

2023

ISSUE

2  
SUMMER

# FINANCIAL REMEDIES JOURNAL

Chair's Column

**HHJ Edward Hess**

Mr Justice Mostyn – An Appreciation on His Forthcoming Retirement

**Sir James Munby**

Interview with Mr Justice Mostyn

**Alexander Chandler KC**

The Revised Standard Family Court Orders – In with the New

**Nicholas Allen KC**

Reflections on the Recent Announcement by the Law Commission of a Review of Financial Remedies Law

**HHJ Edward Hess**

Fairness versus Certainty – Should the Matrimonial Causes Act 1973 be Amended to Restrict the Duration of Spousal Maintenance?

**Katherine Dunseath and Elizabeth Darlington**

Living under an LSPO

**Henry Hood and Amy Scollan**

*Goddard-Watts* – The Second Sequel: Fraud Unravels All, Sometimes

**Harry Campbell and Calum Smith**

Unilateral Assets and Short Marriages after *E v L* – Another White Leopard?

**Nicholas Allen KC**

What Does Equality of Pension Capital Mean?

**George Mathieson**

Pensions on Divorce – Standard Family Order Template and Short Marriages

**Rhys Taylor**

Cohabitation Rights in England and Wales, Scotland and Australia

**Dr Andy Hayward, Marisa Cullen and William Sloan with Michael Allum**

What Family Lawyers Need to Know about Valuing Mixed Property Portfolios in Financial Remedy Proceedings

**Rachel Cooper, Amanda Andrews, Lee Henderson and Mike Fox**

Has the Sign on the Blind Alley Been Lifted? The Possible Return of Compensation

**Fleur Claoué de Gohr**

Are You There ChatGPT? It's Me, Charlotte – ChatGPT, Generative AI and the Law

**Charlotte John**

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# FINANCIAL REMEDIES JOURNAL

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# Contents

75 Chair's Column  
*HHJ Edward Hess*

## The FRJ Mostyn Valedictory

77 Mr Justice Mostyn – An Appreciation on His Forthcoming Retirement  
*Sir James Munby*

89 Interview with Mr Justice Mostyn – Rules and Woolly Discretion  
*Alexander Chandler KC*

101 The Revised Standard Family Court Orders – In with the New  
*Nicholas Allen KC*

104 Reflections on the Recent Announcement by the Law Commission of a Review of Financial Remedies Law  
*HHJ Edward Hess*

111 Fairness versus Certainty – Should the Matrimonial Causes Act 1973 be Amended to Restrict the Duration of Spousal Maintenance?  
*Katherine Dunseath and Elizabeth Darlington*

115 Living under an LSPO  
*Henry Hood and Amy Scollan*

121 Goddard-Watts – The Second Sequel: Fraud Unravels All, Sometimes  
*Harry Campbell and Calum Smith*

124 Unilateral Assets and Short Marriages after *E v L* – Another White Leopard?  
*Nicholas Allen KC*

128 What Does Equality of Pension Capital Mean?  
*George Mathieson*

132 Pensions on Divorce – Standard Family Order Template and Short Marriages  
*Rhys Taylor*

135 Cohabitation Rights in England and Wales, Scotland and Australia  
*Dr Andy Hayward, Marisa Cullen and William Sloan with Michael Allum*

140 What Family Lawyers Need to Know about Valuing Mixed Property Portfolios in Financial Remedy Proceedings  
*Rachel Cooper, Amanda Andrews, Lee Henderson and Mike Fox*

144 Has the Sign on the Blind Alley Been Lifted? The Possible Return of Compensation  
*Fleur Claoué de Gohr*

147 Are You There ChatGPT? It's Me, Charlotte – ChatGPT, Generative AI and the Law  
*Charlotte John*

158 DR Corner: Review of *Do It Out of Court – A Practical Guide to Dispute Resolution Processes in Family Law*  
*DJ Deborah Dinan-Hayward*

160 Tech Corner: Everybody QWERTs – A Guide to Mechanical Keyboards  
*David Lillywhite*

- 163 Money Corner: Mortgage Capacity from a Broker's Perspective  
*Jessica Burton*
- 165 Financial Remedies Case Round-Up  
*Polly Morgan*
- 167 The Summary of the Summaries  
*Henry Pritchard*

# Chair's Column

HHJ Edward Hess

Chair of the Editorial Board, Deputy National Lead Judge, Financial Remedies Court



## A fond farewell to Mostyn J

In this issue of the *Financial Remedies Journal* (FRJ) we have decided to shine an approving and appreciative light on Mr Justice Mostyn, a great family lawyer and the greatest financial remedies lawyer of our age, who has powerfully dominated this territory for a generation and in so many ways moulded it and influenced it for the better. As he retires from his judicial work in July, we are delighted to include a major and substantial appraisal of his life's work by Sir James Munby as well as a full and engaging interview conducted by Alexander Chandler KC. Both pieces are commended to the reader wishing to recall the many highlights of this remarkable career. If his wish is to go out at the very top of his game, then the mathematicians amongst us will confirm and rejoice that his very recent judgment in *James v Seymour* [2023] EWHC 844 (Fam) certainly fits the bill, providing an algebraic formula for the calculation of the payor's 'exigible income' (E) which is defined as  $E = (G \times 91 - Z) - P - (S/0.55)$  and is then applied to a table to produce

the 'Child Support Starting Point'. Nicholas has said that he intends now to devote his time and efforts to the challenges affecting sufferers of Parkinson's disease. We shall not be surprised if these efforts achieve similarly remarkable results in that territory. And tennis players amongst us hope there will be some time left for him to continue masterminding his energetic lawyers' tennis club in Lincoln's Inn Fields. On behalf of all at the FRJ, we thank him for all he has done for the world of financial remedies and wish him well in his retirement from the bench.

## The Law Commission Review of financial remedies law

On 16 March 2020, just before COVID-19 and lockdown descended upon us all, the government gave a written promise to Baroness Deech that (on condition she withdrew some unwelcome amendments to the then Divorce, Dissolution and Separation Bill) there would be a review of financial remedies law in the context of the suggestions she had been advancing in her own Private Members' Bill (the Divorce (Financial Provision) Bill). This promise appeared to have been lost in the mists of time, but suddenly resurfaced in parliamentary exchanges in the House of Lords on 8 March 2023 and then the announcement on 4 April 2023 by the Law Commission that it would be carrying out the promised review in the months and years ahead. Financial remedies practitioners can properly expect to be fully involved and engaged in this review and we should all welcome the opportunity to stand back and reflect on whether the statutory basis of what we do could be improved, whether in the direction suggested by Baroness Deech or in some other direction. The issues raised go to the heart of the FRJ world, and two articles in this issue are targeted at aspects of this review. Readers' attention is particularly drawn to the interesting analysis of the law of maintenance by Katherine Dunseath and Elizabeth Darlington, 'Fairness versus Certainty – Should the Matrimonial Causes Act 1973 be Amended to Restrict the Duration of Spousal Maintenance?'. Would a statutory cap of 5 years' spousal maintenance 'begin to resemble structural or institutional sexism' as Dunseath and Darlington suggest or was Baroness Deech correct to assert, during the Bill's Second Reading debate, that 'The majority of women who work feel downgraded and belittled by the alleged helplessness and unreasonable demands made by some'?

## The updated Standard Family Orders

I declare an interest as a member of the team which first drafted the money Standard Family Orders (SFOs) launched in 2017 and also the team which has updated them in 2022–23, but I hope it is not an exaggeration to say that these template orders have been almost universally adopted now in financial remedies cases and also that they are widely welcomed and have unquestionably improved the overall clarity and presentation of money orders. To retain their usefulness, they need to be regularly updated and adapted to continuing changes in the world (Brexit, remote hearings, digital working, electronic bundles, *Efficiency Statement*, ES1 and ES2, etc) and the updated suite of SFOs attempts to take all these changes on board.

For more detail on the changes involved in the updating, readers' attention is drawn to the article by Nicholas Allen KC on this subject. Class Legal's excellent order drafting programme (available free to judges) has been adapted to utilise the updated SFOs and so drafting an order should be a straightforward process. Sometimes people say to me,

'Why are the SFOs so long?', to which my answer is always this: the SFOs are long because they are intended to cover a wide range of scenarios; but the actual order in a particular case does not need to be any longer than it needs to be – deleting unnecessary paragraphs in the Word format should not be unduly time-consuming!

# Mr Justice Mostyn – An Appreciation on His Forthcoming Retirement

Sir James Munby



Cruel fate has cut short the judicial career of one of the greatest family lawyers of our times. He explains why in his article, 'Sir Nicholas Mostyn shares his experience of living with Parkinson's' [2023] IFL 67. In the form of a revelatory interview (see p 89 below) with Alexander Chandler KC, Sir Nicholas has given us an *apologia pro vita sua*. The Editor rightly thought it should be published alongside an appreciation from another perspective.

As much through choice as because of anticipated objections in august quarters, Mostyn J never sought to ascend to the higher reaches that his vast knowledge, high intellect and tremendous industry would more than have justified. Dare one be allowed to say that his wise choice has immeasurably benefitted us all. As the outstanding puisne of his era, he has achieved much more – and much more of enduring importance – than many who have risen much further.

Called in 1980, Nicholas Mostyn was immeasurably lucky to have as a pupil master the late, great, much-loved and much-lamented Peter Singer (Singer J, 1993–2010). For Nicholas it gave him a lifelong friendship, broken only when Peter died in December 2018 and marked by the remarkable address he delivered at Peter's funeral in Southwark Cathedral in January 2019 (reprinted in *At A Glance* 2019–2020) and his subsequent tribute, 'Sir Peter Singer (1944–2018)' [2019] Fam Law 105. For us it led to a remarkably creative partnership, lasting from 1992 to 2018, which,

combining Mostyn's innovative ideas with Singer's editorial skills and Dick Warner's business acumen as owner of Class Publishing, was to give us Class Legal.

Whatever the state of the substantive law in the 1990s in relation to ancillary relief (financial remedies as we would now call it), practice and procedure were not in a happy condition. If that seems unduly harsh we need only to consider Booth J's landmark judgment in *Evans v Evans* [1990] 1 WLR 575, [1990] 1 FLR 319, and Lord Hoffmann's excoriating speech in *Piglowska v Piglowski* [1999] 1 WLR 1360, [1999] 2 FLR 763. What was to be done?

For Mostyn the first notable step was the publication in 1992 of the first edition of *At A Glance: Essential Court Tables for Ancillary Relief* (more recently re-branded as *Essential Tables for Financial Remedies*), the brainchild of Singer, Mostyn and the late and much-lamented Val le Grice, published by the Family Law Bar Association (FLBA) and produced for them by Class Publishing. It marked a decisive break with the past. Remarkably innovative in function, content, presentation and, not least, format, it was an entirely new kind of practitioner's handbook, and even today there is nothing to match it, either in relation to its own subject-matter or, so far as I am aware, in any other field of legal practice. Its purpose was explained in a Preface which although anonymous was plainly written by Singer, for it consisted of a characteristically laboured parable on the theme of *Romeo and Juliet*; Mostyn's hard work in the boiler room was exemplified by the fact that he asserted the copyright in no fewer than five of the 21 Tables as well as in the thematically arranged Table of Leading Cases which still remains, 30 years later, such a valuable feature of *At A Glance*.

*At A Glance* was of course only the first of a number of similarly innovative works to emerge from Class Legal. The first edition of *Financial Remedies Practice (FRP)*, another Singer-Mostyn venture, in 2011, was followed by the *Dictionary of Financial Remedies* in 2013, the *Dictionary of Private Children Law* in 2021, the *Financial Remedies Journal* in 2022, and the *Dictionary of TLATA and Inheritance Act Claims* in 2023. Although neither edited nor authored by Mostyn (responsibility for all of them lies with HHJ Edward Hess), his fingerprints can be detected on the *Dictionary of Financial Remedies*. But perhaps his greatest work was and remains *FRP*; although assisted by the other distinguished lawyers whose names also adorn the title page, Mostyn was from the outset responsible for all the heavy lifting on *FRP* which remains distinctively a monument to his erudition and mastery of the sources. Its up-to-date coverage of both the family *and the civil* case-law is so extensive – seemingly exhaustive – as to put the poor old *White Book* to shame.

Another less immediately obvious feature of *At A Glance* and its successors was the extensive use by both Singer and especially Mostyn of IT in its preparation. They had very early on seen that the future was electronic. Indeed, as Rhys Taylor tells us, in his invaluable blog, 'The Class Legal Financial Remedies Skyline: a Review', published online on the *Financial Remedies Journal* website in May 2022, *FRP* was 'Designed originally (so Sir Peter Singer once told me) to be electronic only'.

If *At A Glance* was Mostyn's first notable step in this context, the second was even more important – his membership, in the company of a galaxy of legal talent, of

the Ancillary Relief Working Party (ARWP), set up by the then Senior District Judge, Gerald Angel, in 1992 and subsequently chaired by Sir Mathew Thorpe, which led to the 1996 ancillary relief pilot scheme. For those who take the product of their labours for granted – and the numbers who can now recall the bad old days is, in the nature of things, much reduced – it takes an effort of imagination to appreciate just how important and pregnant with future change the work of the ARWP was. We are much indebted to Mostyn for collating the various recollections of those far-seeing pioneers on the ARWP, his own included, in *The Pilot Scheme Jubilee – The story behind the 1996 ancillary relief pilot scheme*, published by Class Legal in 2021. One of the skills he was able to bring to the ARWP was, he tells us, ‘some computing know-how (learned at Ampleforth in the 1970s)’ – so we have much to thank the Benedictines for – but perhaps his greatest contribution was as draftsman of the proposed new rules and creator of the new Form E:

‘I recall many hours in front of my then cutting-edge IBM PS/2 computer (storage 720 KB) grappling with the table function in my word processing program, WordPerfect ... I eventually came up with a template – Form E.’

Class Legal, it hardly needs saying, has long been and remains a leader in the provision of interactive IT systems for financial remedies practitioners, a field of endeavour which Mostyn has very much made his own, although in saying this I must not minimise the enormous impact of his original and long-time collaborator, Peter Singer, or overlook the invaluable contributions of his co-authors, particularly in more recent years.

It was as long ago as 1991 that Mostyn demonstrated to an initially sceptical FLBA audience at Cumberland Lodge an electronic interactive family assets spreadsheet, able to perform in a couple of minutes what would have taken hours to complete using pen, paper and calculator. Of his audience, which included the then President and other senior figures, it may be said that they gasped and stretched their eyes. Thirty-two years later, at Cumberland Lodge in May 2023 Mostyn reprised his earlier demonstration. The fact that to his modern audience there seemed nothing at all remarkable, shows what a very long way we have come from those electronically innocent days of 1991 and reminds us of just how important Mostyn’s pioneering and innovative work in this field has been in creating our modern world.

In 1993 came *Child’s Pay: The Complete Guide to the Child Support Act 1991 and the Subordinate Legislation*, published by Class Publishing, on the new Child Support Scheme. It was accompanied by an electronic calculating tool, provided on a floppy disc, giving the user a quick way to calculate accurate child support figures. When the third, and final, edition was published in 2002 this invaluable tool was provided on a CD.

For once, the publisher’s blurb on the back cover spoke no more than the truth, describing Mostyn as ‘a renowned and experienced computer program deviser’ and identifying him in this context as the author not merely of *Child’s Pay* but also of *Capitalise*, *Quantum Hop* (later *Skip*) and *@eGlance*. *Capitalise* was and remains the pre-eminent electronic *Duxbury* calculator, an unrivalled tool for capitalising income needs personalised to the individual circum-

stances of the case. *Quantum Skip* (now *Quantum Cloud*) was in origin an electronic tool for preparing a Form E program. It now gives users all the tools they need to complete their family law forms, court orders, chronology, schedule of assets and more in a fully digital cloud-based system. *@eGlance* (now *At A Glance Cloud*), the online version of *At A Glance*, is a cloud-based toolkit and knowledge library enabling financial remedy practitioners to carry out a whole range of useful calculations, print out formatted reports, browse leading cases, stay up-to-date with developments in the Financial Remedies Court (FRC), and access extensive and up-to-date commentary on the Family Procedure Rules 2010. More recently they have been joined by *Family Orders Online*, designed to streamline the drafting of standard family court orders: it contains the latest library of standard family orders, always kept up-to-date, and enables the user to merge core case information into the order, including such details as the applicant and respondent, children and court.

These electronic systems, with their array of tools, calculators and report-printing, form-printing and order-printing features, give the practitioner everything they need. The success of Mostyn and Class Legal in providing cutting-edge electronic systems of the kind that practitioners need stands in painful contrast with the still stuttering attempts of the powers that be, more than 6 years after the ill-fated Court Modernisation Programme started in 2016, to provide remotely comparable systems for court users. Why have Mostyn and Class Legal been so successful? It is surely because they have always had the deep understanding of the family justice system and how it operates, and of the needs of the professionals and others who use it, which unhappily is and always has been so markedly and deplorably lacking in the Ministry of Justice and HM Courts & Tribunals Service (HMCTS) and their predecessors. And from the word go Class Legal has had a really good helpline where the phone is answered immediately by someone speaking comprehensible English and the problem is solved.

In addition to his computing skills, Mostyn considers himself, with every justification so far as the non-expert can judge, to be a good mathematician and statistician, with a particular interest in the laws of probability – a subject I must return to below.

The underlying theme which infuses all this output was Mostyn’s early appreciation that, as he very recently put it (*R (MNL) v Westminster Magistrates’ Court* [2023] EWHC 587 (Admin) at [49]), ‘Procedural rules exist for a purpose, and that purpose is to ensure that every legal cause is despatched not merely efficiently, but fairly.’ It is a theme which, as we shall see, has remained a constant throughout his subsequent judicial career, generating many important judgments. An early example, expressed in characteristically trenchant terms, happily consequential in its effect of stamping out widespread abuse, and still (see Peel J in *J v H* [2022] EWFC 133 at [3]) the ‘*locus classicus*’, was *L v K (Freezing Orders: Principles and Safeguards)* [2013] EWHC 1735 (Fam), [2014] Fam 35.

If I emphasise his focus on practice and procedure, it is important also to acknowledge Mostyn the historian of family law. He has never been concerned just with the here and now and has a deep scholarly knowledge and awareness of the importance of the history of family law, nurtured



when at Bristol University he wrote an undergraduate dissertation entitled *Canonical annulment of marriage compared with English law, with special reference to capacity, consent and consummation*. His 1999 lecture to The Family Law Conference in Queensland, published as “Justice Must be Seen to be Done” – Open Justice and Family Law’ [1999] IFL 80, is a penetrating historical analysis of an enduringly important topic which remains as compelling today a quarter of a century after it was written. He opened with a quotation from Lawrence Stone’s *Road to Divorce: England 1530–1987*, 1990, the first of Stone’s great trilogy of magisterial works on the history of marriage and divorce, followed by two volumes of case-studies, *Uncertain Unions: Marriage in England 1660–1753*, 1992, and *Broken Lives: Separation and Divorce in England 1660–1857*, 1993. Two decades later in *Hasan v Ul-Hasan, decd and Another* [2021] EWHC 1791 (Fam), [2022] Fam 1, [2022] 1 FLR 1033 at [31], Mostyn told us, the context being his discussion of the common law action for criminal conversation (crim con), that he had ‘re-read chapter IX of Lawrence Stone’s magisterial work *Road to Divorce*’. One wonders how many of his brethren are even aware of let alone as deeply read in Stone as is Mostyn. This is a topic to which I must return when considering his judgments.

But what of Mostyn the barrister? We catch a glimpse of him as a junior in the recent ‘Interview with Sir Mathew Thorpe’ [2023] 1 FRJ 68 at 70: ‘I have profound admiration for Nicholas Mostyn. We were in chambers together and when he was first in chambers he was my junior of choice if there was not a lot of money about ... And he was so clever’. The account in his *Apologia* of the 5 years Mostyn spent as his junior of choice shows how ‘incredibly influential’ Nicholas Wilson QC was, how he ‘learned so much from him about how to cross-examine, how to prepare cases, how to deal with clients’, and how feels ‘so lucky to have spent those years working with him.’ All that no doubt stood him in very good stead, for when Mostyn took Silk in 1997 he was still only a youthful 39 – he had been born in July 1957 – then as now pretty young for a family Silk.

The same year he was one of the founding editors of the journal *International Family Law*: see the deservedly warm tributes from the current editors and from Rebecca Bailey-Harris in [2023] IFL 65 and 66–67.

1997 was a good time for a thrustingly ambitious ‘money’ junior to be taking Silk.

In the first place, the previous decade had seen the disappearance onto the Family Division Bench of many of the leading ‘money’ Silks: Mathew Thorpe (1988), Peter Singer (1993), Nicholas Wilson (1993) and James Holman (1995), to be followed by Hugh Bennett (1995), David Bodey (1999), Paul Coleridge (2000) and Florence Baron (2004). Increasingly that left the field clear for Mostyn to achieve the pre-eminence which marked his last decade in practice.

But there was to be another, for him a profoundly significant if in 1997 entirely unexpected, development which was to propel Mostyn ever upwards. When in July 1996 the Court of Appeal handed down its judgment in *Dart v Dart* [1996] 2 FLR 286 it seemed that the substantive law of ancillary relief as crafted a generation previously by Lord Denning MR and, more especially, by Ormrod LJ was settled and impervious to change: consider Thorpe LJ’s brutal put down of one Munby QC. And the House of Lords, after all, dismissed Mrs Dart’s petition for leave to appeal. But within

4 short years the world had changed. In February 1999 the House of Lords granted both Mr and Mrs White permission to appeal, and on 26 October 2000 handed down their landmark decision: *White v White* [2001] 1 AC 596, [2000] 2 FLR 981. This, as is well known, was to open up an immense field of highly paid work for the Bar in so-called ‘big money’ cases which to this day shows no sign of abating.

Following *White v White*, in which Mostyn had appeared throughout for Mr White, he appeared in a galaxy of ‘big money’ cases of both legal and, often also of more general, interest. One thinks for example of: *Lambert v Lambert* [2002] EWCA Civ 1685, [2003] Fam 103, [2003] 1 FLR 139; *Parlour v Parlour* [2004] EWCA Civ 872, [2005] Fam 171, [2004] 2 FLR 893; *Sorrell v Sorrell* [2005] EWHC 1717 (Fam), [2006] 1 FLR 497; *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618, [2006] 1 FLR 1186; *McCartney v McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508; *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416; and *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, [2011] 1 AC 534, [2010] 2 FLR 1900 – heard before nine judges of the Supreme Court it was Mostyn’s last case at the Bar.

Some journalists apparently nicknamed him ‘Mr Payout’ and it was said that at the height of his career Mostyn was being paid £500 an hour. Whatever the truth of that, I comment only that had Mostyn chosen to practise at either the Chancery or the Commercial Bar – which his formidable intellect would have made entirely possible – his earnings would have been very much higher than the figure bandied about.

I had the pleasure of appearing with Mostyn only once, when we appeared, he for Mr and I for Mrs White, both of whom were seeking permission to appeal to the House of Lords. Most unusually, and for reasons which were never explained, the Appeal Committee decided that there should be an oral hearing. Mr White’s petition for leave having been issued first, Mostyn opened the batting. I suspect he would agree that he made little headway; the Committee seemed uninterested and unimpressed, one of their Lordships remarking, as I recall, that as the case was all about discretion why should the House consider it. Following on for Mrs White, I made common cause with Mostyn for, although if permission was granted the parties would be bitterly at odds, at this stage they had the same interest in obtaining permission. (Lest it be thought that I succeeded where Mostyn had failed, I make no such claim: permission to appeal was granted only after the penny suddenly dropped with their Lordships that *both* parties were seeking permission.) Soon after, Mrs White dispensed with my services, as she had with both of my predecessors, so I never had the opportunity as a barrister of encountering Mostyn in full adversarial mode.

Mostyn appeared before me in *Sulaiman v Juffali* [2001] EWHC 556 (Fam), [2002] 1 FLR 479, in *Al-Khatib v Masry* [2002] 1 FLR 1053, and, most notoriously, in *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416. His advocacy was intellectually compelling and enhanced by the clarity of expression and confidence of manner which are so potent and persuasive when it comes to what Pliny (Ep I, xx, 14) in a letter to his friend Tacitus some two Millennia ago famously described as ‘working on the minds of judges’. *Spencer*, of course, is best known in many quarters because of some choice words which Mostyn report-

edly used of me following my judgment. Given their public notoriety, I take this opportunity to make clear that I have never borne any grudge against him for what he said. How often have we all come out of court after a long and gruelling day which has not gone entirely as expected and made some unflattering comment about the judge which we would be mortified to think would ever come to the judge's ears – his only mistake was not to think about the possible consequences if his words were ever to become public.

Mostyn became a Deputy High Court Judge in 2000 and was appointed a judge of the Family Division, in succession to Bennett J, in 2010, sitting also as a judge of the Court of Protection, in the Administrative Court (from 2014) and, of course (also from 2014) in the newly created Family Court. Over an immensely productive judicial career spanning more than two decades he has delivered many hundreds of judgments. Here I must be ruthlessly selective, focusing primarily on his judgments in relation to financial remedies – money – cases. My selection, needless to emphasise, is necessarily subjective. I must however place on record that, as he has often said, the judgment of which Mostyn is most proud is not a family case, but the one in the Administrative Court where he quashed the Personal Independence Payment restrictions: *R (RF) v Secretary of State for Work and Pensions (Mind and Another Intervening)* [2017] EWHC 3375 (Admin), [2018] PTSR 1147.

During his 10 years as a Deputy High Court Judge, Mostyn gave many judgments which found their way into the law reports. Probably the most important, and still the leading authority in relation to the handling of third-party claims and maintenance pending suit, is *TL v ML (Ancillary Relief: Claim against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263. In contrast, *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam), [2003] 2 FLR 108, a pioneering decision on the application of *White v White*, has had a more chequered career. His thesis that cohabitation which 'moves seamlessly ... to marriage' should be added to the duration of the marriage – 'the law in this area is not moribund but must move to reflect changing social values' – has endured. In contrast, his thesis in relation to short marriages has not survived subsequent judicial scrutiny, requiring him, as he put it in *E v L (Financial Remedies)* [2021] EWFC 60, [2022] 1 FLR 952 at [43], 'figuratively [to] hold my hand in the flames and recant.' Others which deserve to be recorded are: *Le Foe v Le Foe* [2001] 2 FLR 970, dealing with the rights of the mortgagee where the husband had fraudulently mortgaged the matrimonial home; *W v W (Ancillary Relief: Non-Disclosure)* [2003] EWHC 2254 (Fam), [2004] 1 FLR 494, where the husband's Form E presented him as being insolvent although he had assets of about £2,700,000; and *Rossi v Rossi* [2006] EWHC 1482 (Fam), [2007] 1 FLR 790, on the question of delay in bringing proceedings.

From Mostyn's career as a High Court Judge from 2010 to 2023 I select the following from a very long list of highly significant money judgments: *S v AG (Financial Orders: Lottery Prize)* [2011] EWHC 2637 (Fam), [2012] 1 FLR 651 (whether lottery win by one spouse to be characterised as matrimonial or non-matrimonial property); *N v F (Financial Orders: Pre-Acquired Wealth)* [2011] EWHC 586 (Fam), [2011] 2 FLR 533; *BJ v MJ (Financial Order: Overseas Trust)* [2011] EWHC 2708 (Fam), [2012] 1 FLR 667 (treatment of

trusts in division of assets following divorce); *B v S (Financial Remedy: Marital Property Regime)* [2012] EWHC 265 (Fam), [2012] 2 FLR 502; *AC v DC (Financial Remedy: Effect of s.37 Avoidance Order)* [2012] EWHC 2032 (Fam), [2013] 2 FLR 1483; *DR v GR (Financial Remedy: Variation of Overseas Trust)* [2013] EWHC 1196 (Fam), [2013] 2 FLR 1534 (principles applicable to joinder of trustees and/or underlying companies of a trust in variation of settlement cases); *SA v PA (Premarital Agreement: Compensation)* [2014] EWHC 392 (Fam), [2014] 2 FLR 1028; *AB v CB (Financial Remedies: Variation of Trust)* [2014] EWHC 2998 (Fam), [2015] 2 FLR 25; *JL v SL (Appeal: Non-Matrimonial Property)* [2014] EWHC 3658 (Fam), [2015] 2 FLR 1193; *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam), [2015] 2 FLR 1124 (important guidance on principles relevant to applications for spousal maintenance); *JL v SL (No 2) (Financial Remedies: Rehearing: Non-Matrimonial Property)* [2015] EWHC 360 (Fam), [2015] 2 FLR 1202; *Goyal v Goyal* [2016] EWFC 50, [2016] 4 WLR 170, [2017] 2 FLR 236 (pension sharing order not available in relation to overseas pension); *Quan v Bray* [2018] EWHC 3558 (Fam), [2019] 1 FLR 1114 (spousal maintenance); *Ipekçi v McConnell* [2019] EWFC 19, [2019] 2 FLR 667 (pre-nup not upheld); *CB v KB (Financial Remedies: Calculation of Income Streams and Child Support)* [2019] EWFC 78, [2020] 1 FLR 795 (*Duxbury* amortisation); *OG v AG (Financial Remedies: Conduct)* [2020] EWFC 52, [2021] 1 FLR 1105 (litigation conduct); *E v L* [2021] EWFC 60, [2022] 1 FLR 952 (short childless marriage); *BT v CU* [2021] EWFC 87, [2022] 2 FLR 26 (COVID-19 and *Thwaite/Barder*); *Collardeau-Fuchs v Fuchs* [2022] EWFC 135 (pre-nup and child support); and *James v Seymour* [2023] EWHC 844 (Fam) (child support). One could go on for so long.

