12.612	11.675	10.795	9.966	9.188	8.456	7.769	7.124	6.519	5.952	5.422	4.926	4.464	4.032	3.630	3.256	2.911	2.595
48	13.921	12.901	11.942	11.039	10.191	9.393	8.644	7.940	7.280	6.661	6.081	5.539	5.032	4.559	4.118	3.707	3.325	2.973	2.650
49	14.244	13.198	12.215	11.290	10.420	9.604	8.836	8.116	7.440	6.806	6.213	5.658	5.140	4.657	4.206	3.786	3.396	3.036	2.706
50	14.576	13.504	12.495	11.547	10.656	9.819	9.033	8.296	7.604	6.955	6.348	5.780	5.250	4.756	4.295	3.867	3.468	3.100	2.764
51	14.917	13.817	12.784	11.812	10.899	10.041	9.236	8.480	7.771	7.107	6.486	5.905	5.363	4.858	4.387	3.949	3.541	3.166	2.822
52	15.267	14.140	13.080	12.083	11.147	10.269	9.443	8.669	7.943	7.264	6.627	6.033	5.478	4.961	4.480	4.032	3.616	3.233	2.882
53	15.626	14.470	13.384	12.362	11.403	10.502	9.656	8.863	8.120	7.424	6.772	6.164	5.597	5.068	4.575	4.118	3.692	3.301	2.942
54	15.995	14.810	13.695	12.648	11.665	10.742	9.875	9.062	8.301	7.588	6.921	6.298	5.717	5.176	4.673	4.205	3.770	3.371	3.004
55	16.372	15.157	14.015	12.941	11.933	10.987	10.099	9.267	8.486	7.756	7.073	6.436	5.841	5.288	4.773	4.295	3.850	3.442	3.068
56	16.758	15.513	14.342	13.242	12.209	11.239	10.329	9.476	8.676	7.928	7.229	6.576	5.968	5.402	4.875	4.386	3.932	3.515	3.132
57	17.152	15.876	14.676	13.549	12.490	11.496	10.564	9.690	8.871	8.104	7.388	6.720	6.098	5.518	4.980	4.480	4.015	3.589	3.198
58	17.555	16.247	15.018	13.863	12.778	11.759	10.804	9.908	9.070	8.285	7.552	6.867	6.230	5.637	5.087	4.575	4.101	3.665	3.266
59	17.965	16.626	15.367	14.183	13.072	12.028	11.050	10.132	9.273	8.469	7.718	7.018	6.366	5.759	5.196	4.673	4.188	3.743	3.335
60	18.384	17.013	15.723	14.511	13.372	12.303	11.301	10.361	9.481	8.658	7.889	7.172	6.504	5.884	5.307	4.773	4.277	3.822	3.405
61	18.771	17.407	16.086	14.845	13.679	12.584	11.557	10.595	9.694	8.851	8.063	7.329	6.646	6.011	5.421	4.875	4.368	3.903	3.477
62	19.122	17.770	16.457	15.186	13.992	12.871	11.820	10.834	9.911	9.048	8.242	7.491	6.791	6.141	5.538	4.979	4.461	3.986	3.551
63	19.478	18.101	16.798	15.533	14.311	13.164	12.087	11.078	10.133	9.250	8.425	7.655	6.940	6.275	5.658	5.086	4.557	4.071	3.626
64	19.840	18.436	17.109	15.854	14.637	13.463	12.361	11.328	10.361	9.456	8.611	7.824	7.092	6.411	5.780	5.195	4.654	4.158	3.703
65	20.205	18.776	17.423	16.145	14.938	13.768	12.640	11.583	10.593	9.667	8.803	7.997	7.247	6.551	5.906	5.307	4.754	4.247	3.782
66	20.575	19.119	17.742	16.440	15.210	14.049	12.925	11.843	10.830	9.883	8.998	8.174	7.407	6.694	6.034	5.422	4.857	4.338	3.863
67	20.801	19.466	18.064	16.738	15.486	14.303	13.187	12.108	11.072	10.102	9.197	8.354	7.569	6.841	6.165	5.540	4.962	4.431	3.946
68	20.683	19.677	18.389	17.039	15.764	14.560	13.423	12.351	11.318	10.326	9.400	8.538	7.735	6.990	6.299	5.660	5.069	4.527	4.031
69	20.561	19.562	18.584	17.342	16.044	14.818	13.661	12.570	11.542	10.553	9.606	8.724	7.904	7.142	6.436	5.782	5.178	4.624	4.118
70	20.436	19.442	18.471	17.522	16.326	15.078	13.900	12.789	11.743	10.759	9.815	8.913	8.074	7.296	6.574	5.906	5.289	4.723	4.206
71		19.319	18.354	17.411	16.490	15.338	14.139	13.009	11.945	10.943	10.003	9.103	8.246	7.451	6.714	6.032	5.402	4.824	4.295
72			18.232	17.295	16.381	15.488	14.379	13.229	12.146	11.127	10.171	9.275	8.419	7.607	6.854	6.158	5.515	4.925	4.385
73				17.176	16.267	15.380	14.515	13.448	12.347	11.310	10.338	9.426	8.575	7.764	6.995	6.285	5.629	5.027	4.476
74					16.150	15.269	14.409	13.571	12.547	11.493	10.504	9.577	8.711	7.904	7.137	6.412	5.744	5.130	4.568
75						15.155	14.301	13.468	12.658	11.676	10.670	9.728	8.848	8.027	7.264	6.540	5.858	5.233	4.660
76							14.190	13.364	12.559	11.776	10.837	9.879	8.984	8.150	7.375	6.655	5.974	5.336	4.753
77								13.258	12.458	11.681	10.927	10.030	9.121	8.273	7.486	6.755	6.078	5.441	4.846
78									12.358	11.586	10.837	10.112	9.259	8.398	7.597	6.856	6.169	5.535	4.941
79										11.491	10.747	10.027	9.332	8.523	7.710	6.957	6.260	5.618	5.027
80											10.657	9.942	9.252	8.589	7.824	7.059	6.352	5.701	5.102
81												9.858	9.173	8.514	7.883	7.162	6.445	5.784	5.177
82													9.094	8.439	7.812	7.214	6.537	5.867	5.253
83														8.364	7.741	7.147	6.583	5.950	5.327
84															7.669	7.079	6.519	5.989	5.400
85																7.011	6.454	5.929	5.434
86																	6.390	5.867	5.376
87																		5.806	5.318
88																			5.260

Factors used for the valuation of pensions payable in retirement (females)

Retirement ages 50–69

Age at date of calculation	Assumed retirement age																			
	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69
20	28.705	27.106	25.586	24.141	22.766	21.458	20.215	19.032	17.908	16.840	15.823	14.857	13.938	13.065	12.236	11.449	10.703	9.995	9.324	8.689
21	29.410	27.772	26.214	24.732	23.323	21.983	20.709	19.498	18.346	17.250	16.209	15.218	14.277	13.382	12.533	11.726	10.961	10.236	9.549	8.898
22	30.132	28.453	26.856	25.338	23.894	22.521	21.215	19.973	18.793	17.671	16.603	15.588	14.623	13.707	12.836	12.010	11.226	10.482	9.778	9.111
23	30.871	29.151	27.514	25.958	24.478	23.071	21.733	20.461	19.251	18.101	17.007	15.967	14.978	14.039	13.146	12.300	11.496	10.735	10.013	9.330
24	31.628	29.864	28.187	26.593	25.076	23.634	22.263	20.959	19.719	18.541	17.420	16.354	15.341	14.378	13.464	12.596	11.773	10.992	10.253	9.553
25	32.403	30.595	28.877	27.242	25.688	24.210	22.805	21.469	20.199	18.991	17.843	16.751	15.712	14.726	13.789	12.900	12.056	11.256	10.499	9.781
26	33.196	31.344	29.582	27.907	26.314	24.800	23.360	21.991	20.690	19.452	18.275	17.156	16.092	15.081	14.121	13.210	12.346	11.526	10.750	10.015
27	34.009	32.110	30.305	28.588	26.956	25.404	23.928	22.526	21.192	19.924	18.718	17.571	16.481	15.445	14.461	13.528	12.642	11.802	11.007	10.254
28	34.841	32.895	31.044	29.285	27.612	26.022	24.510	23.072	21.706	20.406	19.171	17.996	16.879	15.817	14.809	13.852	12.945	12.085	11.270	10.498
29	35.693	33.698	31.802	29.999	28.284	26.654	25.105	23.632	22.231	20.900	19.634	18.430	17.285	16.198	15.165	14.185	13.255	12.373	11.538	10.748
30	36.565	34.521	32.577	30.729	28.972	27.302	25.714	24.205	22.770	21.405	20.108	18.874	17.702	16.587	15.529	14.525	13.572	12.669	11.813	11.003
31	37.458	35.363	33.371	31.477	29.676	27.965	26.338	24.791	23.320	21.922	20.593	19.329	18.127	16.986	15.901	14.872	13.896	12.971	12.094	11.264
32	38.373	36.226	34.184	32.243	30.398	28.643	26.976	25.391	23.884	22.451	21.089	19.794	18.563	17.393	16.282	15.228	14.228	13.280	12.382	11.531
33	39.310	37.109	35.017	33.027	31.136	29.338	27.629	26.005	24.461	22.993	21.597	20.270	19.009	17.810	16.672	15.591	14.567	13.595	12.675	11.805
34	40.269	38.014	35.869	33.830	31.892	30.050	28.298	26.634	25.051	23.547	22.117	20.757	19.465	18.236	17.070	15.963	14.913	13.918	12.976	12.084
35	41.251	38.940	36.742	34.652	32.666	30.778	28.983	27.277	25.656	24.114	22.649	21.256	19.931	18.673	17.478	16.344	15.268	14.249	13.283	12.369
36	42.256	39.888	37.636	35.494	33.459	31.524	29.684	27.936	26.275	24.695	23.193	21.766	20.408	19.119	17.895	16.733	15.631	14.586	13.597	12.661
37	43.285	40.858	38.550	36.356	34.270	32.287	30.402	28.611	26.908	25.289	23.751	22.288	20.897	19.576	18.321	17.131	16.002	14.932	13.918	12.959
38	44.339	41.851	39.486	37.238	35.100	33.069	31.137	29.301	27.557	25.898	24.321	22.822	21.397	20.043	18.758	17.538	16.381	15.285	14.247	13.264
39	45.418	42.868	40.445	38.141	35.951	33.869	31.890	30.008	28.220	26.521	24.905	23.368	21.908	20.521	19.204	17.954	16.769	15.646	14.583	13.576
40	46.522	43.910	41.426	39.065	36.821	34.687	32.660	30.732	28.900	27.158	25.502	23.928	22.432	21.010	19.661	18.380	17.166	16.016	14.926	13.895
41	47.552	44.976	42.431	40.011	37.711	35.525	33.448	31.473	29.595	27.811	26.114	24.501	22.968	21.511	20.128	18.816	17.572	16.393	15.277	14.221
42	48.499	45.969	43.460	40.980	38.623	36.383	34.254	32.231	30.307	28.479	26.740	25.087	23.516	22.024	20.607	19.262	17.988	16.780	15.636	14.554
43	49.465	46.883	44.418	41.972	39.557	37.261	35.080	33.007	31.036	29.162	27.381	25.687	24.078	22.548	21.096	19.719	18.413	17.175	16.004	14.895
44	50.449	47.815	45.299	42.895	40.513	38.161	35.925	33.801	31.782	29.862	28.037	26.302	24.652	23.085	21.597	20.186	18.847	17.580	16.379	15.244
45	51.453	48.765	46.197	43.745	41.402	39.081	36.790	34.614	32.545	30.578	28.708	26.930	25.240	23.634	22.110	20.664	19.292	17.993	16.764	15.600
46	52.477	49.733	47.113	44.610	42.220	39.937	37.676	35.446	33.326	31.310	29.395	27.573	25.842	24.196	22.635	21.153	19.748	18.417	17.157	15.965
47	53.143	50.720	48.047	45.493	43.054	40.724	38.500	36.297	34.125	32.060	30.097	28.231	26.457	24.772	23.171	21.653	20.214	18.850	17.559	16.338
48	52.941	51.362	48.998	46.392	43.903	41.526	39.256	37.089	34.943	32.827	30.816	28.904	27.086	25.360	23.720	22.165	20.690	19.293	17.971	16.720
49	52.739	51.164	49.615	47.307	44.768	42.343	40.027	37.815	35.703	33.612	31.551	29.592	27.730	25.961	24.282	22.688	21.178	19.746	18.392	17.110
50	52.538	50.966	49.420	47.900	45.649	43.175	40.812	38.555	36.400	34.340	32.303	30.296	28.388	26.576	24.856	23.224	21.676	20.210	18.822	17.509
51		50.768	49.226	47.710	46.218	44.022	41.611	39.309	37.109	35.009	33.001	31.016	29.061	27.205	25.443	23.771	22.185	20.684	19.262	17.917
52			49.032	47.519	46.031	44.567	42.424	40.075	37.832	35.689	33.641	31.683	29.749	27.848	26.042	24.330	22.706	21.168	19.712	18.334
53				47.328	45.843	44.383	42.947	40.855	38.567	36.380	34.291	32.295	30.387	28.504	26.655	24.901	23.238	21.662	20.171	18.761
54					45.656	44.199	42.766	41.355	39.314	37.084	34.953	32.916	30.971	29.113	27.281	25.484	23.781	22.167	20.640	19.196
55						44.015	42.585	41.178	39.792	37.799	35.626	33.549	31.564	29.669	27.861	26.080	24.336	22.683	21.119	19.640
56							42.404	41.000	39.618	38.256	36.310	34.191	32.167	30.235	28.390	26.632	24.902	23.210	21.608	20.093
57								40.823	39.444	38.085	36.745	34.845	32.780	30.809	28.929	27.135	25.426	23.748	22.107	20.557
58									39.270	37.914	36.578	35.259	33.404	31.394	29.476	27.647	25.904	24.245	22.617	21.029
59										37.744	36.411	35.095	33.798	31.988	30.032	28.167	26.390	24.698	23.089	21.512
60											36.244	34.932	33.638	32.362	30.597	28.696	26.884	25.159	23.518	21.958
61												34.769	33.479	32.206	30.952	29.233	27.386	25.627	23.954	22.364
62													33.320	32.051	30.801	29.570	27.896	26.103	24.398	22.777
63														31.896	30.649	29.422	28.215	26.587	24.848	23.196
64															30.498	29.274	28.071	26.888	25.306	23.622
65																29.127	27.927	26.748	25.590	24.055
66																	27.783	26.607	25.453	24.321
67																		26.467	25.316	24.188
68																			25.180	24.054
69																				23.920
70																				
71																				
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83																				
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85																				
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Retirement ages 70–88

Age at date of calculation		Assumed retirement age																	
	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88
20	8.088	7.520	6.983	6.475	5.995	5.543	5.116	4.714	4.335	3.978	3.642	3.327	3.031	2.754	2.494	2.252	2.025	1.815	1.621
21	8.282	7.700	7.149	6.629	6.138	5.674	5.237	4.825	4.436	4.071	3.727	3.405	3.102	2.818	2.552	2.303	2.071	1.856	1.658
22	8.480	7.884	7.319	6.787	6.283	5.808	5.360	4.938	4.540	4.166	3.814	3.484	3.173	2.883	2.611	2.356	2.118	1.899	1.696
23	8.683	8.072	7.494	6.948	6.432	5.945	5.487	5.054	4.647	4.263	3.903	3.564	3.247	2.949	2.671	2.410	2.167	1.942	1.735
24	8.890	8.264	7.672	7.112	6.584	6.086	5.616	5.173	4.755	4.363	3.994	3.647	3.322	3.017	2.732	2.465	2.216	1.986	1.774
25	9.103	8.461	7.854	7.281	6.740	6.229	5.748	5.294	4.866	4.464	4.086	3.731	3.398	3.086	2.795	2.522	2.267	2.031	1.814
26	9.319	8.662	8.040	7.453	6.899	6.376	5.882	5.418	4.980	4.568	4.181	3.818	3.477	3.157	2.858	2.579	2.318	2.077	1.855
27	9.541	8.867	8.231	7.629	7.061	6.525	6.020	5.544	5.096	4.674	4.278	3.906	3.557	3.230	2.924	2.638	2.371	2.124	1.897
28	9.768	9.078	8.425	7.809	7.227	6.679	6.161	5.673	5.214	4.782	4.377	3.996	3.638	3.304	2.990	2.698	2.425	2.172	1.940
29	10.000	9.293	8.624	7.993	7.397	6.835	6.305	5.806	5.335	4.893	4.478	4.087	3.722	3.379	3.059	2.759	2.479	2.221	1.984
30	10.237	9.513	8.828	8.181	7.571	6.995	6.452	5.941	5.459	5.006	4.581	4.181	3.807	3.456	3.128	2.822	2.536	2.271	2.028
31	10.479	9.737	9.036	8.374	7.748	7.159	6.603	6.079	5.586	5.122	4.686	4.277	3.894	3.535	3.199	2.886	2.593	2.323	2.074
32	10.727	9.967	9.249	8.570	7.930	7.326	6.756	6.220	5.715	5.240	4.794	4.375	3.983	3.615	3.272	2.951	2.651	2.375	2.120
33	10.981	10.202	9.466	8.771	8.115	7.496	6.913	6.364	5.847	5.361	4.904	4.475	4.074	3.697	3.346	3.017	2.711	2.428	2.168
34	11.240	10.442	9.688	8.976	8.305	7.671	7.074	6.511	5.982	5.484	5.016	4.577	4.166	3.781	3.421	3.085	2.772	2.483	2.217
35	11.505	10.687	9.915	9.186	8.498	7.849	7.238	6.662	6.119	5.610	5.131	4.682	4.261	3.867	3.499	3.155	2.834	2.538	2.266
36	11.775	10.938	10.147	9.401	8.696	8.031	7.405	6.815	6.260	5.738	5.248	4.788	4.358	3.954	3.578	3.226	2.898	2.595	2.317
37	12.052	11.195	10.385	9.620	8.898	8.218	7.576	6.972	6.404	5.870	5.368	4.897	4.456	4.044	3.658	3.298	2.963	2.653	2.368
38	12.335	11.457	10.627	9.844	9.105	8.408	7.751	7.133	6.551	6.004	5.490	5.008	4.557	4.135	3.740	3.372	3.029	2.712	2.421
39	12.624	11.725	10.875	10.073	9.316	8.602	7.930	7.296	6.701	6.141	5.615	5.122	4.660	4.228	3.824	3.447	3.096	2.772	2.475
40	12.920	11.999	11.128	10.307	9.532	8.801	8.112	7.464	6.854	6.280	5.742	5.238	4.765	4.323	3.910	3.524	3.165	2.834	2.530
41	13.222	12.279	11.387	10.546	9.752	9.004	8.299	7.635	7.010	6.423	5.872	5.356	4.872	4.420	3.997	3.603	3.236	2.897	2.586
42	13.531	12.565	11.652	10.790	9.977	9.211	8.489	7.809	7.170	6.569	6.005	5.477	4.982	4.519	4.086	3.683	3.308	2.961	2.643
43	13.847	12.857	11.922	11.040	10.207	9.423	8.683	7.988	7.333	6.718	6.141	5.600	5.093	4.620	4.177	3.765	3.381	3.027	2.701
44	14.170	13.156	12.199	11.295	10.442	9.639	8.882	8.170	7.500	6.870	6.279	5.726	5.207	4.723	4.270	3.849	3.456	3.094	2.761
45	14.501	13.462	12.481	11.556	10.683	9.860	9.085	8.356	7.670	7.025	6.421	5.854	5.324	4.828	4.365	3.934	3.532	3.162	2.822
46	14.839	13.775	12.770	11.822	10.928	10.086	9.292	8.546	7.844	7.184	6.565	5.985	5.443	4.936	4.462	4.021	3.610	3.231	2.884
47	15.184	14.094	13.065	12.094	11.179	10.316	9.504	8.740	8.021	7.346	6.713	6.119	5.564	5.045	4.561	4.110	3.690	3.303	2.947
48	15.538	14.421	13.367	12.373	11.435	10.552	9.720	8.938	8.202	7.511	6.863	6.256	5.688	5.157	4.662	4.200	3.771	3.375	3.012
49	15.899	14.755	13.676	12.658	11.698	10.793	9.941	9.140	8.387	7.680	7.017	6.395	5.814	5.271	4.765	4.293	3.854	3.449	3.078
50	16.269	15.097	13.992	12.949	11.965	11.039	10.167	9.347	8.576	7.852	7.173	6.538	5.943	5.388	4.870	4.387	3.938	3.525	3.145
51	16.647	15.447	14.314	13.246	12.239	11.291	10.398	9.558	8.769	8.028	7.334	6.683	6.075	5.507	4.977	4.483	4.024	3.602	3.213
52	17.033	15.804	14.644	13.550	12.519	11.548	10.634	9.774	8.966	8.208	7.497	6.831	6.209	5.628	5.086	4.581	4.112	3.680	3.283
53	17.428	16.169	14.981	13.861	12.805	11.810	10.875	9.994	9.168	8.391	7.664	6.983	6.346	5.752	5.197	4.681	4.202	3.760	3.355
54	17.831	16.542	15.325	14.178	13.097	12.079	11.120	10.220	9.373	8.579	7.834	7.137	6.486	5.878	5.311	4.784	4.293	3.842	3.428
55	18.242	16.922	15.677	14.502	13.395	12.353	11.372	10.449	9.583	8.770	8.008	7.295	6.629	6.007	5.427	4.888	4.387	3.925	3.502
56	18.662	17.311	16.036	14.833	13.700	12.632	11.628	10.684	9.797	8.965	8.185	7.456	6.774	6.138	5.545	4.994	4.482	4.011	3.578
57	19.091	17.707	16.402	15.171	14.010	12.918	11.890	10.923	10.016	9.164	8.366	7.620	6.923	6.272	5.666	5.103	4.579	4.097	3.655
58	19.529	18.112	16.776	15.515	14.328	13.209	12.157	11.168	10.239	9.367	8.551	7.787	7.074	6.409	5.789	5.213	4.678	4.186	3.734
59	19.976	18.526	17.157	15.867	14.652	13.507	12.430	11.417	10.467	9.575	8.739	7.958	7.229	6.548	5.915	5.326	4.779	4.276	3.814
60	20.433	18.948	17.547	16.227	14.982	13.811	12.708	11.672	10.699	9.787	8.932	8.133	7.386	6.690	6.043	5.441	4.882	4.368	3.896
61	20.854	19.379	17.945	16.593	15.320	14.121	12.993	11.932	10.937	10.003	9.129	8.311	7.547	6.836	6.173	5.558	4.987	4.462	3.980
62	21.237	19.777	18.352	16.968	15.665	14.438	13.283	12.198	11.179	10.224	9.329	8.493	7.712	6.984	6.307	5.678	5.094	4.557	4.065
63	21.627	20.138	18.726	17.351	16.017	14.761	13.580	12.470	11.427	10.450	9.535	8.679	7.880	7.136	6.443	5.800	5.204	4.655	4.152
64	22.023	20.506	19.067	17.703	16.376	15.091	13.883	12.747	11.680	10.681	9.744	8.869	8.052	7.291	6.583	5.925	5.316	4.755	4.241
65	22.425	20.879	19.412	18.023	16.707	15.428	14.192	13.030	11.939	10.916	9.958	9.063	8.228	7.449	6.725	6.053	5.430	4.858	4.332
66	22.833	21.257	19.763	18.347	17.006	15.738	14.507	13.318	12.202	11.156	10.177	9.262	8.407	7.611	6.871	6.184	5.548	4.962	4.426
67	23.082	21.640	20.118	18.676	17.310	16.018	14.796	13.612	12.471	11.401	10.399	9.463	8.590	7.776	7.020	6.317	5.667	5.069	4.521
68	22.953	21.873	20.478	19.009	17.617	16.301	15.056	13.881	12.744	11.650	10.626	9.669	8.776	7.944	7.171	6.454	5.789	5.178	4.618
69	22.822	21.747	20.695	19.345	17.928	16.587	15.320	14.123	12.993	11.903	10.856	9.878	8.965	8.115	7.325	6.592	5.913	5.289	4.717
70	22.690	21.619	20.570	19.546	18.241	16.876	15.586	14.367	13.217	12.133	11.089	10.090	9.157	8.289	7.482	6.733	6.040	5.402	4.818
71		21.490	20.445	19.424	18.426	17.167	15.853	14.613	13.442	12.339	11.301	10.304	9.352	8.464	7.640	6.875	6.168	5.517	4.920
72			20.319	19.301	18.308	17.337	16.123	14.860	13.668	12.546	11.490	10.498	9.548	8.642	7.801	7.020	6.297	5.633	5.024
73				19.177	18.187	17.221	16.278	15.108	13.896	12.754	11.680	10.671	9.725	8.822	7.963	7.166	6.429	5.751	5.129
74					18.066	17.104	16.165	15.250	14.124	12.963	11.870	10.844	9.883	8.983	8.126	7.313	6.562	5.870	5.236
75						16.986	16.051	15.140	14.253	13.172	12.061	11.018	10.040	9.126	8.273	7.462	6.696	5.990	5.343
76							15.937	15.029	14.147	13.289	12.252	11.192	10.198	9.270	8.403	7.596	6.831	6.112	5.453
77								14.919	14.040	13.186	12.357	11.367	10.357	9.413	8.533	7.714	6.953	6.235	5.563
78									13.934	13.083	12.259	11.461	10.516	9.557	8.663	7.832	7.060	6.345	5.675
79										12.981	12.161	11.367	10.601	9.701	8.794	7.950	7.167	6.443	5.775
80											12.063	11.273	10.511	9.777	8.924	8.068	7.274	6.540	5.863
81												11.180	10.421	9.691	8.991	8.186	7.380	6.636	5.951
82													10.332	9.606	8.910	8.245	7.486	6.732	6.038
83														9.521	8.829	8.168	7.538	6.827	6.124
84															8.749	8.091	7.465	6.872	6.209
85																8.015	7.393	6.804	6.248
86																	7.322	6.736	6.185
87																		6.671	6.122
88																			6.062