In his remarkable *Valete* for Mostyn, HHJ Edward Hess made an interesting and important point about his judgments: [2022] 2 FRJ 75. Paying tribute to what he called Mostyn's 'very remarkable', indeed 'phenomenal' contribution to the world of financial remedies, he went on:

'but above all he will be remembered for the authority and clarity of his judgments in the field of financial remedies. Participants in this field well know that, on a wide range of subjects (e.g. joinder, needs, Legal Services Payment Orders, child maintenance, costs, Maintenance Pending Suit, lump sum variation, setting aside, company valuation), extracts from his judgments come close to representing a statutory codification of the relevant law. This is no accident, but the product of a high intellect, prodigiously hard work and a practitioner's instinct for knowing where guidance is needed.'

But merely to identify those of Mostyn's judgments which are of *legal* importance seriously underplays their wider significance.

His judgments, as well as being always beautifully crafted, notable for their clarity and (at least by contemporary standards) conciseness, have a much wider sweep than most. He is a great wordsmith, prolific in the deployment of aphorisms and the crafting of metaphors. Consider, for example, *SP v EB and KP* [2014] EWHC 3964 (Fam), [2016] 1 FLR 228 at [29], where, rejecting a wholly misconceived application by counsel for 'amplification of inadequate reasons', he said 'Nor do I need to incant mechanically passages from *Re M [In re M and Another (Children)*

(*Abduction: Rights of Custody*) [2007] UKHL 55, [2008] AC 1288, [2008] 1 FLR 251] as if I were a pilot going through the pre-flight checklist.’ Or *JL v SL (No 3) (Post-judgment Amplification)* [2015] EWHC 555 (Fam), [2015] 2 FLR 1220 at [13], speaking of the use of *Duxbury* calculations, ‘Generally speaking in most human fields the best prophet of the future is the past.’ Or *R (ZAI Corporate Finance Ltd) v AIM Disciplinary Committee of the London Stock Exchange PLC* [2017] EWHC 778 (Admin) at [18] (appeal dismissed [2017] EWCA Civ 1294, [2017] Bus LR 2139):

‘the decision ... may have been laconic, but that is of the nature of case management decisions. When it comes to case management decisions in my opinion the general rule should be that “less is more”.’

Or *R (Sandy) v Secretary of State for the Home Department* [2023] EWHC 640 (Admin) at [47]:

‘There is no doubt that in the world of judicial review proportionality has advanced like a cuckoo, occupying the common law nest of traditional assessment, laying its continental eggs in it, and ejecting its home-incubated *Wednesbury* hatchlings.’

Or *Cummings v Fawn* [2023] EWHC 830 (Fam) at [18], where he described the discretionary range for the assessment of the ‘needs’ principle as ‘a line of books on a shelf bracketed left and right by book-ends.’

Perhaps the most significant was his introduction into our jurisprudence in 2015 of the white leopard as a metaphor for the conceivable but utterly improbable: see *JL v SL (No 2) (Appeal: Non-Matrimonial Property)* [2015] EWHC 360 (Fam), [2015] 2 FLR 1202 at [22], [40], approved by the Privy Council in *Scatliffe v Scatliffe (British Virgin Islands)* [2016] UKPC 36, [2017] AC 93, [2017] 2 FLR 933 at [25]. Of the white leopard it can fairly be said that it has been frequently cited but as yet hardly ever sighted, though as Baker J, as he then was, amusingly commented in *XW v XH* [2017] EWFC 76, [2019] 4 WLR 83, [2019] 1 FLR 481 at [220]:

‘Mostyn J may be right to describe the concept of special contribution as “rare as a white leopard”. As demonstrated by the Court of Appeal decision in *Work v Gray* [[2017] EWCA Civ 270, [2018] Fam 35, [2017] 2 FLR 1297], however, it is neither a unicorn nor, for that matter, a dodo.’

Mostyn is very well read in the writings of Scalia J, which he quotes with the evident admiration properly due to a noted judicial master of language.

In *Carmarthenshire County Council v Y* [2017] EWFC 36 at [8], he cited Scalia’s discussion in *Crawford v Washington* (2004) 541 US 36, 62, of the Sixth Amendment to the US Constitution:

‘It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, *Commentaries*, at 373 (“This open examination of witnesses ... is much more conducive to the clearing up of truth”); M. Hale, *History and Analysis of the Common Law of England* 258 (1713) (adversarial testing “beats and bolts out the Truth much better”).’

Mostyn returned to this in *Sait v The General Medical Council* [2018] EWHC 3160 (Admin) at [49]–[51], and again in *AO v LA* [2023] EWHC 83 (Fam) at [50], [60].

In *OG v AG* [2020] EWFC 52, [2021] 1 FLR 1105 at [69], where the context was the incommensurability of different kinds of commercial contribution within a family business, he cited Scalia J’s memorable statement in *Bendix Autolite Corp v Midwesco Enterprises Inc* (1988) 486 US 888, 897, that it is like ‘judging whether a particular line is longer than a particular rock is heavy.’

In *NB v MI* [2021] EWHC 224 (Fam), [2021] 2 FLR 786 at [94], he cited Scalia’s aphorism that ‘the rule of law is the law of rules.’

In *R (Akinsanya) v Secretary of State for the Home Department* [2021] EWHC 1535 (Admin), [2021] 1 WLR 5454 at [69], he cited Scalia’s statement that:

‘A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means. But while the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.’

If Scalia is his favourite, Mostyn has deployed the words of other American judges. In *DL v SL* [2015] EWHC 2621 (Fam), [2016] 2 FLR 552 at [6], he cited the famous aphorism of the great Brandeis that ‘sunshine is said to be one of the best disinfectants’, though, it has to be noted, allowing much less sunshine to penetrate the Family Division than he would now believe appropriate. And in *R (Sandy) v Secretary of State for the Home Department* [2023] EWHC 640 (Admin) at [49], he cited Cardozo (*The Growth of the Law*, 1924) to telling effect on the limitations inherent in even the widest judicial discretion:

‘Complete freedom – unfettered and undirected – there never is. A thousand limitations – the product some of statute, some of precedent, some of vague tradition or of an immemorial technique – encompass and hedge us even when we think of ourselves as ranging freely and at large ... Narrow at best is any freedom that is allotted to us.’

But his wide range of citations is not confined to the merely legal. In *R (Delo) v Information Commissioner and Another* [2022] EWHC 3046 (Admin) at [8], in the context of considering the history of the role and functions of the office of the Information Commissioner and his predecessors, he cited Lord Acton’s aphorism that ‘the value of history is certainty – against which opinion is broken up.’

And one of his favourite quotations, though so far as I am aware it has never featured in a judgment, is that of the future Marechal Foch allegedly exclaiming on a particularly dark day during the Great War, ‘*Mon centre cède, ma droite recule, situation excellente, j’attaque.*’

And he revels in the purely literary.

In *Fresh View Swift Properties Ltd v Westminster Magistrates’ Court* [2023] EWHC 605 (Admin) at [27], where the context was the law of forfeiture, Mostyn cited Gilbert and Sullivan’s famous lines in Act II of *The Mikado*: ‘My object all sublime / I shall achieve in time — / To let the punishment fit the crime — The punishment fit the crime.’

But the greatest example is surely his judgment in *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam), [2015] 2

FLR 1124 at [40], where, having commented that ‘the assessment of need is elastic, fact-specific and highly discretionary,’ he cited Shakespeare’s *King Lear*, Act 2, Scene 4: ‘For as King Lear pointed out, needs are exceedingly hard to reason; even the poor have things superfluous to their basic needs; and most luxuries are strictly unnecessary.’ It got better, for at [55] he said:

‘[Counsel] invites me to peer into the future and to predict that for at least 7 more years ... the husband will earn bonuses at approximately the same net rate as the average for the last three years ... He in effect invites me to apply Lord Byron’s aphorism that “the best prophet of the future is the past”. On the other hand I recall ... the epigram of the great atomic physicist Niels Bohr that “prediction is very difficult, especially about the future”. I also recall Mark Twain’s acute observation that “prophecies which promise valuable things, desirable things, good things, worthy things, never come true.”’

Sometimes the literary allusion is less obvious. Mostyn’s judgment in *B v S (Financial Remedy: Marital Property Regime)* [2012] EWHC 265 (Fam), [2012] 2 FLR 502 at [76] is so characteristic in so many ways of his writing that it deserves quotation in full:

‘The reason that the sharing principle is sometimes advocated as being applicable to a periodical payments claim is to reflect the theory that post-separation earnings derive from an earning capacity built up during the marriage which is, in some intangible way, a piece of matrimonial property there to be equitably or fairly shared. The high point of that theory is the dictum of Lady Hale which I have quoted above viz “the main family asset is the husband’s very substantial earning power, generated over a lengthy marriage”. As a theory it is problematic, because at the end of the day the only reason there is income after separation is because of work done after separation. A footballer who earns £100,000 per week earns that because he is on the pitch playing football. Certainly, the skills he was born with, and the development of those skills (which may well have happened during his marriage), are all reasons why he can command his salary, but he will not get paid it unless he plays football. The footballer has to fill the unforgiving minute with sixty seconds’ worth of distance run after the marriage.’

But how many of his learned readers would have appreciated that the ‘unforgiving minute’ comes from the final verse of Kipling’s *If* – ‘If you can fill the unforgiving minute / With sixty seconds’ worth of distance run, / Yours is the Earth and everything that’s in it’.

I have already noted Mostyn’s deployment of legal history in his judgments. In *R (Wakenshaw) v Secretary of State for Justice* [2018] EWHC 2089 (Admin) at [28]–[30], he observed that ‘There is nothing new about executive interference in the tenure of judges’ and proceeds to give two historical examples taken from the reigns of Charles I and Charles II.

In his paper, ‘Family Law – Not The Poor Relation’, delivered (remotely from France) to the 19th National Family Law Conference Adelaide, South Australia on 16 August 2022, he referred to ‘La révolution de 5 Brumaire CCIX (Cinquième Brumaire An Deux Cent Neuf)’. Thankfully a footnote explained ‘corresponding to 26 October 2000 [being the date of the House of Lords’ judgment in *White*]

under the new republican calendar adopted by the revolutionary National Convention in October 1793 to mark the “era of liberty”. It was abolished by Napoleon on 1 January 1806.’

Combining his interests in language and history, and illustrating his characteristic use of the interrogative footnote, is *R (Sandy) v Secretary of State for the Home Department* [2023] EWHC 640 (Admin) at [28]. Having noted the words ‘certificate of naturalization’ in British Nationality and Status of Aliens Act 1914, s 2(1), whereas in British Nationality Act 1948, s 10(1) the same words appeared as ‘certificate of naturalisation’, he added this footnote: ‘At some point between 1914 and 1948 the Parliamentary draftsman abandoned the Oxford spelling of the verb suffix *-ize* in favour of *-ise*.’ The footnote implicitly asks but leaves unanswered the interesting question: When? Those wishing to pursue it can, as a first port of call, consider the successive editions of Fowler’s *Modern English Usage*.

But for present purposes what is of greater interest are the judgments in which Mostyn deploys his learning in the history, including the history of the canon law and of the pre-1858 ecclesiastical courts, of the law relating to marriage, to divorce and to financial relief. There are many examples. I note in particular *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam), [2015] 2 FLR 1124, *NB v MI* [2021] EWHC 224 (Fam), [2021] 2 FLR 786, *Hasan v Ul-Hasan, decd and Another* [2021] EWHC 1791 (Fam), [2022] Fam 1, [2022] 1 FLR 1033, *E v L* [2021] EWFC 60, [2022] 1 FLR 952 and *Tousi v Gaydukova* [2023] EWHC 404 (Fam), where, amongst the most considerable learning, reference is made (at [31]) to the period from the time of the Decretal of Alexander III in 1180 up to the *Tametsi* decree of the Council of Trent in 1563.

Most recently Mostyn has displayed his profoundly deep and impressive historical researches in the important sequence of judgments addressing – one is tempted to say denouncing – what he calls a ‘culture of secrecy’ in the FRC and which is, he asserts both unprincipled and, indeed, unlawful: starting on 1 November 2021 with *BT v CU* [2021] EWFC 87, [2022] 1 WLR 1349, [2022] 2 FLR 26, next *A v M* [2021] EWFC 89, [2022] 1 FCR 445, and *Xanthopoulos v Rakshina* [2022] EWFC 30, [2022] 2 FCR 712, culminating on 13 June 2022 with *Gallagher v Gallagher* [2022] EWFC 52, [2022] 1 WLR 4370, [2023] 1 FLR 120; see also his judgment in *Aylward-Davies v Chesterman* [2022] EWFC 4, [2022] 2 FLR 925. On 29 July 2022 he extended his analysis to the Court of Protection: *Re EM* [2022] EWCOP 31, [2022] 4 WLR 101. Despite his avowal in *Gallagher v Gallagher* that it would be his last word on the subject, he has been unable to resist the temptation to say more, justifying himself in his further endeavour (*Re PP (A Child: Anonymisation)* [2023] EWHC 330 (Fam) at [50]) with some very characteristic language:

‘But the flow of anonymised judgments bearing, mostly, the standard misleading and unlawful rubric (but in some instances with weird and incomprehensible variants), has continued unabated. I therefore consider that I have a responsibility to try to set out, in a final push, why I consider that routine anonymisation of the parties in financial remedy cases is likely to be unlawful.’

Very recently he has again returned to the fray in *James v Seymour* [2023] EWHC 844 (Fam).

The rich subtlety and the careful detail of these judgments defy short summary, and this is not the place to repeat what I have already said, first in ‘Some Sunlight Seeps In’ [2022] 2 FRJ 79, and more recently online in ‘Family Justice: Ostiis Apertis? Or a mantle of inviolable secrecy? A challenge to those who would keep the doors closed’ (available online, at <https://financialremediesjournal.com/content/family-justice-ostiis-apertis-or-a-mantle-of-inviolable-secrecy-a-challenge-to-those-who-would-keep-the-doors-closed.4c5f77a599794b90b13d383037c3afd6.htm>). Here I need only observe that Mostyn’s closely reasoned conclusions are securely founded in a historical analysis, as compelling as it is masterly, which refocuses attention on the great dissenting judgment of Fletcher Moulton LJ in the Court of Appeal in *Scott v Scott*, resoundingly vindicated when the case went to the House of Lords, and, from a later generation, disinters the almost forgotten words of Lord Blanesburgh giving the advice of the Privy Council in *McPherson v McPherson* [1936] AC 177.

Also to be noted is his courageous disavowal of his previous error, as he now sees it, displayed in his earlier judgments in *W v M (TOLATA Proceedings: Anonymity)* [2012] EWHC 1679 (Fam), [2013] 1 FLR 1513, *DL v SL (Financial Remedy Proceedings: Privacy)* [2015] EWHC 2621 (Fam), [2016] 2 FLR 552 and *Appleton and Gallagher v News Group Newspapers and PA* [2015] EWHC 2689 (Fam), [2016] 2 FLR 1. This, of course, raises a very stark question: whether Mostyn was right then, and is wrong now, or whether he was wrong then and is right now. My own view is that his most recent views are well founded in both history and principle. He is, if you like, recanting old heresy rather than descending into new heresy.

Mostyn has recently extended his analysis of the anonymity principle to other forensic contexts in a series of judgments which nonetheless are of importance for practitioners in the FRC: *Re PP (A Child: Anonymisation)* [2023] EWHC 330 (Fam), *R (MNL) v Westminster Magistrates’ Court* [2023] EWHC 587 (Admin) and *TT v Essex County Council* [2023] EWHC 826 (Admin) – apparently his last ever judgment in the Administrative Court. It is, if I may be so bold as to say, a merciful judgment which seems to be building up to a decision *against* anonymity only to swerve at the end.

As I have mentioned, Mostyn considers himself to be a good mathematician and statistician, with a particular interest in the laws of probability. The Appendix to his judgment in *James v Seymour* [2023] EWHC 844 (Fam) displays his mathematical skills: he sets out for ‘the algebraically minded’ the algorithm underpinning the statutory child support scheme and proceeds to deploy several pages of mathematical analysis and tabulated calculations.

His skills in relation to the laws of probability were famously displayed in a series of judgments in which he analysed the competing probabilities in relation to a *past* event: *AA v NA and Others* [2010] EWHC 1282 (Fam), [2010] 2 FLR 1173, *A County Council v M and F* [2011] EWHC 1804 (Fam), [2012] 2 FLR 939 and *Re D (A Child)* [2014] EWHC 121 (Fam). These did not find favour with the Court of Appeal when it subsequently had occasion to consider, in *In re A (Children) (Care Proceedings: Burden of Proof)* [2018] EWCA Civ 1718, [2018] 4 WLR 117, [2019] 2 FLR 101, the decision of Francis J in *Re L (A Child)* [2017] EWHC 3707 (Fam), who had, unwisely as it turned out, followed Mostyn’s analysis.

The Court of Appeal (*In re A* at [54], [59]) was caustic and damning: ‘With the greatest respect to the erudition of Mostyn J’s arithmetical approach to the application of the “simple balance of probabilities”, I do not agree that it represents the appropriate approach.’ In following Mostyn, Francis J ‘fell into error ... by the use of a “pseudo-mathematical” approach to the burden of proof’ – language which had earlier been used by the Court of Appeal in *Milton Keynes Borough Council v Nulty and Others, National Insurance and Guarantee Corpn Ltd v Nulty’s Estate and Another* [2013] EWCA Civ 15, [2013] 1 WLR 1183 at [35].

How the Court of Appeal whilst acknowledging his arithmetical ‘erudition’ could at the same time have described Mostyn’s approach as ‘pseudo-mathematical’ without making any attempt to challenge the mathematical correctness of his application of the laws of probability is not easy to understand. One would not, after all, describe either the laws of probability generally, or Bayes’s theorem in particular, as ‘pseudo-mathematics’. If they thought the mathematical/statistical approach was legally irrelevant, why not simply say so? What on earth did they mean by ‘pseudo-mathematical’?

Inevitably this brings to mind the famous rebuke delivered to McCardie J by Scrutton LJ in 1932. In *Place v Searle* [1932] 2 KB 497 at 503, McCardie had spoken approvingly of ‘the lawyer who possesses sociological vision.’ Scrutton responded witheringly. ‘I think that the less sociological knowledge is brought into the discussion of these legal questions, the better’: *Place v Searle* (1932) 48 TLR 428 (together with other passages critical of McCardie it is omitted from the report in [1932] 2 KB 497). McCardie’s reaction was explosive and there followed an unedifying, public dispute between McCardie and Scrutton from which neither emerged with much, if any, dignity.

Mostyn’s response to his handling by the Court of Appeal was more measured, more calculated and, it might be thought, more effective. Back in 2014 (see the case-note on *Re D* in the March 2014 issue of the *39 Essex Chambers Mental Capacity Law Newsletter*, pp 35–37), his judgment in *Re D* had been commended in ‘an extremely interesting’ paper by Ian Hunt, a Chartered Statistician (Royal Statistical Society), ‘Adding a Bayes Leaf to the Law’: ‘In this case Mr Justice Mostyn handles his probability calculations with adroitness. And his vim for probabilistic argumentation is refreshing’. Subsequently, they collaborated to write as joint authors ‘Probability reasoning in judicial fact-finding’ (2020) 24 *The International Journal of Evidence & Proof* 75–94. It adopts an uncompromising stance. I quote from the authors’ Abstract:

‘We argue that the laws of probability promote coherent fact-finding and avoid potentially unjust logical contradictions. But we do not argue that a probabilistic Bayesian approach is sufficient or even necessary for good fact-finding. First, we explain the use of probability reasoning in *Re D (A Child)* [2014] EWHC 121 (Fam) and *Re L (A Child)* [2017] EWHC 3707 (Fam). Then we criticise the attack on this probabilistic reasoning found in *Re A (Children)* [2018] EWCA Civ 1718, which is the appeal decision on *Re L*. We conclude that the attack is unjustified and that the probability statements in the two cases were both valid and useful.’

They go on:

'We believe the charge of "pseudo-mathematics" is clearly fallacious.'

And they conclude:

'in some cases the best explanation of a judgment might include explicit probabilistic reasoning. But because of the ruling in *Re A*, whatever private inner thought processes the judge may entertain, he or she is not allowed to articulate in the judgment any reliance on the laws of probability when reaching his or her decision. What cannot be gainsaid is that there has been as a result a significant curtailment of judicial freedom in the fact-finding sphere, and that freedom is, as Winston Smith famously said in *Nineteen Eighty-Four*, the freedom to say that two plus two makes four.'

These matters seem to stand. What the Court of Appeal was pleased to call the 'pseudo-mathematical' is accepted in the Academy.

The Twitterati were amused, questioning how a judge could come to write such a piece and how the Judicial Official came to publish it.

Mostyn has now moved on, applying a probabilistic approach to identifying what degree of likelihood is required when predicting the happening of *future* events: see *AO v LA* [2023] EWHC 83 (Fam) at [25]–[49], and *Financial Remedies Practice 2023–24* at paras 20.117–20.131 (note in particular the table of suggested probabilities at para 20.130). How will this fare? We can only wait to see if this also is despatched in due course by the Court of Appeal as further unacceptable 'pseudo-mathematics'. What is the probability that it will? I fear there is a real prospect of that, though, daring to differ from Mostyn in my approach, I decline to offer a figure.

Mostyn has also been willing to criticise government policy when considered justified. In *MG and JG v JF (Child Maintenance: Costs Allowance)* [2015] EWHC 564 (Fam), [2016] 1 FLR 424, he reviewed the consequences of the removal of legal aid from almost all private law children cases as consequence of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 having come into force on 1 April 2013. He concluded (at [20]) that:

'it can be said that in the field of private children law the principle of individual justice has had to be sacrificed on the altar of the public debt. And ... it can reasonably be predicted that the phenomenon of the massive increase in self-representation will give rise to the serious risk of the court reaching incorrect, and therefore unjust, decisions.'

It has long been the practice in the Family Division for all the judges to have various tasks, responsibilities or 'jobs' apart from sitting as a judge, these allocated on the basis of expertise, interest and aptitude. Thus, they usually, but not invariably (Wilson J was an earlier exception) act as Family Division Liaison Judges with pastoral and leadership responsibilities on the various Circuits. Mostyn never did. I sensed that wise self-awareness made him unenthusiastic for a task to which, despite his enormous talents, he was, truth be told, not particularly well-suited. More important, as it seemed to me, in the interests of both the Family Division and the wider family justice system, was to keep him in London where his particular talents could make the greatest contribution. I never had occasion to regret it.

His immense contributions in this regard are already the

subject of detailed treatment: see my articles 'The Origins of the Financial Remedies Court – an Insider's View (Part 1)' [2022] 1 FRJ 19 and 'The Origins of the Financial Remedies Court – an Insider's View (Part 2)' [2022] 2 FRJ 127.

Even before the creation of the FRC, he had made a notable mark. I list his achievements:

- In 2013 I had asked Mostyn to be the judge in charge of the Royal Courts of Justice (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*. Suitably revised from time to time, it remains in force.
- Also in 2013, I had asked Mostyn to undertake what became known as the Family Orders Project. It is no reflection on Mostyn's determined leadership of a committed team that in the event this project took much longer to come to fruition than either he or I would have hoped. However, on 30 November 2017 I was able to issue *Practice Guidance: Standard financial and enforcement orders* and in January 2018 Class Publishing published the *Standard Family Orders Handbook: Volume 1 – Financial and Enforcement* by HHJ Edward Hess. Early on in the project, Mostyn had drafted the *Family Orders Project House Rules*. They were subject to mockery from those who professed to believe they were intended as rules to govern the application by end-users of the finalised Standard Orders and not, as was intended, the principles, as it were the design brief (equivalent to publishers' in-house style guides), to be applied by the FOP Team in crafting the Standard Orders. They were published in the interests of transparency so that future users could see the basis upon which the FOP Team was working and, if they wished, propose changes to the design brief. I refer to the *House Rules* because they were a typical example of Mostyn's thoroughness and drive for the clarity and consistency so sadly lacking in the so-called 'agile approach' adopted by, for example, HMCTS.
- In June 2014 I asked Mostyn to chair, jointly with Cobb J, the Financial Remedies Working Group. It reported on 31 July 2014 and 15 December 2014.

Unsurprisingly, and as I had confidently hoped, all this dedicated work by Mostyn brought about major, indeed transformative, improvements in the hearing of money cases.

Behind the scenes, I might add, his contributions were likewise invaluable. He had major input in the preparation both of the Guidance I issued on 28 February 2018: *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*, and of the President's Circular I issued on 27 July 2018, the important section dealing with 'Private' FDRs being included at his suggestion and indeed, as I recall, largely adopting his drafting. Mostyn's judicial views on the matter can be found at *AS v CS (Private FDR)* [2021] EWFC 34, [2021] 4 WLR 68.

Mostyn's labours in creating the FRC were, if anything,

even more impressive and calculated to have the most important long-term consequences.

In his *Valete*, Edward Hess (and, as the Deputy National Lead Judge of the FRC, he of all people should know) rightly described Mostyn as having been ‘a powerful and irresistible force in the creation and development of the FRC.’ Mostyn would not claim the credit for inventing the idea of the FRC – that honour falls to Edward Hess and Joanna Miles, the noted Cambridge academic, for their seminal paper in November 2016 – but once I had decided in 2017 to proceed with the creation of the FRC, his involvement in the project was crucial. His appointment as the FRC National Lead Judge (with Hess as his Deputy) was announced in January 2018. Just 3 years later, after extensive piloting, the President was able to announce on 24 February 2021, in his *Message from the President of the Family Division: The Financial Remedies Courts*, that:

‘the Financial Remedies Courts (FRC) pilot project has now been completed ... With the conclusion of the pilot phase, the FRCs should henceforth be regarded as an established and permanent part of the Family Court ... The establishment of the FRC has been a success and I am therefore very pleased formally to put the project on a permanent footing within the structure of the Family Court.’

Of course, he was much assisted by the unwavering support of successive Presidents, of his Deputy, and of the many others involved during those crucial years, but the simple fact is that this vital project would never have been brought so quickly to its triumphant conclusion without Mostyn’s forceful leadership, energy and driving input.

He was largely responsible for the publication in November 2019 of what may be thought of as the founding constitutional documents of the FRC: the *Financial Remedies Courts: Good Practice Protocol* and *Financial Remedies Courts: Overall Structure of the Financial Remedies Courts and the Role and Function of the Lead Judge*. His endeavours were crowned with the publication on 11 January 2022 of their revised and elaborated replacements: *Statement on the Efficient Conduct of Financial Remedy Hearings proceeding in the Financial Remedies Court below High Court Judge level*, modelled on the existing High Court Statement; *Financial Remedies Court: Primary Principles*, replacing the previous *Good Practice Protocol*; and a revised version of *Financial Remedies Court: Overall Structure of the Financial Remedies Court and the Role and Function of the Lead Judge*. Two days later, on 13 January 2022, the up-dated *Financial Remedies Court Organogram* was published.

With his work done, on 26 April 2022 Mostyn stepped down as National Lead Judge of the FRC, as head of the ‘money’ list in the RCJ and as Judge in Charge of the Standard Orders, to be succeeded by Peel J. For the first time for many years, Mostyn now had no administrative or leadership responsibilities and was able to devote the remainder of his time as a judge exclusively to judging – and oh how productive those final 15 months proved to be.

One has only to contrast the state of affairs which he inherited when appointed head of the ‘money’ list in the RCJ in 2013 with the remarkable legacy he was able to hand on to his successor in April 2022 to appreciate the scale of Mostyn’s administrative achievements. It is a major part of what will prove to be a monumental and lasting legacy.

And what of the future? Mostyn sits for the last time on 28 July 2023, though an accumulated entitlement to leave not taken means that formally he does not retire until 12 December 2023. That noted diarist and reporter of gossip, Sam Seppy, tells us (see (2023) 86 *Family Affairs* 94 at 95) of the plans for Mostyn’s last sitting day:

‘He has his last sitting day, which will be in Wales, planned to the last hurrah, as his 90-year-old father has agreed to perform a fly past of the court centre in Swansea in his 80-year-old Auster – *sauve qui peut!* – and drop down to a local airstrip to whisk his son away into well-earned retirement.’

This conjures up the wonderful image of Mostyn flying up into the clouds as he retires. I am assured that the mundane reality is a little different: his father will indeed be 90, though the Auster is only 66, but after finishing at Swansea Mostyn returns for a final fortnight sitting in London.

And what of Mostyn in retirement? He will, I imagine, continue with the preparation of those hardy annuals, *At A Glance* and *Financial Remedies Practice*. And somehow I cannot see him resisting the temptations for comment, suggestions and criticism provided by the Law Commission’s recently announced financial remedies project. We shall have to wait and see.

Finally, what of Mostyn himself? What of his character?

Modesty is not an attribute one associates with Mostyn and not, one suspects, something he would ever claim for himself. He is, after all, proud to be called Tigger and labelled a Polyanna, both, it might be thought, entirely accurate characterisations. But, truth be told, false modesty is neither morally nor intellectually attractive; and the simple reality is that on any objective view Mostyn has less to be modest about than most of his legal contemporaries.

Like many very successful lawyers he can display a certain, in his case forgivable, vanity. Consider this characteristic effusion in his Foreword to the 2023 edition of the *Dictionary of Financial Remedies*:

‘As before, I have amused myself by getting the computer to tell me how many times I am mentioned. In 2019 it was 94 times; in 2020 it was 97; in 2021 it was 111; in 2022 it was 135; and this year I am very pleased to record that the figure has risen to 151. Again, I have further amused myself by having the computer tell me how my competitors have fared this year. The results are even more pleasing than last year.’

He goes on to record that his nearest competitors can muster only 33, 31 and 29 respectively!

A certain defensiveness and sensitivity to what he knows is a familiar criticism is perhaps apparent in what follows:

‘The customary Boolean search of *Mostyn AND (criticised OR overturned OR reversed OR set-aside OR wrong OR taken leave of his senses)* with a proximity filter of “on the same page” returned a positive result on 8 pages although (perhaps surprisingly) only two entries amounted to an actual criticism of a judgment of mine (*NLW v ARC* [2012] EWHC 55 (Fam) as to the appellate standard – a battle long lost by me; and *Ipekçi v McConnell* [2019] EWFC 19) as to the power to award an indemnity against any future child support calculation.’

That said, when I innocently inquired how many cases there had been in which permission to appeal one of his judg-

ments had been given, and what percentage of the appeals had been successful, he was unable to proffer even the most approximate figures, seemingly having never kept a record.