Notes

1 This term – and associated acronym – has now entered the lexicon as a shorthand for pensions professionals who provide expert witness services with respect to pension assets in financial remedy proceedings. Many PODEs are qualified actuaries – including the PODE authors of this article – but this is not an explicit requirement to practice in this field.

Part III: Reflections on the 40th Anniversary of the Law Commission's Recommendations

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> 'As we approach the 40th anniversary of the 1984 Act, the complexities and challenges to which I have referred would suggest that this is an area which could well benefit from consideration by the Law Commission.'[1]

Much has changed – legally, politically, and societally – since Parliament legislated to provide the English courts with the power to make financial orders after an overseas divorce under Part III of the Matrimonial and Family Proceedings Act 1984 ('MFPA 1984'). These powers were born on the back of a sharp and sudden increase in international movement in the 1970s and early 1980s. At the time England had (as it still does) a liberal approach to the recognition of foreign divorces. But this presented the English courts with a problem when someone with a close English connection divorced abroad and received inadequate financial provision. If the English court recognised the overseas divorce (as it invariably would), it had no power to make financial orders. This left some, with good connections to England, in a position of real injustice and inadequate provision.

In the early 1980s the Law Commission was asked to report on what could be done to address the problem. A Working Paper[2] was published in November 1980 and the final Report[3] was put forward in October 1982, recommending the introduction of a power to make financial orders after an overseas divorce, which was adopted by Parliament and enacted into law with Part III of the MFPA 1984. As we start the 40th anniversary of the Law Commission's Report it is timely to look back on what was proposed at the time, how the law (and society) has developed subsequently and whether reform is required to make Part III fit for purpose in modern society.

Types of overseas divorce that allow a Part III claim to be brought

Since the introduction of the Family Law Act 1986 ("FLA 1986") England has recognised two categories of overseas divorce:

1. A divorce obtained 'by means of proceedings';[4] and
2. A divorce obtained 'otherwise than by means of proceedings'.[5]

The only statutory definition of 'proceedings'[6] is that it means 'judicial or other proceedings'[7] which has been interpreted as requiring compliance with some sort of formalities in the overseas country, often although not always a form of registration. In recent years the interpretation of a divorce obtained by means of proceedings has been extended to cover religious divorces which have been subject to some state registration process. Unhelpfully there is no statutory definition of a divorce obtained by means other than proceedings, but one example is a bare *talaq*.

It is commonly overlooked that a Part III claim can only be brought on the back of an overseas divorce that has been obtained by means of judicial or other proceedings.[8]

It is worth reflecting on what the Law Commission said at the beginning of their Final 1982 Report[9] when explaining why legislation needed to be introduced to allow financial claims after an overseas divorce:

> 'The problems exposed by these cases can be illustrated by a hypothetical, and to some extent exaggerated, case. Suppose an English woman marries a wealthy Ruritanian, and they establish the matrimonial home here in a house owned by the husband. In due course, the husband divorces her in Ruritania perhaps by pronouncing the word "talaq" three times (as is permitted by the law in many countries). No financial order is made in Ruritania. The Ruritanian divorce is recognized in this country as effective to terminate the parties' marriage. The wife then has no right to apply to the court here for financial provision. … Such a woman may thus face destitution.'

It is not clear why drafters of the MFPA 1984 drew a distinction between these two categories of divorce. As the above extract demonstrates, the overarching intention of the Law

Commission appears to be to provide a remedy to those who had been divorced by such means. Moreover, it is probable that those with the greatest need for financial provision after an overseas divorce may well have been those who have been divorced against their wishes otherwise than by means of proceedings. Yet under the current legislation they would be prevented from making a Part III claim.

The Final Report which led to the enactment of Part III is fairly short (15 pages excluding appendices) and limited to matters where the position had changed since the prior Working Paper.[10] The Working Paper is much more detailed. It includes a discussion about the importance of relief being available in the event of an extrajudicial overseas divorce and gives the example of a *talaq* which requires some additional formalities needing to be covered.[11] There is also an acceptance in one of the footnotes[12] that a pure *talaq* and certain other types of extrajudicial divorce may not be covered but no explanation for why they should fall outside the reach of Part III.

Records of discussions which took place in Parliament do not provide the answer either as Part III was barely mentioned during the readings. When introducing the draft Bill, the Lord Chancellor commented that Part III 'need hardly be discussed at all on second reading because it is so obviously right'.[13] The only other reference was made by Lord Scarman who only commented that 'very little' had been said in the debate about Part III and that it would be a 'valuable' addition.

It is worth noting that when the Law Commission[14] published their report[15] on the recognition of foreign divorces in September 1984, which led to the FLA 1986, they recommended abandoning the distinction between proceedings and non-proceedings divorces. The Law Commission commented that there was 'no doubt' that the treatment of non-judicial divorces had been a 'source of some difficultly and judicial disagreement'[16] which had led to conflicting case law as to whether or not a bare *talaq* constituted proceedings[17] and that they had been persuaded that the law should be amended to make it clear that bare talaqs should satisfy the requirement of recognition that they have been obtained by proceedings.[18]

But the Lord Chancellor, when introducing the Family Law Bill in the second reading stage in the House of Lords on 22 April 1986, disagreed.[19] He gave several public-policy reasons including that such divorces were often obtained unilaterally, there is often no available proof to demonstrate what is alleged to have taken place and they usually provide little or no financial provision. As a result, the distinction between proceedings and non-proceedings divorces was maintained with the (perhaps inadvertent) result that the latter are capable of recognition in England without the safety net of a Part III claim if there has been inadequate financial provision.

As above, over the past couple of decades the English law of recognition of foreign divorces (which was always fairly liberal) has been significantly expanded and extended through judicial interpretation to encompass many forms of religious divorce around the world provided there is some sort of state-based registration process or similar. Nevertheless, even with this extension there remain divorces of an informal, customary nature or religious divorces without any form of state involvement which come into the non-proceedings divorce category and if there is to be any reform of Part III it should surely remedy this lacuna to allow for financial claims to be brought regardless of the type of overseas divorce.

The filter mechanism/leave stage

Following the Law Commission's recommendations,[20] Part III contains the requirement that the leave of the court is required, and that the applicant must demonstrate a 'substantial ground'.[21] This leave stage, or 'filter mechanism', has had a long and somewhat confusing history.

In the early years of Part III, applications for leave were usually made without notice to the proposed respondent. Subsequently, a quasi-collaborative practice developed whereby practitioners would often make the leave application on notice. The perceived problem was that the respondent on being informed of the without notice grant of leave would then apply to set aside thereby increasing the costs and the litigation.[22] Many solicitors and barristers took the view that it would be better to deal with it as if on notice. This was condemned by the Court of Appeal in *Traversa v Freddi* [2011] EWCA Civ 81. At the time the relevant rule was r 3.17(1) of the Family Proceedings Rules 1991 which said that an application for leave should be made *ex parte* but was silent as to whether or not the application should be *determined* ex parte or inter partes.

Under the Family Procedure Rules 2010 ('FPR'), applications under Part III were initially dealt with under the Part 18 procedure, i.e. the default procedure used for most financial remedy applications which provides for on notice applications. This inconsistency was resolved with the introduction of FPR 8.25[23] in August 2017 to provide that Part III leave applications must be *made* without notice and (unless the court directs otherwise) also *determined* without notice.

Consequently, the pendulum swung back towards leave applications being made and determined without notice, although the *Potanin* litigation[24] has brought back into focus the difficulties which can arise when the leave application is dealt with ex parte. In that case Mr Justice Cohen granted leave to the former wife following an *ex parte* hearing in January 2019. At the return date the former husband applied to set aside this leave on the basis that his former wife had misrepresented the position at the *ex parte* leave hearing. In November 2019 Cohen J set aside the grant of leave on the basis of three categories of misrepresentation. The former wife successfully appealed that decision with the Court of Appeal holding in May 2021 that her Part III claim should proceed.

At the set aside hearing Cohen J commented that 'one of the difficulties the court faces on a without notice application is the absence of any evidence from the respondent'[25] and that 'with the benefit of hindsight' he regretted being persuaded by the former husband's counsel that he should hear the leave application without notice.[26] When considering this point on appeal King LJ commented that the judge's instincts were absolutely right and that it was an application which should have been heard inter partes.[27]

Nine days after the Court of Appeal's judgment in *Potanin* was handed down, on 24 May 2021, the President's Guidance on the Jurisdiction of the Family Court was updated to provide (among other things) that when deter-

mining the allocation of a Part III application the gatekeeper will also consider whether the permission application should be heard on notice to the respondent.[28]

This enhanced gatekeeping is a key feature of the Financial Remedies Court and is to be applauded. If practitioners provide the court with sufficient information, it will enable the court to consider at the gatekeeping stage whether a leave hearing should be determined *ex parte* or *inter partes*. But should more also be done to help litigants, lawyers and judges on Part III leave applications? The current application form, the D50E, is just one page long and serves no useful purpose. The substantive application form is admittedly slightly better but there is still much room for improvement. Normally, the only meaningful information available to the judge at the leave stage will be the applicant's witness statement in support, for which there is currently no standardised, court approved precedent and only relatively little guidance. This can be hard enough for some practitioners who do not regularly receive instructions in Part III cases. It is almost impossible for litigants in person.

I suggest that the Part III application form for leave should be amended to require much more information, to include essential basic information such as dates of birth, marriage, separation and divorce. It should require a translated version of the overseas divorce certificate and financial order, if different. There should be a requirement to indicate the jurisdiction for the application, i.e. the connection with England as there is on the new form divorce petition. There should be provision for a summary of the outcome in the overseas proceedings and a requirement briefly to address the factors contained within ss 16 and 18 of the 1984 Act. Perhaps there could also be guidance accompanying the form summarising the legislation and important case law such as the Supreme Court in *Agbaje* [2010] UKSC 13 and the Court of Appeal in *Zimina* [2017] EWCA Civ 1429.

There will of course need to be a balance and the leave application should not become disproportionate. After all, the purpose of a leave stage is to avoid unnecessary time and costs and act as a proper filter mechanism as the Law Commission intended. But in the age of digital precedents surely there can be some more guidance – whether in the form of the application forms, template statements or precedent orders – for the benefit of litigants, lawyers and judges.

Level of judge

In the 1980 Working Paper the Law Commission 'tentatively proposed' that Part III claims should fall exclusively within the province of judges of the Family Division of the High Court. The Law Commission said this was because they thought it 'important that the practice of the courts in administering a new and unusual discretion should develop in a consistent and uniform fashion' and that 'this objective was most likely to be attained if the discretion were vested in a comparatively small number of judges who would acquire experience in dealing with what may well be only a small number of applications'.[29] On the other hand, the Law Commission commented that some cases may only involve modest sums and that once some experience has been gained by practitioners and judges of the working of the legislation it might be appropriate to extend the jurisdiction to other levels of judge.[30]

Allocation is now governed by the Family Court (Composition and Distribution of Business) Rules 2014. When originally enacted these rules provided that Part III applications should be allocated to a High Court judge unless the application was for an order by consent. This was however subject to taking into account the need to make the most effective and efficient use of local judicial resources and the resources of the High Court bench that is appropriate given the nature and type of the application.[31]

In the 2014 case of *Barnett v Barnett* [2014] EWHC 2678, which involved proceedings allocated to a High Court judge sitting in London despite the parties and solicitors being based in Stoke, Holman J referred to the above-mentioned exception within the 2014 Business Rules and commented that he could not see any reason why in 'routine applications' it could not be brought in family court sitting locally and allocated to a district judge. In the same year the Financial Remedies Working Group[32] also recommended that consideration be given as to the level of judiciary at which Part III applications should be made.

The position in terms of allocation remained uncertain until 28 February 2018 when the first iteration of the President's Guidance on the Jurisdiction of the Family Court provided that:

> 'Unless such a [Part III] case has some special feature, or complexity, or very substantial assets, it should be allocated to a district judge for the permission decision, as well as substantively.'[33]

This remained the position until 24 May 2021 when amendments to the Family Court (Composition and Distribution of Business) Rules 2014 took effect[34] providing that the default allocation level for a Part III permission application, and the substantive application, was changed from a judge of High Court level to a judge of District Judge level.[35]

On the same date the President's Guidance on the Jurisdiction of the Family Court was also amended to provide as follows:

> 'The great majority of cases will be determined at District Judge level for both the permission decision and substantively. If the case is one of complexity or very high value and it is considered that the permission application should be heard by a judge of High Court judge level, then a completed allocation questionnaire FRC3, modified to reflect the overseas divorce/dissolution, should be filed with the application together with a written request that the FRC gatekeeper allocates the case to a judge of that level …'[36]

The changes to allocation over the last several years undoubtedly reflect the fact that while Part III proceedings remain a specialised area of work, they have become more common. This was specifically envisaged by the Law Commission when making recommendations in the early 1980s. The allocation changes no doubt also reflect the huge pressures on the lists of High Court judges and the creation of specialist financial remedy courts a few years ago. The changes to allocation do however amount to a significant change in the level of judge hearing these cases which could have a significant impact going forwards.

Although Part III cases have many similarities to financial provision on domestic divorce, there are some significant

distinguishing features. First, under Part III the court is not starting from a blank sheet but instead has to weigh up the parties' connections with England. This exercise is not undertaken in a financial remedy case on an English divorce and care needs to be taken to avoid approaching Part III cases as if it was the same.

Second, and perhaps more importantly, the court also has to determine what weight to give to the decision reached by the overseas court. English judges need to be mindful that many specialist family lawyers and judges abroad perceive our Part III powers as controversial and akin to acting as an appeal court in respect of their decisions. This takes on additional importance, the higher the level of court involved in the foreign decision. Would it, for example, be appropriate for a local district judge to in effect overturn a decision of the overseas equivalent of our Supreme Court?

Efficient and effective gatekeeping (which requires improvement in the quality of the information practitioners give to the court to enable them to undertake the gatekeeping exercise) is undoubtedly the answer although it is suggested that as part of that gatekeeping process the seniority of the overseas tribunal should specifically be taken into account given issues of international comity.

Pension sharing orders after an overseas divorce

In its Final Report the Law Commission recommended that the ability to bring a Part III claim should be limited to prevent parties who they described as being little more than 'birds of passage' from being able to invoke the court's jurisdiction.[37] They recommended jurisdictional grounds of one party's domicile or habitual residence for 12 months[36] which remains the jurisdictional grounds contained within s 15 of the 1984 Act today.[39] In addition, the Law Commission recommend – in a change of heart from their provisional proposals in the Working Paper – a further (albeit limited) ground of jurisdiction based on the existence of a matrimonial home. The justification given makes interesting reading.[40] The Law Commission refer to the 'by no means uncommon' situation where both parties may live permanently and indefinitely abroad but still have a property which was once used as the matrimonial home in England. They comment that it would be 'unrealistic' to expect a party in those circumstances to establish habitual residence in England in order to make an application under Part III but that it would be wrong to allow full claims on this basis. They give the example that this could allow one party to exercise 'improper pressure' on the other if their entire asset base were put at risk and therefore proposed that claims be limited if based on this jurisdictional ground.

What wasn't anticipated in the early 1980s – but is a huge issue facing many international families in 2022 and would likely be recommended if the Law Commission were to conduct another review of this area of law[41] – is the treatment of English pensions following an overseas divorce. There are now many instances of family courts around the world making financial arrangements on divorce which require sharing of a UK-based pension. English pension providers will only accept a pension sharing order from the English court and not from a foreign court or written agreement. Part III can provide a solution when one of the parties was born or lives here as jurisdiction can usually be founded on domicile or habitual residence. But there are many instances where this jurisdiction does not exist and the only remaining connection with England is a pension.

Good practice for all lawyers dealing with an international case is to contact lawyers in the jurisdiction in which any assets are situated which will be subject to the final divorce financial settlement. But this doesn't always happen, and the lawyers and parties only find out after the event of the final financial settlement that the anticipated pension sharing order cannot be made resulting in the settlement having to be unpicked, often at much expense and considerable frustration.

Whilst the UK was a member of the EU it was possible to rely on the residual jurisdiction contained within Article 7 of the EU Maintenance Regulation, but since 11 pm on 31 December 2020 that has no longer been possible. Ever since 1 January 2021 there have been many cases where foreign lawyers have found they cannot share an English pension as they anticipated because of lack of jurisdiction. My firm receives many such enquiries and the first arrived on 4 January 2021!