It is a common view that the best judges are those who find themselves least often, if ever, in the Court of Appeal. The timidity which is the best prophylactic against appellate challenge does not however make for great judges. The judge who, like Mostyn, is bold, confident, clever and innovative in seeking to develop the law – and that as the career of his great predecessor McCardie J emphatically demonstrates is a proper role even for a puisne – will inevitably run into challenge. The really good judge will be taken to the Court of Appeal, but not too often, and some, but not too many of the appeals will be successful. Can it be said that Mostyn fails the test?

Speaking only of my own experience of sitting in judgment on him, while in *Traversa v Freddi* [2011] EWCA Civ 81, [2011] 2 FLR 272, I expressed strong criticism of some aspects of his judgment in *CG v IF* [2010] EWHC 1062 (Fam), [2010] 2 FLR 1790, we had no difficulty in *R (ZAI Corporate Finance Ltd) v AIM Disciplinary Committee of the London Stock Exchange PLC* [2017] EWCA Civ 1294, [2017] Bus LR 2139, dismissing the appeal from his judgment ([2017] EWHC 778 (Admin)). And he has even received the occasional plaudit from the Court of Appeal. In *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1327 at [35], Davis LJ described his judgment in *Lachaux v Lachaux* [2017] EWHC 385 (Fam) as ‘conspicuously lucid’.

Inevitably, this takes one to his drubbing at the hands of the Court of Appeal in *Rochdale Metropolitan Borough Council v KW (No 2)* [2015] EWCA Civ 1054, [2016] 1 WLR 198, [2016] COPLR 77, the successful appeal from his decisions in the Court of Protection in *Rochdale Metropolitan Borough Council v KW* [2014] EWCOP 45, [2015] EWCOP 13. Making clear his profound disagreement with the decision in *P v Cheshire West and Chester Council and Another; P and Q v Surrey County Council* [2014] UKSC 19, [2014] 1 AC 896, [2014] COPLR 313, and his preference for the views of the minority in that case, Mostyn had nonetheless professed ([2014] EWCOP 45 at [19]) loyally to be following the opinions of the majority which he recognised were binding on him. The Court of Appeal did not accept that he had done any such thing. He had, they said (at [31], [33]), ‘failed to apply *Cheshire West* to the facts properly’ and his ‘passionate view that the legal analysis of the majority in *Cheshire West* is wrong is in danger of distorting his approach.’

Perhaps characteristically, Mostyn did not take this criticism lying down; within a matter of weeks, in *Re CD* [2015] EWCOP 74 at [38], he said this:

‘In ... *Rochdale* ... [2015] EWCA Civ 1054 at para 32 the Court of Appeal stated “even if *Cheshire West* is wrong, there is nothing confusing about it”. It may seem that way from the lofty heights of the Court of Appeal; and of course the literal words of the Supreme Court’s test are perfectly easy to understand. But for we hoplites who have to administer it at first instance the scope and ramifications of the test are, with respect, extremely confusing. As [counsel], instructed by the Official Solicitor for CD, rightly stated “anyone who deals with this day by day knows this is confusing” ... The answers I received from the Bar when discussing [certain] scenarios belie the blithe suggestion that

“there is nothing confusing” about the test. I do not accept the criticism that my approach to these cases is “distorted” by my “passionate” and “tenacious” belief that *Cheshire West* is wrong. Rather, it is a loyal approach which tries to apply literally and purposively the Supreme Court’s test while at the same time pointing out how confusing and curious it is, to say nothing of the cost it causes to the public purse.’

Ouch!

Perhaps inevitably there has been further controversy. In *RL v Nottinghamshire CC* [2022] EWFC 13, [2022] 2 FLR 1012 at [42]–[43], Mostyn observed that the well-known test used in the family courts to determine whether a previous finding of fact could be reopened – ‘there must be solid grounds for believing that the earlier findings require revisiting’ – ought to be:

‘interpreted conformably with [the decision of the House of Lords in *Phosphate Sewage Company Limited v Molleson* (1879) 4 App Cas 801] if a divergence from the general law is to be averted. This would mean that “solid grounds” would normally only be capable of being shown in special circumstances where new evidence had emerged which entirely changes the aspect of the case and which could not with reasonable diligence have been ascertained before.’

He went on (at [49]):

‘I naturally accept that [the existing] test is binding on me ... I completely agree that on a rehearing application mere hope and speculation will never be enough to gain permission. I am merely suggesting an interpretative reconciliation between the solid grounds test and the general law such that solid grounds will normally only be demonstrated where either the fraud exception, or the special circumstances exception, is satisfied.’

This produced a magisterial rebuke from the Court of Appeal in the later case of *Re J (Children: Reopening Findings of Fact)* [2023] EWCA Civ 465 at [47]–[49]:

‘47. The approach in *Re RL* should not be followed for two main reasons.

48. A judge’s main responsibility is to decide the case in hand. The High Court and the appeal courts may also give rulings on matters of law to ensure that the law is correct, accessible to litigants and the public, and expressed in a way that is helpful to trial judges. This additional responsibility is not a vehicle to pursue a legal theory or to run the rule over binding decisions of higher courts, all the more so where the issue does not arise in the individual case. The analysis in *Re RL* was, and could be, of no legal effect: see *Rochdale Metropolitan Borough Council v KW* [2015] EWCA Civ 1054, [2015] WLR(D) 425. Decisions that reformulate a binding legal test or set up a different test are bound to be cited to trial judges and operate as a distraction and a drain on resources, as exemplified by the need for this appeal.

49. More fundamentally, it is a misconception that the time-tested approach to reopening findings of fact in children’s cases has been arrived at in ignorance or defiance of the principles of *res judicata* in civil proceedings. There is rightly considerable consistency in the response of all courts to attempts to relitigate ... but formulations cannot be cloned from one context to another without regard to their effect. Proceedings



about children take place in the context of a statutory welfare imperative and, as the present appeal shows, reopening applications may arise in a very wide range of circumstances. In order to achieve just, welfare-based outcomes in these cases, the law operates a test that differs for good reason from a test identified in another context. The formulation in *Re RL* originates in the decision in *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801, which arose from efforts to relitigate a claim in bankruptcy, but *Re RL* and the present case required the court to evaluate the very different considerations that arise in cases of child welfare. The applicable law is clear and there is no need to unsettle it for the sake of theoretical conformity by transposing a test devised in a different legal context.'

I have deliberately set out these passages at some length, because they seem to go to the heart of Mostyn's judicial philosophy. A number of key issues emerge.

First, the Court of Appeal asserts that it is not the function of a puisne to 'reformulate a binding legal test or set up a different test.' With that, as a broad statement of principle, we can all agree, although there are many instances in the reports where a binding principle has been modified, sometimes radically, by a puisne. Moreover, is it so clear that Mostyn in *Re RL* in fact offended against the Court of Appeal's precept? In his judgment, as we have seen, he accepted that the conventional test was binding on him but ventured an interpretative reconciliation which he thought would still comply with the rule of stare decisis. Where the general law – here the law of *res judicata* – has been developed in the highest echelons over generations it must be at least arguable that a puisne is entitled to offer an interpretation that reconciles the competing principles.

Secondly, the Court of Appeal also asserts that it is not the function of a puisne to 'to pursue a legal theory or to run the rule over binding decisions of higher courts.' That, if I may respectfully say so, is a much more debateable proposition, which many would not accept (I for one do not) and which, dare one say it, is falsified by history – consider, to look no further, the remarkable, and justly celebrated, judgments of puisnes such as McCardie J and Denning J. In *Re RL* Mostyn J questioned the validity of the conventional test, and was surely entitled to do so. Indeed, the very development of the common law depends on judges, puisne judges as well as appellate judges, identifying where an established, binding, principle needs to be revisited. Were it not so the common law would quickly become moribund.

Finally, and this is a matter of fundamental importance, there are the starkly differing views expressed by Mostyn and the Court of Appeal in relation to what may be called the exceptionalism of the family courts and the undue prevalence amongst family lawyers and family judges of what by way of shorthand I refer to as 'desert island syndrome'. I borrow the concept from the well-known observations of Lord Sumption in *Prest v Petrodel Resources Ltd and Others* [2013] UKSC 34, [2013] 2 AC 415, [2013] 2 FLR 732 at [37], and in his later observations in 'Family law at a distance', his speech in 2106 at the At A Glance Conference, and, more recently in the 'Interview with Lord Sumption' [2022] 2 FRJ 167.

Mostyn's intention as we have seen was to 'avert' a 'divergence from the general law'; in other words, to minimise family law exceptionalism. In contrast, the Court of Appeal's judgment at [49] is, it might be thought, a very

strong, and, dare one say it, an all too characteristic, example of desert island syndrome.

In interesting contrast I note that, very recently, in *Re C and Others (Care Proceedings: Fact-Finding)* [2023] EWCA Civ 38 at [46], the Court of Appeal noted that:

'This principle of restraint [in relation to appellate interference with case management decisions] is applied in family cases *as in any other*.' (emphasis added)

Mostyn would be the first to admit that, once upon a time, not least in relation to anonymity, he suffered from the syndrome but, as already noted, his more recent judgments on the topic evince a profound rejection of Family Court exceptionalism – and here he is surely in good company. After all, when on 28 October 2021 the President published the outcome of his Transparency Review, *Confidence and Confidentiality: Transparency in the Family Courts*, he specifically asserted (at para 22) that the Family Court can no longer continue to be 'an exception from the ordinary imperative for open justice ... it is necessary for the court to regard openness as the new norm ... there needs to be a major shift in culture and process.'

One day someone with a sufficiently uncluttered mind and an interest in what French historians would call '*histoire des mentalités*' will study this interesting phenomenon of Family Court exceptionalism in its origins and its tenacious longevity. This *History of the War of the Desert Islands* will I fear be illustrated with all too many choice examples of egregious Family Court exceptionalism.

As long ago as 1959, in *In re Hastings (No 3)* [1959] Ch 368 at 377–379, Vaisey J lamented 'how hardly this idea of the separate courts dies' despite the Judicature Acts in the 1870s.

'The expression "The Court of Chancery" is constantly heard, yet it is three generations since it existed as a court. "The Court of Queen's Bench" is referred to in the same way: but there is now only one court – the High Court of Justice ... If it is thought that there is some kind of emanation of the Chancery spirit which can overrule the decisions of the Queen's Bench, or some special inspiration of common sense which allows a judge of the Queen's Bench to say that the decisions in the Chancery Division are wrong, that is complete illusion.'

It is now over 60 years since that was said, but in the family courts the illusion continues to linger.

Dare I suggest that a revealing insight into the '*mentalités*' is the Court of Appeal's characterisation of *Phosphate Sewage* as a bankruptcy case – contrast Lord Diplock's use of it in *Hunter v Chief Constable of the West Midlands Police and Others* [1982] AC 529, where the question – utterly remote from bankruptcy – arose out of criminal proceedings. To characterise *Phosphate Sewage* as a bankruptcy case is, of course, as accurate as to characterise *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 as being a medical case about contraception or *Donoghue v Stevenson* [1932] AC 562 as being a case about the sale of sealed containers. But does it not rather miss what might be thought to be the real point?

There are encouraging signs that the tide is starting to turn. The recent decision of the Court of Appeal in *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2023] EWCA Civ 331 marks, both in tone and in substance,

an important and highly significant retreat from Family Court exceptionalism. The court referred pointedly (at [2]) to the ‘the modern practice in the Family Division of the High Court of granting indefinite anonymity orders’ – and the comment was not intended to be complimentary.

One day, this whole idea of Family Court exceptionalism will come to be seen and be accepted as the unhistorical and unprincipled dogma it is. Mostyn will then be seen to have been on the right side of history.

A judge with Mostyn’s clarity of analysis and great intellect is always going to be prey to the feeling that some of his judicial superiors are not his intellectual equals and that on occasions even those who he would accept are his intellectual equals have fallen into error. That is in the nature of the human condition, and judges are not super-human. A judge is perfectly at liberty – indeed, it may on occasions be his duty – to express himself frankly about the perceived error of others, so long as he observes, as Mostyn does, the common decencies of intellectual disputation and, critically,

plays by the ‘rules of the game’, in other words loyally applies the rules of *stare decisis* in following decisions by which he is bound. The proper approach is indeed that surely properly followed by Mostyn himself in *Hasan v Ul-Hasan, decd and Another* [2021] EWHC 1791 (Fam), [2022] Fam 1, [2022] 1 FLR 1033.

I take my leave of one who I do not hesitate to say is a great lawyer and a great judge by posing, even if I do not proffer any definitive answer, a question which inevitably raises comparison between Mostyn and his equally distinguished predecessor McCardie J. What in the modern court system as it was created 150 years ago by the Judicature Acts is the proper function and role of the puisne? Views on this will inevitably differ, though for my own part I believe a puisne is entitled, for example, to rattle cages, to denounce injustice and to develop the law even in radical and unprecedented ways if that is required by the call of justice and the demands of the judicial oath. Did McCardie and Mostyn overstep the bounds? No!

# Interview with Mr Justice Mostyn – Rules and Woolly Discretion

Alexander Chandler KC

1 KBW



**Many thanks for agreeing to be interviewed for the *Financial Remedies Journal***

Very good to see you. You come at the end of an era. Tomorrow is my last day sitting in the Admin Court, hearing a case about council tax. I shall be writing a couple of judgments, but I shall never sit there again. Then four months in the Family Division, of which two weeks are on circuit.

What I have managed to do from my bucket list was recently to sit in the Divisional Court with Lord Justice Warby, doing a case about anonymisation.

**That can't have been a coincidence.**

No, it wasn't a coincidence.

## Early years

**I have read that you grew up in Nigeria, Venezuela, El Salvador. You were raised as a Catholic and attended Ampleforth College, which sounds like the plot of a Graham Greene novel. Was law in the blood? Are you the first in your family to pursue a legal career?**

I was the first.

**You first came to national prominence age 18 when you won the *Observer* debating mace with Edward Stourton. The motion was 'This house disapproves of the Referendum' [on membership of the European Community].<sup>1</sup>**

We were opposing it. We were approving the [1975] referendum and were arguing to stay in Europe.

**At the prize giving, Lord Hailsham is reported to have quoted Churchill: '... if you can speak in this country, you can do anything.'**

Yes, Lord Hailsham was the patron of the Schools Debating Association and when he gave his speech at the prize-giving (we won), he quoted Churchill.

**Is that something you would subscribe to?**

Definitely and of course Ed and I went off in our different ways to speak. He is one of our greatest broadcasters and I went to the Bar.

**Was that when you first thought of a career as a barrister?**

I first thought of a career as a barrister about then, yes. I was doing science A levels and was trying to think of a job that would accommodate science A levels, like engineering or something. Then I got lured into the debating society at Ampleforth, when I started to think about how I could use public speaking in a career. That's why I made the decision then to switch from the idea of reading physics at university to reading law.

## Career as a barrister

**You were called in 1980 and took pupillage in what was then the chambers of Joseph Jackson QC at 1 Mitre Court [now 1 Hare Court]. Did you come to family law by design or by accident?**

There's one person who's responsible for me for me being here and that is Professor Nigel Lowe then of Bristol University, where I went. I didn't get into Cambridge (as my wife continually reminds me) and I got a very distinguished 2:2 from Bristol. There I was inspired by Professor Lowe who was a brilliant teacher of family law, and whose wife [Professor] Brenda Sufrin was in fact my personal tutor. He really inspired me with the subject; so much so that I took the option in the last year of writing a thesis comparing canon law annulment of marriage with English law, and I have it here – the only piece of work I got a first in.

I did a lot of research for that and even spent a week in the monastery at Ampleforth, reading the canon law reports. At Professor Lowe's suggestion I applied for pupillage at 1 Mitre Court, and I remember taking my thesis there and showing it to Joseph Jackson QC, who had written the seminal work about nullity.<sup>2</sup> He very kindly read it and offered me a pupillage. I was allocated Peter Singer as my pupil master for my first six and Bruce Blair for the second.

**Many of your colleagues in chambers at that time ended up either in the High Court or above or took silk. Did you feel at the time that you were part of a stellar generation?**

A few years before I arrived, Joseph Jackson had come over and done a reverse takeover of chambers, and it wasn't a

very happy place although there were some very distinguished names in chambers: Jackson, Thorpe, Focke, Singer, Wall, Hogg, Horowitz, Blair, and we were later joined by Overall, Posnansky, Nigel Dyer. So, it was a distinguished lot although we weren't churning out endless High Court Judges the way that QEB did. Joseph Jackson could be a very irascible man, but he was so clever. He had a terrible temper. I was led by him early in my career and it was a terrifying experience. If he felt you'd put a foot wrong you would be in terrible trouble. He could be difficult and Ormrod LJ and he particularly disliked each other. I remember being led by him in the Court of Appeal and the venom – can you have palpable venom? – between them was extraordinary.

**As a barrister was there anyone, as opponent or judge, who you particularly respected or enjoyed appearing against or in front of?**

The judge who I most enjoyed appearing in front of in the early days was Registrar Colin Turner, who went on to become the Senior Registrar in Somerset House,<sup>3</sup> who was a very genial and amusing man, and he had a very good turn of phrase. He was quite firm, but he was above all witty.

The opponent I most enjoyed being against was Paul Coleridge. He was always very amusing; he was always very fair. Not always completely on top of every detail of the case, but he was a very easy-going opponent. At the other end of the spectrum, I don't say that Martin Pointer QC was difficult, but I enjoyed being against him because he really had you on your mettle. He was very, very intelligent and he was meticulous in his preparation of cases, although it was all a bit last minute. So, you never quite knew what his when you were going to get his skeleton argument and what it was going to say. But he was always a doughty opponent. What has happened to him is an absolute tragedy.

In terms of judges, I always enjoyed appearing in front of Mathew Thorpe LJ. That mind was just incredible, and he had every detail, every nuance, every marvellous turn of phrase was at his fingertips.

One of the memories that I will take forever was being led by Nicholas Wilson QC<sup>4</sup> in front of Thorpe. I remember Nick Wilson asking the mother, 'Can you name a woman in fact, or in fiction, who has behaved as badly as you?' There was a dramatic silence you could cut with a knife, followed by a collective scratching of the heads and people muttering, 'Anna Karenina? ... Lucretia Borgia? ... Regan?' (laughs). Those early days before I took silk, being led by Nicholas Wilson, were so incredibly influential, when I was his junior of choice for about 5 years. His was such a great brain and I learned so much from him about how to cross examine, how to prepare cases, how to deal with clients. I learned so much from him because he was consummate about it. He had this incredible knack of knowing exactly when to use a *bon mot* and when not to. Nothing was ever out of place; it was just extraordinary. I was so lucky to have spent those years working with him.

## Craft of an advocate

### What are the hallmarks of a good advocate?

Preparation and being concise; not being verbose. Charlie Falconer used to have cases with tens of thousands of docu-

ments, and he'd say 'I know where every document is, and what it says'. So, the first thing: you cannot win as a barrister if you just try to wing it. Preparation is the key, not only in your understanding of the documents, but in the way you're going to use those documents, both in your in your written skeleton and orally.

The second thing is trying to be to be concise in your addresses to the court and in your questioning of witnesses. Do not fall into the terrible Radio 4 habit of asking compound questions of witnesses and do not make unstructured stream of consciousness submissions to judges.

Then beyond that, the ability to be a good advocate, is it something you can learn?



### I think it's a learning process.

It is a learning process. Although there are some people who will never be good advocates, though, even though they're highly intelligent. This is true, isn't it?

### It is, but people generally improve with experience, and there is a lot of craft which advocates don't always pay enough attention to, particularly with cross examination.

There is a lot of craft there. Do you want tips for cross examination? What is the most important thing about cross examination?

### I would say, think backwards. Plan your cross examination according to your closing submissions.

Yes, I'm close to that. But here is an infallible tip. The most important thing in cross examination is the question, not the answer. The judge will always remember your questions. He will not necessarily be interested much in the answers.

Cross examination is the way, and the platform where, you can put your case again and again and drill it into the judge's head. If the witness gives an unsatisfactory answer for you, just ignore it and move on to the next question. Get the next question in. Get the questions, which is your case, into the judge's head. It's the questions that matter.

The second thing: write out your cross examination. My cross examinations would always be 'Question ... if he answers this, then ask this; if he answers that, then ask that question'. It would all be planned out in a flow chart, with every possible answer that the witness could give, because of course you happen to know all the answers, don't you? You don't ask a question you don't already know the answer to.

And then there's your point, which is start at the end and work backwards.

When you're a judge, and you hear the questions being put, those questions solidify in your mind, and you think well that's that case that has to be met.

Third of all, never, ever, ever ask compound questions. The judge will not remember any part of it at all.

**Wasn't it Mrs Justice Parker who said no question should be longer than six or seven words?**

I didn't know she said that, but it sounds a good rule. I mean, there's those Radio 4 questions – you know, '... isn't it right that, and isn't that right, and ...?' Absolutely hopeless.

**How rigidly would you keep to your plan of cross examination? Presumably, there were points where you thought, well, this was really a surprising answer. I'm going to follow that through. Or would you say, resist the temptation; keep to the plan?**

I've never been surprised by the answer because I was always religious about obeying the rule, never asking a question to which you don't already know the answer.

**But people under stress say unexpected things, they panic, or they freeze, or if you pause long enough, they may say something stupid.**

People boast about spontaneously asking the absolute killer question they weren't prepared for. It never happened to me. I mean, there was some latitude, but I very rarely strayed from my plan which is always an important part of a case.

We all know what the evidence is going to be. It's a very rare case where something comes out which is completely surprising, isn't it? In the course of my career at the Bar which lasted 30 years, there were maybe two or three cases where suddenly the most extraordinary admissions were made, which I was never expecting. In fact, I wrote about this in a judgment.<sup>5</sup> It is very rare in cross examination that a witness collapses and admits everything. Usually, you use cross examination to reinforce your case and to undermine the credibility of the other party, and you do it by confronting them with documents which are inconsistent. So, you're in complete control of the process. So, it was very rare that that I had something happen that was so surprising that I had to completely move off piste, strap on a different pair of skis and go plunging off into the distance.

**Conversely, what in your view is the worst sin an advocate, particularly a family advocate, can commit?**

Not being precise, not being planned. I mean, you see counsel just asking questions which are forming in their minds. You can almost see it happening physically in front of you.

Being unprepared, unplanned, verbose, prolixity and laziness. It comes back to not being prepared, which will come back to haunt you. If you think you can wing it and you don't know what all the documents are, and one of the documents turns out to be one that the case turns on and you weren't aware of it. That would be a calamity, no? So, unpreparedness is the worst sin. And there's no doubt about that.

**What advice would you give to a junior advocate starting out a career in family law?**

I predict a revolution in the practice of law in the relatively near future. AI is going to make so many youngsters, or people who aren't the big hitters, in solicitors' firms redundant. First of all, the AI product it is going to know where every document is in the file so when a letter comes in it will write the perfect response. It will then do the best possible attendance notes of meetings because it will be putting in sidenotes saying, 'don't do that' or 'that's a mistake'. It will then do all their media, all their tweets, their legal research. All of the drudgery which lawyers currently have to do, writing letters and making attendance notes, will be got rid of. But while the AI machine will be very intelligent, it will have no wisdom. That is what you have to get your head around.

When I was talking to members of my old chambers about this at the FLBA dinner, they were saying surely this revolution is going to be for the benefit of the Bar generally, which will change and become a sort of one stop shop. Because you will go to lawyers for legal advice, not for them to write letters or to produce incredibly expensive attendance notes where there are five solicitors attending a meeting all charging hundreds of pounds an hour, so the aggregate fee for an attendance note is something like £2,500 per hour. A machine will just do all that, and much better than could possibly be done by a human being. It will know what all the previous correspondence says, what the documents say, what your opponent has asked for and whether you provided it 6 months ago. At the moment the division of solicitors doing all this, doing highly charged administrative tasks, and these elite barristers being intermittently consulted – that is all going to change. We will go back to lawyers as they used to be probably 400 or 500 years ago, giving advice, instead of being letter writers.

In a few years' time I see far more sets of chambers being the one stop shops with direct access and the machines doing all the drudgery. So, a client could come into your chambers, the AI machine would take a brilliant proof of all the relevant facts, and it would know what was missed out. You would come in, provide the wisdom content, and the advice, which the machine cannot. So, I think the Bar will be a good place to go. I wouldn't have thought starting as a solicitor will be nearly so promising. I think the solicitors' profession is going to be really shaken down, but I think it will be to the Bar's advantage because the Bar will go back to doing what it does so well, providing the judgment, providing the advice, and not the innumerable man hours of making bundles and all that.

So, family law is going to be a profitable place to go, and I read yesterday that the government is going to refer the reform of the financial elements of the Matrimonial Causes Act to the Law Commission. Well, that's exciting, isn't it?

**Well, it is. If they do something about it.**

Yes, but there's a lot of noise in support, from the two Baronesses [Baroness Shackleton and Baroness Deech] and there are a lot of people on their side, saying that we have to have reform because certain judges, I think there's probably a reference to me, try to make rules. Other judges say no, no, no, they water down the rules and we're back to woolly discretion again. So that it's impossible to predict the outcome of cases, because it's subject to the individual subjectivity of the individual judge. The campaign of Baroness Deech is going to move to the battlefield of the

Law Commission and in a few years' time a revised statute will come out with a more rigid set of rules, like they have north of the border. Joseph Jackson always used to say every Act of Parliament is ten years' work. That was his mantra. So, this could be a very good time, because if they do change the rules, there will be plenty of litigation to work out what they are before things become stable. When I wrote my essay for the millennium<sup>6</sup> I wasn't sure if I would recommend my children to go the family Bar, but I now think it would be a rather good place to go. In the Financial Remedies Court, we've sorted out the procedure, which I think is pretty good, don't you?

**I think the procedure is good. I personally have a problem with the composite schedule. I've spent my life refining my own spreadsheets, getting used to Excel, and I still struggle with having to use the standard ES2.**

But apparently the judges like it. However, that's a small point. I think I mean that can be easily changed, but I think generally the structure of the procedure is pretty satisfactory. The substantive law though in my opinion has got too much woolly discretion in it.

**Are you a proponent of Baroness Deech's draft bill?**

Oh yes, definitely, I'm a supporter of it.

**You recently described yourself recently as having an 'uber Tigger Pollyanna' personality, which suggests energy and optimism, neither of which are classic barrister traits. We're not known for being Tiggerish.**

Glass half full. One of the reasons I've mentioned Registrar Turner is that his nickname for me was 'Tigger'.

**Your former senior clerk, Steve McCrone, sent me some of the older Chambers and Partners entries which described you as '... flamboyant, able to talk the hind legs of a donkey. A classy advocate and a bullish gambler'.**

I suppose what that means is Mrs Miller. I said to her that when we get to the Court of Appeal and the House of Lords, there's no costs protection of any nature. You lose, you pay all the costs. So, we were gambling hard. But she said, 'go for it'. And so we did. I did gamble on that case. But I had confidence I was going to win. Nobody else did. But I did win.

**The trilogy of HL/ SC cases: *White v White*, *Miller* and *Radmacher***

**It is extraordinary to think that the House of Lords nearly didn't grant leave for the appeal to be heard in *White*. Do you think that it was inevitable that there would a change in the law, sooner or later, away from reasonable requirements?**

I can't say. There wasn't an enormous movement before *White* to change things. There were rumblings; there was the Singer paper, that he gave at Cumberland Lodge when he talked about the iniquity of the *Duxbury* paradox (the older you were, the shorter your life expectancy, so you got less), which is exactly what happened to Mrs White. She got less than she owned.

I remember going to Australia and I was taken to the Sydney Cricket Ground by a member of our associate cham-

bers in Sydney, where I was introduced to this marvellous family barrister called Thomas Hodgson, who said 'What is the way you decide your money cases in England?' And I said we do it by reasonable requirements. He said 'why, we do it by contributions'. I said, well, it's because that's the way we've always done it. 'But that's not a good reason, mate, is it? That doesn't make any sense'. I felt a bit uneasy. But people were very wedded to it. I remember when *Dart*<sup>7</sup> was up before the Court of Appeal, I bumped into Mathew Thorpe in the street who said, '*Duxbury* will be defended!' He loved *Duxbury*. It was such a clever piece of magic. One of the things I'm most proud of is that I wrote the very first *Duxbury* program in something called Framework 2, and *Duxbury* is still a perfectly good method for computing needs. But that was the only way cases were decided: house and a *Duxbury*. So, it was inevitable that a case reached the Lords eventually.

**But *White* was a strange case to be a test case. It is often forgotten that Mr White (your client) was cross-appealing in the Lords.**

We [Mr White's side] were trying to uphold the orthodoxy. I was saying that [the trial judge] Holman J was right, that the Court of Appeal had given her additional money for no good legal reason. Her proprietary ownership of the farm was a complete red herring, according to what Lord Denning MR had said in the seventies. Holman J had followed *Dart* to the letter and had been very badly treated by the Court of Appeal. I remember Lord Hutton looking at me and asking, 'What is your main reason for saying Mr Justice Holman's decision should be reinstated?' I said, because he correctly followed *Dart*. And Hutton replied, '... but *Dart* is wrong'.

**With hindsight, would you have taken a different point for Mr White?**

Listen, having read the judgments, I regarded the decision of the House of Lords as a great victory for me because how I managed to hold the 60/40 split in favour of Mr White in the light of those judgments, I still don't know. It was impossible to understand why equality wasn't the outcome. So no, I don't regret anything. I applaud James Turner KC, who represented the wife, Mrs White, who was a doughty fighter.

***Miller/McFarlane* is a significantly more complex judgment and a more controversial one. We've had many years teasing out the subtle nuances and the disagreements between the court. Do you think it was a missed opportunity?**

No, I think that I think it was pretty good actually. There were slight differences between Lord Nicholls and Baroness Hale about short marriages.

I do feel slightly guilty for the emphasis on compensation. Our printed case was absolutely brilliant, for which I have to acknowledge Becky Bailey-Harris who is really good with legal research and has a wonderful way with words. But we put this idea [compensation] in because we wanted to win and hold the original award. We weren't interested in changing the law. And then it appeared in the opinions, and I wanted to write and say, 'we didn't really mean that!'