It is therefore submitted that the jurisdictional grounds should be extended in a similar manner to that available based on the existence of a matrimonial home so that limited claims can be brought based on the existence of a pension which is administered in the UK. During the period of reviewing the laws on the UK leaving the EU, the small group of specialist lawyers meeting regularly with the Ministry of Justice persistently pressed them for legislation to introduce something similar to Article 7 or a distinct stand-alone jurisdiction based on the existence of a pension here. Although apparently the Ministry of Justice were sympathetic, it is understood there wasn't any space in the Parliamentary calendar.

Conclusions

Part III continues to be a much-needed tool to ensure that those with close connections to England are not deprived of a fair financial settlement in the event their divorce takes place abroad. As society has developed, various limbs of the family justice system – including the judiciary, Family Procedure Rules Committee and Office of the President – have done an invaluable job in continuing to develop the way Part III claims are handled. But on the 40th anniversary of the Law Commission paper leading to this important legislation, the time has come for a review and then reform of several aspects of this law.

Notes

1 Lady Justice King, *Potanina v Potanin* [2021] EWCA Civ 702, [93].
2 *Financial Relief After Foreign Divorce* (1980) (Working Paper No. 77).
3 *Financial Relief After Foreign Divorce* (1982) (Law Com No. 117).
4 FLA 1986, s 46(1).
5 FLA 1986, s 46(2).
6 FLA 1986, s 54 .
7 This is the same wording as was contained in the legislation which governed the recognition of overseas divorces at the time, the Recognition of Divorces and Legal Separation Act 1971 (RDLSA 1971).

8 MFPA 1984, s 12(1)(a). As above this is the same wording as appeared in the RDLSA 1971 and the same as the definition of 'proceedings' in the FLA 1986.
9 Para 1.2 of the Final Report.
10 Para 1.7 of the Final Report.
11 Para 11 of the Working Paper.
12 Footnote 67.
13 Matrimonial and Family Proceedings Bill HL Volume 445 (debated on 21 November 1983).
14 In which three of the five commissioners were the same as were involved in the Report recommending the introduction of Part III.
15 *Recognition of Foreign Nullity Decrees and Related Marriages* (Law Com No. 137).
16 Para 6.10.
17 *Chaudhary v Chaudhary* (1983) 4 FLR 794 and *Sharif v Sharif* (1980) 10 Fam Law 216; *Zaal v Zaal* (1982) 4 FLR 284.
18 Para 6.11.
19 Family Law Bill HL Volume 473 (debated on 22 April 1986).
20 Para 2.3 of the Final Report.
21 Section 13.
22 Many took the view that putting over the objections of the respondent to the final hearing had the potential to waste costs if, as seen in some reported decisions, the substantive application was struck out at final hearing.
23 Rule 8.25.
24 Set aside hearing: [2019] EWHC 2956 (Fam); Appeal hearing: [2021] EWCA Civ 702.
25 Para 46.
26 Para 49.
27 Para 33.
28 Para 25(d): If below High Court judge level the gatekeeper will normally be able to make that assessment; if at High Court judge level, it will be referred to the judge in charge of the money list (presently Mostyn J) for cases in London or the South-Eastern circuit or to the relevant Family Division Liaison judge for cases elsewhere;
29 Para 2.16.
30 Para 2.17.
31 Rule 15(2).
32 [2014] Fam Law 1313.
33 Para 25.
34 Rule 15 and Schedule 1 paragraphs 2(c) and (f), and 4
35 See the Family Court (Composition and Distribution of Business) (Amendment) Rules 2021
36 Para 25(c).
37 Para 2.10.
38 Para 2.7.
39 The jurisdictional grounds did change for needs-based claims between 2011 and 2020: EU Maintenance Regulation.
40 See paras 2.8–2.10.
41 In 2016 the Law Commission endorsed a recommendation that Part III jurisdiction be extended to include English-based pensions in their Report *Enforcement of Family Financial Orders* (Law Com No. 370) (para 9.62).

Whose Fault Is It Anyway?

Will the introduction of 'no fault' divorce herald greater reliance on conduct in financial remedy proceedings?

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The Divorce, Dissolution and Separation Act 2020, which comes into force on 6 April 2022, represents a significant and positive shift away from investigating reasons for marriage breakdown and towards individuals' autonomy. Whilst very few practitioners oppose the introduction of no fault divorce,[1] in certain quarters of the media the view has been expressed that if someone has behaved particularly badly in a marriage, there should be an outlet for the other spouse to shout that from the rooftops during the divorce;[2] and there is concern that this may manifest itself in an increase in conduct allegations in financial remedy proceedings.

In this article, we review the significance of conduct in financial proceedings and argue that, whilst 'fault' has its place, there should not be a shifting of the tectonic plates to see judges being expected to adjudicate upon a growing tide of conduct allegations.

Although s 25(g) of the Matrimonial Causes Act 1973 refers to 'conduct which it would be inequitable to disregard' there is no statutory definition of conduct. We adopt the categories set out by Mostyn J in *OG v AG* [2020] EWFC 52 as to the distinct ways in which conduct can affect a financial outcome.

Preface: where conduct and needs align

Case law[3] and our experience in practice highlight that even before considering the categories of conduct set out in *OG v AG* there is a broader sense in which the way in which parties have conducted themselves is relevant. To give a familiar example, a party who has developed depression and anxiety which are keeping her(/him) out of the workplace will have needs which s/he is unable to meet. Whether or not those circumstances have been brought about by – on one end of the spectrum – deliberate abusive and controlling behaviour by the other spouse or – at the other – without the other party's culpability and even in spite of his(/her) care and support, the needs will be there.[4]

One way of advising and protecting the client who has been subjected to abusive behaviour is therefore to focus robustly on her needs – as a reason to depart from the 'yardstick of equality' – in light of the full impact the abuse has had on her future. It is important to be alive to the risk that a party who is vulnerable by virtue of an abusive relationship may accept less than s/he is entitled to in a desire to get things 'over and done with' and get out of a position of conflict.[5] The Domestic Abuse Act 2021 introduces procedural safeguards, including the statutory presumption that parties who have experienced or are at risk of experiencing domestic abuse will be entitled to special measures in court proceedings.[6] Nonetheless, it will continue to fall to practitioners to be appropriately trained in and recognise the hallmarks of abuse and ensure that victims are advised in a holistic manner as to their long-term needs in view of the impact of their experiences.

The OG v AG categories of conduct

Category one: 'Gross and obvious personal misconduct'

Mostyn J identifies[7] this category of conduct as the type referred to by Baroness Hale in *Miller v Miller* [2006] UKHL 24 as being appropriate to take into account only in very rare cases. Baroness Hale reasoned that: 'it is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases'.

Indeed, it is difficult to find any example of a case (post-*Miller*) where an award has made a compensatory or punitive payment purely on account of a party's behaviour towards the other party.[8]

At best, 'pure' conduct is treated as a looking glass through which to assess other s 25 factors.[9] In *R v B* [2017] EWFC 33, Moor J found that the husband had engaged in a 'complete and irrational obsession with avoiding tax', which had caused him to commit tax evasion and fraud described by Moor J as a 'financial catastrophe' he had brought down on the family. As a result, he concluded that the husband 'still has needs but they must be assessed in the light of what is available because of what he has done and the effect it has had on everyone concerned'. In principle, therefore, gross personal misconduct can be used as a lens through which needs and contributions are assessed, quite apart from being considered for its direct financial impact under the second category (below).

The case law therefore speaks to the importance of

asserting the causal link between serious misconduct and the needs of the innocent party to be viewed through that 'lens'. It is hoped that in light of *Re H-N and Others (Children)* [2021] EWCA Civ 448, the Family Court will be cognisant that in assessing 'gross and obvious personal misconduct' in the context of allegations of coercive and controlling behaviour and other forms of domestic abuse, it must draw together the strands of a pattern of behaviour, having regard to the definition of 'domestic abuse' contained in s 1(3) of the Domestic Abuse Act 2021.

Category two: Financial conduct – wanton and reckless dissipation

The principle when dealing with the second category of conduct was stated by Cairns LJ in *Martin v Martin* [1976] Fam 335: one cannot 'fritter away or dispose recklessly' of resources and then claim on divorce the distribution of a share as if one had behaved reasonably. A finding of conduct of this nature leads to the notional 'add back' – the 'frittering' party will be treated as having the money s/he would have had were it not for the way s/he behaved.[10]

Conduct of this category, too, is difficult to establish and fraught with uncertainty. The exact threshold to be met in order to make out 'wanton and reckless dissipation' is debatable. As commentators have noted,[11] 'wanton' is a word capable of having several meanings. Meanwhile, 'reckless' is a term of art in criminal law, which the Family Court has not adopted in the current context as referring to a particular *mens rea* for reckless dissipation.[12]

The height of the bar of 'wanton and reckless dissipation' became perhaps as apparent as ever in *MAP v MFP* [2015] EWHC 627. In circumstances where the husband was found to have used substantial amounts of matrimonial assets on cocaine and prostitutes, Moor J held that as well as 'deliberate, unprovoked, morally culpable conduct', there will be 'other situations where conduct justifies such a penalty, although such cases will undoubtedly be rare'. He said that although motivation is important, 'a spouse cannot take advantage of all the good characteristics of his or her partner whilst disavowing the bad characteristics. To put it colloquially, you have to take your spouse as you find him or her.' He therefore rejected the wife's claim for sums to be added back, saying that the husband was 'flawed' like many successful people, and despite his actions being 'morally culpable' and 'irresponsible', his actions did not amount to deliberate or wanton dissipation.

Further adding to the shades of grey, Wilson LJ in *Vaughan v Vaughan* [2007] EWCA Civ 1085 held that the 'obvious caveats' to the add-back jurisdiction include that the fiction 'does not extend to treatment of the sums re-attributed to a spouse as cash which he can deploy in meeting his needs, for example in the purchase of accommodation'. In cases falling short of 'gross and obvious' personal conduct but where there has been 'wanton and reckless dissipation', therefore, the Family Court, applying *Vaughan*, has been reluctant to trespass on the needs of the dissipator.[13]

Taking all of this together, the category of cases where the court will seek to achieve the equality the non-wasting spouse would have had were it not for the wasteful actions of the dissipating spouse is narrow. There is danger, even, that the test will be applied too narrowly. The apparent logic to the principle that in marriage one must 'take the rough with the smooth' belies the fact that the rewards of having a wealthy spouse are not inherently connected with the risk that one's spouse may engage in deliberate unilateral decision-making as part of a pattern of behaviour which potentially amounts to economic abuse.

In light of growing understanding as to the forms controlling behaviour and economic abuse can take,[14] there is a risk of unfairness if a spouse like Mrs MAP simply has to live with whatever poor financial decisions her husband makes on their joint behalf, because he is financially successful and 'Many very successful people are flawed'.

Category three: litigation misconduct

According to Mostyn J in *OG v AG*, the correct place to reflect litigation misconduct is to penalise the guilty party in costs and it is 'very difficult to conceive of any circumstances where litigation misconduct should affect the substantive disposition'.[15] That follows the approach of the Court of Appeal in *Ezair v Ezair* [2012] EWCA Civ 893, which must be right in order to avoid 'double penalty' between costs orders and the substantive outcome.[16]

We do not propose to say a great deal about this area, which in itself opens a vast field of debate. We note only the potential impact of the amendment to Practice Direction 28A which took effect 27 May 2019 to include the further guidance that: 'The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs.' It is hoped that in considering whether a party has 'refused to negotiate reasonably and responsibly', the court gives proper regard to the non-legal obstacles to settlement. For example, if a party can properly evidence that s/he has struggled to countenance entering a negotiation through fear, or has had difficulty engaging with the proceedings because of depression, burnout, or overwhelm, or in her proposals s/he has been more cautious about her financial security than otherwise may be expected, the court may well consider that s/he has negotiated 'reasonably and responsibly' in his/her particular circumstances.

Category four: the 'evidential technique' of adverse inferences

Finally, there is a category of cases where 'conduct' arises in financial remedy proceedings in the form of failure to comply with disclosure obligations. The court may then use the 'evidential technique' of drawing inferences as to the existence of assets.[17]

This category of conduct is notable in our context as a particularly powerful means of redressing unhelpful and obstructive behaviour. As identified by Wilson LJ in *Behzadi v Behzadi* [2008] EWCA Civ 1070, an adverse inference that a party holds undisclosed assets (in that case, a finding that the wife had beneficial interests in properties in Iran which she had attempted to alienate) can permit the court to find that she is capable of meeting her needs, while a notional re-attribution to that party of monies which have been dissipated (with a wanton element) may not.

Looking ahead: taking conduct seriously in financial remedy matters

In summary, the Family Court continues to have a number of items in its 'toolkit' for ensuring that a fair financial outcome can be reached in cases where one of the parties has mistreated the other in some way. Whilst the Family Court does not seek to quantify and remedy the misconduct in and of itself (for example by awarding a form of 'damages' to the innocent party), it can and will:

1. View the innocent party's 'needs' through the magnifying glass of the other party's behaviour (in cases of 'gross and obvious personal misconduct');
2. Notionally 'add back' to the matrimonial assets monies which have been wasted by 'wanton and reckless' dissipation by one party;
3. Make costs orders to provide a remedy for litigation misconduct; and
4. Draw adverse inferences – in potentially very broad terms – against parties who have failed to comply with their duty of full and frank disclosure.

Going forward, it is hoped that – particularly in light of growing awareness of the patterns of abusive behaviour – the Family Court will continue to use these tools to good effect, in the right cases, to grant fair financial outcomes to those who have been disempowered by the abusive behaviour of their spouses. In appropriate cases, practitioners should not shrink away from 'conduct' allegations which can be properly made out but raise them with a sharp focus on which tool in the toolkit can be used to redress the imbalance.[18]

Fears of an outpouring of conduct allegations in financial proceedings once no fault divorce comes in – is there cause for optimism?

Finally, a word on whether there will be a surge in conduct allegations in financial proceedings with the advent of no-fault divorce.

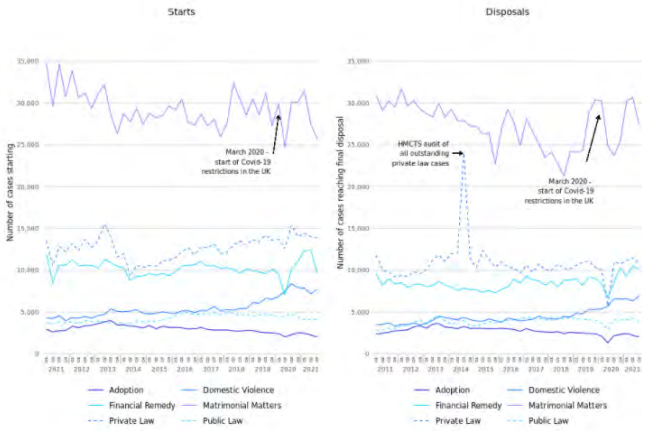
In the authors' view, although this topic will be something of a watchpoint for practitioners and judges in 2022 and beyond, there is cause for optimism that there will not be a tsunami of conduct allegations in financial proceedings post-April 6. Among our reasons:

1. As was clear from the Nuffield Foundation's *Finding Fault* paper in 2017,[19] public awareness of the ground for divorce and the need to apportion blame absent 2+ years' separation was low. This was one of the reasons why the study concluded that retaining a fault-based system provided no deterrent to divorcing, as most people make the decision to divorce ignorant of that being the case. Indeed:

> 'One of the arguments in favour of fault is that having to produce a reason for the divorce will act as a deterrent and hence protect marriages. There was little evidence in the study that that was the case … [T]here was no evidence at all that fault was protecting marriage. That is probably not surprising given gaps in the public understanding of the grounds for divorce and the ease with which a fault divorce can be obtained …'[20]

   Therefore, it is unlikely that there is a big cohort of people lining up to divorce, agitating to file a behaviour petition full of venom who will, upon being told that that is no longer on the menu, decide to bring those sentiments into conduct allegations in financial proceedings.
2. Far fewer people pursue financial remedies than get divorced each year. The tables below show cases started and disposed by case type between January to March 2011 to July to September 2021:[21]

Figure 1: Cases started and disposed, by case type, January to March 2011 to July to September 2021 (Source: Table 1)



   Broadly speaking they show 2.5–3 times more divorce petitions than financial remedy starts (for the most recent period in respect of which we have statistics, Q3 2021, there were 25,587 petitions and 10,015 financial remedy applications). We know that c.55–60% of petitions at present are fault-based. What is more, our experience as practitioners is that very few want to apportion blame, but do so as they are told that they have no other (immediate) option. It is hard to see, therefore, that around 5,500 to 6,000 of the financial applications issued each quarter would suddenly see an injection of conduct allegations.
3. There simply aren't the resources to devote to more detailed investigations of conduct in financial remedy proceedings. Whilst the latest *Family Court Statistics Quarterly* bulletin showed volumes of new cases across all Family Justice areas decreasing in Q3 2021,[22] possibly stabilising following the recovery from the impact of Covid-19, there continues to be an impact on timeliness measures. Care and supervision proceedings have increased further to levels seen at the end of 2012, with the average time to first disposal now *45 weeks,* up 4 weeks year on year. Children Act cases more widely have also seen increases in the time to a first definitive disposal, with private law cases taking an average of 42 weeks, 9 weeks up from last year. Whilst there are initiatives such as the Family Solutions Group's report *What about me?*,[23] focusing on particular areas of the family justice system and diverting appropriate cases into non-court based dispute resolution, change takes time. In the meantime, judges are faced with robust case-management decisions and surely any evidence of an increase in frivolous conduct allegations would not be given airtime.
4. More broadly, the government's focus is on alterna-

tives to court. In August 2021 the Ministry of Justice launched a wide-ranging call for evidence on Dispute Resolution in the Civil and Family spheres. The reasoning underpinning the project was clear – 'litigation is still far from the last resort and too many cases still go through the court process unnecessarily. The provision of dispute resolution schemes remains patchy … [M]ore still needs to be done to increase uptake of less adversarial options.' At the time of writing there has been no news of early findings and next steps, but it is a case of – watch this space. Again, one of the main drivers behind losing fault in the divorce process was the adverse impact that the need to apportion blame has on mediation and collaborative practice. To allow 'fault creep' in financial proceedings would have the same impact.

No fault divorce has been campaigned for by Resolution, the FLBA and others for decades, making 6 April 2022 a momentous date in the annals of family law. Whilst conduct in financial remedy proceedings has its place, it is to be hoped – and we suggest likely – that it will continue to be relied upon only in the narrow band of cases where it has its rightful place.

Notes

1 According to a survey carried out by Resolution in 2018, 90% of family law professionals said that the current law makes it harder to reduce conflict and confrontation between clients and their ex-partners. 'Join our campaign for no-fault divorce' (*Resolution*, 20 May 2019), <https://resolution.org.uk/no-fault-divorce/join-our-campaign/>, last accessed 28.01.22.

2 For example, see M McDonagh, 'The problem with no-fault divorce', *The Spectator* (London, 13 April 2019) <https://www.spectator.co.uk/article/the-problem-with-no-fault-divorce)>, last accessed 27.01.22.

3 For an example, see *Rapp v Sarre* [2016] EWCA Civ 93, in which Black LJ (as she then was) declined to interfere with the Order of Judge Everall QC at first instance that the wife would get a 54.5% share of the matrimonial assets. The husband argued that the judge had given undue weight to his conduct which included drug addiction and using female escorts, leading to a finding that the husband had received excessively large sums from the wife to pay for his addiction issues, an unquantified waste of money during the marriage, and a level of distress to the wife which it would be inequitable to disregard. Black LJ found that this was not a necessary part of the reasoning which had led to the departure from equality in favour of the wife, which had been justified solely by reference to the wife's needs in light of the high standard of living enjoyed by the parties, including detailed consideration of her budget.

4 In this article, where we use 'spouse', the term 'civil partner' is interchangeable.

5 See J Crisp and R Hunter, 'Domestic Abuse in Financial Remedy Applications' [2019] Fam Law 1440, highlighting research showing that 25% of financial remedy applications involve alleged conduct amounting to domestic abuse, and the impact that this can have on the path to settlement; see also E Hitchings, J Miles, H Woodward, 'Assembling the Jigsaw Puzzle: Understanding Financial Settlement on Divorce' (Nuffield Foundation and University of Bristol, November 2013).

6 Domestic Abuse Act 2021, s 63.

7 See [2020] EWFC 52, [34].

8 For example, in *K v L*, the husband had been committed to prison for sexually abusing the wife's grandchildren, the Court of Appeal declined to give broader guidance on the proper treatment of conduct in ancillary relief claims. The husband's conduct was said by Wilson LJ to leave a 'legacy of misery … so profound as plainly to have entitled the judge to reach what, in their absence, might well … have been an appealable determination'. However, the judgment set out in turn that the trial judge had been entitled in his discretion to attach the weight he did to the non-matrimonial nature of the wife's wealth and to the husband's agreement in 1993 not to pursue his wife's greater wealth in the event of a divorce. The notion that the husband's conduct could have justified a departure from equality in the wife's favour even in the absence of those factors is obiter.

9 Per Coleridge J in *H v H* [2005] EWHC 2911, [44]. In that case, the husband had been convicted for attempting to murder the wife. Yet Coleridge found that the court 'should not be punitive or confiscatory for its own sake' but rather the conduct should be seen as a magnifying factor when considering the wife's needs.

10 An alternative remedy for the 'innocent' party would be to seek for the dissipated funds actually to be returned to the matrimonial pot, by applying for the offending transaction(s) to be set aside under s 37 of the Matrimonial Causes Act 1973. Where this can be made out, it will have the advantage of making more capital available to meet both parties' claims. From a procedural fairness perspective, Mostyn J in *N v F* [2011] EWHC 586 (Fam) found that the wife must 'nail her colours to the mast' and make such an application or assert with clear evidence that there has been dissipation (with a wanton element) in preference to 'a faint criticism falling short of either of those standards'. There are disadvantages, however, to the s 37 route. To meet the criteria for a set-aside, the disposing party would need to have alienated the property with the intention of defeating his or her spouse's claim which, as we will see below, does not necessarily need to be the case for a notional add-back. The add-back application can also create a preliminary issue which becomes costly to litigate, and can be ineffective in cases where third parties against whom it is difficult to enforce have received the funds, at which point the application often transforms into an assertion of wanton and reckless dissipation and a claim for notional re-attribution (add back).

11 A Murray, 'Mapping out wanton behaviour: *MAP v MFP*' [2015] Fam Law 1085

12 *AC v DC (No 2)* [2012] EWHC 2420 (Fam), [2013] 2 FLR 1499 per Bennett J, [82], holding that the concept of mens rea is 'inapposite' in this area of the law, and also irrelevant.

13 *N v F (Financial Orders: Pre-Acquired Wealth)* [2011] EWHC 586 Fam, [2011] 2 FLR 533; *GS v L (Financial Remedies: Pre-Acquired Assets: Needs)* [2011] EWHC 1759 (Fam)

14 See s 1(4) of the Domestic Abuse Act 2021, in which 'economic abuse' is the only item on the non-exhaustive list of forms of domestic abuse in s 1(3) to be defined, being defined as 'any behaviour that has a substantial adverse effect on B's ability to— (a) acquire, use or maintain money or other property, or (b) obtain goods or services.' See also E Da Costa Waldman, 'Economic Abuse: its impact on financial remedy cases and how to manage it' [2021] Fam Law 1394.

15 The general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of the other party (pursuant to rule 28 of the Family Procedure Rules), but that the court may make such an order if it considers it appropriate to do so because of the conduct of the party in relation to the proceedings, having regard to the factors set out in rule (7)(a)–(f) of FPR 28.3.

16 As put by Thorpe LJ in *Ezair*, ibid.

17 As put by Mostyn J in *OG v AG* [2020] EWFC 52.

18 Taking into account in assessing the evidence of allegations

the definition of domestic abuse in s 1(3) of the Domestic Abuse Act 2021 and the recognition in *Re H-N* that an incident-based approach to making out allegations of domestic abuse has serious limitations.

19 L Trinder, D Braybrook, C Bryson, L Coleman, C Houlston and M Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation, 2017).

20 Ibid, p 136.

21 Tables from Figure 1, "Family Court Statistics Quarterly: July to September 2021", (*gov.uk,* 16 December 2021) <www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2021/family-court-statistics-quarterly-july-to-september-2021> last accessed 07.01.22.

22 Ibid.

23 Family Solutions Group (Sub-group of the Private Law Working Group), '"What about me?" Reframing Support for Families following Parental Separation' (HMCTS, 12 November 2020).

BT v CU [2021] EWFC 87: Barder, Thwaite, Drafting Lump Sums and Anonymisation

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Sometimes in law, as in life, things do not turn out expectedly.

BT v CU was intended to be a test case for whether COVID was capable of being a *Barder* event. H's argument was that the pandemic was 'unforeseen and unforeseeable', outside the 'natural processes of price fluctuation', and thereby capable of providing the basis for an application to set aside a series of future lump sums.

In the event, the hearing developed in unexpected directions, whereby the judgment of Mr Justice Mostyn involved a comprehensive review of four important arears:

(1) Was COVID a *Barder* event?;
(2) The court's jurisdiction to review executory orders (*Thwaite*), and the previously unexamined relationship between *Thwaite* and *Barder*;
(3) Was there was a sound legal basis for the practice of drafting 'a (non-variable) series of lump sum orders' as opposed to variable lump sums by instalment? and
(4) Should financial remedy judgments continue to be anonymised?

The facts

Unlike many reported financial remedy cases, *BT v CU* did not involve Ultra High Net Worth individuals, offshore trusts or jurisdictional disputes. The complexity of the legal issues (above) belies the relative normality of the case.

The parties were aged 54 and 49. They had been married for 15 years and had two children, aged 17 and 15. At the date of final hearing (10 December 2019) the assets comprised net capital of £850,000, pensions worth £770k and H's 100% shareholding in a well-run company, incorporated before the marriage, which provided school meals. The value of those shares had been determined by a Single Joint Expert at £3.2m gross.

At the final hearing, it was common ground that W would receive the majority of available capital in order to rehouse. H had by that stage purchased another property for himself. The main issues related to (i) the value of the company (H disputed the SJE valuation), (ii) whether the company was fully or partially matrimonial, and (iii) how much H should pay to W to reflect the value of her claim in relation to the company.

Following a four-day final hearing, District Judge Hudd (i) accepted the SJE's valuation of the company (£3.2m, based on an EBITDA calculation), (ii) reflected H's argument about the pre-marital origin of the company in the overall division of the assets, rather than seeking to quantify what part of the company was marital/non-marital, and (iii) ordered H to pay, in addition to the division of net capital, a series of lump sums totalling £950,000. In light of the strong track record of the company (and the potential to raise finance if profits dipped) the court ruled that these lump sums should not be capable of variation.

The overall effect was that the total assets (comprising net assets, pensions and company shares) of £4.75m were divided 58:42 in H's favour, reflecting illiquidity, risk and that the company was not entirely matrimonial (i.e. it had been incorporated beforehand). H would retain the company but would be obliged to pay £150,000 on 1 November 2019 (which was paid) and four annual sums of £200,000 commencing 1 November 2020.

Impact of pandemic and set aside application

Five months after this final hearing, on 23 March 2020, the UK went into its first lockdown and, for the first time in living memory, the schools were closed. The impact on the company was immediate in that a previously steady income stream ground to a halt, necessitating urgent applications for loans to maintain its solvency. H contended that he would not be able to pay the lump sums (e.g. £200,000 on 1 November 2020) and that the value of the company had slumped.

In those circumstances – and it is perhaps worth recalling the almost apocalyptic mood of April 2020 – H issued an application to set aside, limited to his future obligations to pay the annual sums. H did not seek to disturb the existing capital orders (i.e. W's receipt of the net proceeds of sale of the family home or the first lump sum of £150,000).

This raised a novel legal point: could a Barder application be based on the economic effects of COVID?

As every law student will recall, in certain, exceptional circumstances, the court may reopen a final hearing based upon a supervening event (*Barder*). There are, per Lord Brandon, four essential pre-conditions that should be met, including that the event relied upon should have taken place within a few months and have invalidated the fundamental basis of that order.

In the subsequent case of *Cornick (No 1)* [1994] 2 FLR 530 Mrs Justice Hale (as she then was) considered the application of *Barder* to cases where, post-judgment, the value of assets has changed. Hale J identified three categories: (1) where the value of an asset has changed by the natural processes of price fluctuation, (2) where a wrong value was put upon an asset at trial and (3) where something unforeseen and unforeseeable had happened. In the first category, a *Barder* application could not succeed (as Mr Myerson found to his cost); the second category might be reviewed if it amounted to misrepresentation; only the third might properly come within *Barder*.

In *BT v CU*, H sought to argue that COVID and its effects were unforeseen and unforeseeable, thereby falling outside the natural processes of price fluctuation: this was a 'category three' case where the court might set aside, rather than a 'category one' case.

The litigation

Following issue of H's *Barder* application in April 2020, the wheels of justice turned slowly, as they are wont to do. The parties agreed an effective stay for six months, after which it took almost a year before the application was heard (October 2021), by which stage the question of whether COVID could be a *Barder* event was not quite as fresh and topical as it had been in the spring of 2020.

Moreover, the issue had been transformed by the unexpectedly generous Government furlough scheme. By the time *BT v CU* reached court in October 2021, the company had received over £3m of grants, without which, it would likely have collapsed. Without such Government largesse, it is likely that the courts would have faced a significantly greater number of applications to reopen final orders made in the months leading up to March 2020. An interesting counter-factual is, what would the outcome have been in *BT v CU* without furlough?

Judgment of Mostyn J

(1) COVID and Barder

There was no dispute in *BT v CU* as to which authorities were relevant. W relied on the well known case of *Myerson (No 2)* [2009] EWCA Civ 282, where the value of the husband's shares slumped post-judgment from £15m to a negative value. At [29], Mostyn J observed that 'it is clear that [Thorpe LJ's] principal reason was that the global financial crisis of 2008 was not unforeseeable and the downturn did not invalidate the fundamental basis of the order'.

At [21], Mostyn J commented, 'When assessing whether a new event was unforeseeable in a case where it is said that the event has caused a major shift in the value of the assets (as opposed to a case where the new event is the death of a party) I consider that the court should principally focus on the economic impact rather than its cause or event'.

Accordingly, the court focused not on H's argument that the pandemic was a once-in-a-century event but on the bottom line, i.e. its financial impact: '*au fond* such a case is no different in substance to one where a business was devastated by the impact of the 2008 global financial crisis'.

In a case where the company had, in effect, been rescued by the furlough scheme, Mostyn J held that the impact of COVID on this business, projected to involve a reduction in turnover of 10%, wiping out the operational profit, failed to satisfy the first of Lord Brandon's conditions, i.e. that the fundamental basis of the order was invalidated. The court's answer to the direct question posed in the case, was as follows:

> '[22] My answer to the first question posed for me – Is Covid capable of being a *Barder* event? – is "probably not", but, as always, it depends on the specific facts of the case.'

(2) Executory orders (Thwaite)

Having failed in his *Barder* application, the question arose: could H succeed on the basis of seeking to review what was still an executory order.[1] In *Thwaite* [1982] Fam 1, the Court of Appeal held that where an order was still executory, the court may refuse to enforce it if, in the circumstances prevailing at the time of the application, it would be inequitable to do so. This '*Thwaite*' test ('inequitable to do so') is notably lower than the *Barder* test (i.e. invalidates the fundamental basis of the order).

In other words, have family lawyers been applying the wrong law in set aside cases for the past forty years? Have we been struggling with the famously difficult terrain of a *Barder* application when an easier path was available to us, by virtue of *Thwaite*?

Curiously, in the past four decades, no court had resolved the tension between these two cases. The point had apparently been raised in *L v L* [2006] EWHC 956 (Fam), but Mr Justice Munby (as he then was) described this as 'a refinement which there is no need for me to explore here'. One of the benefits of undertaking legal research online is that it becomes much easier to detect trends. It is notable that for a generation, *Thwaite* arguments almost disappeared from the law reports. The case was cited in only one family case from 1988 to 2016. Since then, it has been relied upon in at least seven. Moreover, *Thwaite* has been applied inconsistently. In *Akhmedova* [2020] EWHC 2235 (Fam), Knowles J held that for *Thwaite*, the change of circumstances must have been unforeseen; in *Kicinski v Pardi* [2021] EWHC 499 (Fam), Lieven J held that there was no such requirement.

From paragraph [43] of his judgment, Mostyn J reviewed his own decision in *SR v HR* [2018] EWHC 606 (Fam):

> 'that any application under the principle in *Thwaite* should be approached "[51] extremely cautiously and conservatively", which, of course, was coded language expressing my doubt that the jurisdiction to rewrite (as opposed to mere refusal to enforce) existed at all … [56] However, since my decision in *SR v HR*, there have been four cases which have rejected my doubts and which have held that the court has the power not merely to stay enforcement of an executory order, but to rewrite an executory final order to provide for something completely different to that which it originally stated.'

Mostyn J reviewed each of the four decisions and expressed his respectful disagreement:

> '[63] I have to say, with great respect, that I do not agree with these decisions. They appear to me to be in conflict with the binding precedent of *Barder* …
>
> [64] An application to set aside an executory order under the *Barder* doctrine is explicable as an exercise of appellate powers, now replaced by a specific rule permitting the power to be exercised at first instance. An application to set aside an executory order based on fraud, or mistake, can be explained as a separate cause of action. These are surely the only legitimate exceptions to the statutory prohibition on variation of the amount of capital settlements.
>
> [66] If this route were available, then it means that many *Barder* cases, including *Barder* itself, will have been tried, and in most cases dismissed, applying a set of principles far more rigorous than those required under the executory order doctrine. This is because most *Barder* cases, including *Barder* itself, concern orders which are executory. It would therefore seem, if the proponents of the executory order doctrine are correct, that the entire litigation in *Barder* itself, all the way to the House of Lords, was conducted on a completely wrong footing.'

Lump sums by instalment

The third substantive issue concerned the possibility that District Judge Hudd's order might be varied, in spite of the learned judge's clear intention that it should not be. This was relevant on the question of whether H might have an alternative remedy to pursuing a *Barder* set aside (cf. *Myerson*).

All family lawyers will know that lump sum orders cannot be varied, with the exception of 'lump sum orders by instalment' (see ss 23(1)(c) and 31(2)(d) of the Matrimonial Causes Act 1973). Since the Court of Appeal decision in *Hamilton* [2013] EWCA Civ 13, a practice has developed whereby orders are drafted as 'lump sums by instalment' (which are variable) and 'a series of lump sums' (which are not).

The jurisdictional basis of this distinction is questionable. In *Hamilton*, Mrs Justice Baron (sitting in the CA) cited no authority in support of the proposition that by artful drafting the parties could achieve an outcome which involved staggered lump sum payments which avoided the power to vary. In Baron J's judgment, the end justified the means: ('there must be a mechanism whereby the parties can agree, or the court can effect a clean break').

In the longest section of Mostyn J's judgment (paras 68 to 98), the learned judge traces through the development of the court's powers to make capital orders, placing particular emphasis on the 1969 Law Commission Report, 'Financial Provision in Matrimonial Proceedings'. That report recommended the creation of a power to vary the timing of lump sum instalments but not the overall quantum.

The question of the court's power to vary the quantum of lump sum orders has been considered in at least eight reported cases, none of which referred to the 1969 report, and in only one (*Tilley* (1980) 10 Fam Law 89), was the power to vary the quantum actually exercised. *Tilley* is a short report which Mostyn J disregards ('I do not consider that there is a clearly expressed *ratio decedendi* which binds me').

Having reviewed the development of statutory and case law in some detail, Mostyn J concludes that the Court of Appeal incorrectly stated the law in *Hamilton* and that the expression 'a series of lump sums' is no more than camouflaging language. Where an order contains provision for different payments on different dates then this is a lump sum by instalment which is, as a matter of law, variable as to timing but not as to quantum:

> '[96] … If, however, there are different payments on different dates for different purposes, as described by Sir George Baker P in *Coleman*, then that arrangement will be a series of lump sums. Mr Chandler submits that the law should look to effect and not semantics; and cites Lord Templeman's famous aphorism in *Street v Mountford* [1985] AC 809 (albeit in a different context):
>
> > "The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."
>
> I agree.
>
> [97] In my judgment, notwithstanding that the order in this case is to be characterised as a lump sum payable by instalments, it is not variable as to overall quantum under s 31 Matrimonial Causes Act 1973. The overall quantum can only be set aside or altered under the *Barder* doctrine. Under s 31 all that can be achieved is recalibration of the payment schedule.'

Anonymisation

Finally, an issue arose as to anonymisation. Traditionally, financial remedy judgments are anonymised up to High Court level, but heard in open court, without anonymisation, in the Court of Appeal and above. Accordingly, the case which was reported as *NG v KR* [2008] EWHC 1532 (Fam) is re-titled as *Radmacher v Granatino* in the Court of Appeal ([2009] EWCA Civ 649) and Supreme Court ([2010] UKSC 42).

On the wider question of open justice in the family court, the Family Division has traditionally divided as follows: on one hand there is Mr Justice Holman who presumptively sits in open court (see e.g. *Luckwell v Limata* [2014] EWHC 502 (Fam)); on the other, all of the other High Court judges have started with the opposite presumption, e.g. Mostyn J in *DL v SL* [2015] EWHC 2621 'it is my opinion that [FPR 27.10] does incorporate a strong starting point or presumption [sitting in private] which should not be derogated from unless there is a compelling reason to do so'.

However, in *BT v CU*, Mostyn J effectively crossed the floor. At paragraph [105], the learned judge remarked:

> '[105] I no longer hold the view that financial remedy proceedings are a special class of civil litigation justifying a veil of secrecy being thrown over the details of the case in the court's judgment. In my opinion it is another example of the Family Court occupying a legal Alsatia (*Richardson v Richardson* [2011] EWCA Civ 79, [2011] 2 FLR 244, para 53, per Munby LJ) or a desert island "in which general legal concepts are suspended or mean something different" (*Prest v Petrodel*

> *Resources Ltd and others* [2013] UKSC 34, [2013] 2 AC 415, para 37, per Lord Sumption).'

While on the facts of *BT v CU*, the court retained anonymisation, a clear warning was sounded:

> '[113] it should be clearly understood that my default position from now on will be to publish financial remedy judgments in full without anonymisation, save that any children will continue to be granted anonymity. Derogation from this principle will need to be distinctly justified by reference to specific facts, rather than by reliance on generalisations.'

Conclusion

Mostyn J's judgment in *BT v CU* covers many legal issues and is required reading for financial remedy practitioners. For those who prefer a more abbreviated read, the headline points are as follows:

(1) COVID probably isn't capable of founding a successful *Barder* argument.
(2) *Thwaite* has been misapplied in several cases and is not realistically available as an alternative to *Barder*.
(3) The practice of drafting a series of lump sums in order to avoid the variation power is disapproved as camouflage. However, the variation power should extend only to timing and not as to quantum.
(4) The court's presumptive approach from now on in financial remedies should involve naming the parties unless distinctly justified otherwise.

Notes

1 The term 'executory' is defined in *Potter* [1990] 2 FLR 27 as 'an order which still has to be carried out'.

T v T (Variation of Pension Sharing Order and Underfunded Schemes) [2021] EWFC B67

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HHJ Edward Hess's judgment in the case of Mr T and Mrs T is without doubt the most complex and detailed pension sharing judgment ever handed down by the courts in England and Wales. It has more twists and turns than a John le Carré novel and, as you will see, features many of the pension sharing on divorce elephant traps.

The case features a former husband and wife who were both aged 53 at the time of the final variation application hearing in November 2021. Although there were various financial elements to the original judgment following the final hearing on 30 September 2015, this article focuses purely on the pension sharing order (PSO) aspects of this long-marriage case. It also excludes any legislative references as these are thoroughly referenced throughout the judgment.

As with most cases involving pension sharing, the timing of events is often as crucial as the events themselves, and so this summary starts with a chronology to highlight the timing of the key events in this particular case.

Key chronology

- 30 September 2015 – judgment delivered orally on conclusion of final hearing by DJ Thomas at Bromley Family Court.
- Pension Sharing Order awarded against husband's company X pension with a CE at time of trial of £826,125.
- 3 May 2016 – Final Order perfected.
- 21 July 2016 – Order of HHJ Redgrave expressly permitted the husband to apply for decree absolute whilst he was appealing against other aspects of the original order. There was no appeal against the PSO.
- 2 August 2016 – pension administrators comment 'paragraph F of the Annex should have the external transfer box marked as the trustee of the scheme does not permit internal transfers'.
- 11 October 2016 – Husband's company X pension provides new CE of £1,795,362.
- October 2016 – a further unsealed version of the Annex presented to company X, this time with the 'external' box ticked by the lawyers at paragraph F.
- 5 December 2016 – company X pension scheme announced a policy of substantially reducing CEs for external transfers due to the scheme being underfunded.
- Early 2017 – amended Pension Sharing Annex sealed by the court.
- 8 June 2017 – new CE issued of £1,652,012, but reduced to £722,138 on account of scheme underfunding.
- Mid 2017 – both husband and wife are aware of the developments in changes to transfer values. Husband thinks wife will receive more than expected and wife thinks she will receive less than expected, as she was not aware of the option of an 'internal transfer' following company X's decision on 5 December 2016.
- 15 July 2017 – wife issues application seeking a 'declaration of the court' in relation to the PSO, that proved to be based on an entirely erroneous understanding of the law.
- 5 September 2017 – husband (acting in person) applied for a stay on the pronouncement of decree absolute.
- 21 September 2017 – wife applies for decree absolute to be pronounced.
- 29 September 2017 – DJ Thomas temporarily stayed any application for the pronouncement of decree absolute.
- 21 November 2017 – husband (acting in person) applied for a variation of the PSO, which legally prevented the PSO taking effect until the application had been determined.
- 22 December 2017 – DJ Thomas gave permission for the pronouncement of decree absolute, which happened the same day.
- 13 April 2018 – company X pension trustees reverse their policy of reducing CEs, but wife was unaware of this development until 24 March 2021, despite court

hearings on 18 April 2018, 23 November 2018, (possibly) 5 September 2019 and 8 October 2020, where husband did not disclose this important fact.
- 2 August 2021 – husband's pension fund CE now valued at £2,471,833.
- 8 November 2021 – final variation application hearing commences before HHJ Hess.
- 10 November 2021 – in the judgment handed down by HHJ Hess, the judge:
  - quotes and explains the law on moving target syndrome;
  - explains the rules around CEs and pension underfunding;
  - dismisses the husband's PSO variation application on the grounds that nothing had changed significantly, and the change in CE does not justify a variation in the percentage of the PSO;
  - warns about the danger of the PSO having not taken effect since 30 September 2015 when first handed down by DJ Thomas;
  - dismisses the wife's application for a 'declaration of the court' in July 2017; and
  - awards costs against the husband of £100,000.
- The judge also concluded that the husband's action had prevented the PSO taking effect for more than 6 years, which had been overlooked by most of the lawyers involved on both sides of the case for much of that period. The judge also warned about the ticking of the internal/external transfer boxes in paragraph F of the Pension Sharing Annex.