So that's why one of the first things I did when I got on the bench was to try and put the lid on compensation as

fast as I could. We'd only introduced that as a makeweight, having dug up some idiotic American academic analysis about how it should all be seen through the eyes of recompense, without acknowledging the fact that you don't normally get compensated for something you've done voluntarily.

**But that remains Baroness Hale's view, that compensation should play a more central role in the law.**

She does but she is on message that the main metric is sharing. I've always said to her, why do you have compensation if you've got relationship-generated needs? Why do you need compensation as a separate a head, a separate strand, when you've got within needs 'relationship-generated disadvantage', which is the same thing. Your needs should reflect what you've given up. But there have only been at most, two or three cases which have included compensation where, for some reason or other, there isn't a sharing claim.

Brenda Hale did subscribe to the primary message that sharing is the main metric. I did try to explain recently in *Fuchs*<sup>8</sup> that, when the Lords decided *White*, they decided reasonable requirements should not be the sole metric and instead there should be a disposition which reflected fairness, which is where they stopped. They didn't explain anything about fairness. They just gave this protean thing called fairness without explaining, when you applied this criterion, how much money it would spew out at the other end.

So, we had these few years between *White* and *Miller* where people said reasonable needs come to £2 million but fairness, I think is £3 million. It was subjective and driven by the gut. In *Miller* we said we cannot keep going like that, we have to have some sort of understandable rule which we can explain to our clients and argue in court. So, they came up with the idea of sharing which had been foreshadowed in *White* but only as a crosscheck against discrimination.

**The 'yardstick'**

Yes. But it was there just to make sure you weren't discriminating. But it wasn't a mode of disposition. You used needs and fairness which you checked against equality, which was quite an intellectually challenging journey because you arrived at your destination and then had to stop and make sure you'd arrived at the right destination.

That's why they gave us a much firmer rule [in *Miller*] about sharing and explained that within needs there was the concept of relationship-generated disadvantage. And then they brought in compensation which I think was a bit of a distraction because I really struggle to see cases where compensation is actually going to feature as the measure which generates the result in the case. Where needs are to be exceeded, it should almost invariably be by sharing; not necessarily equal sharing, because there can be some unequal sharing where assets have come into the matrimonial pot which have their origin outside the marriage. That's a good principle – if a pre-marital asset has been matrimonialised, it doesn't mean that the ultimate sharing of that asset is equal. I think that's perfectly fair: that's Lord Wilson's case of *Vaughan*.<sup>9</sup>

**It must have been a close-run thing [Miller]?**

It was a really close-run thing.

**The reasoning of Singer J (the trial judge) wasn't upheld.**

Well, Singer J decided it basically on conduct. Somehow, we managed to repackage that in the Court of Appeal as a different type of conduct and somehow won that, and then we abandoned conduct altogether entirely in the Lords, where I said everything had been misunderstood in the courts below. I remember in the Lords, Lord Hoffmann looked up – he had been playing on his Blackberry – and said to me 'you're just giving this judgment a good makeover, aren't you?'

Did I mention that as part of our submissions we had identified the origin of 'community of property' or 'matrimonial acquest'? Because my junior Becky Bailey-Harris is such a brilliant lawyer and legal historian, she had discovered that it derived not from Roman law, or Norse law after the Conquest, but from the Visigoths. This was referred to by Tacitus in his tract 'Germania' which we quoted without a translation in our printed case. Then we went to a mate of ours in Oxford and asked for a deliberately really useless translation for it. So, in the Lords, I stood up and started translating, only for Lord Hope to say 'No, no, no, it doesn't say that; it says the opposite', and Lord Hoffmann said 'Come on, anybody can see it. It says the opposite to what you say.' I said, 'What? so it's in my favour?' I then said to the Lords, 'oh you're so clever'. They were all mine after that.

**So, you'd set the trap, which they walked straight into.**

Straight in.

**Can we turn to *Radmacher*, which in some ways was the most radical of the three cases?**

Well, in some ways it was a bigger change in the substantive law.

**Do you view the development of the law with nuptial agreements as positive or are you troubled by there now effectively being two classes of claimant depending on whether there is an agreement?**

No, it's fine. The Supreme Court had all decided that the time had come to recognise pre-nups. The issue was whether they should have contractual force and we took a long time picking over these issues, looking at Australian law and American law and then there were the public policy arguments – those old cases that said agreements in contemplation of separation were void as a matter of public policy. And then Lord Phillips said if they aren't contractual none of the public policy objections, which only apply to contracts, arise. You could see, unlike *Miller* when you couldn't see which way they were going to decide, which way they were going to decide in *White* and also in *Radmacher*. In fairness it had been made quite easy for the Supreme Court in *Radmacher* because the judgments of the Court of Appeal had been of very high quality. Thorpe LJ had written a good judgment; Wilson LJ had written an exceptionally good judgment, which became the template for the decision.

So, it didn't surprise me, and it doesn't disconcert me that we have two classes of applicants [depending on whether there is a pre-nup]. Every country that has a regime where you can make agreements has two classes, those with *séparation de biens* and those with community

of property. I don't have a problem with that at all. After some initial resistance in my early days of being a judge, I have come around and I now regularly uphold agreements.

It was interesting, when I decided *Fuchs*, there was no dispute between the parties, but that the agreement applied. It was simply a question of what it meant and what each clause generated for the wife. So, it was simply an interpretation exercise. I'm told by Mr Justice Peel that he has not tried a case in the last year that hasn't had an agreement.

*Radmacher* was in fact my very last case at the Bar, and I was able to end my submissions to the Supreme Court by saying 'those my Lords and my Lady are my very final submissions'. I sat down and it was the last thing I said as a barrister in England and Wales. I did one case after that in the Cayman Islands. But that was my last case at the Bar here.

**This might be a mischievous question but would the result in *Radmacher* have been different if the genders of the parties had been reversed. It's very difficult to see how a mother and wife would have received the award that Mr Granatino did in that case.**

No, had it been a wife, she would have got more, I've no doubt. On the basis of needs though. My argument, which I won at first instance before Baron J, was that the agreement can go in the bin because it is fundamentally unfair and just do a conventional needs award. I know that a wife would have got more on that basis and that permission to appeal would not have been granted. Everybody knows that.

**Is there one piece of advocacy you are most proud of as a barrister?**

The advocacy that I would like to remember most was turning round the House of Lords in *Miller*. James Turner KC opened it in the morning, and he deliberately left me with the death slot at 3 pm, when he sat down and they [the Lords] were then definitely on his side. I had said beforehand to everyone in chambers that I'm going to get her £5 million and everyone in chambers said you will never get her £5 million after an 18 month-marriage, and then they said you'll never hold that in the Court of Appeal, and then they said I'll never hold it in the House of Lords. So, I was proved right in that case!

During the dead hour – 3 pm to 4 pm – they were looking at me with gimlet eyes and I was just flannelling and paddling, trying to consume the time before we could stop. Then, I went with my two juniors Tim Bishop [now KC] and Becky Bailey-Harris to Chez Gerard in Chancery Lane and we prepared the framework for my submissions the following day, and I turned them around with the force of advocacy. I was able to satisfy myself that advocacy really counted after that.

## Career on the bench

**You took a full-time appointment in 2010 when you were at the peak of your profession. You'd earlier been interviewed by Lynn Barber (*The Guardian*, 15 July 2007, 'Mostyn Powers'), where you said that you might take an**

**appointment if you were 'overwhelmed by ennui'. Had you reached that stage?**

I had reached the stage where, and this is coming your way, I was exhausted by the complexity of the work. And more significantly, I was overwhelmed or becoming very stressed by the unrealistic expectations that clients had when they instructed me. People have begun to regard me as some kind of miracle worker and they were coming to me with preposterous, outlandish claims, saying 'if anybody can win, it's you'. Clients were becoming more and more demanding, and the demands of the job had become very, very pressing and it was definitely time to move on. Also, I was looking forward to it because I thought I'd be good at it. I knew I could write good judgments because a couple of my judgments as a deputy were pretty good – *GW v RW*<sup>10</sup> was a good pathfinder, although it was later shot down, and *TL v ML*<sup>11</sup> which has stood the test of time. I was once told that in matrimonial law, *TL v ML* is the most cited case in Hong Kong. So, I was actually looking forward to it and I think it has suited me. I'm not sure the Court of Appeal would agree!

**You talk about unrealistic expectations. Did your reputation as 'Mr Payout' come back to haunt you, being associated with huge awards?**

Yes, that was one of the reasons I went – that you're the only one who can win. I did in fact apply two years before I was appointed, as a cohort of four comprising Jonathan Baker LJ, Eleanor King LJ and Judith Parker J. We were all appointed at the same time but took our positions sequentially. I thought I've been a barrister for such a long time. And being a judge is very interesting. I mean, you're not nearly as well paid so you leave a lot of money behind. But it's much less stressful. And you're largely in control of your own life. You can go at the pace you want to go. People say that being a judge is very exhausting. Which is true. The work is difficult but provided you're decisive, provided you can make the decision, it's a much easier job than being a barrister in my opinion. As a barrister you have to win cases; as a judge you only have to decide them.

**But writing judgments is a lot harder work than preparing closing submissions.**

Yes, it is, but I am good at writing judgments.

**The two things people generally say they like about being a barrister is the unpredictability of their working lives, with occasional days off when a case settles, and the collegiality of chambers. Were those not difficult to leave behind?**

No. I have marvellous collegiality here. For eight years, my room was next to Mr Justice Holman's. We had a marvellous time together. and he became one of my closest friends. As a judge I've met so many people and I've made many good mates. When you go on circuit you meet interesting people so the collegiality is fine. And of course, I've kept up with my old chambers. The pay is much less, OK. But I would point out that we did fight for the judicial pension which is very good. You would be surprised if you asked an actuary how much it would cost to get a judicial pension. I'm not complaining at all. And I don't at all regret becoming a High Court Judge.





*The legal historian: Mostyn J and Bilbo loyally following Hawkins J and Jack (Carlill v Carbolic Smoke Ball Co [1892] 2 QB 484)*

**You must miss the cut and thrust of cross examination. It must be difficult, sitting as a judge, when advocates miss points, flounder about, or don't pursue the points fully?**

Yes, it can be painful to watch. I have been known to take over the cross examination in court when it has been too painful. Yes, I think that cross examining witnesses, which I was really good at, is really the only thing that I have missed.

I've enjoyed being a High Court Judge. It suited me very well. I made the decision quite early on that I wasn't going to apply to the Court of Appeal. I realised that sitting in banks of three wasn't going to work at all. I've had the experience the other day of sitting in the Divisional Court and I enjoyed that very much, but it did confirm to me that to be autonomous, the monarch of the mountainous Principality of Court 50, suits me down to the ground.

**Similar to how Lord Denning didn't enjoy sitting in the House of Lords, being part of a group of five?**

Exactly – and being alone, it's even better. And so much of our work is appellate anyway. So, you don't need to be in the Court of Appeal as we have all of the private law appeals now. I sit half of the time in the Admin Court where for a third of that time, I hear regulatory appeals from doctors, dentists, solicitors, barristers, etc. It was interesting sitting in the Divisional Court, I found I was much more restrained in my questioning, when sitting with another person, than when I am the sole autocrat of the Principality of Court 50.

**Lord Sumption's expression is that he always enjoyed trespassing on other people's cabbage patches. You clearly**

**have a very wide interest in the law. Have you enjoyed your forays into different areas of law, public law, deprivation of liberty.**

I do spend about a third of my time sitting in the Admin Court, where I am now the senior judge. I've been doing it longer than anybody. So, I well know my way around judicial review. They bring me in to do the family JRs; one I was doing recently involved the interpretation of s 17 of the Children Act, so I'm perfectly adept at doing that. In relation to deprivation of liberty, when I was first arrived, the clerk of the rules showed me around and took me to an enormous cupboard where she said 'this is where we keep the DOLS'. I thought this is where the anatomically correct dolls were kept which they used in the Cleveland Inquiry. That was the first time I'd heard the expression meaning Deprivation of Liberty, so that was a fairly steep learning curve. Learning how the Court of Protection worked ... have you ever done a Court of Protection case?

**I have and it very much was not what I expected. I had assumed it would be a branch of family law, similar to public law. I hadn't realised so many specialists were non-family lawyers, or how technical the work was.**

It was a terrible mistake, wasn't it, by the family Bar. When the Mental Capacity Act 2005 was passed in the light of the European Court's decision in *Bournewood*,<sup>12</sup> which said our common law way of dealing with these issues was unfair and contrary to the Convention on Human Rights, the FLBA made a fatal mistake of not moving in and seizing that work, allowing the medical Bar to move in and take over that work

completely, and they do it very well. But it's not their territory.

A 'best interests' jurisdiction in what the Irish realistically call 'adult wardship', which is what it is, should be done by family practitioners in my opinion. As you just pointed out, it's done and done very well by the medical Bar. I had to learn that very quickly and so I've loved the width of the work.

On circuit we do care cases, although I really wouldn't want to do those all the time. Those circuit judges who have unremitting diets of care work, I mean, it's just unbelievable, the brutality that you have to witness on a daily basis. I don't know how they manage psychologically. I did a four-week case last year about a child who died in Wales which was appalling, and I was taken out for a Bar dinner at the end, where one barrister said it was nothing compared to the case we're doing next week.

**It used to be the rule in the Police that constables would only deal with child sex cases for 6 months at a time because it's so harrowing. So, to sit as a circuit judge dealing cases involving child abuse ...**

Non-stop. Yes, so I wouldn't particularly want as a judge to only do one type of work. If you are a family circuit judge you would normally do public law with a bit of private law, unless you've got an FRC ticket. But in the Family Division we are lucky. We get such a variety of things to do. So, I'm very happy about that. I was happy having relentlessly done at the Bar big money cases, which are always quite interesting, with interesting people, to come here and do other things, a great variety of cases.

**I think recently you've worked out that it's 310 judgments to date.**

I went to Westlaw and found 310 judgments which have a commentary. So, its many more in reality.

**You worked out the word count is equivalent to writing *War and Peace* every other year. That's an extraordinary amount of output, given, if I may say, the quality and breadth of your judgments.**

It's a fair bit. Although I am quite good at it, and the systems work well for me.

**How do you find the time? I know from personal experience that you will send emails early in the morning. Have you always got up at 5 am in the morning?**

I now know that insomnia is a feature of the condition I have, Parkinson's. So, I only have 4 or 5 hours sleep a night if I'm lucky. I sleep very badly. So, most people will see emails from me at 5 am because I'm up. It is not very satisfactory, and I hope that an adjustment to my medication regime will improve that. I do find that I get very, very tired, I can get hit by a wave of fatigue. So, I'm up early because of my condition.

**Were you always like this, as a barrister? Would you get up at the crack of dawn?**

No, this early bird thing is only in the last six to seven years.

**Could we turn to a handful of judgments? *TL v ML* very quickly became the authoritative statement of the law on the procedure in intervenor cases.**

And in MPS cases too.

**Although that has recently been slightly watered down by the Court of Appeal [in *Rattan v Kuwad* [2021] EWCA Civ 1]**

Yes, that's a problem. *TL v ML* contained a perfectly good set of rules. And then they water it down. This is why there's going to have to be legislation. You set out rules, 'Rules, Rule OK', as I said in one lecture,<sup>13</sup> and then they water them down with individual discretion. It was always a feature of the practitioners in QEB wasn't it? 'We'll work out the right solution for you'. 'Bespoke'; that was the word they always used.

**That does seem to be the tension: you either work this out mathematically, or you sit back and say it's 60/40 ('the boffins v the gurus'). It seems as though the Court of Appeal is taking us back towards discretion.**

It's what I call woolly discretion. And I really regret that. That is why I believe that Baroness Deech who has been railing about this for some time, will gain some traction with the Law Commission.

Look at *Hart v Hart*!<sup>14</sup> I don't want to be rude, but I really do feel that was a retrograde step. We've got these good rules in place that she'd get 50/50 of the acquest, unless there was good reason not to, and then they put a layer on top, saying it was all subject to the judge's individual, discretionary, perception of fairness.

I really think, to adapt the words of Scalia, that in the field of financial remedies the rule of law should be the law of rules.

**When you're writing a judgment like *TL v ML* does it occur to you that as well as resolving a case, you may be writing a judgment which is going to be cut and pasted into hundreds of position statements? Do you have an eye to the impact your judgment might have on the profession?**

Sometimes, although not in *TL v ML*; I was too young then. I quite like coining the odd soundbite. I like 'the unforgiving minute'<sup>15</sup> ('... the footballer has to fill the unforgiving minute with sixty seconds worth of distance run after his marriage'.)

**Which I've heard quoted in many cases.**

And you might like this, which has nothing to do with family law. For example, today, I was dealing with a judicial review where the issue was whether in assessing the lawfulness of a decision, should it be *Wednesbury* unreasonableness or the continental principle of proportionality, which the European Court has said we have to use whenever the European Convention of Human Rights is in play, and which its supporters would extend across the board? I myself am very doubtful of such a method of review as it is so close to being a review of the merits of a decision as to be, usually, the same thing. The case was about the refusal of the Home Secretary to give British citizenship to someone who had been a warlord in Sierra Leone. So, I used some colourful metaphor, which I hope might go down quite well, to set the scene: 'There is no doubt that in the world of judicial review, proportionality has advanced like a cuckoo, occupying the common law nest of traditional assessment, laying its continental eggs in it and ejecting its home-incubated *Wednesbury* hatchlings'.

So, one does try. I think judgments should try to be readable.

**An overly anonymised judgment can be excruciating to read.**

I was arguing in *Re PP*<sup>16</sup> the reason we have open justice is so that this particular arm of the state can be seen to be working fairly. Most people cannot get to court, so the next best thing is to read the judgments, and you're only going to read the judgments if they are readable. If they are anonymised, they become unreadable. There are still quite a lot of judgments which are unreadable because unfortunately not everybody follows the rules about writing judgments, which include keeping it as short as possible.

When I worked out that I had written *War and Peace* every other year, that was based on an average of 12,000 words per judgment. A lot of judges write judgments a lot longer than that – and I think exceptionally long judgments are an absolute bane, they can be incomprehensible. I don't understand why when people write judgments, they have to set up all the arguments on one side, then the other and then you have this section called 'discussion'. What does that even mean? I would just go straight to the decision.

Do you know who is the most important person you're writing the judgment for?

**The person who loses.**

Yes! The person who loses. People forget this.

**Yes, because the person who wins doesn't generally care why they've won.**

Yes. And the person who loses is entitled to know why, in short, simple language, in my opinion.

## Selection of main judgments

**One of your first reported judgments as a High Court Judge was *FZ and SZ*<sup>17</sup> where you made a very bold statement about the practice of applicants applying for freezing orders.**

You maybe don't remember what a scandalous world we lived in in the late noughties. When every case began with a freezer [freezing injunction]. Solicitors would say we'll start by hitting them hard and they'll go down and they'll stay down. Every case began with one and I just thought this was not only so unjust, but it was so, so damaging to family relations. I've talked in one case<sup>18</sup> about how a nuclear winter ensues from which relations never recover. So, I had this campaign to try and make people obey the law and only seek freezers when they had good grounds to seek them, and I'm pleased to see that it's been adopted in other fields as well. So, the ex parte freezing injunction is much less common than it used to be – you don't remember because you're too young – so many cases began with an injunction. Is there a syndrome now of cases beginning with a Part IV injunction based on coercive control?

**Certainly, coercive control is brought up in more than half of my cases. Developing the point about freezing orders, *UL v BK* ...**

*UL v BK* will be on my gravestone.

**You've indicated that it is one of the judgments you're most proud of. That is a case which has obviously stood the test of time, but it is one in which you disapproved of not only the Court of Appeal, but also the House of Lords.**

Well, I didn't, I explained them.

**You said that their decisions were '*per incuriam*'.**

It is quite interesting, the development of the law of injunctions, given what's happening in the Privy Council with cases like *Broad Idea*<sup>19</sup> and in the Court of Appeal in *Bacci & Ors v Green*<sup>20</sup> which say that the injunction doesn't have to be in support of a legal right – although that's another story. My draft judgment in *UL v BK* was approved by Sir James Munby [then President] who said this had to stop. An application for a freezing injunction has to come within the four corners of s 37 of the Matrimonial Causes Act or s 37 of the Senior Courts Act, which should be applied absolutely rigorously. This idea that you just kick off a case with a freezing order, that has to stop. And I did stop that. So that's one thing I stopped.

And the other thing I stopped were open-ended spousal maintenance orders. They're not made any more, are they?

**No, joint lives orders have almost completely died a death, whereas 10 plus years ago they were almost routine in the South East.**

That's gone now, hasn't it?

**Yes. When you disapprove or criticise the judgment of another judge, does that ever lead to awkwardness behind the scenes?**

No, they all laugh. They think it's hilarious. There's no awkwardness. Lord Justice Stuart Smith said to me, 'Nicholas, you've turned criticism of the Court of Appeal into an artform'. And of course, if you're not planning to get promoted, you're suddenly liberated.

I do follow the Court of Appeal – now, stop laughing! – unless the decision is *per incuriam*, in which case I don't have to follow them. Where it is not *per incuriam* and is binding on me, I do follow it. That doesn't mean I have to agree with them. So, I was perfectly loyal, and I behaved myself in *Hasan v Ul-Hasan*,<sup>21</sup> where I found that Lord Denning's decision in *Sugden*<sup>22</sup> was binding on me. So, I had to follow it, but I allowed a leapfrog appeal and we're still waiting for judgment.

I am conscious of what the rules of precedent say, and if a decision is binding on me, I will follow it. The actual answer to your question is, no, there's no awkwardness.

**Sooner or later every judge is appealed successfully. Do you find it frustrating where your decision is appealed, not to have a say in the appeal. The appeal is against your judgment whereas cases are rather more rounded than might appear from the judgment.**

Well, I'll tell you one thing I want to see a rule change about: when I give a judgment and somebody wants to appeal, the rules do not say that you have to apply to the first instance judge for permission. A decision called *P v P*<sup>23</sup> says that it is good practice to do so, which I have emphasised in *Re HH*<sup>24</sup> saying that it is very bad practice not to ask permission to appeal from the trial judge. If they do come to you for permission, they have to state the grounds and

when you deal with it, you can give some reasons about their grounds. So, when you say you don't have a say in the appeal, you do, provided they have come to you seeking permission.

I got a bit of a slapping recently from the Court of Appeal in *Villiers*,<sup>25</sup> on an obscure point about s 27 of the MCA.

**I think the criticism was that you had raised a new argument during the hearing.**

I took the view that there was a jurisdictional barrier preventing the claim being made. They said it was procedurally unfair for me to have raised it – the Court of Appeal can say that of course – but what was I supposed to do where I thought there was a jurisdictional barrier? Also, the wife did not ask for an adjournment to deal with the point.

What I find extremely galling is that in that case I handed out the judgment in draft. I said I will give you a week to provide any application for leave to appeal. They said we don't need a week; we're not going to appeal. Then they went straight to the Court of Appeal which gave them permission. So, I was deprived of giving my reasons on their grounds of appeal, which is why I would have a rule making it mandatory to seek PTA from the trial judge.

**Was there any part of your judicial career that you regret?**

If there has been a negative aspect to my judicial career has been that it was for a long time overshadowed by the pension dispute with the government which was toxic and completely soured relations between government and judiciary, and also because of the government's policy of divide and rule (the pension reforms only applied to the younger judges) caused much internal division and rancour within the judiciary itself.

The proposed reforms were announced in mid-2012 by Chris Grayling. Attempts to get him to withdraw or at least modify them, so that the tax-free status at least was retained, came to nothing with the consequence that we issued proceedings in 2015. The decision of the employment tribunal in our favour was in January 2017. The decision of the EAT again our favour was in January 2018. The decision of the Court of Appeal in our favour was in December 2018, and the Supreme Court refused permission to appeal in June 2019. 7 years it took! There is a quite funny story about who was to be the lead claimant for our group of High Court and Court of Appeal judges. It would mean that the name of the case would have that lead claimant's name in it, e.g. *Chandler & Ors v MOJ*. When this came up in discussion, I said of course it had to be Rabinder Singh LJ as the most senior judge. However, he flatly refused and said that it had to be me because 'I didn't have a reputation to lose'!!

**Can we turn briefly to anonymity? You have is a series of judgments in the past year in which you express increasingly radical views about how the Family Court has misapplied the law. Why is opening up the Family Court so important?**

You should read the decision of the Privy Council in a case called *McPherson* in 1935<sup>26</sup> where a famous politician in Alberta was getting divorced and they arranged for the undefended divorce to be heard in the judge's library in the courthouse in Edmonton, behind a door which wasn't locked, but which had 'private' written on it, thereby

preventing anybody from coming in. This went to the Privy Council and the argument for the appellant which their Lordships agreed with was that when a person sits in a courtroom with the doors shut, and the public are not allowed in, he is not acting as a judge. He is being at best, a private arbitrator. Because judges sit in public so that the people can see that this particular arm of government is functioning fairly. That is why I now agree entirely with James Holman. I don't sit in public, though I sit in private with the doors open, so the Press can come in because that's what the law allows. I do agree with the principle that justice that is being administered behind closed doors is not being administered by a judge, it is being administered by someone else.

**We don't yet know what the Farquhar Report will say on this issue, but there appears to be a lack of enthusiasm among your colleagues for opening up the Family Court.**

So, I always answer that lack of enthusiasm by saying will you please tell me what lawful power you are wielding to hear these cases in private? What is the power, bearing in mind the House of Lords said in the foundational decision of *Scott v Scott*<sup>27</sup> that there is no power to do this? There is no power to have general anonymity or general privacy. There is only power in the individual case, applying the criterion of necessity; in other words, that you have to have privacy because otherwise justice will not be done. That is what Warby LJ said in the Divisional Court just the other day.<sup>28</sup> It has to be justified in the individual case by reference to the criterion of necessity – this comes from Viscount Haldane, ending up with Warby LJ, separated by 110 years. How can this be done on a standardised basis? What is the power? It may be that if you had a national poll, people would say these things should be in private, in which case pass legislation like s 121 of the Australian Family Law Act 1975.<sup>29</sup>

That is what I always say: where is the power? And the answer is pathetic: 'we've always done it this way'. What I genuinely don't understand is that, within only a few years of *Scott v Scott*, they were back to the old practices by 1935.

**What do you say to those who say, by opening up the Family Court, anyone who could afford to resolve their disputes in private will avoid the court service altogether by arbitration, and removing those cases from the courts will stymie the development of the law?**

Well, that's just a terrible reason for having secret justice. I have been completely persuaded and as I've said recently that a pillar of the constitution is called open justice.<sup>30</sup> And it's as important as having an open legislature. That's not to say if people want to have private justice, they can pay for it. Fair enough. And then there's the other argument: there will be blackmail. Well, that doesn't seem to prevent the massive amount of work in the King's Bench Division, does it?

**We recently had the announcement that the Law Commission will review the Matrimonial Causes Act. In your view, have the higher courts taken a wrong turn in their interpretation of the law? Has the pendulum swung too far in favour of the economically weaker party?**

No, I actually think what we've been doing at first instance – Holman J, Moor J, myself – has meant that the law has become fairly stable, certain and fair. But unfortunately, in

recent times there has been a retreat back to the land of subjectivity and discretion, which I think has fired up the government to refer the matter to the Law Commission, So I don't think it took a wrong turning. No, I don't. I think it took the right turn. I wish the courts would resist the temptation always to allow tweaking on the facts of the individual case. I think the people who say this forget how much more difficult this makes it to settle cases.

**One final legal question: Is there one case you would have decided differently had you been the court of ultimate appeal?**

I definitely would have decided the proprietary estoppel case [*Guest*]<sup>31</sup> with the minority. It seems much more logical that the recompense should be the underpayment, to make up how much he should have been paid, rather than discount the value of the farm. Also, *Cheshire West*.<sup>32</sup> I would have decided that along with the minority, and the madness that has ensued would never have happened. The millions, billions of wasted pounds of having endless court reviews of people who are not being detained by the state in a gilded cage but are just being looked after. My attempts to water it down in the *Rochdale* case came to nothing. I was fiercely criticised by the Court of Appeal!<sup>33</sup>

## Plans in retirement

**You retire in July 2023. Will this be a clean break, or will you continue to sit, as a PFDR judge or arbitrator?**

I'll stop sitting in July; I'm still on the books as a judge until December because I've got a fair bit of leave backed up. But I'm stopping sitting in July. I'm not going to sit after that in any capacity. I'm going to continue to be an editor of *At A Glance* and the *Financial Remedies Practice*. I'm not going to be a primary author; I'm going to be more of a non-executive editor in the way Sir Peter Singer, who I miss very much, was. He would get the output from me after my sweating over a hot computer and would change this or that word with a biro.

I must say that HMCTS has very assiduously enabled me to carry on working these last few years by providing me with a permanent judicial assistant. They did a very good retirement course the other day and the question was asked, are you going to doing any private work? Well, you can only do that if you're going to keep up with the law. You can't offer yourself as a private FDR judge if you don't keep up with the law and I'm not planning to keep up with the law, reading the weekly bulletins. I might read the *Financial Remedies Journal* perhaps. But this is what people forget – you need to read a lot more than that to keep up with the law, don't you? I mean, we almost do it osmotically. All barristers and all Judges keep up with the law, and I'm not planning to do that at all. I'm planning to enjoy myself as much as I can because I don't know where this condition is going to take me. So, I'm going to enjoy myself as much as I can.