What can we learn from this case?

The fact that the CE increased from £826,125 at trial in the autumn of 2015 to £2,471,833 in August 2021, is simply a function of 'moving target syndrome'. This refers to the fact that a transfer value will always be recalculated at some point during the implementation period and will almost certainly be higher or lower than the original CE. The judge made it clear that the increase in CE is not reasonable justification for the variation of a PSO. He also commented that 'by preventing the PSO taking effect for more than 6 years, the husband had left open the possibility of "moving target syndrome" more than in most cases', and said 'if he feels he has lost out by it then he is very substantially the author of his own misfortune'.

What the judge did not highlight, was that had the decree absolute been applied for by the husband following the judgment in 2015, he would have capped the amount of his pension benefits that were to be included in the PSO and, therefore, the amount of benefits that would be valued at the point of implementation. In this case the husband left company X sometime in 2018, although the judgment does not say when. It is possible therefore that the overwhelming majority of the husband's benefit will be captured in the final implementation of the PSO, whereas potentially 2 or 3 years' worth of accrual could have been excluded from the final split had the decree absolute been applied for much sooner.

Although the wife's application for the decree absolute was eventually successful in December 2017, the husband's application to vary the PSO a month earlier automatically prevented the PSO from taking effect. It could not take effect until the husband's application was finally dismissed, which it was by HHJ Hess in November 2021, whereupon the PSO immediately took effect from the date of the decree absolute in December 2017.

As the judge pointed out, neither the wife's nor the husband's legal team were aware that because the PSO had not taken effect, and because the couple had been divorced since December 2017, the wife was at risk of losing the PSO. Had the husband died before the final hearing before HHJ Hess, the wife would have received no spouse's benefit from the company X pension scheme, and neither would she have received any benefit from the PSO.

Internal/external transfers

The trustees of a Defined Benefit pension scheme are entitled to insist on an external transfer where they choose not to accept ex-spouses as members of the pension scheme on divorce. However, the law requires that if the trustees choose to reduce the CE where a pension scheme is underfunded, the trustees must in those circumstances offer the option of an internal transfer to the ex-spouse. This means that the ex-spouse becomes a shadow member of the pension scheme until such time as a full transfer value is once again available, at which time they would have the option of transferring out with a full transfer value.

In this case, it would appear that neither the husband, the wife, nor their legal teams were aware of this complex part of pension sharing legislation, and at the time of the original CE, only the external transfer option was offered as CEs were not being reduced. When this policy changed on 5 December 2016 and the CE was eventually reduced, the scheme did not inform the parties that an internal transfer option would now be available to the wife.

To compound this problem, the pension scheme had commented that the external transfer option box in paragraph F of the Pension Sharing Annex should be ticked to reflect the fact that the scheme does not offer an internal transfer option. This was correct at the time the comment was made, and it resulted in the lawyers agreeing to the ticking of the 'external transfer' box before the Pension Sharing Annex was finally approved by the court.

It is perhaps one of the happier outcomes of this case that as a result of the delay caused by the husband's application to vary the PSO, the PSO was not implemented during the period when CEs were dramatically reduced by approximately 50%. It will never be known what the pension scheme trustees would have done had the wife applied to implement the PSO at this point, when they were in receipt of a Pension Sharing Annex electing for the external transfer option. We can only hope and pray that the administrators would have realised that an internal transfer option also had to be offered. Had they not, and had a transfer out been made on a reduced basis, then the wife's lawyers could have been having an exceedingly difficult conversation with their insurers.

The above situation was predicted as a distinct possibility when the PAG report was drafted, hence PAG recommended in paragraphs V41 to V44 of its report that this box is not ticked, which readers of this article are encouraged to digest. Sadly, the Annex has yet to be amended. Until it is, family lawyers would be well advised not to tick either of

the paragraph F boxes, and vigorously defend any request by a pension scheme administrator for them to do so.

In conclusion, it was clear from this case that the legal teams on both sides, excepting the wife's lawyers at the latter stage of proceedings, according to the judge 'appear to have had limited understanding of the issues with which they were dealing'. There will happily be a good outcome for the wife, not only in terms of the significant increase in CE she is likely to receive as a result of the delay, but also in receiving a greater proportion of the husband's pension assets due to the husband (as the Petitioner) not applying for decree absolute much sooner. This ensured that further accrual in his pension scheme benefits will be included within the final implementation, and CEs have risen substantially over the period of the case.

While many of the common PSO elephant traps are encapsulated in this case, the key message has to be to apply for decree absolute as soon as possible once a PSO can take effect, usually 28 days following the date of the original Order. In this case it was the date the Order was first handed down, not when the Order was finally perfected some 6 months later. It is also important to then get on and implement the PSO as quickly as possible. As we see all too often, the longer it takes to implement a PSO, the greater the likelihood that problems will arise.

Principal Private Residence Relief on Divorce

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When individuals stop living in the matrimonial home they are often likely to face a capital gains tax charge when the property is sold or transferred.

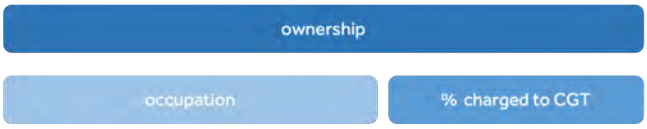
Any individuals that have lived in a property as their main home are entitled to Principal Private Residence (PPR) relief when the property is sold.[1] The relief is available for the home and grounds up to an acre. The relief is available for periods of occupation only. There are two types of occupation: actual and deemed. Actual occupation arises when the individual was living in the property. Deemed occupation arises when the legislation allows for a period of absence to be treated as occupation.

Deemed occupation

The final 9 months of ownership are always considered deemed occupation.[2] There are primarily three other types of absence which are counted as deemed occupation:

- when the individual was away from the home due to working overseas (uncapped);[3]
- where the individual was working away from home in the UK (up to 4 years);[4]
- any absence up to 3 years.[5]

The above reliefs are known as 'sandwich' reliefs as the individuals have to have been living in the property as their main home before and after the absences. For the first two scenarios if the individual has been unable to return to the home due to the location of their work, PPR relief would still be available.



Section 225B relief

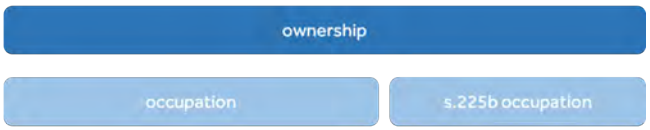
Section 225B relief is one of the few reliefs in the tax code that exists specifically for couples who are going through a divorce. In certain circumstances it allows individuals to extend their period of deemed occupation until the point of transfer or sale. This permission is granted at s 225B of the Taxation of Capital Gains Act 1992.

By way of illustration; Mr and Mrs A have owned their home together from 2011, they married in 2014 but separated in 2016 at which time Mr A moved out of the matrimonial home. It's 2021 and they are in the process of divorcing and have decided to sell the property. It was purchased for £650,000 and is now worth £1.5 million.

Mrs A will have no capital gains tax liability on sale as she has lived in the property for the whole period of ownership.

Mr A will have an exposure to capital gains tax of £42,000 (Calculation: sale price less purchase price = 850,000, only 50% of the gain is charged on Mr A as the property is owned jointly. Mr A lived in the property for 6 years out of 10 so 60% of the gain will be eligible for PPR relief. 40% of the gain is 170,000, this would be taxed at 28% – this is a very simplified explanation.)

If Mr A transfers the property to Mrs A ahead of the sale and claims s 225B election, PPR relief will apply to whole gain and Mr A's liability will be reduced to £nil.



The conditions for the relief are:

I. the property must have been Mr A's main home before he left the property;
II. the property must still be Mrs A's main home;
III. Mr A cannot have elected any other property to be his main home;
IV. the property must be transferred either due to a court order or by way of an agreement;
V. the transfer must be being done due to a divorce.

Condition (iii) 'Mr A cannot have elected any other property to be his main home' specifically means that Mr A cannot have submitted an election to HMRC requesting that a new property be his main home for PPR relief. If Mr A owned another home, this would not preclude him from claiming this relief. It is quite uncommon for individuals to register a home as their PPR unless they live in two or more properties.

For this treatment to apply the s 225B election must be made in writing to HMRC. There is no prescribed election template to be followed. The election should include the address of the property, a statement to HMRC that the indi-

vidual is claiming s 225B relief on the property, the individual's full name, national insurance and unique taxpayer reference number if they have one.

The election should be posted to HMRC at the following address: Self Assessment, HM Revenue and Customs, BX9 1AS.

If Mr A purchases another home before the transfer of the property can be completed, he can choose whether the PPR attaches to the former matrimonial home or to the new property. Often this choice will be made once the value of PPR relief on each property has been ascertained. Typically, the relief is more valuable on the former matrimonial home and the election is made on that property. Once the interest in that property has been transferred to the occupying spouse the PPR relief will automatically attach to the home in which Mr A is living.

In the majority of circumstances an individual can only claim PPR on one property at one time.

Garden and grounds

PPR relief is given up to the permitted area. This is currently up to 0.5 hectares (about an acre)[6] including the site of the home. The permitted area can be extended if the grounds are required for the reasonable enjoyment of the house. Generally speaking, a garden is taken to be part of the grounds. The grounds are defined as enclosed land surrounding or attached to a house serving chiefly for ornament or recreation. When considering whether the garden and grounds are reasonably required for the enjoyment of the house the following criteria are looked at:

- size and character of the house;
- how the gardens are actually being used;
- are the garden/grounds actually required for the purposes of the taxpayers enjoyment;
- the opinion of the HMRC district valuer.

If HMRC disagree that the garden and grounds are reasonably required they may open an enquiry into the house sale and the relief claimed. Penalties can be charged if HMRC determine that the parties failed to take reasonable care with regards to their tax obligations when selling the property. We are seeing more cases concerning the size of garden and grounds reaching the tax tribunals.

With the introduction of Google Earth a HMRC officer can view the property and its surrounding grounds without having to leave the office.

PPR relief must be restricted to the property and allowable gardens. Any additional land will not qualify for PPR relief and the gain on this land will need to be calculated.

In *Longson v Baker (HMIT)* [2001] STC 6, 2001 BTC 356 Mr and Mrs Johnstone purchased Velmede Farm. The grounds were converted to be appropriate to keep horses. After divorcing Mr Johnstone, Mrs Johnstone sold the house and the grounds. The question for the court was whether the grounds of 3.5 acres were required for the reasonable enjoyment of the house.

On appeal by Mrs Johnstone, this case was heard at the High Court. Evans-Lombe J dismissed the appeal, holding that 'in my judgement it is not objectively required i.e. necessary to keep horses at a house in order to enjoy its residence'.

Therefore, in cases where the garden and grounds of the property are over an acre clients should seek advice as to what portion of the grounds may be subject to capital gains tax on sale.

Second homes

In some cases, individuals will move into their second homes during proceedings. As above PPR relief is available for residences in which individuals live as their main home. Unfortunately, there is no statutory definition of 'residence' for these purposes. In the case of *Iles & Anor v Revenue & Customs* [2014] UKFTT 436 (TC) the First Tier Tribunal concluded that for a property to qualify as a residence it must have a sufficient degree of permanence, continuity or expectation of continuity to justify describing that occupation as a residence.

In *Stephen Core v HMRC* [2020] UKFTT 440 (TC), the taxpayer moved into a property upon which he had already received on offer to sell. The offer was refused prior to the taxpayer taking up residence, but was subsequently accepted. Notwithstanding that the property was occupied only for a period of six to eight weeks, the First-tier Tribunal found that it had been the taxpayer's main residence as it was only after moving in and receiving a higher offer that the decision to sell was made.

Therefore, in some circumstances where an individual moves into a second home or previously rented out property they may be able to claim a portion of PPR relief when the property is sold. Whether PPR relief is available will depend heavily on the circumstances.

Deferred charge

If one party transfers the legal title to the former matrimonial home to the other party but retains a secured beneficial interest in the property this is often referred to as a deferred charge. The transferor will usually receive a percentage of the proceeds on future sale.

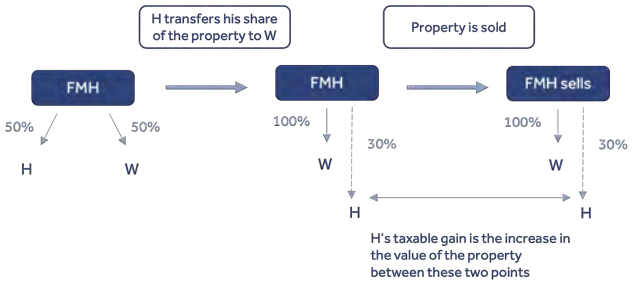
When there is a deferred charge, the party with the charge, has an asset, they hold something that will rise/reduce in value and which will be realised at some point in the future. But at the time the charge is granted, the consideration is uncertain. A disposal for unascertainable consideration is taxed following the principles established in *Marren v Ingles* (54TC76):

- The property is deemed to be disposed of at the time of the charge in return for a right to receive future unascertainable consideration.
- That right is a separate chargeable asset known as a 'chose in action' for CGT purposes.
- The consideration for the disposal of the property is the value of the right, and PRR should be available.
- When the deferred payment is eventually received this is a disposal of the right and the proceeds for the first disposal are taken as base cost.
- No PRR is available on this second disposal as it is a disposal of the right and not the underlying property.

The lower rate of capital gains tax is used because a chose in action is not a residential property so the residential property rates will not apply. The rates would be either 10%

or 20% depending on the level of earnings the person has at the time of disposal.

When the property is sold and the individual receives their payment there will be a capital gains tax charge on the amount they receive. The capital gains tax rate applied will be 20% (as the tax is on the 'chose in action' rather than on the property.[7] The gain is calculated as the amount they receive on sale less the value of their interest when they received the charge.



If the deferred charge is for a fixed amount (rather than linked to a percentage of the property value) there would be no tax payable on the payment of the charge. This is because there is no tax liability on the repayment of a debt and a fixed sum would be viewed as a debt.[8] For individuals debts are assets for chargeable gains purposes; however, a chargeable gain or allowable loss does not accrue on the disposal of a debt if the transferor is the original creditor.

Notes

1 Taxation of Capital Gains Act 1992, s 222–224.
2 Taxation of Capital Gains Act 1992, s 223(2)(a).
3 Taxation of Capital Gains Act 1992, s 223(3)(b).
4 Taxation of Capital Gains Act 1992, s 223(3)(c).
5 Taxation of Capital Gains Act 1992, s 223(3)(a).
6 Legislation defines the space as 0.5 hectares or 5,000 m^2.
7 Note, this would be 10% for a basic rate taxpayer. The 10% rate would be applied for the portion of the gain up to the basic rate band (including the individual's income). For example, for an individual earning £20,000, the first £30,270 of their gain would be taxed at 10% and the excess at 20%.
8 Taxation of Capital Gains Act 1992, s 251(1).

Criminal Confiscation, Trusts of Land and Financial Remedies

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Background

Convicted criminals may find themselves subject to confiscation applications and orders. These might be accompanied by a trust of land or financial remedy application, by a (perhaps not so) innocent applicant. How do confiscation proceedings work generally? How do they interact with family proceedings? This article gives a general introduction to confiscation, before looking specifically at its interaction with trusts of land and financial remedy applications.

Criminal Confiscation: Proceeds of Crime Act 2002, Part 2

Background: the purpose of confiscation

Part 2 of the Proceeds of Crime Act 2002 (**PoCA**) 'is concerned with the confiscation of the proceeds of crime. Its legislative purpose, like that of earlier enactments in the field, is to ensure that criminals (and especially professional criminals engaged in serious organised crime) do not profit from their crimes, and it sends a strong deterrent message to that effect'.[1]

A confiscation order deprives the criminal, directly or indirectly, of the benefit of crime, by ordering the payment of a fixed sum of money. Personal not proprietary, the order may be satisfied from criminally or legitimately acquired assets. 'Confiscation' is a misnomer; 'Although "confiscation" is the name ordinarily given to this process, it is not confiscation in the sense in which schoolchildren and others understand it.'[2]

Confiscation orders

Jurisdiction: The Crown Court must consider making a confiscation order if (a) a defendant ('**D**') is convicted in proceedings before the Crown Court or committed to it under various provisions; and (b) either the prosecutor asks the court to proceed, or the court believes that it is appropriate to do so.[3]

How does confiscation work? The court must ask itself three questions:[4]

> '(i) Has the defendant (D) benefited from the relevant criminal conduct?
>
> (ii) If so, what is the benefit D has so obtained?
>
> (iii) What sum is recoverable from D?
>
> Where issues of criminal lifestyle arise the questions must be modified. These are separate questions calling for separate answers, and the answers must not be elided.'

Answering the questions: the wording of PoCA. PoCA defines many of the relevant terms. It is important to 'focus very closely on the language of the statutory provision in question in the context of the statute and in light of any statutory definition'.[5] However, there is a vast array of caselaw as to their meaning and application.

Standard of proof: The standard of proof is the balance of probabilities,[6] with limited possible exception.

Question 1. Identifying the benefit from criminal conduct: 'Criminal conduct' is conduct which constitutes an offence in England and Wales, or would do if it occurred there.[7] D 'benefits from conduct' if D obtains property[8] as a result of or in connection with the conduct.[9] The benefit is the value of the property[10] or pecuniary advantage[11] so obtained. Benefit takes two forms: benefit from 'general criminal conduct' (**GCC**) and from 'particular criminal conduct' (**PCC**).

Question 1(a): GCC occurs where the court decides that D has a 'criminal lifestyle'.[12] D has a criminal lifestyle only where (a) D is convicted of an offence specified in Schedule 2 PoCA;[13] (b) the offence constitutes conduct forming part of a course of criminal activity as statutorily defined;[14] or (c) the offence is committed over a period of at least six months, and D has benefitted from the conduct which constitutes the offence.[15] Other than conviction for a Schedule 2 PoCA offence, D must also have obtained 'relevant benefit'[16] of not less than £5,000.[17]

If D has a 'criminal lifestyle' the court decides whether D has benefitted from his GCC.[18] GCC is *all* of D's criminal conduct, and it is immaterial whether it occurred, or whether property comprising the benefit was obtained, before or after the passing of PoCA.[19] Four statutory assumptions must be made for the purpose of deciding (a) whether D benefited from his GCC; and (b) his benefit from the conduct:[20] *first*, that any property transferred to D at any time after the 'relevant day' was obtained by D as a result of his GCC, and at the earliest time D appears to have

held it;[21] *secondly* that any property held by D at any time after the date of conviction was obtained by D as a result of his GCC, and at the earliest time D appears to have held it;[22] *thirdly*, that any expenditure incurred by D at any time after the 'relevant day' was met from property obtained by D as a result of his GCC;[23] and *fourthly*, for the purpose of valuing property (assumed to have been) obtained by D, that D obtained it free of any other interests in it.[24] The 'relevant day' is the first day of the period of six years ending with the day when proceedings for the offence concerned were started against D, or the earliest such day when there is more than one set of proceedings.[25] The prosecution must initially prove the underlying facts to which the assumption is applied (e.g. that property was transferred to D).[26] The standard of proof is the civil standard,[27] although the criminal standard may apply where it is necessary to prove a criminal offence with which D has not been charged in order to engage the assumption.[28] However, the court must not make a required assumption in relation to particular property or expenditure if (a) it is shown to be incorrect; or (b) there would be a serious risk of injustice if it were made.[29]

Question 1(b): PCC is much more confined. It is all of D's criminal conduct which constitutes (a) the offence(s) concerned; (b) offences of which D was convicted in the same proceedings as those in which D was convicted of the offences concerned; and (c) offences which the court will take into consideration in sentencing D for the offences concerned.[30] The assumptions do not apply. Once PCC is identified, the court then identifies the benefit D has obtained from it.

Question 2. Valuing the benefit from criminal conduct: Once identified, the benefit must be valued. The value of the benefit is the value of the property[31] or a sum equal to any pecuniary advantage[32] obtained. There are detailed valuation provisions.[33] The basic rule is that the value at any time of property then held by a person is its market value at that time,[34] subject to third-party interests,[35] but ignoring specified charging orders.[36] This is however subject to other provisions.[37] The value of property obtained as a result of or in connection with criminal conduct is its value at the time when the court makes its decision,[38] and this is the greater of (a) its value (at the time D obtained it) adjusted to account of later changes in the value of money; and (b) the value at the time of the court's decision of (i) the property held by D; (ii) if D no longer holds it, property directly or indirectly representing it in D's hands; and (iii) if D holds only part of it, then that part and any property directly or indirectly representing the other part in D's hands.[39] References to 'value' at (a) and (b) are to the values found in accordance with the basic rule.[40]

Question 3. The recoverable amount: The amount recoverable from D is the amount in which the confiscation order will be made; however, the order will be made only if, or to the extent that, it would not be disproportionate to require D to pay the recoverable amount.[41] The starting point is that the recoverable amount is an amount equal to D's benefit from the conduct concerned.[42] However, if D shows that the available amount is less than that benefit, then the recoverable amount is either the available amount or, if the available amount is nil, a nominal amount.[43] The available amount[44] is the aggregate of the totals of the values (at the time the confiscation order is made) of all the free property then held by D minus the total amount payable in pursuance of obligations which then have priority,[45] and the total of the values (at that time) of all tainted gifts.[46]

D is to be treated as making a gift if he transfers property to another for a consideration whose value is significantly less than the value of the property at the time of the transfer.[47] Whether such a gift is 'tainted' will depend on whether D was found to have a criminal lifestyle.[48] If D has a criminal lifestyle (or no decision about this has been made), the gift will be tainted where D made it within six years of commencement of proceedings for the offence concerned (or the earliest of two or more offences and proceedings);[49] or where D made it at any time, and it was of property D obtained as a result of or in connection with his GCC, or it represents such property (wholly or in part, directly or indirectly) in D's hands.[50] Where there is no criminal lifestyle, a gift will be tainted if made at any time after the date of the offence, or the earliest of several offences, including those taken into consideration.[51] It is immaterial whether PoCA had been passed at the time.[52] Tainted gifts are valued by a similar (but not identical) statutory method to property obtained from conduct.[53]

Proportionality: Once the court has decided the recoverable amount, it must make a confiscation order requiring D to pay that amount, but it must make such order only if, or to the extent that, it would not be disproportionate to require D to pay the recoverable amount.[54] Proportionality is assessed against the statutory purpose of removing from Ds the proceeds of their crime; but there is not a more general discretion not to make confiscation orders than this.[55] There are many decided cases on proportionality. It will, for example, be disproportionate to make a confiscation order where the loser has been repaid in full (or potentially analogous cases).[56] So, for example, where D corruptly procured contracts from Network Rail, but gave full value under those contracts, a proportionate order was confined to the gross profit and, in principle, the pecuniary advantage obtained by obtaining market share, excluding competitors, and saving on the costs of tendering properly.[57] Where two or more Ds jointly obtain benefit, each obtains the whole, but subject to a *caveat* that at enforcement, double recovery would be a disproportionate violation of Article 1 of Protocol 1 ECHR.[58]

Proportionality: Article 8: Article 8 ECHR rights and proportionality issues are engaged at the *enforcement* stage when considering sale of the family home, rather than at making the confiscation order.[59]

Default term: When making the confiscation order, the court will fix a custodial term to be served in the event of default, subject to statutory maximum terms.[60]

Payment: D must pay the confiscation order on the day it is made.[61] However, in certain circumstances, the court may extend this, initially for three months, but to a maximum of six months from the day of the confiscation order.[62]

Variation: Making the confiscation order is not always the end of the matter. In certain circumstances,[63] PoCA allows for applications for confiscation orders where none was initially made; for confiscation to be reconsidered where no

benefit was initially found and no order initially made; for benefit and/or available amount to be reconsidered in respect of an existing confiscation order; for an existing confiscation order to be varied or discharged where the available amount is inadequate to meet the amount outstanding; and for discharge where a small amount is outstanding or recovery from the estate of a deceased defendant is impractical.

Procedure: Proceedings usually begin with D being ordered to provide information.[64] Next, the prosecutor will file and serve a 'statement of information', setting out specified information;[65] D will then provide a response.[66] The prosecutor may then file a reply, and the application will be case-managed to a final hearing.

Third parties: the confiscation stage: Third parties were never entitled to participate in confiscation proceedings, save insofar as D may have called the third party as a witness at the confiscation stage; third party participation occurred (if at all) if an enforcement receiver was appointed at the enforcement stage. Consequently, at confiscation, and given that confiscation orders are personal not proprietary, third-party interests were unaffected. This changed in 2015, with amendments made to PoCA, which concern the determination of the extent of D's interest in property.[67] Now, where it appears to a court making a confiscation order that (a) property held by D is likely to be realised or otherwise used to satisfy the order; and (b) a person other than D (may) hold(s) an interest in it, the court may, if it thinks it appropriate to do so, determine the extent of D's interest it, at the time the confiscation order is made.[68] The court must not exercise this power unless it gives to anyone it thinks is or may hold an interest in the property a reasonable opportunity to make representations to it.[69] Such a determination is conclusive in relation to any question as to the extent of D's interest in the property that arises in connection with (a) its realisation, or the transfer of an interest in it, with a view to satisfying the confiscation order; or (b) any action or proceedings taken for the purposes of any such realisation or transfer.[70] This binds neither the Court of Appeal nor Supreme Court.[71]

To assist the court in considering whether to make (and in making) such a determination, the court may order a third party whom it thinks may hold an interest in the property to provide specified information.[72] So, too, when D complies with any order requiring the provision of information,[73] and when the prosecutor provides its statement of information,[74] prescribed relevant information must be provided. However, the 2015 amendments were not intended to be used in every third-party case; they were designed to streamline the system by combining confiscation and enforcement in simple cases where there could be no sensible debate about enforcement of the confiscation order; in more complex cases, third-party interests could be considered at enforcement.[75] There is prescribed scope for appeal to the Court of Appeal against such determination.[76]

Third parties: enforcement receivership: The court may appoint an enforcement receiver to enforce the confiscation order,[77] and confer upon the receiver various powers, including taking possession of the realisable property, to realise as the court specifies.[78] 'Realisable property' is any free property held by (a) D; and (b) the recipient of a tainted gift.[79] 'Held' is widely defined as 'holding an interest' in the property, including beneficial interests.[80] The receiver deals with the realisable property, in order to obtain the recoverable amount. The receiver must exercise their powers without taking account of any obligation of D, or a recipient of a tainted gift, if the obligation conflicts with the object of satisfying any confiscation order that has been or may be made against D,[81] but with a view to allowing a person other than D or a recipient of a tainted gift to retain or recover the value of any interest held by them.[82] Third-party interests may therefore be considered here, if not precluded by their involvement at the confiscation stage. However, determination at the confiscation stage[83] will bind the court, unless the third party was not given a reasonable opportunity to make representations when the determination was made and has not appealed against the determination, or if it appears to the court that there would be a serious risk of injustice if that person were bound by it.[84]

Restraint orders

Restraint orders[85] are tools for the preservation of assets. They can be very widely drawn. They may prohibit *any person* (not just D) from dealing with any realisable property held by the specified person, whether or not it is described in the order, and whether it was transferred to that person before the order is made.[86] This may extend to third-party assets, if the court considers that assets held by a third party are in fact D's. Restraint orders may be subject to exceptions (e.g. for reasonable living expenses, business expenses, reasonable legal aid expenses[87]) and must include a 'legal aid exception'.[88] The court may also make ancillary orders for ensuring the effectiveness of the restraint order.[89] There is also the potential for a 'reporting requirement' to be made where the restraint order is made during the course of a criminal investigation.[90]

If a court in which proceedings are pending in respect of any property is satisfied that a restraint order has been applied for or made in respect of it, it may either stay the proceedings or allow them to continue on any terms it thinks fit;[91] but before doing so it must give an opportunity to be heard to the applicant for the restraint order, and any statutorily specified receiver.[92]

Financial remedies and criminal confiscation

How does this all tie-in with third-party interests, whether pursuant to applications under the Trusts of Land and Appointment of Trustees Act 1996 (**ToLATA**) or the Matrimonial Causes Act 1973 (**MCA**)?

Subsisting legal and beneficial interests: ToLATA

Established third-party interests held under trusts of land will not be included in the 'available amount' within the value of all free property held by D,[93] although in principle their value as 'tainted gifts' may be included.[94]

In *Gibson v RCPO* ((2008 CA))[95] D (H) was convicted in May 1999 of drug trafficking between 1996 and 1998. A confiscation order was made, including the equity in a property held in the joint names of D (H) and his former W, which had been bought in 1990, three associated endowment policies and two bank accounts (all held in joint names). In enforcement proceedings, to which W was joined, the High Court held that whilst W was the 50% beneficial owner of the equity in the FMH and the jointly-

held assets, she knew at least from 1993 that the source of the money used to pay the mortgage and endowments and to fund the accounts was not legitimate, 'tainting' her half-share; further, whilst the legislation did not permit W to be deprived of her half-share, as a matter of public policy, the taint of which W had guilty knowledge should be taken into account against her, and her share reduced to 12½%. The Court of Appeal disagreed. W's share was not realisable property, regardless of knowledge and taint; she had owned 50% from acquisition, which did not depend on any later agreement to pay the mortgage from criminal monies. The court also found that W's share was not a gift, W having provided consideration by bringing up the children and looking after the family home., the prosecution having made this concession

However, in *R v Hayes (Tom)* ((2018) CA)[96] the Court of Appeal distinguished the approach to tainted gifts in *Gibson*. It held that the 'tainted gift' provisions[97] must be applied in accordance with the statutory purpose behind their enactment, so will focus on the monetary value of any alleged consideration.[98] Whilst accepting that the question of 'gift' is intensely fact-specific, the tight definitions[99] make it potentially arguable as to whether 'consideration' arising solely from bringing up children or looking after the family home can *ever* suffice to be valuable consideration for these purposes; and even if it could, it would need to valued objectively and in monetary terms, and on an evidenced basis. Importantly, the relevant statutory provisions are in terms of 'money or money's worth', to be objectively assessed, not in 'human terms'. However, the court considered that it would be wrong to commit to a wholly inflexible purported statement of principle; but where the consideration is not direct financial contribution(s), the evidence must be closely and rigorously examined to establish if it may be assessed as consideration of value and, if so, to what extent.[100]

Re: B ((2008) HC (Admin))[101] demonstrates potential for apparently harsh outcomes. D (H)'s confiscation order reflected his half-share in the equity in the FMH, bought many years before the offending with a joint mortgage. Following D (H)'s arrest, W applied for a re-mortgage in her own name and, shortly before conviction, D (H) transferred his share into W's sole name for no monetary value. The court accepted that this was not to evade confiscation, and that the transfer into her sole name simply reflected the reality that W had been financing the family for many years, including paying the mortgage, whilst D (H) had contributed very little (being long-term unemployed through serious illness), and his offending was inept. However, D (H) had an equity in the house, and 'the law in this area can sometimes be harsh in its application. Here it treats the … transfer as a gift of [D (H)'s] equity to [W]. Thus it is available to be realised to pay the confiscation order.'[102]

Financial remedy applications

In confiscation applications: When making a confiscation order, the court must disregard what a third party may obtain in financial remedy proceedings over and above any interest which the third party holds at the time the confiscation order is made. The right to apply for relief under the MCA is not 'an interest' within the PoCA definitions. The court neither has regard to, nor allows for, any possible adverse consequences for a former spouse and her child when deciding the amount to be confiscated: *Webber v Webber* ((2006)) HC (Fam)).[103] Even under the pre-PoCA legislation, it had been held that 'the right to apply [for a property adjustment order], and the application itself, do not of themselves confer any property rights on the party making the application': *Re: MCA* ((2002) CA).[104]

In financial remedy applications: The core principles were set out in *HM Customs and Excise & Anor v MCA & Anor, A v A* ((2002) CA):[105]

- Neither MCA nor PoCA takes priority.[106]
- Both statutes confer a discretion, the exercise of which depends on the facts of the individual case.[107]
- It is not axiomatic that the public interest lies more in enforcing a confiscation order than in making a property adjustment order.[108]

However, where assets are tainted with the proceeds of crime and subject to confiscation, in most cases they should not ordinarily be distributed, as a matter of public justice and policy; but the court is not deprived of jurisdiction to make such distribution, and circumstances may exist where such order is justified: *CPS v Richards & Richards* ((2006) CA).[109] Indeed, whilst pending confiscation D remains the owner of the assets, D has in reality forfeited entitlement for s 24 MCA purposes; and the court cannot protect children from every consequence of their parents' behaviour.[110]

Whilst the decided cases are to an extent fact-specific, there are a number of basic factors. In exercising the discretion to make a property adjustment order, the court will consider:

- the applicant's [lack of] knowledge of D's criminality;[111]
- whether the property was:
  - purchased with the proceeds of crime or 'tainted';[112,113]
  - preserved by D's criminal conduct.[114]

Financial order not made: In *CPS v Richards & Richards* ((2006) CA),[115] a property adjustment order was refused. All family assets (other than a gift to W from her parents, which gave W a 13.3% beneficial share in the FMH) were the proceeds of drug trafficking. W 'knew that the husband was involved in criminal activities and that she really knew that from the word go'.[116] In the High Court, W was awarded a lump sum of £39,250 from the net proceeds of sale of the FMH, together with a sum reflecting the 13.3%. The Court of Appeal disagreed. The family assets were tainted (save for the gift); W knew they were tainted; so all family assets were susceptible to confiscation (save for the gift). 'In the instant appeal the whole of these tainted assets should be subjected to confiscation procedures and simply not distributed to satisfy any ancillary relief order.'[117] 'The error of the judge lay in thinking that the requirement to conduct a balancing exercise meant that in every case, all factors are relevant. In cases such as this the knowledge of the wife, throughout her married life, that the lifestyle and the assets she enjoyed were derived from drug trafficking is dispositive.'[118] Further, an order in favour of the child under s 23(1)(f) MCA would be 'clearly open to the same objections that no assets available should be distributed where, to the knowledge of the applicant seeking relief, they were derived from drug trafficking'.[119]

In *Stodgell v Stodgell* ((2009) CA),[120] D (H) fraudulently

evaded tax for many years during the marriage. A confiscation order was made in the full benefit figure of £900,453 (reflecting unpaid tax, interest and penalties), but by the time of the enforcement hearing, there was insufficient to meet it. The Court of Appeal refused W permission to appeal against a stay of her financial remedy application until the discharge of the confiscation order. W was not complicit in the criminality; she was entirely innocent. However, non-complicity was a necessary condition but not sufficient condition for W to succeed in her application. The critical fact was not that the properties were not acquired from crime; it was that they could not have been and could not be preserved without the non-payment of tax and penalties.[121]

Financial order made: In *Re: MCA* ((2002) CA),[122] a property adjustment order was made. None of the equity in the FMH or the associated endowment policies was acquired with the proceeds of crime; D (H) and W had separated before the drug trafficking began; and W was not only innocent of any involvement in it, but she also lived in a house and enjoyed the benefit of policies all untainted by it. For Schiemann LJ, this was of critical importance. If the confiscation proceedings precluded the MCA application, W would lose her home, and given her state of health would become dependent on the state for housing and benefits. 'In short, if the appellant is right, a substantial injustice will be done to Mrs A in order to garner the sum of £29,360 into the coffers of the state. I cannot regard that, on the facts of this case, as a proportionate outcome, or one which is in the public interest.'[123]

H v CPS ((2007) HC (Admin))[124] was decided under general property principles. A house was bought with proceeds of the sale of the FMH post-separation. W sought variation of a restraint order and transfer of D (H)'s interest in the house. The court held that D (H) held no beneficial interest in the house, so it was not an available asset for confiscation purposes. Alternatively, the court considered that any such interest which D (H) *might* have retained would be transferred to W. Although it was not as clear that there was no 'taint' as in *Re: MCA*, the case was nowhere near as far towards 'taint' as *Richards*. There was no criminality at all during the marriage; criminality came post-separation, and many months after the parties' agreement at the time of acquisition. There was no suspicion that W had the least knowledge of D (H)'s criminality. W had made, and continued to make, a very significant contribution. Even if D (H) made some of the interest payments on the mortgage with the proceeds of crime, W was unaware of this, and their sum was no more than D (H) ought to have been paying to maintain the children. D (H) had been deprived of his property in confiscation, and public policy did not require any part of the house to remain available for satisfaction of the confiscation order.

Concurrent applications: Where there are concurrent confiscation and financial remedy applications, there is no strict rule requiring one to be considered first; it is fact-specific.[125]

Costs: A costs order is in principle available where a prosecutor intervenes in ToLATA proceedings.[126] A costs order is also available in financial remedy proceedings, as the prosecutor's application is not 'for' but 'in connection with' financial remedies; and rather than 'no order', the starting point is therefore a 'clean sheet' but with a 'soft' presumption that costs follow the event.[127]

A practical example: *Ai ('the wife') v Mki ('the husband') v CPS*[128] is a good example. D (H) was subject to a confiscation order flowing from a drugs-related conspiracy. The FMH was the sole asset in financial remedy proceedings. CPS submitted that D (H) was its sole legal and beneficial owner, and its whole net value should be subsumed in confiscation. W sought a transfer into her sole name so she could occupy it with the three children. The court found that the FMH was bought in D (H)'s sole name with the intention that it would be treated as his, that it was highly probable that it was bought with a deposit that was funded by his offending, W knew from the outset that D (H) was involved in crime, and also knew that the family household was being funded at least in part by D (H)'s crime. This was therefore a *Richards* rather than a *Re: MCA* case. CPS's concession in confiscation that D (H) and W held 50% beneficial interests each was not legally binding[129] and it was not treated by D (H) and W as being jointly owned thereafter. The mortgage payments were from money tainted by D (H)'s criminality at least until his imprisonment in 2012. W made mortgage payments until that time, and there were no subsequent payments to ground a constructive or resulting trust. D (H) was therefore solely entitled to the legal and beneficial interests in the FMH. The court refused to exercise its MCA discretion to transfer to W any part of D (H)'s beneficial entitlement or proceeds of sale of the property (save to the extent of any surplus after the confiscation); this was tainted by D (H)'s criminality and W's MCA application was tainted by her own knowledge of his criminality. The court accepted that this was devastating for W and three children whose home would be lost in the confiscation proceedings; but *Richards* involved a five-year-old child. D (H) was ordered to pay the CPS's costs of intervening. Finally, in the unlikely event of any surplus at the conclusion of confiscation proceedings and satisfaction of the order for costs in the financial remedy proceedings, H's interest would be transferred to W absolutely; save to that extent, W's capital and proprietary claims were dismissed. A nominal periodical payments order from D (H) to W of £0.05 p.a. was also made.