**The first edition of your podcast *Movers and Shakers* is in the charts, which we recommend to all of our readers. Just briefly tell us something about how that came together.**

It's all in Rory Cellan-Jones's piece in the *Daily Mail*,<sup>34</sup> and also in Joshua Rosenberg's Substack.<sup>35</sup> What happened was

just after I was diagnosed, I was talking to my closest friend Ed Stourton, the journalist. This was in May 2020, nearly 3 years ago. And he said you must meet Rory Cellan-Jones, who's just been diagnosed. And so we met. He became a very good friend. We met regularly in a pub to chew the fat. We heard that Jeremy Paxman had been diagnosed. So, I invited him along to the pub and then he brought Paul Mayhew Archer who had written the *Vicar of Dibley*, and then Rory brought in Mark Mardell. Also, we were joined by this marvellous woman called Gillian Lacey Solymar. And so, this group was formed, and we meet for a few pints in the Ladbroke Arms. It probably was my idea. We had such interesting discussions, and they were so helpful because all of our symptoms were different. It was very, very useful for us to ward off those black thoughts which we all get. Because you don't know where you're going, and you don't know when. It's been great fun doing the podcast and I think you would agree it is quite funny and very interesting. It's got some quite emotional moments. We've had the most marvellous feedback from the public, from all over the world, from California, from South America, from Zambia. People saying, oh, I wish I'd had something like this, and I wish my father who had it, had been able to participate in something like this. So, I'm going to be doing a lot on that in my retirement.



**Any plans to write your memoirs to write fiction? Could there be a Rumpole in the offing?**

I've got a good subject for a historical novel – but I'm not going to tell you. Knowing that Robert Harris writes one a year and makes millions, I thought I can surely write one as good as Robert Harris. I was talking to my son-in-law who is a very successful scriptwriter and he said, Nicky, your particular style of writing is not quite the same, so I put that out of my mind.

The problem about memoirs is that I wouldn't be able to talk about what happened in the great cases would I? I wouldn't be able to talk about the really funny bits, you know, clients, representing famous people. I'm not actually planning to write my memoirs.

I am planning to do a lot of work on the Parkinson's front, raising money for charity. I don't know how long the

podcast will last. I mean some of these podcasts go on for many episodes, and I actually think we're doing good things. So, I'm going to do that.

And I intend to spend quite a lot of time watching the England cricket team.

**In the past, you described yourself as 'Catholic, Welsh and Wagnerian'. Do those three words still apply?**

I think it was a bit pretentious actually. I'm at its highest a cultural Catholic. I'm not a believer. And never have been. So that was always rather a rather a pretentious thing to say. Although in fact I notice that after that judgment I wrote called *Tousi*,<sup>36</sup> one commentator condemned it as a very Catholic judgment by a very Catholic judge. I was tempted to write the former might be true, but not the latter. Welsh? Well, I do support Wales at rugby, ha-ha. And of course, we are of Welsh origin, but that's a bit pretentious as well, and Wagnerian – I am Wagnerian, yes.

**What does it actually mean to be 'Wagnerian'?**

It means you are obsessed by his music. You know every note of it, and you go to performances of the operas as often as you can. And his music is swirling around in your brain all the time.

**Do you have a favourite author or book genre?**

My favourite book when I got into serious reading in my teens was the *Gormenghast Trilogy* by Mervyn Peake. I loved all that Gothic business and the idea of acres and acres of moss-covered roofs and strange people inside. In recent times, a book that I've read and not been able to put down, is *Earthly Powers* by Anthony Burgess, although that's quite Catholic! It struck the right note as far as I was concerned, an excellent book.

**Favourite piece of classical and popular music?**

The Wagner fixation began when aged 12 I found in my mother's records the *Tannhauser Overture* conducted by Otto Klemperer, and I thought what the hell, that is the one. That was how I started, and that would be the one I would take. So, if I had to have one it would be the Overture to *Tannhauser*.

**And popular music?**

I don't really do that, although we did recently go to that very, very good ABBA show, marvellous, so clever, we sat there transfixed. So, I would say *The Winner Takes It All* would have to be my favourite pop song.

**Finally, if instead of your Valedictory, you were giving a speech at the Oscars, is there anyone you would particularly want to thank?**

I have been looked after as this condition has developed by my wife who is the most wonderful person I could ever hope to meet. She is absolutely the most wonderful person. Apart from being incredibly intelligent, she is the kindest, the most conscientious, and most interesting person I have ever met. I've been so, so lucky to be able to marry Liz. So, if I was doing an Oscars' speech, I'd burst into tears and

thank her because I know that as things deteriorate, and they will, she will be there by my side and I will be so, so lucky.

In terms of my career, I would thank Nigel Lowe for setting me on this path. Nicholas Wilson, of course and then Tim Bishop, who's a marvellous junior, he was a brilliant, brilliant, brilliant junior. And then since I've been here, my clerk Tony. And then in the recent times, my JAs who have enabled me to carry on. I'm on my sixth JA and they've all been marvellous.

**Thank you very much.**

No, my pleasure!

**Notes**

- 1 [www.esu.org/changing-lives/edandnick/](http://www.esu.org/changing-lives/edandnick/)
- 2 *The Formation and Annulment of Marriage* (Sweet & Maxwell, 2nd edn, 1969).
- 3 Location of the Principal Registry of the Family Division, before its move to First Avenue House in High Holborn.
- 4 Now Lord Wilson JSC.
- 5 *AO v LA* [2023] EWHC 83 (Fam) at [60]–[62].
- 6 *Essays for the New Millennium* (Family Law, 2000).
- 7 *Dart v Dart* [1996] EWCA Civ 1343.
- 8 *Collardeau-Fuchs v Fuchs* [2022] EWFC 6.
- 9 *Vaughan v Vaughan* [2010] EWCA Civ 349.
- 10 *GW v RW* [2003] EWHC 611 (Fam).
- 11 *TL v ML & Ors* [2005] EWHC 2860 (Fam).
- 12 *HL v UK* (2004), App no 45508/99; 40 EHRR 761.
- 13 [www.judiciary.uk/speech-by-mr-justice-mostyn-to-the-hong-kong-family-law-association](http://www.judiciary.uk/speech-by-mr-justice-mostyn-to-the-hong-kong-family-law-association)
- 14 *Hart v Hart* [2017] EWCA Civ 1306 at [95]–[97].
- 15 *B v S* [2012] EWHC 265 (Fam) at [76].
- 16 *Mid Yorkshire Hospitals NHS Trust v PP* [2023] EWHC 330 (Fam).
- 17 *FZ v SZ* [2010] EWHC 1630 (Fam).
- 18 *UL v BK* [2013] EWHC 1735 (Fam) at [52].
- 19 *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24.
- 20 *Bacci & Ors v Green* [2022] EWCA Civ 1393.
- 21 *Hasan v Ul-Hasan* [2021] EWHC 1791 (Fam).
- 22 *Sugden v Sugden* [1957] P 120.
- 23 *P v P (Variation of Post-Nuptial Settlement)* [2015] EWCA Civ 447.
- 24 *Re HH (A Child: Stay of Order Pending Appeal)* [2022] EWHC 3369 (Fam).
- 25 *Villiers v Villiers* [2022] EWCA Civ 722.
- 26 *McPherson v McPherson* [1936] AC 177.
- 27 *Scott v Scott* [1913] AC 417.
- 28 *R(MNL) v Westminster Magistrates and BBC* [2023] EWHC 587 (Admin).
- 29 [www.legislation.gov.au/Details/C2019C00101/Html/Volume\\_2#\\_Toc2952438](http://www.legislation.gov.au/Details/C2019C00101/Html/Volume_2#_Toc2952438)
- 30 *Mid Yorkshire Hospitals NHS Trust v PP* [2023] EWHC 330 (Fam) at [54].
- 31 *Guest v Guest* [2022] UKSC 27.
- 32 *P v Cheshire West* [2014] UKSC 19.
- 33 *KW & Ors v Rochdale MBC* [2015] EWCA Civ 1054.
- 34 [www.dailymail.co.uk/health/article-11882493/RORY-CELLAN-JONES-keeping-sense-humour-vital-Parkinsons.html](http://www.dailymail.co.uk/health/article-11882493/RORY-CELLAN-JONES-keeping-sense-humour-vital-Parkinsons.html)
- 35 <https://rozenberg.substack.com/p/mostyn-to- retire-early/comments>
- 36 *Tousi v Gaydukova* [2023] EWHC 404 (Fam).

# The Revised Standard Family Court Orders – In with the New

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The standard orders project has a long history. The then President (Sir James Munby) first appointed a drafting group in 2013 under the leadership of Mostyn J to produce a comprehensive set of orders that it was intended would become mandatory in the Family Court and the Family Division. Such orders were required, said the President, because ‘[i]nordinate amounts of time and money are spent – wasted – in the process of drafting orders that could, and therefore should, be standardised’.<sup>1</sup>

The group’s work began with the creation of the Family Orders Project House Rules (which covered children as well as finance orders) published by the President in August 2013. These were then revised in April 2014.

It was initially intended that the orders would be finalised and introduced for the new Family Court on 22 April 2014. However, as the President noted in his *12th View from the President’s Chambers: The process of reform: Next steps* (July 2014) [2014] Fam Law 978, ‘this is complex

work which cannot be rushed’ and that ‘this important work has not been put on hold indefinitely’ but there had ‘merely been a necessary slowing of the tempo’ and that ‘implementation will be staged’.<sup>2</sup>

At the same time the President invited Mostyn J and Cobb J to chair a new Financial Remedies Working Group (FRWG) which he tasked *inter alia* (in his *12th View*) to ‘create a comprehensive body of standard form orders’ for use in financial remedy cases. This task represented the continuation of the work already undertaken by the team led by Mostyn J. The FRWG produced an interim report on 31 July 2014 in which it: (1) endorsed and adopted the April 2014 revision of the House Rules ‘as representing a sensible, clear and helpful structure for all court orders in the family court’; and (2) recommended the adoption of a range of ‘Omnibus’ and ‘Wardrobe’ standard orders<sup>3</sup> which were annexed to the report. The FRWG then published a final report (dated 15 December 2014) on 26 January 2015 in which, having considered the responses on this subject, maintained its recommendations.

The full standard financial and enforcement orders drafted by a team led by Mostyn J were eventually issued on 30 November 2017 with the approval of the President.<sup>4</sup> The standard children orders were likewise first issued on 6 June 2018 again with the approval of the President.<sup>5</sup>

As Sir James Munby observed in his Guidance of 30 November 2017:

‘Inordinate amounts of time and money are spent – wasted – in the process of drafting orders that could, and therefore should, be standardised ... We are no longer living in the world of the fountain pen and biro (which even today still account for far too much drafting of orders) any more than in the world of the quill pen. My ambition, therefore, 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.’

In January 2018, Class Legal published the *Standard Family Orders Handbook: Volume 1 – Financial and Enforcement* by HHJ Edward Hess. The *Standard Family Orders Handbook: Volume 2 – Children and Other Orders* by HHJ Edward Hess, HHJ Martin Dancey and Edward Devereux KC was published in July 2018. Second editions of both handbooks were published in December 2020 and August 2021, respectively. Class Legal expects to bring out third editions during the course of this year.

There were some amendments (including corrections of errors and ambiguities), revisions, and additions in subsequent years but the standard family orders (SFOs) remained largely unchanged and became almost universally used. In his *President’s Memorandum: Drafting Orders* dated 10 November 2021, Sir Andrew McFarlane P stated:

‘Standard Orders

7. When drafting orders, whether by consent or following a hearing, the standard order templates

should be used, adapted as appropriate to the facts of the case: *Practice Guidance: Standard Financial and Enforcement Orders* (30 November 2017); *Practice Guidance: Standard Children and other Orders* (6 June 2018).

8. However, these templates only provide standard clauses for agreements and orders disposing of the case together with rules about formatting. They say nothing about the content of the recitals. This is the area where great controversy seems to arise.'

This led the President to say the following about recitals: (1) where the order follows a hearing its terms (including its recitals) must reflect the result of the hearing, no more and no less (and that the purpose of a recital is not to summarise what happened at a hearing, but rather to record those essential background matters which are not part of the body of the order and that the parties should not seek to introduce adversarial and partisan statements in their favour in the recitals to the order); (2) the practice of parties seeking to attribute views to the court which did not form part of the court's decision must cease; and (3) the practice of a party's representative seeking to record that party's position before, or during the course of, the hearing must also cease.

On 18 January 2022 Mostyn J announced a review of the SFOs. He highlighted the need for the orders to be kept up to date to reflect changes in substantive law and ongoing developments such as Brexit, the COVID-19 pandemic and increased electronic working methods. HHJ Hess was appointed to lead the review of the financial remedy orders and HHJ Kambiz Moradifar was appointed to lead the review of the children orders.

Mostyn J also invited practitioners, judges and other interested parties to provide comments on any relevant matters by 28 February 2022. A full list of all those who responded – including judges, barristers, solicitors and various organisations – is attached at Appendix A to the Advisory Notice in relation to the revised SFOs.

Peel J continued the review when he succeeded Mostyn J as judge-in-charge of the SFOs on 26 April 2022.

HHJ Hess worked with Nicholas Allen KC and Amy Kisser on the financial orders and HHJ Moradifar worked with Edward Bennett, Steven Howard, Nastassia Hylton and Alexander Laing on the children orders.

Melissa Chapman of Class Legal took on editorial, layout and formatting responsibility (as she had done with the original orders).

The revised SFOs were published by Peel J on 17 May 2023 with the approval of the President.

In the main the revised SFOs are a work of evolution rather than revolution. Many of the suggestions made by those who responded to the request for comments have been incorporated.

In part, revisions reflect changes in law, practice and procedure, such as: (1) incorporating the new terminology for divorces – conditional order and final order – consequent upon the coming into force of the Divorce, Dissolution and Separation Act 2020; (2) directions supporting the *Statement on the Efficient Conduct of Financial Remedy Proceedings in the Financial Remedies Court Below High Court Judge Level*; (3) directions relevant to remote/hybrid hearings, the guidance on electronic

bundles, and private FDRs; and (4) the consequences of the United Kingdom having left the European Union.

Substantive amendments to the financial orders include:

- orders relating to the making of a pension sharing orders which now codify good practice (providing the option formally to provide that neither party shall apply for a final divorce order until 28 days after the making of the order, but that such application shall be made promptly thereafter) and also seek to act as a bulwark against mischief after the order has been made (requiring parties to cooperate with the timely implementation of the order and also providing the option in effect to injunct the pension holder from intentionally dealing with the pension subject to the order pending implementation);
- a greater steer for the instruction of single joint experts rather than sole experts, and for their reports to be considered by the court without personal attendance at the hearing;
- orders reflecting the provisions of the Domestic Abuse Act 2021, including prohibition against cross-examination, and the appointment of a Qualified Legal Representative;
- a permission to appeal directions order;
- orders incorporating the new required forms for cases involving committal applications.

Changes to the children orders include:

- an updated Deprivation of Liberty order, and an updated standalone Port Alert order;
- references to the new *Planning Together for Children Course* which has replaced the *Separated Parents Information Programme*;
- separate orders for different stages of public law and private law proceedings, all of which have been made more streamlined.

Anomalies in the original orders have (it is hoped) been resolved and there is now also greater internal consistency and clarity of phraseology.

It is also hoped that many (if not all) of the formatting issues – including frustrating changes of font and problems with auto-numbering when the orders are being amended – have now been resolved.

Thought was given to introducing with the revised SFOs a set of standard orders dealing with cryptocurrencies and related issues. The authors of the revised SFOs are aware of the detailed work that has been done in this area by *inter alia* Andrzej Bojarski of 36 Family, Helen Brander of Pump Court Chambers and Byron James of Expatriate Law. However, this is self-evidently a complex area. It is a technology which continues to evolve at speed, there is likely to need to be some investigation into what orders are being used in the commercial courts where crypto freezing orders are becoming more commonplace (there have been a number of decisions making freezing injunctions against persons unknown following ransomware attacks), and any such orders may also require input from third party crypto experts. The decision was therefore taken to not to produce such orders for the time being, but it is probably only a matter of time before such standard orders are introduced.

The revised SFOs have been accompanied with updated House Rules. As Sir James Munby observed in his *Sixth View*



*from the President's Chambers: The process of reform: Latest developments* (October 2013) [2013] Fam Law 1260 when commenting on the original version of these Rules:

'They are *not* rules which courts or practitioners will have to follow; *their* obligation will simply be to use the prescribed forms of order. The House Rules, akin to house style manuals used by publishers of books and newspapers, are merely internal instructions to Mostyn J's team to ensure consistency in their drafting of the prescribed forms. They may seem tedious and pedantic but can I make two points:

- (1) we need house rules, for internal use, to ensure consistency; and
- (2) they are designed to shorten orders by removing unnecessary verbiage.'

With the agreement of the President Peel J has decided not to put the revised SFOs out for formal consultation (as was done with the original two sets of orders) but rather direct that they be used with immediate effect. This is because: (1) of the very extensive and well-responded to consultation exercise in the first quarter of 2022; (2) it is therefore thought (or at least hoped) that they address most if not all of the issues that were identified with their predecessors; and (3) where they may need 'tweaking' is most likely to become apparent by their repeated use in practice. Peel J has therefore said that a more limited review of the SFOs will be undertaken during 2024 once the orders are bedded in and practitioners and other users have experience of them in practice and provided feedback.

In his Guidance of 30 November 2017, Munby P also observed as follows:

'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 [but] 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.

The digital revolution will enable us to carry through to completion this radical revision of court orders and how they are produced. Court orders will be standardised and digitised, with standard templates, self-populating boxes and drop-down menus designed to ease and shorten the process of drafting and then producing

the order. Given the marvels of modern IT, why should we not be able to hand every litigant in all but the most complex cases a sealed order before they leave the courtroom?'

It is a frustration shared by all that more than 5 years later the court modernisation programme has still not reached the stage where the above aspiration can yet be realised.<sup>6</sup> However, as and when the IT allows it remains the intention of Peel J and the authors of the revised SFOs that they will be able to be used in this way.

As with the previous versions of the SFOs they do not have the status of 'forms' under FPR Part 5. Their use is, however, very strongly encouraged. As Sir James Munby observed in his Guidance of 6 June 2018, '[t]he standard orders should however represent the starting point, and, I would hope and expect, usually the finishing point, of the drafting exercise'. However, a standard order may be varied by the court or a party if the variation is required by the circumstances of a particular case and departure from the standard form does not, of course, prevent an order being valid and binding.

## Notes

- 1 View from the President's Chambers: The process of reform: An update (August 2013) [2013] Fam Law 974.
- 2 This was largely a repeat of what had been said in the *View from the President's Chambers: The beginning of the future* (March 2014) [2014] Fam Law 301, namely 'The family orders project continues under the leadership of Mostyn J. ... May I take this opportunity of making clear that this important work has not been put on hold indefinitely. There has merely been a necessary slowing of the tempo whilst even more pressing matters take priority. Implementation may be staged and in any event will not take place until after April 2014'.
- 3 Financial Remedies Directions Omnibus – Shorter Version, Financial Remedies Directions Omnibus – Longer Version, Financial Remedies Final Orders Omnibus, Children Act Schedule 1 Final Orders Omnibus, Wardrobe of Enforcement Orders, and Wardrobe of Committal Orders.
- 4 Practice Guidance: Standard financial and enforcement orders [2018] Fam Law 89.
- 5 *Practice Guidance: Standard children and other orders* [2018] Fam Law 899.
- 6 Class Legal produce an online version of the SFOs, family-orders.co.uk. which can be used free of charge by any salaried or fee-paid member of the judiciary with an e-judiciary account (contact them at info@classlegal.com).

# Reflections on the Recent Announcement by the Law Commission of a Review of Financial Remedies Law

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## The Law Commission announcement

- (1) On 4 April 2023 the Law Commission announced a 'review of the laws which determine how finances are divided among couples after divorce',<sup>1</sup> targeted at producing a 'scoping report' in September 2024.
- (2) The announcement carried the following explanation of the task and the likely timetable:

'Half a century after the passage of the 1973 Act, the Government has asked the Law Commission to review whether the current law is working effectively, and delivering fair and consistent outcomes for divorcing couples.

In its review, the Commission will carry out a detailed analysis of the current laws on financial remedies, to determine whether there are problems with the current framework which require law reform, and what the options for reform might look like.

The Law Commission's work will consider the financial orders made by courts in England and Wales, as well as the law in other countries. It will conclude by publishing a scoping report in September 2024, which could provide the basis for a full review and future financial remedies reform.'

- (3) Professor Nicholas Hopkins, Law Commissioner for Property, Family and Trust Law, added:

'Fifty years since the current law was put in place, it's essential that we look at whether it is working effectively for all parties. This is a hugely important area, affecting separating couples and their children at an incredibly stressful time of their lives. It is essential that any reform in this area is very carefully considered.'

- (4) Lord Bellamy KC, Parliamentary Under Secretary of State in the Ministry of Justice, the minister with specific responsibility for family law, further explained the context of the review thus:

'The breakdown of a marriage can be an incredibly difficult time but it is in everyone's interests to remove acrimony from the process wherever possible. This review will address whether our laws are still working in the fairest way to support separating couples and avoid unnecessary conflict when it comes to dividing their finances. This important step builds on our landmark no-fault divorce reforms which ended the blame game, helping protect families and children from the stress of separation.'

- (5) The documentation supporting the announcement included more information as to the issues particularly in focus:

'the laws which govern the use of financial remedy orders are now several decades old, dating back to the Matrimonial Causes Act 1973 ... The project will consider the financial orders made by courts in England and Wales, as well as the law in other countries ... As part of its analysis of existing law, the Law Commission will consider whether there is potential for reform in specific areas such as:

- The discretionary powers given to judges over the division of financial assets, and whether there is a need for a clear set of principles, enshrined in law, to give more certainty to divorcing couples.
- Whether there should be wider powers given to the courts to make orders for children over the age of eighteen.

- How maintenance payments for an ex-spouse or civil partner should work.
- What consideration the courts should give to the behaviour of separating parties when making financial remedy orders.
- Orders relating to pensions and whether they are overlooked when dividing the divorcing parties' assets.
- The factors judges must consider when deciding which, if any, financial remedy orders to make.'

(6) The terms of reference for the project provide a little more detail for this focus:

'The Law Commission will consider specifically (but not be limited to considering) whether there is scope for reform in relation to the following areas:

- (1) The discretionary basis of the current law, and whether it allows for sufficient certainty as to legal outcomes;
- (2) Whether there may be ways to structure the discretionary basis of the current law with a clear set of underpinning principles, in order to create more certainty as to outcomes;
- (3) Whether there should be wider powers for the courts to make orders in respect of children of the family who have already attained the age of eighteen;
- (4) The operation of "conduct" as a factor to which the court must have particular regard when deciding to make financial remedies orders;
- (5) The treatment of pensions on the division of parties' assets on divorce;
- (6) Potential maximum periods for spousal periodical payments orders; and
- (7) The principles underlying s.25A of the Matrimonial Causes Act 1973.'

The terms of reference explain that:

'The review will proceed taking into account the following policy aspirations (insofar as is possible, accounting for potential tensions between the aspirations):

- (1) The law relating to financial remedies should:
  - (a) provide fair outcomes;
  - (b) provide sufficiently certain outcomes;
  - (c) have regard to the position in which financially vulnerable parties might find themselves on divorce;
  - (d) be straightforward and easy for parties to a divorce or dissolution to understand, where possible equipping parties to reach agreement without the court's assistance and without needing to expend large sums on legal fees;
  - (e) minimise risk of conflict between parties to a divorce or dissolution;

- (f) apply effectively, including in relation to cases involving parties with limited financial means; and
- (g) be capable of adapting over time to socio-economic changes.'

(7) The terms of reference make clear that the review will *not* consider:

- '(1) The law relating to child maintenance as governed by the Child Support Act 1991.
- (2) The law relating to financial provision for children under Schedule 1 to the Children Act 1989.
- (3) The law relating to the rights of cohabitants on relationship breakdown.
- (4) The principle that parties may make an application for financial relief in England and Wales after an overseas divorce under Part III of the Matrimonial and Family Proceedings Act 1984.
- (5) The principle that the court may make financial remedies orders on a nullity of marriage order or nullity of civil partnership order, or on judicial separation order or separation order.
- (6) The principle that the law on financial remedies on divorce will be replicated so as to apply in the same way in respect of dissolution of civil partnership.
- (7) The principle that a former spouse who has not remarried may make an application for maintenance under the Inheritance (Provision for Family and Dependents) Act 1975.
- (8) The law relating to the enforcement of financial remedies orders, including in relation to cross-border reciprocal enforcement.'

(8) It is important for me (in a personal capacity, and as a judge, and in so far as I represent the Financial Remedies Court (FRC)) to make absolutely clear that I welcome this Law Commission review and the opportunity to reflect in depth and meaningfully on how this area of the law, in which I have spent approaching 40 years practising as barrister and Judge, could be conducted in a way which works less adversarially and less expensively for those unfortunate enough to be going through the emotional minefield of a divorce. The purpose of this article is not to express any views on the merits of any changes which might emerge from this review, but to reflect on the types of issues which appear to be up for review, to discuss the context in which they have come to be reviewed and to suggest some linked areas which might helpfully form part of the discussion.

### The vintage of the Matrimonial Causes Act 1973

- (9) The steer given in the announcement is that the Matrimonial Causes Act 1973<sup>2</sup> is a creature from a different age and the time might be right for putting it out to grass. Hence the references to 'Fifty years since

the current law was put in place' and 'Half a century after the passage of the 1973 Act'. Of course this country was, in all sorts of ways of culture and mores, a very different place in 1973 than it is now, but any analysis of the 1973 Act needs also to recognise the radical changes in the way that judges have interpreted its meaning over that 50-year period. A judge in 2023 interpreting the words of the 1973 Act, s 25 is likely to be thinking very differently from a 1973 counterpart – even though the words themselves have hardly changed (and not at all since 1984).

- (10) The great judge-made changes introduced by the House of Lords (Lord Nicholls taking the lead) in *White v White* [2000] UKHL 54 and *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 did not require any change to the words of the statute to drive them. Thus arrived the outlawing of discrimination between earner and home-maker and the equal sharing principle, also (much less often in practice) the compensation principle, though the reader will not find any of these words or concepts in the text of the 1973 Act itself. Likewise, cohabitation which 'moves seamlessly ... to marriage' being added to the duration of the marriage itself as first proposed in *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam) by Nicholas Mostyn QC (sitting as a Deputy High Court Judge) did not require any change to the statute but (said the judge) 'the law in this area is not moribund but must move to reflect changing social values'. Likewise, the radical change in the treatment of agreements introduced by *Radmacher v Granatino* [2010] UKSC 42 did not involve any change of wording in the statute – nor, indeed, does the word 'agreement' appear in the Act. Likewise, recent case-law has significantly curbed the obligations against post-separation incomes by expressly declining to place a value on earning capacities (see Moylan LJ in *Waggott v Waggott* [2018] EWCA Civ 727) and curbing the use of joint lives spousal periodical payments orders, imposing a clear burden on the payee to establish a justification for anything other than a non-extendable term or the continuance of the order on a variation application (see Mostyn J in *SS v NS (Spousal Maintenance)* [2014] EWHC 4183, *Clarke v Clarke* [2022] EWHC 2698 (Fam) and *Cummings v Fawn* [2023] EWHC 830 (Fam)). There have been many other less major changes in specific areas and Mostyn J has often busied himself over the last 15 years or more by writing influential judgments which modernise and almost codify the law in specific subject areas (his recent judgment in *James v Seymour* [2023] EWHC 844 (Fam), in which he introduces – for the 'algebraically minded' anyway – what he calls an 'Adjusted Formula Methodology to give a Child Support Starting Point' is a good example of this).
- (11) Whilst elected politicians have largely left the field open to unelected judges (which could amount to a legitimate criticism of the process), it cannot be said that the law in this area has been left to ossify. Thus, it should follow that it will not be accurate or sufficient to criticise the provisions of the 1973 Act by reference to its vintage. If the operation of the modern law is to

be criticised, it must be on its merits and the outcomes produced by its modern interpretation.

## The interventions of Baroness Deech as a trigger to the review

- (12) Perhaps the headline factors in this review – the investigation of 'Whether there may be ways to structure the discretionary basis of the current law with a clear set of underpinning principles, in order to create more certainty as to outcomes' and 'Potential maximum periods for spousal periodical payments orders' and 'The principles underlying s.25A of the Matrimonial Causes Act 1973' – all appear to arise directly from the work of Baroness Deech and her Divorce (Financial Provision) Bill. That this is so can be derived from the sequence of events in March 2020 as they resurfaced (post-COVID-19) in March 2023. In March 2020 Baroness Deech, supported by Baroness Shackleton, and with a clear eye on her own Divorce (Financial Provision) Bill, was seeking to table amendments to the important Government-sponsored Divorce, Dissolution and Separation Bill. The proposed amendments were apparently unwelcome and, in order expressly to dissuade them from this course, the then relevant family justice minister, Lord Keen, wrote to Baroness Deech and Baroness Shackleton on 16 March 2020 promising a 'review of the law governing financial provision on divorce'.
- (13) This promise disappeared from public view until, in the House of Lords on 8 March 2023, there were the following exchanges:

*Baroness Deech:* '... what progress have they made with their three-year review of the law governing financial provision on divorce since the commitment made by ... Lord Keen ... in his letter dated 16 March 2020 ... I fear that the noble Baroness, Lady Shackleton, and I were misled when, three years ago, we were guaranteed a review of the financial elements of divorce. Relying on that, we refrained from pressing amendments. The law that relates to splitting money on divorce is so antagonistic and unreformed that it undermines the alleged good points of the no-fault divorce law. We are lagging 50 years behind nearly every other country in the western world, including Australia. The amount of discretion in our law makes it very hard for unrepresented parties. Money that should go to the children is being spent on legal costs. Even judges have called this law "apocalyptic" – accessible only to the rich. When will the Government reform this very bad law?'

*Lord Bellamy:* 'I hope to announce a review of financial provision very shortly ... Respectfully, I do not accept the characterisation that the Government have misled everybody; we have had our hands somewhat full in recent times. The Matrimonial Causes Act 1973 reaches its 50th anniversary this year and a review of financial provision is indeed opportune. The Government are in close consultation with the Law Commission, which we consider the most appropriate body to carry out that review.'