Effect of financial order on confiscation: A financial order made against D does not relieve D of his personal obligation to satisfy an existing confiscation order. The purpose of the confiscation legislation is not defeated because, in default of payment, D is liable to serve the default term.[130] However, an application may be made to the court to adjust the available amount under the confiscation order; and, if no confiscation order has yet been made, the court must have regard to the financial order when determining the available amount.[131] However, the third party in related financial order and confiscation proceedings may be in a better position than 'commercial' third parties. A restraint order cannot be varied prior to the making of a confiscation order unless variation does not conflict with the satisfying of the confiscation order, so commercial third-party creditors must wait and see if D retained any assets after its satisfaction; however, the Court of Appeal has considered that the competing public policy objectives of confiscation and financial remedies are a 'special situation'.[132]

Conclusion

The interplay of confiscation with trusts of land and financial remedy proceedings is therefore intensely fact-specific, as is the case management of concurrent proceedings. One size does not fit all. However, the best advice 'is that where a family knowingly builds its house upon the sand of drug related activity in this way the house (and other finances) may well fall to confiscation. Or, put more simply, the best advice to any family contemplating behaving in this way is: "Don't do it".' [133]

Notes

1 *R v Waya* [2012] UKSC 51; [2013] 1 AC 294, [2].
2 *R v May* [2008] UKHL 28; [2008] 1 AC 1028, [9].
3 PoCA, s 6(1) to (3).
4 *R v May* [2008] UKHL 28; [2008] 1 AC 1028, [48(2)]; approach followed in *R v Ahmad; Fields* [2014] UKSC 36; [2015] AC 299 at [34].
5 *R v May* [2008] UKHL 28; [2008] 1 AC 1028, [48(4)].
6 PoCA, s 6(7).
7 PoCA, s 76(1).
8 Broadly defined in PoCA, s 84.
9 PoCA, s 76(4).
10 PoCA, s 76(7).
11 PoCA, s 76(5) and (6).
12 PoCA, s 6(4).
13 PoCA, s 75(2)(a).
14 PoCA, s 75(2)(b), specifically defined at PoCA, s 75(3).
15 PoCA, s 75(2)(c).
16 'Relevant benefit' is defined for PoCA, s 75(2)(b) ('course of criminal activity') at PoCA, s 75(5), and for PoCA, s 75(2)(c) (offending over six months) at PoCA, s 75(6).
17 PoCA, s 75(4).
18 PoCA, s 6(4)(b).
19 PoCA, s 76(2).
20 PoCA, s 10(1).
21 PoCA, s 10(2).
22 PoCA, s 10(3).
23 PoCA, s 10(4).
24 PoCA, s 10(5).
25 PoCA, s 10(8).
26 *R v Whittington* [2009] EWCA Crim 1641; [2010] 1 Cr App R (S) 83.
27 PoCA, s 6(7).
28 *R v Whittington* [2009] EWCA Crim 1641; [2010] 1 Cr App R (S) 83; *R v Briggs-Price* [2009] UKHL 19; [2009] 1 AC 1026.
29 PoCA, s 10(6).
30 PoCA, s 76(3).
31 PoCA, s 76(7).
32 PoCA, s 76(5).
33 PoCA, ss 79 and 80.
34 PoCA, s 79(1) and (2).
35 PoCA, s 79(3).
36 PoCA, s 79(4).
37 PoCA, s 79(5), those provisions being ss 80 (value of property obtained from conduct) and 81 (value of tainted gifts).
38 PoCA, s 80(1).
39 PoCA, s 80(2) and (3).
40 PoCA, s 80(4), with reference to PoCA, s 79.
41 PoCA, s 6(5).
42 PoCA, s 7(1).
43 PoCA, s 7(2).
44 PoCA, s 9(1).
45 PoCA, s 9(1)(a), (2) and (3).
46 PoCA, s 9(1)(b).
47 PoCA, s 78(1).
48 PoCA, s 77(1) and (4).
49 PoCA, s 77(1), (2) and (9).
50 PoCA, s 77(3).
51 PoCA, s 77(4) to (7).
52 PoCA, s 77(8).
53 PoCA, s 81.
54 PoCA, s 6(5).
55 *R v Waya* [2012] UKSC 51; [2013] 1 AC 294.
56 *R v Waya* [2012] UKSC 51; [2013] 1 AC 294.
57 *R v Sale* [2013] EWCA Crim 1306.
58 *R v Ahmad; Fields* [2014] UKSC 36; [2015] AC 299.
59 *R v Ahmed; R v Qureshi* [2004] EWCA Crim 2599; [2005] 1 WLR 122.
60 PoCA, s 35.
61 PoCA, s 11(1).
62 PoCA, s 11(2) to (8).
63 PoCA, ss 19 to 26.
64 PoCA, s 18.
65 PoCA, s 16.
66 PoCA, s 17.
67 PoCA, ss 1 to 4 Serious Crime Act 2015.
68 PoCA, s 10A(1).
69 PoCA, s 10A(2).
70 PoCA, s 10A(3).
71 PoCA, s 10A(4)(b).
72 PoCA, s 18A.
73 PoCA, s 18(2).
74 PoCA, s 16(6A).
75 *R v Hilton* [2020] UKSC 29; [2020] 1 WLR 2945.
76 PoCA, s 31(4) to (8).
77 PoCA, s 50.
78 PoCA, s 51(2)(a) and (c).
79 PoCA, ss 82 and 83.
80 PoCA, s 84(2)(a) and (f).
81 PoCA, s 69(2)(c).
82 PoCA, s 69(3)(a).
83 PoCA, s 10A.
84 PoCA, ss 10A(4)(a) and 51(8B).
85 PoCA, ss 40 to 47.
86 PoCA, s 41(1), (2), (9).
87 PoCA, s 41(2A) to (5B).
88 PoCA, s 41(2A).
89 PoCA, s 41(6) to (7).
90 PoCA, s 41(7A) to (7C).
91 PoCA, s 58(5).
92 PoCA, s 58(6).
93 PoCA, s 9(1)(a), with reference to PoCA, ss 82 and 84.
94 PoCA, s 9(1)(b).
95 [2008] EWCA Civ 645.
96 *R v Hayes (Tom)* [2018] EWCA Crim 682; [2018] 1 WLR 5060.
97 PoCA, ss 77 and 78.
98 *R v Hayes (Tom)* [2018] EWCA Crim 682; [2018] 1 WLR 5060, [34].
99 PoCA, ss 77 and 78.
100 *R v Hayes (Tom)* [2018] EWCA Crim 682, [40] to [58], with a 'convenient general approach' suggested at [58].
101 *Re: B* [2008] EWHC 690 (Admin).
102 *Re: B* [2008] EWHC 690 (Admin), [13].
103 *Webber v Webber* [2006] EWHC 2893 (Fam); [2007] 1 WLR 1052 *per* Sir Mark Potter P, [44] (*obiter*).
104 *HM Customs and Excise & Anr v MCA & Anr, A v A* [2002] EWCA Civ 1039; [2003] Fam 55 *per* Schiemann LJ, [9].
105 *HM Customs and Excise & Anr v MCA & Anr, A v A* [2002] EWCA Civ 1039; [2003] Fam 55.
106 *HM Customs and Excise & Anr v MCA & Anr, A v A* [2002] EWCA Civ 1039; [2003] Fam 55, [43].
107 *HM Customs and Excise & Anr v MCA & Anr, A v A* [2002] EWCA Civ 1039; [2003] Fam 55, [43].
108 *HM Customs and Excise & Anr v MCA & Anr, A v A* [2002] EWCA Civ 1039; [2003] Fam 55, [44].

109 *CPS v Richards & Richards* [2006] EWCA Civ 849, [26].
110 *CPS v Richards & Richards* [2006] EWCA Civ 849, [27].
111 *HM Customs and Excise & Anr v MCA & Anr, A v A* [2002] EWCA Civ 1039; [2003] Fam 55, [36] and [37], [44], [47] and [48].
112 'Taint' here is used with its everyday meaning, as opposed to the statutory definition under PoCA.
113 *HM Customs and Excise & Anr v MCA & Anr, A v A* [2002] EWCA Civ 1039, [36] and [37], [47] and [48].
114 *Stodgell v Stodgell* [2009] EWCA Civ 243, [10].
115 *CPS v Richards & Richards* [2006] EWCA Civ 849.
116 *CPS v Richards & Richards* [2006] EWCA Civ 849, [9].
117 *CPS v Richards & Richards* [2006] EWCA Civ 849, [25].
118 *CPS v Richards & Richards* [2006] EWCA Civ 849, [26].
119 *CPS v Richards & Richards* [2006] EWCA Civ 849, [25].
120 *Stodgell v Stodgell* [2009] EWCA Civ 1243.
121 *Stodgell v Stodgell* [2009] EWCA Civ 1243, [9] and [10].
122 *HM Customs and Excise & Anr v MCA & Anr, A v A* [2002] EWCA Civ 1039; [2003] Fam 55.
123 *HM Customs and Excise & Anr v MCA & Anr, A v A* [2002] EWCA Civ 1039; [2003] Fam 55, [48].
124 *H v CPS* [2007] EWHC 1291 (Admin).
125 *Webber v Webber v CPS* [2006] EWHC 2893 (Fam); [2007] 1 WLR 1052, [52], where the financial remedy application was to be considered first.
126 *CPS v Piper* [2011] EWHC 3570.
127 *Baker v Rowe* [2009] EWCA Civ 1162.
128 Family Court at Bristol (HHJ Wildblood QC) in late 2015.
129 *Re Norris* [2001] UKHL 34.
130 *HM Customs and Excise & Anr v MCA & Anr, A v A* [2002] EWCA Civ 1039; [2003] Fam 55, [46].
131 *Webber v Webber (CPS Intervening)* [2006] EWHC 2893; [2007] 1 WLR 1052, [46].
132 *SFO v Lexi Holdings plc (in Administration) and M* [2008] EWCA Crim 1443; [2009] QB 376, [73].
133 Family Court at Bristol (HHJ Wildblood QC) in late 2015, [5].

Private Alternative Dispute Resolution (pADR) – a Still Much Under-Used Process

Sir Paul Coleridge

A few introductory thoughts – the bigger picture

The legal profession is notoriously slow at embracing change whether it is to the substantive law or, more often, to process. Every attempt to make the system work better and to the advantage of the punters is customarily met with a shaking of the head, a sucking of the teeth or a digging in of the heels… or a combination of the three. The slow development of the various forms of Private ADR process has been a classic example, although there may, at last, be signs that the impact of covid has stirred things up a bit. I can remember, back in the day before the millennium, when very occasionally a more enlightened party might suggest, sotto voce, that a dispute might be better resolved outside the court arena only to be met with a stream of objections. I also well remember acting for a very nervous lady in the early 1990s and inviting Lord Justice Purchas, recently retired, to deal with it privately by way of an informal arbitration in a London solicitors' office. It was very simple innovation and very popular with the clients. But it was a one-off and not repeated in my experience until well into the 2000s.

The arrival in the mid-nineties of the new AR rules incorporating the mandatory FDR and standardised documentation (the 25th anniversary of which we have recently been remembering and celebrating) certainly began a new era and planted and nurtured the seed of the idea that this more streamlined process could just as easily be employed in a private setting as in the conventional public court arena. No real expansion of the system took place until after Bennett J retired from the High Court in 2010 when momentum gathered as he began to conduct private FDRs (PFDR) as a matter of routine in larger cases. By the time I 'stepped down' from the bench in 2014 the PFDR was much better established and I was able to slot into the groove almost seamlessly. And the pandemic has provided an additional stimulus to the growth of the private sector as backlogs, especially in financial cases, have mushroomed and Zoom hearings have proved to be a very practical solution to the restrictions on live hearings imposed by the lockdowns of varying severity. But there is surely a great deal of room for significant further expansion of private services? The use of out of court systems is still a long way from becoming routine let alone the first port of call in resolving financial issues. Old habits take a long time to die.

So why this reticence when, entirely predictably, anecdotal reports as to satisfaction levels are invariably favourable?

I think the residual reluctance is born of two hard-wired beliefs and attitudes. The first is that it is considered by some to be somehow slightly anti-social to jump the public queue by paying to do so (cf. the private medical sector versus the NHS). The accepted assumption is that everyone, from whatever walk of life, should stand in the same line and wait their turn. The second, even more entrenched view, is that disputes generated by family breakdown should properly be resolved by state intervention, personnel and machinery rather than the potentially speedier and slicker private systems.

But surely both attitudes are nowadays both misdirected and antediluvian? Let me deal with them swiftly.

In terms of so called social responsibility there is no proper or useful comparison to be made between the use of private medicine and pADR. On the contrary, unlike paying privately to use medical professionals, which necessarily prevents them from carrying out their allocated work in the NHS by reducing the available pool, the use of pADR is a positive benefit to society, freeing up as it does scarce public judges/courts to deal with other and more pressing and complex disputes. Until such time as judges are allowed to 'moonlight' their expertise (i.e. never), from the public benefit point of view the more cases are removed from the public into private lists the better for all. Paying to avoid the court queues is therefore of truly public benefit, very socially responsible.

Similarly, the attitude that such disputes are properly and primarily matters for resolution by state intervention is now surely misdirected. The entrenched belief that only the state can and should determine and manage the impact of family breakdown is born of the historic belief and attitude that marriage is fundamentally a matter for the state to regulate both in its formation and thus also in all aspects of its dissolution. But it is time that this age old approach was eradicated from our professional minds, acting as it does as a real if hidden drag on progress.

Of course it is true that marriage was originally regulated by the church and later the state as being good for society. As such terminating marriage was a matter of serious public import, notoriety and immorality only to be managed by officials appointed by the sovereign, viz. the judges and courts. Remember that during my lifetime no divorcee was ever allowed into the royal enclosure at Ascot (which nowadays would have excluded most of the Royal family!).

It was this attitude which drove marriage law, divorce law and financial arrangements post-divorce, and I fear that it is this attitude which still bedevils real progress in our thinking, especially among some of our politicians who resolutely refuse to give this area of our private lives proper time for reconsideration and reform. As we all know, the statutory laws related to financial distribution are now almost half a century old and, if we can agree about one thing, it is that society has undergone a total revolution in social attitudes during that time including especially the rationale behind the division of the spoils of family breakdown. Instead all meaningful reform has been carried out piecemeal on a case by case basis by the judges.

Perhaps one of the most graphic example of judicial reform is the wholesale binning of the Victorian prohibition on pre-nups in favour of the modern approach to enforceability based on personal autonomy. Remember Lord Phillips' memorable words:

> '**Autonomy**
>
> 78. The reason why the court should give weight to a nuptial agreement is that there should be **respect for individual autonomy**. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best.'

Remember, too, recent research by Marriage Foundation that:

> '1 in 5 couples married since 2000 may have some form of prenup in place, finds first-ever research on the subject.'

So they are no longer as rare a hen's teeth but increasingly popular.

So let us embrace the new autonomous approach to committed relationships both married and unmarried **and the available private procedures which accompany them** which enable and encourage couples to fashion their own escape clauses and solutions. I would now advocate that ordinary family disputes, both large and not so large, should routinely be handled outside the public courts leaving them to handle the vast number of cases which necessarily involve state participation and adjudication either at national or local government level.

But leaving aside the broad policy considerations, what are the real and practical advantages to private dispute resolution?

Mediation

Mediation is of course where we start and, in theory, what every couple aspires to when their relationships fail. Much beloved of government because it is cheap, it seems so obvious. Sit down quietly and calmly in a room with a trained mediator and all can and will be sorted. Of course, statistically we know that out of court agreed solutions always predominate and it is only the minority which end in dispute. But these mediated cases are self-evidently the easiest to settle; the low fruit of the dispute resolution world. Quite rightly this will always remain so. But my nagging concern about the mediation process remains; that one side often has the upper negotiating hand either psychologically or practically. Without independent, well trained and experienced, proactive intervention the playing field can look and feel anything but level.

And I have found mediation via Zoom far from satisfactory or easy. The process is inevitably very drawn out and ease of communication, a vital key to smooth and successful mediation, is severely hampered. So mediation is the right place to start but often limited in its usefulness unless the case is straightforward and all parties are in a very fair and balanced frame of mind, not attributes normally associated with family breakdown.

Private FDR and arbitration

The three crucial advantages to going the private route, whether FDR or arbitration are:

- autonomy of Tribunal selection;
- speed; and
- privacy.

Tribunal selection

The great complaint and so weakness of the public FDR system is that the parties complain (or one of them complains) that they have or had no confidence in the particular judge chosen by the lottery of the system. As a result, whether right or wrong, the recommendation is at high risk of rejection. Similarly there is often the complaint that the selected judge had insufficient preparation time to enable him/her to fully absorb the facts and issues and so the adjudication is often seen as rushed and insufficiently considered.

Both objections disappear when both sides select the tribunal and the chosen tribunal can take as much time as required to read, prepare and, vitally important, pre-hearing THINK. I have found it a wonderful luxury to read the actual papers before reading counsels' notes and so come at the issues initially with a more or less neutral view. One can read and then, if required, re-read. And where necessary carry out some preliminary calculations. The tribunal's sense of being on top of the case before the oral argument starts is palpable.

Inevitably, the limited time usually available to the judge in the public system is not conducive to confidence in these sensitive 'early neutral' judicial recommendations intended to drive early settlement .

Speed

The relevance of this is obvious at a time when the court lists are choked and there are huge backlogs. Self-evidently, the private route allows cases to be fixed and resolved

within a far shorter time frame with all the attendant saving of costs and stress.

Privacy v Publicity

The confidentiality inherent in the private system, especially where one or other of the parties has concerns about publicity, is again self-evident. With the ever-increasing tendency of the courts to reveal details of a case either via access to the court or via public judgment underlines the importance of this factor. Personally I have never been able to see the public benefit in these essentially private family disputes being aired in the public arena. However my views are no longer the fashion. The extra bargaining power handed to the party who has no security or other publicity concerns seems to me gratuitously unfair to the other side.

Finally, in the private setting the ambience and informality of the process is often remarked on by clients, especially those in danger of feeling overawed by appearing in a public court building or court room. All participants seem to be more relaxed and, as the tribunal tends to be under less time pressure, a greater degree of latitude in presentation is allowed. If a whole day is allocated to one FDR without unrelated litigants trying to extract some of judges' limited time, a constructive atmosphere for negotiation is heightened.

And of course, part of the (unspoken) reason for a more relaxed tribunal is that, unlike in the public sector, there is a simple, old fashioned contractual relationship between the parties and the judge. The tribunal's desire to be perhaps somewhat more accommodating in attitude is, subconsciously, affected by the knowledge that it is the parties who have selected him/her and the parties who are paying the bill. Might there be other appointments if this one works well and is successful?

Very swiftly, after the pandemic struck, pFDRs and arbitrations moved online via Zoom. In my experience these arrangements have invariably worked very well and the time saved by not having to travel to a distant court has been an added bonus.

The several advantages I mention here apply equally to private arbitrations as to pFDRs. The previous reticence to use arbitrations because of the constraints on the appeal process have now been swept aside since King LJ pronounced that arbitration awards are now open for revision 'if the judge decides the arbitrator's award was wrong: not seriously or obviously wrong, or so wrong that it leaps off the page, but just wrong'. (*Haley v Haley* [2020] EWCA 1369 as further developed by Mostyn J (approved by The President) in *A v A (Arbitration Guidance)* [2021] EWHC 1889.

This lowering of the bar to appeal puts these private awards in a similar category to all first instance decisions with the Court potentially retaining ultimate control over what is within the category of fair decisions.

The other objection sometimes raised to private disposal is cost. My experience of that argument is that it is spurious when a proper calculation of the comparative cost of the two processes includes the savings delivered by shortening of the whole process. If a dispute can be settled via private process either before any application is formally issued or speedily afterwards, the mere shortening of the whole process more than offsets the fees of the tribunal.

Some conclusions

Save in cases of especially devious and asset-hiding parties, pADR is here to stay, grow in use and hopefully become the first port of call for resolution of post family breakdown disputes. This tendency should now be driven by an underlying acceptance that parties should design their own bespoke, long term committed relationships in a way which suits them (via marriage, with or without a pre-nup, civil partnership or other cohabitation agreement) and similarly, where they fail, the couple should resolve any dispute by private means without heavy handed intervention from the state via public courts.

I have touched on the actual, practical advantages to managing these disputes via private discussion, negotiation and pADR. My experience is that they are tangible and real.

Whilst declaring and unashamedly admitting to a personal interest, I make no secret of the fact that I am an unstinting supporter of Private FDRs and arbitrations. The opportunity to negotiate during and within the process (where necessary employing the judge to intervene and assist) all within the purview of this more relaxed but still privileged occasion provides, in my experience over dozens of cases, the best possible environment to achieve a civilised, fair, agreed and speedy solution in the interests of both sides.

Tech Corner: The Remarkable 2, for Family Lawyers?

Rhys Taylor

The 36 Group

We date ourselves with our I.T.

My generation grew up on the ZX Spectrum 48K. The noise of Jet Set Willy loading on a cassette tape is an iconic sound of my childhood. I graduated without ever having owned a PC.

Hershman & McFarlane was famously birthed on a pair of Amstrad word processors. Mostyn, then a junior barrister, imagined the Form E into existence with an IBM PS/2 (720KB).

We have lived more recently, thanks to Covid, in remarkable times these last two years. It beggars belief that less than two years ago we were all fretting and stroking our chins on how to make contact with ancient judicial laptops using Skype for Business.

Zoom, Teams and the dreaded CVP (itself, about to be surpassed) are now part of our everyday existence.

A whole etiquette has grown up about remote court hearing behaviour. The 'I'm not a cat' advocate was perhaps the zenith of online lockdown advocacy mishaps (although, it was also said that if a cat was trying to pass itself off as an advocate, this is exactly what it would have said). The anonymous and briefly unmuted (presumably accidental) declaration of 'f**kwit' during an advocate's cross-examination comes a close second.

I.T. is more than just the tech on the desk. It is about how we are and how we behave. How far we have come? We can look back at previous generations and marvel at how they got by with the typewriter, the fax, the Roneo duplicating machine and then photocopier, the suitcase and pink tape.

And so it is that I write a few comments about the Remarkable 2 with a degree of trepidation. I am dating myself. I have owned one for a week or so. I fancy my ownership of this new kit as being cutting edge. My fellow lawyers on Twitter are asking me all about it, whereas future generations may well regard this as defunct. Even Twitter may, one day, go the way of 'Friends Reunited'.

But for the moment, this is the whizzy bit of tech that everyone wants to know about, and I have promised too many people I will write a review.

What life-changing task does the Remarkable 2 perform? Well, it replicates a pencil and paper. I know, I know, but this is really good.

My file-laden wheelie case of old has given way to a rucksack with my laptop, iPad Pro, spare screen and a host of wires. But when I sit down 'in the zone' to do the final sketching out, in most of my cases I have scratched this out on a piece of paper and pencil.

I used to go to court with a counsel's Blue Book. I have dozens, perhaps hundreds of them, knocking about. They are saved just in case someone complains, someone sues, someone demands that I justify myself. Quite how I would find the details of a case going back several years, from the mountain of Blue Books, one can only wonder. But the data is there, somewhere, in that dusty pile in the corner.

But since lockdown I have fallen out of love with my Blue Books. I have been tinkering with my tech and trying to do it all electronically. But I can't do it all on screen and so on my desk there are lots of notes and bits of paper, with ideas for this or that or the reckoning for a settlement which I brokered last week. It had all become a bit of a mess.

And this is where the Remarkable 2 comes in. The idea is that it is an electronic scribble pad. An etch-a-sketch for grown-ups in 2022; yet this is a smart and expensive bit of kit.

Staring back through time and to the room at the end of the long corridor, I can still picture 6-year old Rhys in his primary school remedial handwriting class. I am afraid things have not improved much since then. I dread to think what my handwriting would reveal about my personality, if so analysed. However, even my dreadful scrawl is converted by Remarkable 2 into neatly ordered type, at the press of a button.

When you purchase a Remarkable 2 you get a pen (get the ungraded one, with the electronic eraser just like on a pencil) and a choice of protective covers. You should also purchase the 'Connect' subscription. This allows you to sync the Remarkable 2 with all of your other electronic devices via an App you download on to them. You can also 'inte-

grate' your Remarkable 2 with your cloud storage system such as Dropbox or OneDrive, so that you can access PDFs direct from where you keep them.