*Baroness Shackleton:* 'I declare my interest as a practitioner in this field for 40 years. The law is hopelessly out of date: it relies entirely on finance and the discretion of judges. The judges have a fiefdom now in that, since 3 October 2017 you cannot go to the Court of Appeal if leave is refused, so their discretion is absolute. It is normally commercial judges who change the law, and arbitrators, mediators and judges need guidance. There is no use in having a divorce if the money is not sorted out; the house has to be sold and the children are caught in the conflict. Divorce practitioners like me make a fortune in arguing, because the guidelines are 50 years out of date. I know that this is not a vote winner and does not appeal to the masses, but many people in this country are touched by this and I would like an assurance that it will be included in the King's Speech as vital business on the agenda, because responsible Governments do service to this.'

*Lord Bellamy:* 'These matters will be considered fully in a forthcoming review, hopefully by the Law Commission'.

- (14) The Law Commission announcement, of course, followed shortly after this exchange and it is perhaps safe to assume that the ideas promoted by Baroness Deech and contained in her Divorce (Financial Provision) Bill, which has been on the books of the House of Lords (in various iterations) for a significant number of years, will be at the heart of the matters to be considered carefully by the Law Commission.
- (15) It is important to recall the detail of these ideas. If implemented in its current form, the Divorce (Financial Provision) Bill would make some very significant changes to the provisions of Matrimonial Causes Act 1973. The existing s 25(2)<sup>3</sup> would disappear and new principles would govern:
- Capital orders would largely be limited to the sharing of matrimonial property. The Bill contains detailed provisions of what is meant by matrimonial property. If the share of matrimonial property is not sufficient to meet the capital needs of one party then there will be no capital topping up mechanism from non-matrimonial property based on needs – that party would simply lose out.
  - Pre-nuptial and post-nuptial agreements would (subject to various caveats related to the fairness of their creation) be binding contracts with no discretionary escape route for an outcome based on fairness or need.
  - Spousal periodical payments orders would only be available at all in narrower circumstances than at present (the existence of 'economic advantage derived from contributions by the other' or 'economic disadvantage suffered in the interests of the other party' being important factors) and would be in any event limited to a period of 5 years after the divorce, unless the recipient could establish that a consequence of limiting periodical payments to that term would cause the recipient to 'suffer serious financial hardship as a result'.
- (16) These proposed changes must fall to be analysed against a number of claims made by their promoters and it is suggested that those engaging in this debate in the months and years ahead will need to address each of these claims.
- (17) It is suggested by the promoters that the changes, in contrast to the existing law, will be overall advantageous to the cause and empowerment of women. In the words of Baroness Deech, which a perusal of *Hansard* suggests have a body of political support, in a speech in the House of Lords on 11 May 2018 (emphasis added):
- 'This brings us to the nub of the changes in society which this Bill is trying to address. The law for centuries has seen all women as dependants, certainly once they marry, tied to their husband's financial situation and social status for ever, regardless of the nature of the breakdown or her own capacity. In brief – noble Lords know the social changes all too well – 72% of mothers go to work, according to the Institute of Fiscal Studies, whereas in 1975 only half did. Women's education and career prospects, equal opportunities and pay law have driven this, and two-earning couples have become the norm. However, to the law, this is unknown. There is a thesis to be written about the absence of the modern working woman from family law. **Women with no children and with grown-up children are still treated as incapable by many of our judges ... There are those who will say that women suffer in the workplace and from childcare, and that men should continue to make it up to them for the rest of their lives. As long as judges accept as reasonable the demands of some women on divorce for millions and of many more for ongoing lifetime payments, then subconsciously or consciously male employers will never take women as seriously in the workplace as they should. The majority of women who work feel downgraded and belittled by the alleged helplessness and unreasonable demands made by some.** Extreme handouts to divorced wives do nothing to help unmarried women and single mothers who are making their own way in the workplace. Women are not all victims, they are autonomous, and sometimes they have to make over property to less well-off husbands on divorce regardless of behaviour. Of course the law is equal, but the attitude of judges is not.'
- (18) There may be others who feel that, in practice, many women, perhaps particularly those who make career sacrifices for their children, will not overall be treated advantageously by the proposed changes to financial remedies law and their needs will go unmet as a result of such changes and that injustice will inevitably result. Such people may regard these changes as turning the clock backwards rather than forwards, introducing greater unfairness than exists in the present system.
- (19) Of course, there are many gradations on the scale here, and the words of a statute can dictate the number and breadth of clauses designed to enable a Judge to exercise discretion to give relief from injustice and this essentially political debate will have to take place and the Law Commission will have to come to a conclusion on this difficult area in their scoping paper.

Ultimately, though, elected politicians will have to decide where the balance properly lies as a matter of social justice.

- (20) It is suggested that the promoted legal structure and fixed principles would be significantly clearer, with much less scope for judicial discretion, such that the scope for family lawyers to make so much money out of the divorcing community by adversarial conduct would be much more limited. In the words of Baroness Deech, 'The amount of discretion in our law makes it very hard for unrepresented parties'. In the words of Baroness Shackleton, 'Divorce practitioners like me make a fortune in arguing, because the guidelines are 50 years out of date'.
- (21) Others may fear that the capacity of lawyers to argue, and to charge a lot of money for arguing, would not be diminished by a new legal structure and more fixed principles, indeed might be increased by a new generation of family lawyers taking points on what was meant by terms such as 'economic advantage derived from contributions by the other' or 'economic disadvantage suffered in the interests of the other party' or 'suffer serious financial hardship' or the overall definition of matrimonial property. After all, at least with the benefit of hindsight, it was perhaps inevitable that the statement made by Lord Nicholls of Birkenhead in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 that when the marital partnership ends each is entitled to an equal share of the assets of the partnership 'unless there is a good reason to the contrary' would greenlight a near two decades 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'. It may therefore be that many years of greater uncertainty would follow while a new Act bedded down.
- (22) Many would also argue that judge-made case-law has made the current law tolerably clear in any event, albeit with important safety valves to promote fairness. In the words of Peel J:<sup>4</sup>

'The aim must always be to combine fairness and efficiency. I firmly believe that financial remedies law is not, or should not be, as complex as sometimes it is made out to be. Dare I suggest that the law, centred on familiar principles of sharing and (most commonly) needs, within the overarching section 25 matrix, is reasonably settled. The vast majority of cases, dealt with by specialist judges, can be dispatched relatively swiftly.'

- (23) Some may also argue that the attractive wish to reduce adversarial litigation and the legal costs of divorce would be more likely to be enhanced by improving procedures, and that such thoughts should be considered by the Law Commission, even though they do not fall within the express agenda. There are many ideas in this area; but let me identify one which has gathering support – the Single Lawyer Solution. Instead of each party having a lawyer who, in each case, feels it necessary and appropriate to score points by taking chunks out of the other side (and charging a lot of money for the effort and quite often not taking the case any further forward), the parties cooperate by appointing one lawyer who advises them both as to a fair way

forward at a fixed cost. The Divorce Surgery (ably led by two barristers, Harry Gates and Samantha Woodham) promote this methodology and the process, and its manifest advantages, are described in their article 'Someone! Do Something about costs! The Single Lawyer Solution' (emphasis added):<sup>5</sup>

'Couples can, and increasingly are, being advised from the outset *together* as to what constitutes a fair outcome in their circumstances, enabling them to settle at the earliest stage. Precisely because **a joint process involves neither litigation nor communication back and forth between opposing legal teams over financial disclosure collated in adversarial fashion over extended timeframes**, it is entirely possible to offer such services for a fixed fee. Lawyers can therefore feel comfortable to propose such an arrangement. Couples can budget.

... we now propose that something be done: **specifically, a radical shift and cultural pivot towards making joint advice the default first step in financial remedy practice**. The provision of a court room at public expense and the ability to be heard in contested litigation should depend on having satisfied that requirement, absent some disqualifying feature of the kind referenced above. Cases will settle, busy court lists will reduce (so prioritising judge time for the truly meritorious), public money will be saved and – back to the point under discussion – family finances will be protected from the costs of litigation ...

But could more be done? **Might a summary of the joint advice from the single lawyer be made open and available to the judge at the outset and in the course of any future litigation between the couple?** In principle, it is easy to see how doing so might prove an effective brake on free-spending litigation: the parties could expect to be asked to explain and justify why they propose to depart from their joint advice. Decisions on LASPO costs could take into account the joint advice – a litigant wishing to argue against the single joint advice should have the task of justifying why a LASPO costs order should be made. Then later following judgment, success or failure in bettering the identified bracket could be made a relevant factor in the assessment of costs – an unsuccessful party should ordinarily expect to bear the costs unnecessarily incurred by rejecting the single joint advice if it has turned out to be correct. The attraction to the judge hearing the case would be plain and the existence of joint legal advice should be a significant inhibitor to ongoing litigation.'

## Wider powers to make orders in respect of adult children

- (24) An intriguing express inclusion in the Law Commission agenda for review is the item requiring thought on 'Whether there should be wider powers for the courts to make orders in respect of children of the family who have already attained the age of eighteen'. I have pondered on what is really being targeted here. I wondered whether this item was referencing the ideas of Williams J in *DN v UD* [2020] EWHC 627 (Fam) to

extend the meaning of ‘special circumstances’ under Children Act 1989, Sch 1, para 3(2)(b),<sup>6</sup> which did not meet the approval of the Court of Appeal in *UD v DN* [2021] EWCA Civ 1947. I wondered whether this item was a reference to the fiendishly complicated ‘baton-passing’ provisions of Children Act 1989, Sch 1, which dictate when a child, as opposed to one of the parents, may and/or can make an application<sup>7</sup> for financial provision against the other parent. Both of these matters would certainly justify a serious review, but neither of my thoughts can be right because the terms of reference make clear that the review will *not* consider ‘The law relating to financial provision for children under Schedule 1 to the Children Act 1989’.

- (25) Having ruled out these thoughts, I confess I have had difficulty identifying what is being reviewed here and what wider powers are to be considered and what has happened to cause the Law Commission to wish to consider them.

## Conduct

- (26) Another intriguing express inclusion in the Law Commission agenda for review is the item requiring thought on ‘The operation of “conduct” as a factor to which the court must have particular regard when deciding to make financial remedies orders’.
- (27) The 1973 Act, under s 25(2)(g), expressly allowed the court, in determining its award, to take into account ‘the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it’. Conduct (often in the form of adultery) had hitherto typically been regarded as a significant feature for the court to factor into an outcome, but not long after the 1973 Act came into force, the Court of Appeal, in the form of Lord Denning in *Wachtel v Wachtel* [1973] EWCA Civ 10 firmly shut the door to the consideration of conduct in almost all cases. In Lord Denning’s words (emphasis added):

‘When Parliament in 1857 introduced divorce by the Courts of law, it based it on the doctrine of the matrimonial offence. This affected all that followed. If a person was the guilty party in a divorce suit, it went hard with him or her. It affected so many things. The custody of the children depended on it. So did the award of maintenance. To say nothing of the standing in society. So serious were the consequences that divorce suits were contested at great length and at much cost. All that is altered. Parliament has decreed: **“If the marriage has broken down irretrievably, let there be a divorce”. It carries no stigma, but only sympathy. It is a misfortune which befalls both. No longer is one guilty and the other innocent.** No longer are there long contested divorce suits. Nearly every case goes uncontested. The parties come to an agreement, if they can, on the things that matter so much to them. They divide up the furniture. They arrange the custody of the children, the financial provision for the wife, and the future of the matrimonial home. If they cannot agree, the matters are referred to a Judge in chambers.

When the Judge comes to decide these questions,

what place has conduct in it? Parliament still says that the Court has to “have regard to their conduct”. **Does this mean that the Judge in chambers is to hear their mutual recriminations and to go into their petty squabbles for days on end, as he used to do in the old days? Does it mean that, after a marriage has been dissolved, there is to be a post mortem to find out what killed it? We do not think so. In most cases both parties are to blame – or, as we would prefer to say – both parties have contributed to the breakdown.** It has been suggested that there should be a “discount” or “reduction” in what the wife is to receive because of her supposed misconduct, guilt or blame (whatever word is used). We cannot accept this argument. In the vast majority of cases it is repugnant to the principles underlying the new legislation, ... **the Court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame.**’

- (28) The years since 1973 have not seen any re-opening of the door: see, for example, *S v S* [2006] EWHC 2793 (Fam) and the first reference to the ‘gasp factor’ and the law has seemed well-settled. The suggested redefinition of ‘conduct’ by the Divorce (Financial Provision) Bill seems, if anything, to close the door slightly tighter by suggesting that conduct will be taken into account only if it ‘has adversely affected the financial resources of a party’ or would be ‘manifestly inequitable to leave conduct out of account’. So what is the logic of the Law Commission now reviewing the issue of conduct?
- (29) Perhaps the logic is to be found in the rising concerns about domestic abuse, which have found their way into various aspects of family law, most obviously in the passing of the Domestic Abuse Act 2021. Plainly, the presence of an abusive relationship can affect the procedures adopted by a court in ensuring that the victim of domestic abuse is able properly and fully to participate in the proceedings, but there are a growing number of voices suggesting that the presence of domestic abuse should affect outcomes,<sup>8</sup> in particular where the abuse has a significant financial effect on the victim,<sup>9</sup> but also sometimes where the ‘consequences are not financially measurable’.<sup>10</sup>
- (30) If these voices are successful in persuading the Law Commission to open the door (even a little) on conduct, then great care will have to be given to avoid the danger identified long ago by Lord Denning of the court being required by parties ‘to hear their mutual recriminations and to go into their petty squabbles for days on end’. The challenge for the court is to be able to distinguish (in advance of hearing any evidence) between what is a petty squabble and what is something much more serious. Judges hearing private law children cases in the last few years will be well aware of the huge increase in fact-finding hearings in recent times as domestic abuse issues have risen up the agenda.

## Pensions

- (31) The Law Commission will also consider ‘The treatment of pensions on the division of parties’ assets on divorce

... and whether they are overlooked when dividing the divorcing parties' assets'. The Pension Advisory Group, which will shortly be publishing its update (PAG2) on the 2019 report, *A Guide to the Treatment of Pensions on Divorce*, is keen to assist the Law Commission in its review and has already offered its full cooperation and assistance.

*HHJ Edward Hess delivered the paper which forms the basis of this article at the FLBA Cumberland Lodge meeting and the 3PB Family Law Conference, both in early May 2023.*

## Notes

- 1 All the documents make it clear that the review will also cover the law applicable on the dissolution of civil partnerships, which is for all practical purposes identical. This article will use the terminology referable to the dissolution of marriages by divorce, but all the comments apply equally to the dissolution of civil partnerships.
- 2 In fact, the provisions first appeared in the Matrimonial Proceedings and Property Act 1970 and were later translated into the 1973 Act, so they are a little more than 50 years old.
- 3 And, presumably, s 25A, though the Bill does not actually say this.
- 4 'The Financial Remedies Court: The Road Ahead' [2022] 2 FRJ 76.
- 5 [2022] 3 FRJ 181.
- 6 Which appear in almost identical terms in Matrimonial Causes Act 1973, s 29(3)(b).
- 7 Which were discussed by me in some detail in *J & K v L (Schedule 1: Older Children) (Rev 1)* [2021] EWFC B104. I expressed the view: 'It is not easy to understand why those drafting Schedule 1 did not simply allow a co-existence of parental and child remedies for children older than 18 (or perhaps 16), but they appear to have deliberately chosen a more complicated "baton-passing" scheme'.
- 8 See, for example, Harry Campbell and Philip Tait, 'Economic abuse as conduct', FRJ Blog, 24 February 2023, available at <https://financialremediesjournal.com/content/economic-abuse-as-conduct.bed35c5162464f7c8afd8439191501bb.htm> and DJ Judith Crisp, Professor Rosemary Hunter and Professor Emma Hitchings, 'Domestic abuse in financial remedy cases' [2022] 2 FRJ 123.
- 9 See Mostyn J in *OG v AG* [2020] EWFC 52.
- 10 See HHJ Reardon in *DP v EP (Conduct; Economic Abuse; Needs)* [2023] EWFC 6.



# Fairness versus Certainty – Should the Matrimonial Causes Act 1973 be Amended to Restrict the Duration of Spousal Maintenance?

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As part of the Law Commission’s review of the law concerning financial division upon divorce, announced on 4 April 2023, it will consider ‘how maintenance payments for an ex-spouse or civil partner should work’. The terms of reference set out that the Law Commission is to consider specifically potential maximum periods for spousal periodical payment orders.

The maximum period approach is taken in the Divorce (Financial Provision) Bill tabled by Baroness Deech. The proposal is set out in the draft for section 5 of the Bill:

‘5(1) In deciding whether and in what terms to exercise its powers to make a periodical payments order in favour of one of the parties to the marriage, the court must take into account ...

- (c) that a party who has been *dependent to a substantial degree* on the financial support of the other party should be awarded such periodical payments as is reasonable to enable that party to *adjust to the loss of that support* on divorce over

*a period of not more than five years from the date of the decree of divorce, such period not to be exceeded unless the court is satisfied that there is no other means of making provision for a party to the marriage and that that party would otherwise be likely to suffer serious financial hardship as a result.’ (emphasis added)*

This approach contrasts markedly with the lack of any real steer within the Matrimonial Causes Act 1973 (the 1973 Act) as to whether and in what way an order for periodical payments should be made. The limitation of the 1973 Act in this regard was addressed in 2006 in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 by Lord Nicholls:

‘5. ... The Matrimonial Causes Act 1973 gives only limited guidance on how the courts should exercise their statutory powers. Primary consideration must be given to the welfare of any children of the family. The court must consider the feasibility of a “clean break”. Beyond this the courts are largely left to get on with it for themselves. The courts are told simply that they must have regard to all the circumstances of the case.

6. Of itself this direction leads nowhere. Implicitly the courts must exercise their powers so as to achieve an outcome which is fair between the parties. But an important aspect of fairness is that like cases should be treated alike. So, perforce, if there is to be an acceptable degree of consistency of decision from one case to the next, the courts must themselves articulate, if only in the broadest fashion, what are the applicable if unspoken principles guiding the court’s approach.’

The judgment of Baroness Hale in *Miller v Miller; McFarlane v McFarlane* is also of note:

‘122. My Lords, there is *much to be said for the flexibility and sensitivity of the English law of ancillary relief*. It avoids the straitjacket of rigid rules which can apply harshly or unfairly in an individual case. But *it should not be too flexible. It must try to achieve some consistency and predictability.*’ (emphasis added)

And further at [131]:

‘131. Section 25A(2) provides:

“Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.”

I assume that the reference to “such a case” is to a case in which the court has decided to exercise its powers under the listed sections rather than to a case in which it has decided that it would be appropriate to exercise those powers so as to terminate the parties’ financial obligations as soon as possible after the decree. If it decides to make a periodical payments order, *it must consider how quickly it can bring those payments to an end. It has therefore to consider fixing a term, although in doing so it must avoid “undue hardship”*. This is linked to two other powers: section 28(1) allows the court to specify the duration of a periodical payments order; generally, it is open to the recipient to apply to

extend the term, provided this is done before it expires; but section 28(1A) gives the court power to prohibit any application for an extension. If there is an application for an extension, the court has the same duty to consider bringing the periodical payments to an end as soon as possible: section 31(7); and it now has power to order a lump sum, property adjustment or pension sharing instead: section 31(7B). Thus if there were not the capital resources to achieve a clean break at the outset, it may be achieved later if sufficient capital becomes available.’ (emphasis added)

Baroness Deech’s proposal of a presumption of a 5-year restriction on periodical payments is seen in the approach taken in the Scottish law. Lord Hope addressed this in his well-known judgment at [114]–[120] in *Miller v Miller; McFarlane v McFarlane*.

His Lordship at [114] set out the position under Scottish law, that:

‘a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust, over a period of *not more than 3 years* from the date of the decree of divorce, to the loss of that support on divorce.’ (emphasis added)<sup>1</sup>

Lord Hope’s speech sets out the competing concepts which underpin the question of whether there should be a statutory time limit for periodical payments (or a presumption of such) or not:

‘[115] A rigid application of the clean break principle, as enacted in s 9(1)(d), has the advantage of certainty. But it runs the risk of becoming outdated as social conditions change and the reasoning behind it no longer fits in with modern concepts of fairness. As Lord Nicholls of Birkenhead has explained, the concept of fairness is ultimately grounded in what people think. Social and moral values change from one generation to the next. Baroness Hale of Richmond’s comment in para [127] *that statutory statements of principle translated into rules can operate harshly in some cases, particularly where the resources consist largely of income rather than capital, shows where the problem lies*. The flexibility which sheriffs and judges need to adapt the law to what would be regarded as fair today as compared with what was regarded as fair 25 years ago is denied to them.

[116] The way that Mrs McFarlane’s case would have to be dealt with if the case had arisen in Scotland illustrates the problem. *It would not be possible to design an award under the Scottish system that provided her with an amount of income for the future that gave fair recognition to her entitlement*. She is entitled to an award that reflects the agreement that she and her husband entered into, because in their case the capital assets that would be needed for this are not available. They decided that she should sacrifice her own high earning career in the interests of the family while her husband developed his ability to generate income. *Under the Scottish system he would continue to enjoy the benefits of his high earning capacity. But she could not be compensated for her future economic disparity, due to his lack of capital. She would be required instead to adjust to a lower standard of living*. And she would have to do this over a period of no more than 3 years.

[117] The annotation to s 9(1)(d) in *Current Law*

*Statutes*, based on para 3.107 of the report by the Scottish Law Commission, explains the purpose of that paragraph. *The principle is intended to enable the court to cushion the blow of divorce by providing funds to enable a spouse “to find employment or retrain, or to adjust to a lower standard of living”*. I agree with Lord Nicholls of Birkenhead’s observation, in para [94] of his speech, that the situation in which Mrs McFarlane finds herself is a paradigm case for an income award that will compensate her for the significant future economic disparity, sustained by the wife, arising from the way the parties conducted their marriage. That is impossible under the rules which apply in Scotland.

[118] *With the benefit of hindsight, it can be seen how unfairly the principle which s 9(1)(d) lays down ... discriminates against women*. It operates harshly in cases where a high earning wife, or the highly qualified wife with the prospect of high earnings – and it is, of course, almost invariably the wife, not the husband who does this – gives up a promising and demanding career in the interests of the family. Women today compete on equal terms with men in business and in the professions for high earnings. They are being encouraged to do so by the measures for equal pay and the removal of discrimination on the ground of sex. These measures were already in place by 1985, but had not begun to realise their full potential for change by that date. Many more women than were foreseen in 1981 are now reaching the ranks of those who are highly paid for what they do. But many women are mothers too. *The career break which results from concentrating on motherhood and the family in the middle years of their lives comes at a price which in most cases is irrecoverable*.

[119] As the district judge recognised in Mrs McFarlane’s case, it is *almost always impossible for a woman who has made that choice to achieve the same pattern of high earning on her return to work which she would have done if the progress of her career had not been interrupted by concentrating on her family*. *The price that her decision brings with it is made all the more severe by the difficulties which under current conditions couples are likely to experience in providing for a pension which will maintain their standard of living in the future*.

[120] These effects appear not to have been foreseen in 1981 when the Scottish Law Commission published their report. *Achieving a clean break in the event of divorce remains as desirable now as it was then. But if this means that one party must adjust to a lower standard of living, the result is that a clean break is being achieved at the expense of fairness. Why should a woman who has chosen motherhood over her career in the interests of her family be denied a fair share of the wealth that her husband has been able to build up, as his share of the bargain that they entered into when that choice was made, out of the earnings that he is able to generate when she cannot be compensated for this out of capital?*’ (emphasis added)

In recent years, however, there has been an increasing trend in the reported cases towards a significant curtailment of the use of joint lives spousal periodical payments order and an emphasis on the need for a clean break, requiring the applicant to justify anything other than a non-extendable term.

In *Waggott v Waggott* [2018] EWCA Civ 727, the Court of Appeal found that the husband’s earning capacity is not

capable of being a matrimonial asset which the wife is entitled to share. The judge at first instance had ordered the husband to pay the wife ongoing maintenance for joint lives assessed at £175,000 per annum. The husband's cross appeal was allowed and a 5-year term with a section 28(1A) bar substituted.

In finding that earning capacity is not a matrimonial asset, Moylan LJ, with whom MacDonald J and Sir James Munby agreed, said:

'[123] Any extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break. In principle, as accepted by Mr Turner, the entitlement to share would continue until the payer ceased working (subject to this being a reasonable decision), potentially a period of many years. If the court was to seek to effect a clean break this would, inevitably, require the court to capitalise its value which would conflict with what Wilson LJ said in *Jones v Jones*.

[124] Looking at its impact more broadly, it would apply to every case in which one party had earnings which were greater than the other's, regardless of need. This could well be a very significant number of cases. Further, if this submission was correct, I cannot see how this would sit with Lady Hale's observation in *Miller* that, even confined to "(i)n general", "it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation" (para 144) or her observation as to the effect of "(t)oo strict an adherence to equal sharing" (para 142).' (emphasis added)

In *Quan v Bray & Ors* [2018] EWHC 3558 (Fam), Mostyn J gave the following guidance:

'48. In every case where an award of periodical payments is made the court must consider, pursuant to sections 25A and 28(1A) of the Matrimonial Causes Act 1973, whether the award should be term limited, and, if so, whether that term should be extendable or not. These provisions have been strangely neglected since they were enacted, but recent decisions have emphasised their key importance. A limited term should be imposed unless the court is satisfied that the claimant would not be able to adjust to a cut-off without undue hardship. Normally that decision is easily reached because the claimant will have a capital base to fall back on in her later years. Generally speaking, there would have to be shown good reasons why a term maintenance order should not be made. And, generally speaking, where a term maintenance order is to be made there would have to be shown good reasons why it should not be non-extendable. Ultimately the court's goal should be wherever possible, to achieve, if not immediately, then at a defined date in the future, a complete economic separation between the parties.' (emphasis added)

The aim of complete economic separation was reiterated by Mostyn J in *Clarke v Clarke* [2022] EWHC 2698 (Fam). His Lordship referred at [36] to the now widely referenced synopsis of the jurisprudence applicable in financial remedy cases set out by Peel J in *WC v HC (Financial Remedies Agreements)* [2022] EWFC 22 and proposed that the following be added to that guidance:

'xvii) Where an application for spousal periodical payments is actively pursued the court must diligently

apply s.25A and consider whether the application can be dismissed and an immediate clean break effected. If the court concludes that a substantive order is needed to meet the applicant's needs the court should only make the award in such amount and for such a period as to avoid the applicant suffering undue hardship. The applicant must show good reasons why a non-extendable term maintenance order should not be made. The court's goal should be to achieve, if not immediately, then at a defined date in the future, a complete economic separation between the parties. The same principles apply, *mutatis mutandis*, where the court considers an application by a payer of spousal periodical payments for the variation or discharge of the order. The burden will be on the payee to justify a continuance of the order, and if so, for how long: *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam), [2015] 2 FLR 1124, *Quan v Bray & Ors* [2018] EWHC 3558 (Fam), [2019] 1 FLR 1114.' (emphasis added)

There is wide consensus that a clean break is best if possible. There is obvious advantage in no longer being financially entangled with or dependent on a former spouse, and a clean break also has the significant policy advantage of creating separate economic actors and precluding future litigation.

The real issue is the breadth of circumstances in which a clean break is not achievable within a prescribed time-frame. That a clean break should be avoided only where it is necessary to prevent 'undue hardship' in the future presupposes that some economic hardship for one party but not the other is fair. That may well be so: perhaps if you divorce a breadwinner then you should not expect to be eating the same type of loaf in the future. On the other hand, if the privileging of clean break outcomes is taken too far or if the judge's discretion is limited to making an order for periodical payments for a specific duration, say 5 years, then overall outcomes might begin to resemble structural or institutional sexism: simply put it will often be women who have to make downward adjustments to their standards of living. The debate about whether there should be statutory time limits brings this balancing exercise to the fore.

There is then further the issue of the unpredictability of outcome which is a product of the current legislation. Three judges considering the same case in which it is contended that a periodical payments order should be made are likely to make three different orders. In itself that is unproblematic but there must be a real concern that the orders made can be so different as to make the outcome unpredictable.

The issue is made more complicated when one considers the view that the same case would probably occasion a different periodical payments order in different parts of England. The Law Commission considered evidence of significant regional differences in the levels of needs-based support likely to be awarded in different courts in its 2014 report *Matrimonial Property, Needs and Agreements* and its concerns led to the Family Justice Council producing its *Guidance on 'Financial Needs' on Divorce*, the second edition of which was published in 2018 ('the Family Justice Council Guidance').

In the Family Justice Council Guidance it is stated that 'a party may be expected to suffer some reduction in standard of living having regard to the overall objective of transition to independence' and that need is to be measured by

‘assessing the standard of living during the relationship’ with this factor assuming more importance the longer the relationship’s duration.

The questions raised by the long-standing proposal to restrict the duration of periodical payments orders will no doubt be well mapped-out in the Law Commission’s future reports and the ensuing discussions. Ultimately, there are various incompatible ‘fairnesses’, each of which privileges a different underlying idea or belief about society. Without expressing a view as to whether periodical payments should be restricted in duration by statute, the following matters are a selection of the points which are likely to arise:

- (1) Is the statutory steer towards a clean break sensible and should other ‘rules’ be built around this? What of cases where a clean break is not possible or desirable, such as those where the parties are older or those where there is a sizeable disparity in future earnings or earning capacity which cannot be fairly addressed by the apportionment of assets?
- (2) Is it time to move on from the notion of women being

‘compensated’ for future economic disparity which was created by decisions made within a marriage (e.g. career pause or sacrifice; apportionment of domestic tasks and childcare and wider caring responsibilities)?

- (3) Would a time-limited rule for periodical payments assist in reducing the number of cases which went to court? Do such rules create greater certainty of outcome?
- (4) Would such rules be fairer for unrepresented parties? Or would there tend to be litigation in an attempt to be seen as an exception to the rules?

Ultimately, the decision is, of course, for Parliament to determine. In so doing, it will be necessary to take account of prevailing societal attitudes, which may still be accurately reflected in the current drafting of the 1973 Act, interpreted and developed by the courts over the past 5 decades.

### Notes

- 1 Family Law (Scotland) Act 1985, s 9(1)(d).

# Living under an LSPO

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Commentary on legal services payment orders (LSPOs) often concerns their effect on those required to fund them. That is not hard to understand. The (usually) substantial payment to an opposing firm to fund work perceived as contrary to the payer's interest is never an enjoyable experience, however important a contribution it might make to access to justice and, ultimately, the proceedings' constructive resolution.

However, life in receipt of an LSPO is also no bed of roses. This article reflects on this aspect in the context of the developing jurisprudence on such orders and to anticipate developments that might be required to make them manageable. Much of the discussion may also have wider relevance, in the context of not only pent-up fury on the bench as to the size of costs generally<sup>1</sup> and the accompanying discussion of costs capping, but also the threats to the litigation loan market. If the pending appeal of the decision in *Simon v Simon (Integro Funding Ltd ('Level') intervening)* [2022] EWFC 29 goes against Level, we may see a much-reduced litigation loan market, bringing more cases into LSPO territory.

## Background

As legal aid for family cases withered on the vine, the vacuum it created was partially addressed by requiring the wealthier party to meet the other's legal fees through maintenance pending suit.<sup>2</sup> In 2013 this was put on a statutory footing: Legal Aid, Sentencing and Punishment of Offenders Act 2012, ss 49–51 inserted s 22ZA into the Matrimonial Causes Act 1973 and the LSPO was born. It enabled the court, in proceedings for divorce, nullity or judicial separation, or for financial relief in connection with such proceedings, to order one party to pay to the other 'an amount for

the purposes of enabling the applicant to obtain legal services for the purposes of the proceedings'.

Section 22ZA followed the earlier case-law in requiring the court to be satisfied that without an LSPO the applicant would not reasonably be able to obtain appropriate legal services. In particular, s 22ZA(4) requires the court to be satisfied that the applicant is not reasonably able to secure a loan, nor able to secure legal services on a *Sears Tooth* basis (by granting their lawyers a charge over their award). Mostyn J put flesh on the s 22ZA bones in his *obiter* comments in *Rubin v Rubin* [2014] EWHC 611 (Fam). These included the expectation that there be a detailed estimate of the costs to be covered by an LSPO, that any order should cover the period to the FDR after which it should be reviewed, and that monthly instalments are to be preferred to a single lump sum. Whilst the statutory provisions do not apply to applications under Children Act 1989, Sch 1 or Matrimonial and Family Proceedings Act 1984, Part III, Mostyn J indicated that such applications are subject to the same basic principles.

As an LSPO is precluded by the availability of a litigation loan, they most commonly arise in cases where loan providers are unwilling to fund, usually owing to the absence of an obvious route to repayment. This includes cases where outright capital provision is not available, of which the prime example is Schedule 1 cases. The dynamics of such cases can be particularly challenging; the power imbalance between the parties is reinforced by the applicant's inability to make any claim for herself, and, where there has been a very short relationship, the parties may not know each other particularly well, providing little foundation for a constructive postseparation relationship. LSPOs may also be called upon where lenders are not satisfied there is adequate, or sufficiently reliable, security whether because the assets are abroad, in trust, illiquid, in the names of third parties, or where there is a general absence of financial disclosure. All these circumstances are likely to heighten suspicion and mistrust, and the very need for an LSPO might suggest that there does not exist between the parties a relationship sufficiently constructive to make possible voluntary provision for legal fees from one to the other.

Thus, while not an iron rule, the cases in which LSPOs are needed can be amongst the more acrimonious and complex we deal with. This plainly has its effect on the legal costs that can accumulate, and can make managing the budget particularly challenging. However, we also argue that the way in which LSPOs have come to be managed by the judiciary has added to the difficulties faced by solicitors and their clients when subject to an LSPO. We consider the issues arising in respect of four stages: (1) prior to an LSPO; (2) the quantification of an LSPO; (3) operating under an LSPO; and lastly (4) recovering overspend.

## Work carried out before an LSPO is made

Unless the client has some resources of their own, solicitors are likely to carry out considerable initial work on credit and without any certainty that they will be paid. Many solicitors in our line of work are ready and willing to do this. However, there will be a limit to the credit that firms can allow, which may leave little scope for work other than the drafting of the LSPO application itself. Such applications are not

straightforward; they involve early attention to the substantive case to be advanced, and preparation of a detailed costs estimate to cover many months of litigation at a time when the respondent may not have shown their hand at all. It is a substantial and technical piece of work, made more complex if there is any issue over jurisdiction, and is likely to involve a substantive and contested standalone hearing for which counsel's fees will be incurred. The cost of an initial LSPO application will therefore be a tidy sum, for which the solicitors will be entirely at risk unless and until an order is made.

This creates pressure to commence proceedings and issue an LSPO application at an early stage. Judicial approaches have reinforced this to minimise firms' willingness to extend credit in several ways: were the client to change solicitors prior to an LSPO, their costs cannot be recovered on an interim basis (see *BC v DE* [2016] EWHC 1806 (Fam)); costs incurred prior to issuing an LSPO application may not be recoverable on an interim basis (see *LP v AE* [2020] EWHC 1668 (Fam) and *R v R* [2021] EWHC 195 (Fam), [2021] All ER (D) 933) and (as explored in depth below) such unpaid preliminary costs as can be recovered on an interim basis may be subject to a 'taxation' of up to 30%.

The cumulative effect is to minimise what prospects may exist of reaching an early, pre-issue, out of court settlement. Whilst Mostyn J suggested in *Rubin* (at [13] (x)) that an LSPO application could be made pre-issue to fund alternative dispute resolution, he expressed doubt as to whether this applied to Schedule 1 and Part III proceedings (at [15]), and it is not clear that any such applications have been made in practice even in matrimonial claims. Nor is making a funding application before or during non-court dispute resolution likely to enhance the prospects of that process succeeding.

### ***The 'notional standard basis of assessment'***

In the Schedule 1 case of *BC v DE*, Cobb J instigated the practice of applying a 'notional standard basis of assessment' to unpaid costs to be met under an LSPO (i.e. those pre-LSPO costs discussed immediately above).<sup>4</sup> Cobb J cited earlier, unreported, decisions of Roberts J and Holman J within the same proceedings, explaining that Roberts J had ordered 70% of outstanding costs to be paid under an LSPO to reflect 'a rough computation of a standard basis of assessment'. He also cited Mostyn J's decision in *MG & JG v JF* [2015] EWHC 564 (Fam) in this regard, but it seems clear that Mostyn J was guided by what he considered each party could afford to pay; he made no mention of notional assessment.

In *BC v DE*, Cobb J applied a 15% discount to the applicant's incurred and prospective costs, saying (at [28]):

'From the costs claimed ... I propose to make a deduction of 15% to reflect a notional standard basis of assessment; in doing this, I have taken a broad view about whether the costs are reasonably incurred, reasonable in amount and proportionate to the matters in issue, recognising that any costs which are disproportionate in amount may be disallowed or reduced, even if they were reasonably or necessarily incurred (CPR 44.3(2)(a) and PD 44.6.2), and on the basis that the court would resolve any doubt in favour of the paying party (CPR 44.3(2)(b)).'

However, these provisions of the CPR do not apply to LSPOs,

as they are not costs orders, nor has any principled basis been offered, in *BC v DE* or since, for their application by analogy. Indeed, as Mostyn J said in *TL v ML* [2005] EWHC 2860 (Fam), a judgment which was approved by Wilson LJ (as he then was) in *Currey v Currey* [2006] EWCA Civ 1338, saying '[i]t is clear that a costs allowance is not a costs order'. As Wilson LJ went on to say in *Currey*, under the then-anticipated 'no order as to costs' rule, the 'proper treatment of liabilities for costs ... will generally be that they are debts to which the judge should have regard when making his substantive award', rendering interim provision for costs 'consonant' with that approach.

There does not appear to be another reported example of this 'notional assessment' approach until it was renewed by Cobb J in *Re Z (Schedule 1: Legal Costs Funding Order; Interim Financial Provision)* [2020] EWFC 80.<sup>5</sup> On this occasion Cobb J deducted 30% of the mother's costs incurred up to the making of the LSPO 'to reflect a notional standard of assessment', having 'taken a broad view about whether the costs are reasonably incurred, reasonable in amount and proportionate to the matters in issue', and referring again to the same provisions of the CPR. This approach was repeated by Cobb J in a later hearing in the same case, *Re Z (No 2) (Schedule 1: Further Legal Costs Funding Order; Further Interim Financial Provision)* [2021] EWFC 72. Peel J then also adopted the 'notional assessment' approach in the matrimonial case of *MG v GM* [2022] EWFC 8, saying 'I further propose to apply a discount, which is frequently (but not invariably) applied to the sums sought in order to reflect a notional standard basis of assessment', and applying a 30% discount.<sup>6</sup>

Principled opposition to the 'notional assessment' approach has now been provided by Francis J in *DR v ES* [2022] EWFC 62 (whilst dated January 2022 the judgment was not published until March 2023). The judge recorded 'I am completely satisfied, until somebody establishes otherwise, that all of the bills that [the wife's solicitors] have rendered are bills for time that has been properly incurred'. He went on to say (at [58]), without directly engaging with the contrary case-law on the point:

'Mr Hale, on behalf of the husband, made the very valid point that when one goes through an assessment of costs, you get about 30 per cent knocked off. Well, that may be true in civil litigation, it may be true where one party is ordered to pay the other's costs in some family litigation, but my job at the moment is not assessing costs in that sense of somebody being made to pay an order for costs, it is dealing with debt.'

Certainly, solicitors hope that these words are heeded. 'Notional assessment' presents solicitors with several challenges. Not the least of them is the strain on the solicitor-client relationship as the result of the judicial suggestion that a third of the work done by the solicitor to that point was not reasonable.

Most solicitor practices operate on a profitability ratio of between 30 and 40%. A notional assessment of 30% (unless later reversed) removes virtually all profit from the work. Solicitors therefore face the possibility of significant work for little or no profit. Whether to undertake such work at all is a reasonable question to ask.

Lastly where costs have been 'notionally assessed', the ultimate recoverability of the difference at a Final Hearing remains possible, and therefore constitutes an interest that

the solicitors have in the proceedings. (The same applies to overspends on the LSPO awarded, addressed below.) When, in *BC v DE*, Cobb J held that the costs of the currently instructed solicitors could be recoverable under an LSPO, he explained the desirability of this on the basis that significant outstanding costs can impact the solicitor's conduct of the litigation and motivate a client to accept a settlement that is less than fair if it settles her debts. Yet that is the result of leaving the client owing a significant debt to their solicitor.

## The LSPO budget

Judicial approaches to applicants' costs budgets have varied in recent case-law, with the costs of the other party often a factor. Yet this was not always so: in *A v A* [2001] 1 FLR 377, the case in which Holman J established the pre-statutory interim costs provision, he took a straightforward approach. The wife set out in her affidavit that she required £4,000 per month towards her legal fees and Holman J held: 'Of course, that affidavit was settled by, or on the instructions of, the wife's solicitor himself and may be self-serving. But I see no reason why I should not accept the truth and reality of it'. Such an approach has not much been seen in recent case-law.

There have been cases where a judge has reviewed a proposed budget and explained their reasons for reducing it. In *LP v AE* [2020] EWHC 1668 (Fam), Cohen J ordered an LSPO of £48,000 where the mother had sought £89,000, explaining that he considered it unreasonable for the father to pay for a partner at £620 per hour, or for hearings and conferences to be attended by a partner and an associate.

More often, a broad approach is taken based on the other party's (i.e. the payer's) costs. This can result in the amount sought being granted, even where it seems high to the judge, as in *Chai v Peng* [2014] EWHC 1519 (Fam) where the wife's (reduced) budget of £60,000 per month was described by Holman J as 'enormous', but given the scale of the case and 'the rate at which the husband himself is expending legal costs ... necessary and reasonable'. Similarly, in *LKH v TQA AL Z (Interim Maintenance and Costs Funding)* [2018] EWHC 1214 (Fam), Holman J described the £250,000 sought by the wife as 'eye watering', but granted it as it was proportionate to the husband's costs.

Alternatively, this comparative approach results in a reduction of the applicant's budget, and to repeat a point made before, the LSPO application often has to be made before the respondent's legal team have got into their stride at all. In *Re Z (No 1)*, Cobb J reduced the amount sought by the mother from £95,000 to £65,000, which he explained as a caution against encouraging the mother to litigate, and 'to reflect the lower bills of the father'.<sup>7</sup> In *MG v GM* [2022] EWFC 8, Peel J described the costs sought by the wife of between £381,000 and £423,000 as 'too high' and awarded £250,000, taking into account the projected costs of the husband (who did not pay VAT) of £175,000.

The apogee of this approach is the 'pound for pound' order, under which a respondent is required to pay £1 to the applicant's lawyers for each £1 paid to their own. Simon Calhaem, considered such orders in a blog on the *Family Remedies Journal* website,<sup>8</sup> noting that they are, anecdotally, becoming more common. He convincingly argues that such orders were made as enforcement mechanisms, and should be restricted to these circumstances, as they break

the causal link between what the applicant reasonably needs to be represented and the quantum of the LSPO.

An alternative, and arguably more realistic, approach was (again) taken by Francis J in *DR v ES*, where he recognised that in some cases costs will, due to the nature of family law work, exceed what may seem 'reasonable', and that it will sometimes be reasonable for the applicant's costs to exceed those of the respondent. He wrote (at [57]):

'Now, I know from my own experience when I was at the bar that, sometimes, a vulnerable or anxious or talkative client can spend two or three hours doing something that should have taken one, and sometimes I would have said to my client, "You know, this is quite expensive social work", but sometimes you have just got to do it, and it is important for the husband that the wife is properly advised and that she understands what she is doing. He is a commercially aware sophisticated businessman dealing with property and companies in England. The wife came to England in the circumstances that I identified, and she is not commercially aware, she does not understand the husband's business circumstances, she has to ask the questions through her lawyers, and it does not surprise me at all that she incurs greater costs than he does in the initial phase. It may be, of course, that the time will come when his costs will be greater because his team have to spend a lot of time preparing detailed answers to questionnaire and all of the documents that go with those answers but, at the moment, I am not prepared to accept the criticisms made of the lawyers' bills.'

Francis J granted the wife the amount she sought to take the case to the next stage, saying '[i]t is essential that she is fully funded so that she can conduct the FDR with the benefit of her experienced solicitors and counsel'. Even in cases where the applicant is not a 'vulnerable or anxious or talkative' client their costs burden may be higher, particularly in Schedule 1 cases where the respondent is running the millionaire's defence.

As solicitors, we do our best to put forward careful and considered budgets. We know our clients and will often have the measure of the other side. We are experienced in running these cases and are in the best position to assess what it will cost to run them well. As officers of the court with a duty to act with integrity, a starting assumption that the amount we posit is realistic (as offered by Holman J in *A v A*) would seem justified. As with the approach to 'notional assessment', it is to be hoped that Francis J's approach to budgets will be followed.

## Working under an LSPO

The first task after an LSPO is made will often be to explain to the client why the budget you put forward has been reduced and the impact this will have on the conduct of their case. The very fact of the reduction can affect the solicitor-client relationship and the client's confidence in their lawyer and their worth. The lawyer's need to limit the time they spend on the case in an effort to remain within the costs estimate may also create difficulties, particularly in the case of an especially anxious and/or demanding client. As matters progress, solicitors may need to decline to take steps requested by the client on the basis that it was not anticipated when the budget was prepared, or to ensure later headroom. This potentially raises contractual

and regulatory issues, and attention will have to be paid to the terms of retainer letters to make clear that we can refuse to carry out instructions falling outside the funding arrangements. Beyond what this might sometimes do to client relations, it could place us into a degree of executive control of proceedings with which we may not feel comfortable.

Family solicitors are accustomed to operating within costs estimates – most of our clients do not have unlimited resources. This does not generally create a large imbalance between the parties; where resources are generally limited both parties are operating within tight constraints. In bigger money cases, so long as they are conducting the litigation reasonably, the weaker financial party can expect their costs to be accommodated within the award. Yet where one party is operating under an LSPO, perhaps one set at a lower amount than their solicitor assessed as necessary, with the other party free to litigate as they wish, a significant power imbalance arises.

This imbalance can be exacerbated by the characteristics often exhibited in cases in which LSPOs tend to be made, and which make the cutting of budgets particularly painful. The opposition is often a top firm occupying a land of plenty with a wealthy client ready to litigate vigorously with no judicially applied limit on what can be spent. The LSPO is most unlikely to have anticipated all of the issues that the respondent(s) might wish to raise and which will create work which the award was not designed to meet – indeed, that might sometimes be the motive. In short, it cannot come as a surprise that an LSPO made months before might not have anticipated everything that has subsequently occurred in vigorous litigation. Unless a further LSPO is successfully applied for, this will likely result in an ‘overspend’, for which the client will be indebted to their lawyer.

## Overspend

Anecdotal evidence as well as case-law illustrate that in practice solicitors acting under an LSPO do, indeed, frequently ‘overspend’. However, the recent decisions of Cobb J in *Re Z (No 4)* and Cohen J in *Xanthopoulos v Rakshina* [2023] EWFC 50 make clear that solicitors should expect that the respondent will not be ordered to pay such costs, leaving the debt with their client.

Yet this was not always Cobb J’s approach. In *BC v DE* (as discussed above, the case in which ‘notional assessment’ approach was instigated) the mother’s lawyers had underestimated their fees by over 50%. Cobb J said (at [32]):

‘I understand the father’s lawyers’ surprise and frustration at this miscalculation on the part of the mother’s lawyers, but I see no reason why the mother should not be entitled to recover the balance for the work done, which seems ... to be reasonable ... where a legal costs funding claim is made in relation to outstanding incurred costs, at least the court and the paying party can see the reasonableness of the costs incurred.’

A few days later HHJ Booth, in *M v F* [2016] EWHC B12 (Fam), rejected the father’s argument that he should not have to pay the mother’s overspend as she should have kept within her budget. He said “[c]osts budgeting” has no place in family proceedings. The sums awarded were not expressed to be a limit’. He added ‘any reduction of the sums awarded for the benefit of the child to pay towards

litigation costs would, absent something exceptional, be impermissible’. Given these comments, solicitors could reasonably have expected flexibility in respect of any overspend, at least in Schedule 1 cases.

The subsequent case-law reflects a diversity of approaches. There are cases in which it was ordered that overspend not be repaid because of the applicant’s poor litigation conduct (such as the matrimonial case of *H v H* [2016] EWFC B81 (Fam)), or where an overspend was ordered to be paid because it arose from the respondent’s poor litigation conduct (such as *MT v VA (Second Application: Legal Services Provision Order)* [2020] EWHC 3087 (Fam), where the applicant’s overspend was incurred defending an appeal against the LSPO and in taking enforcement action, and *A v V* [2022] EWHC 3501 (Fam), where it was held that ‘the litigation has been fuelled by the [respondent] father’s unreasonable and remarkable conduct’).

In other cases – seemingly and understandably only Schedule 1 cases – respondents have been ordered to pay an overspend notwithstanding the applicant’s poor litigation conduct. In *CA v DR* [2021] EWFC 21, Roberts J expressed sympathy for the father’s objection to paying £12,000 of the mother’s costs on the basis that that sum had been unreasonably incurred, but noted that it was ‘a contractual debt for which the mother is liable’ and represented a financial need which she would order the father to pay. Recorder Chandler KC sought to balance the competing interests in *Re A (Schedule 1: Overspend: Costs Clawback) (Rev 1)* [2022] EWFC 21, where the father objected to paying £70,000 of the mother’s costs which related to her unsuccessful appeal of an interim maintenance order, and £60,000 which represented an overspend. The judge set out (at [111]), ‘[w]hile I have sympathy with [the Father’s] submissions, and I agree that the Father should not in principle have had to pay the costs of the appeal or the overspend, my overarching point is that the Mother’s hard liabilities have to be paid, and the only way this can happen is by the Father paying these’. He therefore ordered that the sums be paid, but subject to a clawback to be enforced only with leave of the court if the mother made further applications. Cohen J, hearing the appeal as *G v W* [2022] EWHC 1101 (Fam), accepted that this approach was unusual but considered it to be ‘eminently within the discretion of the judge in the circumstances of the case’.

Yet in two other recent cases – one Schedule 1 and one Part III – judges have taken the opposite approach, foreshadowed in interim decisions and affirmed at the final hearing. In *Re Z (No 2)*, Cobb J criticised the mother’s solicitors, saying they ‘were not entitled’ to assume overspends would be retrospectively authorised and warning that ‘[a]ny potential overspend will require prior court authorisation, or will otherwise need to be accepted at the solicitor’s risk’. Mostyn J endorsed Cobb J’s approach at an interim hearing in *Xanthopoulos v Rakshina* [2022] EWFC 30. At the final hearing in *Re Z (No 4)*, Cobb J made no award in respect of the mother’s overspend, criticising her solicitors for ‘ignoring’ the terms of the LSPO and saying ‘I am not prepared to foist the largely unauthorised expense on the father’. By the time of the final hearing in *Xanthopoulos v Rakshina* [2023] EWFC 50, the husband – unrepresented and absent at the final hearing – owed £900,000 to five



different former solicitors, all of which represented overspend. Cohen J made no provision for this, saying (at [153]):

‘[i]t is not the job of the court to act as the insurers of solicitors who overshoot, let alone dramatically overshoot, the sum provided by way of LSPO ... If the solicitors run short of funds then it is their duty to apply to the court for a further order. If they choose to carry on with their work and incur further fees then they do so at their own risk’.

These two decisions, notwithstanding their inconsistency with other recent High Court authorities, means solicitors must now assume that we will not recover overspends, irrespective of the circumstances. Such an approach makes the prospects of acting under an LSPO even less appealing. The options where original estimates – or judicially reduced budgets – are about to be overtaken by events are not palatable. An application for an increase will cost a further tidy sum, for which the solicitors will be entirely at risk, with no guarantee that the application – probably contested – will succeed. From the client’s perspective, the remaining funds may be better expended on taking substantive steps in the proceedings. Further, unless there happens to be an approaching and available interim hearing shortly before the budget is likely to be breached, a standalone hearing will be needed. The time it can take to obtain one means that either a high degree of prescience and a very early application are required, or the litigation must slow down whilst a hearing is awaited. The alternative of standing down entirely, with the risk that the applicant might be left unrepresented, goes completely against the grain. We suspect the result, more often than not, may be that no charge whatever will be made for those steps which the original estimate did not cover.

The costs budgeting regime which exists in much of the civil litigation sphere by which the costs recoverable from the losing party are limited to a pre-approved budget does not apply in the Family Court. It may, of course, be where some in the Family Court would like to go; Mostyn J expressed that view in *J v J* [2014] EWHC 3654 (Fam) 9 years ago.<sup>9</sup> In a November 2021 article for Resolution’s *The Review*, James Pirrie highlighted that the court’s approach to LSPOs could be seen as the court’s ‘first tentative steps’ towards costs capping in family cases.<sup>10</sup> The latest judgments validate his assessment. It now seems that a form of costs capping applies to one party in LSPO cases, limiting recoverability of the applicant’s costs in excess of the permitted budget (which has generally been subject only to a broad assessment rather than a detailed analysis). This not only exacerbates the power imbalance between the parties as explored above, but discriminates between applicants who require an LSPO and those who are able to fund their cases through other means, e.g. loans.

### The need for a clear and principled approach furthering the purpose of LSPOs

LSPOs must be workable if solicitors are to be willing to act under them. That five firms in a single case are unlikely to recover a total of £900,000 owed to them (little outright provision was made for the otherwise impecunious husband) suggests that this may not be the case. Part of the solution no doubt lies with us – as solicitors we must

prepare thorough budgets, do our best to act within them, and apply for a further LSPO as soon as it is clear that one will be needed (albeit that this is likely to increase expenses, slow down cases and drain court time). Yet the situation would also be assisted by the judiciary displaying trust that solicitors provide realistic budgets and reverting to showing flexibility where there has been some overspend but the costs have been reasonably incurred.

The current law is muddled in terms of principle, and potentially unfair to both solicitors and their clients. Authoritative guidance on the following points is needed:

- (1) Is the deduction of up to 30% of costs incurred prior to the making of an LSPO by way of a notional assessment appropriate? If it is, should the respondent be ordered to pay the deducted sum at the end of the proceedings? Alternatively, should the court, in line with Francis J’s approach in *DR v ES*, assume that pre-LSPO costs have been properly incurred and should be provided for under the LSPO unless otherwise established?
- (2) Should applicants be penalised for delay in making an LSPO application through limited interim recovery of pre-application costs? Should the same approach apply where delay reflects efforts to reach a negotiated solution? If a penalty is applied, should the balance generally be payable by the respondent at the end of the proceedings?
- (3) How should judges approach an LSPO budget for future costs? Should solicitors’ budgets generally be trusted save where there is an obvious cause for concern? Should a judge conduct a detailed consideration of the budget, akin to the costs budgeting process in civil cases? Is it appropriate for an applicant’s costs to be limited to the respondent’s (anticipated) costs?
- (4) In what circumstances may an overspend be recovered? Does this differ in matrimonial cases and in Schedule 1 cases?

Until there is both clarity and an approach that is perceived to be broadly fair to all involved, solicitors may be reluctant to act under LSPOs. Combined with the threat to litigation lending arising from the *Level* litigation, access to justice for those lacking assets in their own names could be in placed in jeopardy.

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### Notes

- 1 See e.g. *Gallagher v Gallagher (No 2)* (*Financial Remedies*) [2022] EWFC 53, *YC v ZC* [2022] EWFC 137, *WC v HC* [2022] EWFC 40, *Traharne v Limb* [2022] EWFC 27, *A v M* [2021] EWFC 89, *Crowther v Crowther* [2021] EWFC 88 and *Xanthopoulos v Rakshina* [2023] EWFC 50.
- 2 *A v A* [2001] 1 FLR 377, *Moses-Taiga v Taiga* [2005] EWCA Civ 1013, *TL v ML & Ors (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263 and *Currey v Currey (No 2)* [2006] EWCA Civ 1338, [2007] 1 FLR 946.
- 3 In *LP v AE* [2020] EWHC 1668 (Fam), Cohen J described a 2-

month delay in issuing an LSPO application as ‘highly regrettable’, saying it had been issued ‘far too late’ and limiting interim recovery of costs incurred prior to the application; in *R v R* [2021] EWHC 195 (Fam), [2021] All ER (D) 93, Nicholas Cusworth KC (sitting as a Deputy High Court Judge) characterised costs incurred prior to the issue of the LSPO application as ‘costs in relation to which solicitors have made “a decision to extend ... credit”’ and concluded ‘I am not persuaded that all or even the majority of that amount [incurred prior to the application] need now be discharged to achieve a fair balance between the parties’. In the context of a Schedule 1 case, *R v F (Schedule One: Child Maintenance: Mother’s Costs of Contact Proceedings)* [2011] 2 FLR 991, Bodey J observed that if it looks like such an application is going to be necessary ‘it should be issued without delay’.

4 He applied this discount to prospective costs as well, a lead which has rarely been followed.

5 No mention of notional assessment was made when providing for unpaid costs under an LSPO by Roberts J in *MT v VA (Second Application: Legal Services Provision order)* [2020] EWHC 3087 (Fam) or by Cohen J in *LP v AE* [2020] EWHC 1668 (Fam).

6 Albeit in a different context, namely the making of an *inter partes* costs order, in *JM v CZ (Costs: Ex Parte Order)* [2014] EWHC 1125 (Fam), [2015] 1 FLR 559, Mostyn J said that he had invited counsel to give him their anecdotal experience as to the usual percentage tariff that is allowed on a standard assessment. Perhaps unsurprisingly the receiving party said it laid between 70% and 80% and the paying party around 66%. Mostyn J concluded that ‘the correct percentage yard-

stick which I should take for the purposes of assessing these costs on the standard basis is 70%’.

7 As is clear from the judgment in *Re Z (No 2) (Schedule 1: Further Legal Costs Funding Order; Further Interim Financial Provision)* [2021] EWFC 72, the father’s costs soon increased significantly.

8 ‘Pound for pound orders: Are they legal?’, available at <https://financialremediesjournal.com/content/pound-for-pound-orders-are-they-legal.eddfd8b9c2cc48a3926fc3e77b8ccad8.htm>

9 Mostyn J further expressed his frustration with the issue in *Gallagher v Gallagher (No 2)* [2022] EWFC 53 at [13], ‘I am not going to repeat my lamentations about the exorbitance of costs which I have expressed in recent judgments. Nor am I going to repeat my cry that something must be done. In this judgment I merely record the facts and I leave it either to the Lord Chancellor, or to the Family Procedure Rule Committee, to do something about it’.

10 In a November 2021 article for Resolution’s *The Review*, ‘A chill wind in costs ...’, James Pirrie referencing Cobb J’s criticism of the wife’s solicitors at [32], [34] and [41] of *Re Z (No 2) (Schedule 1: Further Legal Costs Funding Order; Further Interim Financial Provision)* [2021] EWFC 72 commented: ‘Previously there was a significant separation: it felt as though we were free to charge out clients for work carried out: they of course being free to challenge our costs as falling short in some way. However, the events of litigation are very much a separate conversation. Now the court is taking some first tentative steps towards costs-capping what is charged’.

# Goddard-Watts – The Second Sequel: Fraud Unravels All, Sometimes

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The words ‘*Goddard-Watts*’ may cause a feeling of *déjà vu* for financial remedy practitioners. After their separation and divorce (in 2009 and 2010, respectively) the parties settled by consent the financial relief claims arising from their divorce in 2010. Subsequently, it was found on two separate occasions that the husband had, first, misrepresented his assets and, second, after the substantive rehearing in 2016,<sup>1</sup> failed to make appropriate disclosure of likely significant capital accumulations in the foreseeable future. Consequently, two ‘final’ financial relief orders were set aside on the basis of his fraudulent non-disclosure in 2015 and 2019, respectively.<sup>2</sup>

Sir Jonathan Cohen heard the third determination of the wife’s claims in January 2022.<sup>3</sup> He adopted what has come to be conventionally described as ‘the *Kingdon* approach’.<sup>4</sup> That is, Cohen J relied upon the determination made by Moylan J (as he then was) in the first rehearing of the wife’s financial relief application in 2016 that she had received an appropriate share of the husband’s company, known as ‘CBA’, in 2010.