That mountain of Blue Books can be consigned to history, and you can bring some discipline into the storage of your scribblings. It is the last piece of the family lawyer's electronic set-up. It took me less than an hour to figure it out and get going. It is intuitive and easy to use.

You can add a PIN number to the device, for security, and the Remarkable Cloud storage is in Europe and states that it is GDPR compliant.

This device is not an iPad substitute. It is not a heavy bundle reader. It is your Blue Book replacement for the post Covid, post paper, digital age. You can annotate the odd PDF document using it and then send it back to your primary device but it will never be your main reader as a lawyer.

The Remarkable 2 feels slick, with Apple levels of consumer magnetism and packaging. It has a price tag to match it. Notwithstanding the price, in the post Covid world, we have fallen out with love with paper.

The Remarkable 2 was the future (once).

Money Corner: Financial Protection and Divorce

Tamsin Caine

Smart Financial

The area of financial protection is one that most of us first come across when we are buying a house. The mortgage adviser will deftly remind us of all the things that might go wrong for our family if we were to become seriously ill or die. During my training in my early years in financial services, I worked for a national estate agency as a mortgage consultant and recall being shown a devastating video of the consequences for one family of not having sufficient protection in place. So, why is it important for those who are going through divorce?

Many of our clients rely on their maintenance payments. Whether child maintenance or spousal maintenance, without them they may struggle to pay bills and buy food, never mind any treats, holidays or entertainment. Often these payments are made to the spouse who gave up work to look after the children and haven't had the same opportunity to build a career or achieve a high paying job.

With this reliance on an income stream from their ex, what happens if the ex becomes too ill to work or even dies? They are unlikely to benefit in the will and an Inheritance Act claim is costly, stressful and uncertain. So, what can they do to insure themselves against this situation? There are a few different financial protection products available that might suit this situation.

I should begin by explaining that insurance, or financial protection, cannot be taken out on just anyone's life. There must be 'insurable interest', which is defined by the Association of British Insurers (ABI) as:

> 'The interest that a person has in something such as a particular property or another individual, which means that the person would suffer a loss should that property or individual be harmed. In insurance law, you can only buy insurance for something or someone in which you have an insurable interest.'

In the case of a divorced couple, the maintenance recipient has an insurable interest in the maintenance payer, who will be the 'life assured' on the protection policy, as they would lose this income stream in the event of their becoming seriously ill or dying.

Now, let me summarise what each one does and the benefits they may have:

Term Assurance (Life Insurance)

Term Assurance is the most straightforward financial protection policy, providing a defined lump sum payment in the event of the death of the life assured occurring within the specified term, e.g. if John's death occurs within 10 years, the policy owner, ex-spouse, receives £500,000. If the policy is a 'level term' policy the amount will always be the same. However, there are options for the sum assured (amount paid out) to increase, which is more expensive, or decrease, which is cheaper.

Whole of Life

As the name suggests, this policy does not have a limited term. It is therefore either very expensive to begin with or increases in cost as time moves on. If you are in a position where you have pension benefits, either yours or via a sharing order, the maintenance will be likely to cease at some point, removing the 'insurable interest' and the policy issue if something happens to your former spouse. Therefore, this may not be appropriate, unless there is a lifetime maintenance order.

Critical Illness Cover

This is usually paid as a lump sum if the life assured is diagnosed with one of a list of specified illnesses within a defined term. There is no deferred period, i.e. they don't have to be ill for a certain amount of time, but there will be no pay out if the illness is not on the list. As an example, many providers cover some cancers but they may only cover the advanced stages, even if the life assured cannot work in the initial stages. There are providers who offer a basic list and a comprehensive list.

Family Income Benefit

This can be a form of Life Insurance or Critical Illness Cover.

Rather than receiving a lump sum, you will receive a monthly or annual benefit to the end of the policy term. There are options for the benefits to be taken to retirement and the annual amount could increase with inflation. It tends to be lower cost than the lump sum options because the total amount of cover that would be received decreases year on year.

Income Protection

Income Protection will pay a monthly benefit after a set amount of time (deferred period), such as 4, 12, 26 or 52 weeks. Short term policies are available or those that pay to retirement. The benefits can also be taken to increase with inflation so that you continue to receive an equivalent amount.

Existing cover

The cost of financial protection often increases with age and so existing cover held by a couple may cost less than a new policy would. However, it is important to review any existing policies to ensure that the cover remains appropriate and fit for purpose. Also, many protection policies are held in trust, which again may name beneficiaries who the individuals may no longer wish to benefit.

One important issue is that cover should not be cancelled during the divorce process as it may provide valuable protection until the decree absolute (or Final Order) are issued.

What protection is appropriate?

As my family lawyer friends often say, it depends! There are many aspects that we should take into consideration when considering financial protection for clients.

Firstly, the willingness of the ex-spouse to provide essential information in a timely manner for the application. If we are insuring the life of another, i.e. one spouse is taking out an insurance policy on their ex-spouse, there will still be a need for both parties to be involved. The 'life assured' will need to complete a medical questionnaire. There may also be requirements for further medical information from the GP or even an in-person medical assessment.

Secondly, the cost of the new policy. The ex-spouse's age, smoker status and medical information will all impact the cost of the policy. If the ex-spouse is a smoker, older and in poor health, it may be that the maintenance recipient cannot afford the premiums for the new policy.

Thirdly, the type of cover needed may not be available. In many cases, the most appropriate cover might be income protection for the ex-spouse's income. However, this is only available as cover for the individual's own earnings or by an employer. This might mean the maintenance payer taking a policy to ensure that they can always make their maintenance payments, and also protect their own income for themselves. This is not entirely satisfactory as they could cease cover at any time, without the knowledge of the maintenance recipient.

Help

In conclusion, this is an area in which specialist advice is essential to ensure that your client receives the best possible advice. Financial advisers, financial planners and wealth managers should all usually be able to help, although it is worth considering a divorce specialist who will have come across the various scenarios during their everyday work.

Financial Remedies Case Round-Up

HHJ Hess and Henry Pritchard

HHJ Hess: Chair of the Editorial Board | Henry Pritchard: One Hare Court

From the Chair of the Editorial Board

The *Financial Remedies Case Round-Up* will be a regular feature in the FRJ. The intention will largely be to draw brief attention to a full range of financial remedies case judgments delivered since the last edition of the journal, which the interested reader can follow up via the hyperlinks on the FRJ website. The main aim will be to feature judgments from all levels of the judiciary, not just those from the High Court and Court of Appeal which dominate most financial remedies case reporting, and the facts of which often are far away from the bread and butter of most financial remedies work.

I wish to announce, however, a special feature of the *Case Round-Up.* In each edition of the FRJ the Editorial Board will identify one outstanding judgment published since the last edition which is an outstanding *must read* for all financial remedies practitioners. In deference to the imminent retirement of Mr Justice Nicholas Mostyn from the position of national lead judge of the FRC, and in genuine admiration of his phenomenal contribution to the FRC and the wider field of financial remedies in general, we propose to call the judgment receiving this award '*The Mostyn*'.

It is fitting that for this first edition of the FRJ, and the first award of *The Mostyn*, there is only one serious candidate and we unhesitatingly make this award to Mostyn J's judgment in ***BT v CU* [2021] EWFC 87**, published in November 2021. This judgment was remarkable for the depth of its research and the breadth of areas in which it fundamentally seeks to change existing practice. The judgment adds a fifth condition to the usual four *Barder* conditions (the applicant must demonstrate that no alternative mainstream relief is available to him which broadly remedies the unfairness caused by the new event). It answers the question – 'Is Covid capable of being a *Barder* event?' – by saying 'probably not'. It throws cold water on the whole development of the *Thwaite* jurisdiction not infrequently used to set aside executory orders. It throws yet colder water on the possibility that the quantum of lump sums can ever be varied, overthrowing the established but curious distinction between a lump sum by instalments and a series of lump sums. For good measure it then suggests that almost all financial remedies litigants should lose their anonymity in published judgments. The Court of Appeal may yet have other ideas, but the general status of Mostyn J's decisions is such that it is a reasonable prediction that most if not all of these persuasively expressed dicta will soon become established practice. The judgment is further discussed in the article by Alex Chandler above.

Henry Pritchard provides a concise round up of other recent financial remedies judgments.

AJC v PJP [2021] EWFC B25

DDJ Hodson used the court's power under FPR 9.20(1) to dismiss at the first hearing a wife's application to convert a nominal spousal maintenance order into a substantive one.

Azarmi-Movafagh v Bassiri-Dezfouli [2021] EWCA Civ 1184

The Court of Appeal (King, Moylan and Newey LJJ) allowed this second appeal, reinstating an award of a lump sum in a needs case calculated so as to discharge a party's liabilities, in order not to undermine the award in respect of housing. King LJ gave guidance on the correct approach to debts in needs cases, as well as the use of deferred charges.

AD v BD (Financial Remedies Appeal) [2021] EWFC B48

HHJ Vincent allowed an appeal where the first instance judge had provided for a substantial departure from equality of capital (80%/20%) and in respect of maintenance. Having found that the original judge had pared down the husband's needs whilst not sufficiently scrutinising the wife's, HHJ Vincent substituted an award of 61%/39% and awarded the husband c.66% of his costs of appeal.

LF v DF (Financial Remedy: Appeal: Costs Debts in a Needs Case) [2021] EWFC B50

HHJ Rogers allowed an appeal where the first instance judge had not awarded sufficient capital to prevent hard liabilities from undermining the basis of a needs-based award.

Rogan v Rogan [2021] EWHC 2587 (Fam)

Holman J dismissed a judgment summons for committal to prison of a bankrupt who had failed to pay his debt to his former wife, who had herself successfully petitioned for his bankruptcy. The judge found that the underlying debt had already been discharged in variation proceedings and also that it would be a misuse of the judgment summons to commit someone incapable, by reason of being bankrupt, of paying the debt.

W v H (Financial Remedies: Pensions) [2021] EWFC B63

Recorder Salter refused to allow an updated pensions report to be completed following his judgment in order to take into account 'moving target syndrome', noting that the parties ought to have sought one in advance of the Final Hearing.

J v J (MFPA 1984 – Interim Provision) [2021] EWFC 78

Peel J awarded interim provision under Part III, including maintenance at £200,000 p.a. and legal costs including costs already incurred, albeit with a 15% reduction. The judge had drawn inferences about the husband's wealth in the absence of sufficient disclosure.

Crowther v Crowther & Ors (Financial Remedies) (Rev 1) [2021] EWFC 88

Peel J determined long running and extremely contentious proceedings, dealing with the enforceability of Tomlin orders, cohabitation, conduct and non-disclosure. The judge described the only beneficiaries of this 'nihilistic litigation' as being the 'specialist and high-quality lawyers'.

Z (No 3: Schedule 1: Further Orders) [2021] EWFC 85

Cobb J made further interim provision in these Children Act 1989, Schedule 1 proceedings. The mother had to admit after the hearing that she had misled the court about a supposed debt. The judge declined the father's invitation to sanction the mother under the Perjury Act 1911 but noted that the mother's credibility had been seriously damaged.

Aldoukhi v Abdullah [2021] EWHC 3086 (Fam)

Moor J determined the first reported case where jurisdiction under Part III was founded under MFPA 1984, s 15(1)(c), being that one or both of the parties had a beneficial interest in a property which had at one point been a matrimonial home.

T v T (Variation of a Pension Sharing Order and Underfunded Schemes) [2021] EWFC B67

HHJ Hess determined that a substantial increase in the CEV of a pension did not justify a variation of a PSO. The judge gave guidance on moving target syndrome, pension sharing in underfunded pension schemes and the distinction between external and internal transfers. In a postscript he drew attention to the warning given in the PAG Report about the drafting of pension sharing annexes. The judgment is further discussed in the article by Paul Cobley above.

A v M [2021] EWFC 89

Mostyn J considered the correct approach to carried interest on private equity funds in financial remedy proceedings, as well as underlining that parties would not be able to rely on cases being anonymised in future.

E v B (Interim Maintenance Inaccurate Time Estimate) [2021] EWFC B90

Recorder Chandler heard an application for interim maintenance under MFPA 1984 Part III, refusing the wife's application for a legal costs allowance and noting that the time estimate for the hearing had been far too short and that parties and their representatives had a duty to give accurate time estimates.

Cathcart v Owens [2021] EWFC 86

Mostyn J dismissed, via a summary disposal, an application to set aside a number of financial consent orders. The judge was satisfied that the underlying allegation of fraud was not made out and certified the application as being totally without merit.

Siddiqui v Siddiqui & Anor [2021] EWCA Civ 1572

The Court of Appeal (Moylan, Dingemans and Underhill LJJ) dismissed an application for financial orders by an adult against his parents on the bases that the court did not have jurisdiction to make such orders and that the situation did not come within the ambit of any of the rights protected by the ECHR.

Her Royal Highness Haya Bint Al Hussein v His Highness Mohammed Bin Rashid Al Maktoum [2021] EWFC 94

Moor J determined a high-profile financial remedy claim between the ruler of Dubai and his former wife Princess Haya, making orders under Part III and Schedule 1 which are thought to amount to the largest ever award made in England & Wales.

Austin v Haynes [2021] EWCA Civ 1919

The Court of Appeal (Underhill V-C and Moylan and Nichola Davies LJJ) dismissed an appeal against enforcement and variation orders made under Children Act 1989, Schedule 1.

LS v PS [2021] EWHC 3508 (Fam)

Roberts J dismissed an application by an intervenor to admit documents covered by without prejudice privilege for the purposes of its application to set aside a financial remedy order made by consent following a private FDR.

DN v UD [2021] EWCA Civ 1947

The Court of Appeal (King, Moylan and Newey LJJ) allowed an appeal in relation to an award made pursuant to Children Act 1989, Schedule 1 in respect of a person aged over 18 on the basis of 'special circumstances', holding that no such circumstances had been shown on the evidence.

L v L [2021] 10 WLUK 588

HHJ Booth held that there should be equal division in a sharing case despite the husband's pre-marital contributions to his business.

Santi v Santi [2021] EWHC 388 (QB)

Nicklin J commented that a person who has credible grounds to believe that another person, including their spouse, has obtained confidential or private information about them, should be entitled to seek the relief of a court, even if the issues arise in the context of a matrimonial dispute.

CW v CH (MFPA 1984 Part III: Interim Applications) [2022] EWFC B1

Recorder Allen QC dealt with interim applications under Part III for periodical payments and a costs allowance, making orders in respect of both.

Interview with Sir Jonathan Cohen

Rhys Taylor

Sir Jonathan, thank you very much for agreeing to be interviewed this evening for the Financial Remedies Journal.

Can I please start by asking you, do you have any particular recollections from your early days at the Bar?

Well, first of all, it was great fun. There was a huge variety of cases and, by today's standards, very little paperwork. A heavy case in those days was one lever arch file. You would turn up at the county or magistrates' court with a statement from your client (if they were civil cases there would also be pleadings) and virtually no idea of what anyone on the other side was going to say. So in the magistrates' court, you had no prosecution statements; you would just go in and cross-examine completely blind and mysteriously, when defending, you sometimes won cases. Nowadays it would be thought to be completely human rights non-compliant.

Have you always been a specialist family lawyer?

Absolutely not. When I joined Chambers at 4 Paper Buildings, a long time ago in 1975, we did bits of everything. It was marvellous training. I can still remember the day when I appeared in all three divisions of the High Court in different cases. That would never happen now.

On appointment to the High Court bench. What did you miss most about the Bar?

It might sound a strange answer, but what I missed most was the company of those in their 30s and 40s. There are lots of people in the RCJ in their 50s and 60s, but I really enjoyed the company of my colleagues and in particular my younger colleagues in Chambers and that's what I miss most.

What did you not miss?

Clients.

What case gave you the most satisfaction at the Bar?

That is a really difficult one. I think the cases that gave me most enjoyment were the ones where the subject matter was so interesting, and I think of two in particular: one was the immunisations case of *Re C (Immunisations)* [2003] EWCA Civ 1148, [2003] 2 FLR 1095 where we had to consider every one of the various immunisations which are given; their benefits and dangers; the risks of illness – that was absolutely fascinating working with high class juniors and doctors on that. And the other one I remember particularly was *Hvorostovsky v Hvorostovsky* [2009] EWCA Civ 791, [2009] 2 FLR 1574 – a finance case which went to the Court of Appeal and learning how the opera world worked; how the stars made their money and the extraordinary methods of payment that used to exist. That was very entertaining.

What was your worst day in court at the Bar?

My two worst days were in respect of two care cases which I lost – the only two borderline care cases that I lost when I was in Silk – when I really felt the decision was wrong. And those did give me sleepless nights, when parents lost their children when I didn't think they should have.

What, in your view, is the mark of effective advocacy in Financial Remedy cases?

The efficient use of words, making complicated concepts simple and no grandstanding.

You now hear first-tier Financial Remedy appeals. Do you see any themes coming through?

Well, actually, we don't hear many first-tier financial remedy appeals because, of course, we only get appeals from circuit judges and recorders sitting at first instance. So really the only significant source of appeals is inclined to be the Central Family Court. There are surprisingly few final orders that are appealed, certainly in my experience, but probably a disproportionate number in respect of cost orders and enforcement issues.

What do we family lawyers get wrong most often?

Two things came to mind. First of all, too often we still get competing chronologies, competing schedules of assets, notwithstanding the rules for efficient conduct. And secondly, and this really comes into your question about costs, too often we see cases being taken on and run to the end which can never be commercially viable for the parties, but I think we'll touch again on that later on.

Well, I'll go straight to it. Do you have views about the typical costs incurred in Financial Remedy applications?

My view is that if rich people want to spend large sums of money on lawyers, that is a matter for them. But I think many judges are worried by cases where costs are incurred

which are wholly disproportionate to the family assets. Clients need to be told at a very early stage if they can't afford to fight a case, and if they'd be better off self-representing, then they should be told that too.

Is the developing body of caselaw on the need to make open offers changing the way cases are dealt with before you?

I think slowly. The need to negotiate sensibly is a message that Mr Justice Mostyn, in particular, has been promulgating and I think that that is getting through. So, yes, but slowly.

Would you favour a return to Calderbanks?

Yes, I would. I don't know that it's necessarily a popular view, but I would like to see Calderbanks reintroduced for costs incurred post FDR. I think there is a difference in costs which are incurred before FDR, which should rightly be covered by the general rule that there is no order as to costs. But litigants who continue to take their case right through to the end, notwithstanding a reasonable offer, should be punished in costs. And even if there is more flexibility in its application than there was before, I would like to see a return to Calderbanks in those circumstances.

Do you have any observations about the establishment of the Financial Remedy Court?

I'm all for it. The financial cases should come before judges who have expertise, but of course, it all depends on the FRC being properly resourced. But yes, all power to its elbow.

Any thoughts on increased transparency for the Financial Remedy Court?

I think this is a really difficult one. For my part, I have no problems with hearings being attended by legal bloggers and by accredited reporters who know the rules and the reporting restrictions. I am very cautious about details of people's finances being available and attributable to them in the absence of litigation misconduct. I don't have a problem with lifting either wholly or partly anonymity in cases of those who misbehave during the course of proceedings, but otherwise I am cautious about publication. Presence of those reporters and bloggers who know the rules and will comply with them is fine. But beyond that, I need to be persuaded.

After your retirement, do you intend to accept any private FDR or arbitration appointments?

Well first of all, my retirement is not due for almost exactly two years! Yes, certainly, if anyone will have me – I am very keen to continue my involvement in family law.

What percentage, roughly how many cases do you see which includes a litigant in person?

In money cases in the High Court, not very many – I would guess not much more than 10%. In children's cases, again not that many in the High Court, save for respondents in abduction cases and they have often been unrepresented. There is a new scheme starting whereby there will be a duty solicitor on duty to help those in those circumstances and that will be an enormous improvement.

If I may, the family lawyer you have admired the most and why?

I'm a bit coy about this, I'm not going to pick out anyone who is still practising, but my predecessor as Head of Chambers was Lionel Swift QC and I know of no one who was more comfortable appearing in any sort of case in any Division of the High Court, but also was more generous with his advice and, when necessary, his means to anyone in need. He was a superb role model.

Your alternative career?

That's very difficult. I suppose ideally, I would, in my fantasy world, spend several days a week being a cricket correspondent and one day a week perhaps running a pop-up food restaurant where I would cook a no-choice menu – but it might not have many customers!

Your ideal day out of court?

Ah, well I'd start off by having a good read of the newspaper and doing the crossword because I am obsessed with newspapers; a bit of exercise – maybe some golf or some real tennis; lunch with friends and family; a nap in the afternoon and then maybe a visit to the theatre in the afternoon and more eating and drinking.

Your desert island book?

I don't really have a favourite book – as I've already said, I love to have a daily newspaper. I feel that the Victorian classics are a bit of a gap in my reading repertoire, so I'd like to get into Dickens, Trollope and Austen more than I have. And then maybe when I've finished them, I could re-watch *Some Like It Hot*, which is my favourite film of all time.

Sir Jonathan, thank you very much for your time this afternoon.

Not at all, it's been a pleasure. I have to say that I have enjoyed and am enjoying my career in family law enormously. Thank you very much, Rhys.

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