The wife appealed this approach arguing that she could not receive a ‘fair’ resolution of her financial claim without an investigation of all financial matters *de novo*; to do otherwise, she argued, would have meant that the husband had benefitted from the fraud he perpetrated.<sup>5</sup>

In *Kingdon v Kingdon* [2010] EWCA Civ 1251, Wilson LJ

(as he then was) giving the leading judgment, with which the other members of the Court of Appeal agreed, concluded that the first-instance judge was entitled to proceed to repair the defect by providing an additional lump sum award referable to the husband’s non-disclosed shares, subject to the husband’s ability to pay. The judge had a discretion how best to proceed; in the exercise of that discretion, he was required to seek to deal with the case justly and in a way proportionate to the complexity of the issues and which would save expense and ensure expedition. The husband’s net gain could be precisely quantified and the appropriate percentage to be awarded to the wife able to be readily expressed.

In *Sharland v Sharland* [2015] UKSC 60, Baroness Hale of Richmond at [43] emphasised that the fact that there had been misrepresentation or non-disclosure justifying the setting aside of an order did not mean that the renewed financial remedy proceedings must necessarily start from scratch. She noted that *Kingdon v Kingdon* provided a good example of how it had been possible to isolate the issues to which the non-disclosure related and deal only with those. There was ‘enormous flexibility’ to enable the procedure to fit the case.

The original consent order in *Goddard-Watts*, approved on 1 June 2010 by Deputy District Judge Marco, provided that the wife received £7.6m in money or moneys-worth, of which £1m was to be paid in instalments over 8 years. On the assets then disclosed, which did not include the husband’s later disclosed trust interests, the husband received the equivalent of approximately £9m.

In 2014, the wife discovered that the husband was considered by their trustees to be the principal beneficiary of two trusts. She applied to set aside the consent order. Moor J heard the application in July 2015. He found that the husband had engaged in deliberate and material non-disclosure, set aside the consent order, and gave directions for re-hearing.

The case next came before Moylan J (as he then was) for rehearing in June 2016 with a final judgment handed down in November 2016. The trusts were found to have total assets of £12.67m, including liquid assets of £8.4m. The husband’s current capital resources, excluding the trust assets, totalled £22.8m/£24.2m. The wife’s assets amounted to £4.5 million. Moylan J concluded that at least 65% of the trusts’ assets should be treated as available ‘marital’ resources, and the wife should be awarded 32.5% of the trusts’ assets, by way of lump sums payable on realisation. No discount was necessary to reflect the fact that the husband was retaining illiquid assets (namely his business shares), since this had already been considered in the unequal division of the company’s worth effected in 2010. Consequently, he awarded the wife an additional lump sum of £6.42m.

Moylan J therefore determined the case by isolating the resources which were not disclosed and dealt only with those subject to accelerating the outstanding payment of £1m lump sum previously payable over a period of 8 years. He did not agree with the wife’s submission that the only way of achieving a fair outcome was to give the wife an award based on current values of the assets. Instead, he:

‘must determine what is fair *now* and [he] must do so by reference to all the circumstances in the case. These include the current resources available to the parties

but also the division which was effected in 2010 and the fact that this was procured by non-disclosure ... as referred to by the Supreme Court, the court has “enormous flexibility” in deciding how to determine the claim and, in [his] view, it would not be helpful for the flexibility to become subject to sub-principles or over-lain with other asserted overarching considerations’ (at [88] and [89])

However, the premise upon which Moylan J proceeded in respect of the 2016 valuation of the husband’s business (CBA) proved to be unsound and the husband’s evidence in relation thereto disingenuous. In January 2018, 25% of the total shares in CBA were sold. The husband received £20.45m and the children’s settlement worth £4.45m. The sale contract provided the purchaser with an option exercisable in or before January 2021 to buy the residue of the shares for £75m, which would result in the husband receiving a further £61.3m and the children’s trust its proportionate share. The husband had an option for 2 years, beginning in January 2021, to buy back the shares at the sale price of £25m.

The wife came to know of the sale and applied to set aside Moylan J’s order. The set aside application came before Holman J who was ‘driven to conclude’ that the husband’s evidence on the ‘crunch issue’ was ‘evasive’ and ‘untrue’. Holman J therefore set aside the 2016 order, finding that if Moylan J had known the true facts he would have withheld the handing down of judgment and adjourned the proceedings while the full and true facts were ascertained; the non-disclosure had deprived the wife ‘of a real prospect of doing better at a full hearing’, per *Sharland v Sharland* at [35].

On the (second) rehearing, Sir Jonathan Cohen acknowledged that he was adjudicating upon the wife’s claim *de novo* ‘albeit against the background of the orders made in the past which have provided her with funds’. Like Holman J, he noted that the husband’s disclosure ‘has deprived [the wife] of the opportunity of being able to consider the resolution of her claims with full knowledge of what the asset base was’. However, unlike Holman J, he chose to adopt the *Kingdon* approach for (he said) the following reasons:

- (1) the case before him had been a single-issue case: solely about the value and realisation of H’s shares in CBA. This was inevitable as W received her fair share of the non-disclosed trusts in 2016 and her share of the other assets in 2010;
- (2) Moylan J had adopted the *Kingdon* approach in 2016 and the fact that one further aspect of non-disclosure has come to light did not lead to a conclusion that he should adopt a different course. There was merit in consistency;
- (3) H’s disclosure of the value of CBA in 2010 was in the right region;
- (4) it followed inevitably that the wife received her share of the company upon separation. Since then, she has made no contribution to the marital partnership (albeit she had made a significant contribution to the children of the family);
- (5) if CBA had gone bust, the husband would not have been able to resuscitate a claim against the wife. He took the shares in the company as part of the settlement and whether the company succeeded or failed

would have made no difference to the outcome of the case. This illustrated that the sharing of the company took place in 2010 and there was no cause to revisit. The husband was not trading with the wife’s funds and she was not bearing any of the risk; and

- (6) it is well established law that changes in the value of an asset after an order effecting sharing has been made would not justify reopening the capital claims. Each party bears the consequences of the change in the value of their portfolios.

Sir Jonathan Cohen therefore concluded that it would not in general terms be appropriate or fair for the wife to share in the current renaissance of the business after its near recent collapse. However, he did conclude that he could properly consider that the entire burden of the children’s care had fallen on the wife from 2010 and, as it could not have been in the contemplation of either party that this would be the case, he could take that factor into account in his approach to needs.

Sir Jonathan Cohen thereafter stated that he did not accept that this was an all (complete rehearing) or nothing (sharing having already taken place) case. Having assessed the wife’s income needs as £200,000 per annum, the shortfall required to supplement her capital fund from which to draw the income was £1.1m. He therefore made this award which he considered ‘produces a fair outcome in all the circumstances of the case’.

At the root of the appeal before the Court of Appeal was the submission that Sir Jonathan Cohen failed to accord due weight to the husband’s fraud when considering the correct approach to determining the wife’s restored financial relief application. Consequently, in that he wrongly isolated the wife’s interest in CBA by reference to the tainted orders made in 2010 and 2016, the husband benefitted from the fraud he had perpetrated, since the wife was precluded from having her claim fully and fairly determined in 2022 (or previously) based on the actual contemporaneous financial landscape, even if subject to consideration of post-separation accrual. It was ‘inconceivable’ that the endorsement of the *Kingdon* approach in [43] of *Sharland* was intended to override the principles which had been identified in [32] and [34] of the judgment, namely to protect the victim of fraud and the integrity of the court process and to prevent the party who perpetrated the fraud benefitting from it.

Macur LJ stated at [51] that:

‘care must be taken not to elevate the exact approach which was adopted by the first instance judge in *Kingdon*, as approved by Wilson LJ in the Court of Appeal, and as condoned by Baroness Hale in *Sharland*, into principle. That is, *Kingdon* is authority for the principle that the court retains a wide flexibility to adapt or “enable the procedure to fit the case”; it *may* be possible to isolate the issues to which the non-disclosure relates and thereafter to rectify the defect without the need to dismantle the whole order; see *Kingdon* [37]. The approach which the judge had adopted in *Kingdon* certainly did “fit the case”, for it took into account that it was the husband who sought to benefit from the fraud he had perpetrated in order to set aside the whole order to his own advantage. The procedure and adjudication reflected his “degree of turpitude”. (See [35] and [37]).’ (emphasis added)

However, Macur LJ concluded that it was not appropriate for Sir Jonathan Cohen to have adopted a *Kingdon* approach in this case. She disagreed with the husband that the ‘taint’ of non-disclosure merely provided a gateway to review an order at either first instance or in the Court of Appeal. At the most basic level, a previous deception once found, ‘infects’ the fraudulent party in terms of the reliability of their evidence. At another level it raises the equitable principle that a party is not to be allowed to benefit from their fraud by manipulation of the court process to the detriment of the victim of fraud.

Macur LJ found that Sir Jonathan Cohen had not conducted his own assessment of fair division independent of Moylan J’s approach. In any hearing heard *de novo*, it is inevitable that the court will be faced with arguments of post-separation accrual, as was contemplated by Moylan J in [96] of his judgment, and must deal with them to achieve fairness. The wife did not have the opportunity to make any arguments in this regard in relation to the newly disclosed facts. The husband’s fraud should provide the context against which the judge should make the fresh evaluation.

Macur LJ considered the husband’s fraudulent non-disclosure in 2016, particularly when seen in the context of his previous fraudulent non-disclosure, to be so far-reaching that it positively required the judge to consider ‘the entire financial landscape’ completely anew (see *Kingdon* at [36]). Consequently, she concluded the judge was wrong to determine the wife’s application by segregation of the capital award agreed in 2010 and confirmed in 2016. This was too blunt a division of the wife’s claim. The unfortunate delay in finalising the wife’s application has been caused entirely by the husband’s fraud; the wife was entitled to have her application considered *in toto* and in real time. She had not been allowed to air her claim in the full knowledge of the disclosable facts. It was, however, made clear that the wife would not necessarily achieve a greater award.

Although the wife succeeded, it remains the case that, as Carr LJ stated in her supporting judgment, whilst there are judicial statements at the highest level to the effect that fraud unravels all (see, e.g. ‘A judgment that is tainted and affected by fraudulent conduct is tainted throughout ...’ per Lord Brunswick in *Hip Foong Hong v H Neroira & Co* [1918] AC 888 at 894, cited with approval recently by Lord Kerr in *Takhar v Gracefield Developments Ltd & Ors* [2019] UKSC 13

at [45]) this ‘broad mantra’ needs to be treated with caution given that, as the judgments in *Kingdon* and *Sharland* themselves demonstrate, fraud does *not* necessarily unravel all. Although it is imperative that a fraudster must not be able to retain an advantage derived from their fraud, and the courts must be astute in ensuring so, its mere presence does not always unravel all. It cannot do so. There are also statutory exceptions (see *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 710) and circumstances where fraudulent non-disclosure is proved but remains insufficiently material to justify setting aside the order.

*Goddard-Watts* was a case which, on its facts, demanded the unravelment of all because the extent, materiality and repetition of the non-disclosure was so great that anything else would have failed to do justice. So, the degree of turpitude (see *Williams v Lindley* [2005] EWCA Civ 103), although not expressly referenced, remains a factor of paramount importance when assessing whether the fraud is capable of isolation and remedy.

Proportionality is essential (or at least should be) to almost all decisions family lawyers have to make, and applications to set aside financial orders are no different: it is the thread which runs through *Kingdon* and has been endorsed by courts of the highest level. Once the fraud has been proved it is to be judged against the nature, extent and pervasiveness of the fraud and the appropriate and proportionate next steps determined thereafter.

So, the principle is not absolute. But its strength has not been diluted, just clarified. In fact, this case demonstrates just how powerfully the principle is enforced: that 13 years, three final orders, two appeals and (on our count) no fewer than five reported judgments later, justice requires the matter start afresh. Once fully digested, it becomes clear that the judgment in *Goddard-Watts* goes some way to settle the tension that can exist between finality and fairness, and reaffirms that fraudsters can expect short shrift from judges in England and Wales.

## Notes

- 1 *Goddard-Watts v Goddard-Watts* [2016] EWHC 3000 (Fam).
- 2 *KG v LG (No 2)* [2015] EWFC 64 and [2019] 1 FLR 885, respectively.
- 3 *Goddard-Watts v Goddard-Watts* [2022] EWHC 711 (Fam).
- 4 *Kingdon v Kingdon* [2010] EWCA Civ 1251.
- 5 *Goddard-Watts v Goddard-Watts* [2023] EWCA Civ 115.

# Unilateral Assets and Short Marriages after *E v L* – Another White Leopard?

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It was made clear by the Court of Appeal in *Miller v Miller* [2005] EWCA Civ 984, [2006] 1 FLR 151 that none of the pre-*White v White* [2000] UKHL 54, [2000] 2 FLR 981 so-called short marriage cases<sup>1</sup> had survived the change in judicial approach that *White* heralded.

As Thorpe LJ stated (at [32]) the principle drawn from those cases ‘was that the award should be enough to get the unhappy applicant back on her feet’. At [33] and following he identified a number of ‘very good reasons’ why this was no longer ‘the modern approach’ namely: (1) it originated and developed during ‘long years’ in which the yardstick for measuring the applicant’s claim was an assessment of her (and is was usually her) reasonable requirements; (2) a marriage is not to be equated to a purely financial venture where the court may redress breach of

contract or the disintegration of a partnership by an award of damages or other financial relief and MCA 1973, s 25 requires a more sophisticated evaluation of the extent of the wife’s commitment to and investment in the marriage emotionally and psychologically; and (3) reliance on the old cases was precluded by the Court of Appeal’s decision in *Foster v Foster* [2003] EWCA Civ 565, [2003] 2 FLR 299.

Wall LJ (as he then was) took a similar approach (at [70] and following) and was ‘in no doubt at all’ that the earlier decisions had not survived *White* concluding (at [76]) that all these cases ‘are all liable to attack on the basis that they are discriminatory’.

On appeal to the House of Lords (*Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186) Lord Nicholls of Birkenhead affirmed this conclusion stating (at [55]) that:

‘In the 1980s cases attention was directed predominantly at the wife’s needs. There may be cases of short marriages where the limited financial resources of the parties necessarily mean that attention will still have to be focused on the parties’ needs. That is not so in big money cases. Then the court is concerned to decide what would be a fair division of the whole of the assets, taking into account the parties’ respective financial needs and any need for compensation. The court will look at all the circumstances. The general approach in this type of case should be to consider whether, and to what extent, there is good reason for departing from equality. As already indicated, in short marriage cases there will often be a good reason for departing substantially from equality with regard to non-matrimonial property.’<sup>2</sup>

The ‘equal sharing’ principle, explicitly introduced in *Miller/McFarlane* by which each party is entitled to an equal share of the assets of the partnership unless there is a good reason to the contrary, is therefore clearly now applicable as much to short marriages as to long marriages. As Lord Nicholls stated (at [17]) ‘[a] short marriage is no less a partnership of equals than a long marriage. The difference is that a short marriage has been less enduring. In the nature of things this will affect the quantum of the financial fruits of the partnership’ and (at [19]) ‘[t]o confine the *White* approach to the “fruits of a long marital partnership” would be to re-introduce precisely the sort of discrimination the *White* case was intended to negate.’

So far, so straightforward.

But then came *Sharp v Sharp* [2017] EWCA Civ 408, [2017] 2 FLR 1095 – the wife’s appeal from *JS v RS* [2015] EWHC 2921 (Fam), where Sir Peter Singer had awarded the husband £2.725m being one half of what he found to be the ‘matrimonial acquest’. The wife’s central ground of appeal was that her marriage fell squarely within the confines of the kind of case Baroness Hale of Richmond had envisaged in [153] of *Miller/McFarlane* (namely, the genuine dual-career family, where both parties have worked throughout the marriage and not all assets have been pooled and where family assets should be divided equally but it would be fair to leave undisturbed ‘whatever additional surplus each has accumulated during his or her working life’) and that, as a consequence, there should have been a departure from the sharing principle.

The Court of Appeal agreed, albeit not to the extent that the wife had hoped, reducing the husband’s award to £2m

based on their repeated phrase – a ‘relaxation of the sharing principle’ – in relation to what has become known as ‘unilateral assets’ (a phrase coined by Burton J in *S v S (Non-Matrimonial Property: Conduct)* [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496 at [29] and picked up in *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [82] to describe ‘non-business partnership, non-family asset cases’ as referred to by Baroness Hale in *Miller/McFarlane* at [150]).

The facts of *Sharp* are somewhat exceptional: at the time of separating, both parties were in their early 40s. They did not have children. When they met, each was earning around £100,000 pa. During the central 5 years of the marriage, the wife entered an unparalleled period of earnings – her bonuses in that period totalling around £10.5m. It was common ground that from a financial perspective the £6.9m of assets derived almost entirely from the wife’s bonuses.

The ratio of *Sharp* can be distilled from the following four paragraphs of the judgment of McFarlane LJ (as he then was) (emphasis added):

‘[92] In the present case the **wife’s bonuses** were not “family assets” as categorised by Baroness Hale and, in contrast to *Foster*, they **had not been generated by the joint efforts of the parties** (*Foster* being a case which was held to be “all about contribution”). It is hard to justify holding that this case is not one where “there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them” (Baroness Hale para 153). **By Baroness Hale’s analysis at paragraph 152 the court is obliged to take account of the duration of the marriage with a view to considering reducing the husband’s share to reflect the period of his domestic contribution.** Further, in a case where, in contrast to the more traditional “bread-winner” / “home-maker” model, **each partner worked full time for most of the marriage, and where there are no children, it must be necessary for the court also to evaluate the extent, if any, by which the husband’s domestic contribution exceeded that of the wife.**

[97] The **inescapable conclusion** from this analysis of the speeches in *Miller*, in terms of the possibility of **some alteration from, rather than a strict application of, the equal sharing principle in relation to short, childless marriages, where both spouses have largely been in full-time employment and where only some of their finances have been pooled, is that fairness may require a reduction from a full 50% share** or the exclusion of some property from the 50% calculation. Of the five members of the Judicial Committee, only Lord Nicholls suggested a contrary view and even on his analysis the potential for some form of relaxation can be seen.

[113] It is, therefore, my conclusion that the division of the assets determined by Sir Peter Singer in this case does not accord with the approach dictated by the majority of the House of Lords in *Miller*. Further, as a matter of law, the decision of the House in *Miller* established that **departure from the principle of equal sharing may occur in order to achieve the overarching goal of fairness in a particular case.** This case is, therefore, one of the “very small number of cases” (Baroness Hale, para 152) where the factors that I have identified justify departure from the equal sharing principle.

[114] On the facts of this case, Mr. Feehan is therefore right that the combination of potentially relevant factors (**short marriage, no children, dual incomes and separate finances**) is sufficient to justify a departure from the equal sharing principle in order to achieve overall fairness between these parties ...’

The concept was considered further by Moylan LJ in *XW v XH (Financial Remedies: Business Assets)* [2019] EWCA Civ 2262, [2020] 1 FLR 1015 (hearing the wife’s appeal from the earlier decision of Baker J (as he then was) and reported at [2017] EWFC 76, [2019] 1 FLR 481). Upon considering the case law on unilateral assets, he noted at [106] that:

‘we were referred to no authority in the approximately 13 years since the decisions in *Miller* and *Charman* in which the concept of “unilateral assets”, in other words, assets that are the product of one party’s endeavour during the marriage, has been applied to support an unequal division of such assets beyond short, childless marriages.’

Later Moylan LJ observed at [135] that although what was said by Lady Hale in *Miller* could be given a ‘broad application ... which can be seen to be concerned not to close doors which should remain open to enable the court to achieve a fair outcome’, the ‘substantial practical experience the courts have acquired of the application of the sharing principle since *Miller* was decided and to developments in the jurisprudence since that decision’ meant that the court is ‘able further “to keep the room for application of the concept (of unilateral assets) closely confined” (*Charman*, at [86]) ...’

Thereafter he continued as follows:

‘[141] Returning to *Miller*, in my view, the substantive focus of Lady Hale’s observations, at [147] to [153], is short, childless, marriages. However, even if she left open that they might apply in other than such marriages, we can now see that to apply them in those cases would be discriminatory in the same way that special contribution initially risked being applied in a way which would have significantly undermined the progress made by *White*.

[142] ... I acknowledge, in this discretionary area, that it would be unwise to close doors to the notion that fairness might leave scope for the court to decide not to effect an equal division of marital assets because of a particular factor or combination of factors in an individual case. However, as a matter of general principle, I find it hard to envisage how, in other than short, childless marriages fairness would be achieved if the existence of “business assets” was the basis for justifying an other than equal division.

[145] Accordingly, it is evident that a broader application of a different approach to a marital asset merely because it was a “business” asset would be, as was identified in *Charman*, at para [83], “deeply discriminatory” and would, therefore, “gravely undermine the sharing principle”. The effect would be the same whether property is excluded from the sharing principle, because it is not treated as marital property, or whether the sharing principle is not applied to such property so as to divide it equally. Indeed, it would seem to me likely to be rare for sufficient wealth to have been generated other than through “business efforts and acumen” for the determinative principle to be sharing rather than need. This is why I have concluded that the application of a different approach

to business assets, in other than short, childless marriages, would result in the sharing principle being undermined in the same way identified in *Charman* and, accordingly, that the judge was wrong to take this factor into account, at para [239].

In *E v L (Financial Remedies)* [2021] EWFC 60, [2022] 1 FLR 952, Mostyn J observed [20] that Moylan LJ in *XW v XH (Financial Remedies: Business Assets)* ‘while seeking determinedly to limit this exception to the equal sharing principle, seemingly accepted, with barely concealed distaste, that it might apply to a short marriage case which was childless’. He went on at [21] to say that he ‘struggled with the logic’ of the unilateral assets exception and asked ‘Why should it make any difference, if there is to be an exception to the equal sharing principle for short marriages, whether the parties had children or not’.

On the distinction between a childless marriage and a marriage with children, Mostyn J concluded:

[27] The reason that we do not attempt any valuation of the quality or attributes of a marriage is, as Moylan LJ has explained, that to do so risks subconscious discrimination. It was for this very reason, as will be seen, that Lord Nicholls in *Miller* ... condemned as heretical my opinion in *GW v RW* ... that in order to have equal validity with financial contribution, a domestic contribution needed to be earned over time. For that view, as well as the concept of fledging (to which I will turn below), I freely admit my error and figuratively hold my hand in the flames.

[28] In applying the sharing principle it is not merely invidious, but extremely dangerous, for the court to attempt an evaluation of the quality of a marriage or of the arrangements made within it, as to do so will almost inevitably trigger subconscious discriminatory practices. It is for this reason that the doctrine of special contribution has to all intents and purposes been consigned to history. When the court is undertaking the application of the sharing principle, it should start and almost invariably finish with the proposition that a marriage is a marriage ...

[29] In my judgment for the court to start asking why there are no children, and whether this denotes a lesser extent of commitment to the relationship, is to make windows into people’s souls, and should be avoided at all costs.

[30] It is not clear to me from where this factor of childlessness derives. An analysis of *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186 shows that childlessness is not part of the reasoning of Baroness Hale of Richmond and Lord Mance. It is true that the Miller marriage was childless. At para [41] Lord Nicholls of Birkenhead referred to the absence of children, but recorded that the couple had been trying for one and that Mrs Miller had suffered a miscarriage. No one suggested that this sad failure denoted “a completely different category of commitment”.

[31] Childlessness was not a reason that the House of Lords upheld the unequal division of the acquiescence in that case.

It is worth noting that in *VV v VV* [2022] EWFC 41, [2023] 1 FLR 170 at [44] Peel J stated that ‘I agree with Mostyn J at para [28] of *E v L* that it is dangerous for the court to evaluate the quality of a marriage ...’.

Moving on from the issue of childlessness and instead

looking at the shortness of the marriage, Mostyn J stated at [43] that there was ‘absolutely no logical reason’ to draw a distinction between an accrual over a short period and an accrual over a long period. Mostyn J did however recognise from *Miller* in the House of Lords at [44] a ‘possible exception for non-family assets generated by one spouse alone during a short marriage where those assets have been kept separate and where both spouses have been financially and independently active.’ He noted the Court of Appeal’s decision in *Sharp* as having ‘acknowledged the exception’ and the likewise acknowledgment of the principle by Moylan LJ ‘with obvious distaste’ in *XW v XH*.

Mostyn J noted at [45] that McFarlane LJ in *Sharp* stated that the exception would apply only in a ‘fringe of cases’ and that Lady Hale in *Miller/McFarlane* acknowledged ‘the great rarity of the exception’. Likewise, he noted that Moylan LJ stated in *XW v XH* that the concept ‘will only be capable of being legitimately invoked in vanishingly remote circumstances’. Expressing his own view, Mostyn J stated:

‘For my part I would say (as I have said before when talking about the rarity of sharing non-matrimonial property) that a case where there can be a legitimate non-discriminatory and unequal sharing of matrimonial property *earned* in a short marriage will be as rare as a white leopard. I have said “earned” to draw a distinction between money generated during the marriage and an asset brought into a marriage which has been “matrimonialised” such as a dwelling used as a matrimonial home. I accept that the law recognises the possibility of unequal sharing of such an asset: see *Vaughan v Vaughan* ...

[46] The reason for the rarity is obvious. The exception is founded on the notion that the value of the contributions made by one spouse during a short marriage in generating “business assets” is worth more than the value of the contributions made by the other spouse during that period. Like the now discredited doctrine of special contribution this notion gives rise to the Orwellian oxymoron that all contributions are equal but some are more equal than others. It is very difficult to escape the conclusion that discriminatory forces are underpinning this notion. Hence the need to confine its application to extremely rare situations.’

Even prior to *E v L (Financial Remedies)* it was possible to argue that *Sharp* was a case confined to its facts. It is of note that it has been cited in only a handful of reported judgments over the last 6 years (*XW v XH* (at first instance and on appeal), *IX v IY (Financial Remedies: Unmatched Contributions)* [2018] EWHC 3053 (Fam), [2019] 2 FLR 449, *E v L (Financial Remedies)* and *ARQ v YAQ* [2022] EWFC 128 and not even all of these in relation to the issue of unilateral assets). There will be few marriages carrying the combination of features: short, parties working, no children and a huge disparity of financial contribution. *E v L (Financial Remedies)* makes this even easier to argue.

Such an approach also has the advantage of stopping parties engaging in the ‘general rummage through the attic of their marriage to discover relics from the past to enhance their role or diminish their spouse’s’ deprecated by Coleridge J in *G v G* [2002] EWHC 1339 (Fam), [2002] 2 FLR 1143 at [49]. Lord Nicholls spoke to similar effect stating in *Miller/McFarlane* at [67] that ‘[a] good reason for departing from equality is not to be found in the minutiae of married life’. More recently in *WC v HC (Financial Remedies)*



*Agreements*) [2022] EWFC 22, [2022] 2 FLR 1110 Peel J stated at [1] (ii):

‘By para 11 of the High Court Statement of Efficient Conduct of Financial Remedy Proceedings, s25 statements must only contain evidence, and “on no account should contain argument or other rhetoric”. In this case, W’s over long statement crossed the line and descended into a number of personal, and prejudicial matters, directed at H which, in my view, were irrelevant to the matters at hand. Parties, and their legal advisers, may be under the impression that to describe the other party in pejorative terms, and seek to paint an unfavourable picture, will assist their case. It is high time that parties and their lawyers disabuse themselves of this erroneous notion. Judges will deal with relevant evidence, and will not base decisions on alleged moral turpitude or what Coleridge J once famously described disapprovingly (albeit in a slightly different context) as a “rummage through the attic” of the marriage in *G v G (Financial Provision: Equal Division)* [2002] 2 FLR 1143, at [49].’

The same is true at all levels of the Financial Remedies

Court given that paragraph 22 of the *Statement on the Efficient Conduct of Financial Remedy Proceedings Below High Court Judge Level* is in similar terms, stating *inter alia* that witness statements ‘may only contain evidence’ and must not ‘seek to argue the case’ or ‘use rhetoric’. The combination of *E v L (Financial Remedies)* and these Efficiency Statements may therefore mean there is less need for judicial ‘distaste’ in the future.

## Notes

- 1 *S v S* [1977] Fam 127, *H v H (Financial Provision: Short Marriage)* (1981) 2 FLR 392, *Robertson v Robertson* (1983) 4 FLR 387, *Attar v Attar (No 2)* [1985] FLR 653 and *Hedges v Hedges* [1991] 1 FLR 196.
- 2 As he had said earlier: ‘[24] In the case of a short marriage, fairness may well require that the claimant should not be entitled to a share of the other’s non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage.’

# What Does Equality of Pension Capital Mean?

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I started writing expert witness reports around 2005 and, right from the start, a regular question was, ‘Should we seek equality of income or equality of capital?’ Letters of Instruction regularly ask the expert to calculate ‘The pension sharing order required to achieve (i) equality of income and (ii) in the alternative, equality of capital.’

I have always wondered what the solicitor means by ‘equality of capital’ and what they expect the expert to do. The judgment of Moor J in *CMX v EJX (French Marriage Contract)* [2022] EWFC 136 is very interesting in how he tackles equality of income/capital, and how equality of capital can be achieved. The judgment has provoked much commentary, and challenges much of the received wisdom in this area.

One such commentary is from Calum Smith, pupil barrister (at the time of writing) at 1 Hare Court. Another is from Paul Cobley – no doubt known to many readers as one of the true experts on pensions and divorce, although he does not produce PODE (Pension on Divorce Expert) reports. Paul has been one of the main contributors to both iterations of the Pension Advisory Group. Both commentaries can be found on the *Financial Remedies Journal* website.<sup>1</sup>

In [49] and [50] of his judgment, Moor J writes:

‘49. Turning to pension sharing, my attention was

drawn to the decision of Nicholas Francis QC, sitting, at that point, as a deputy High Court Judge in *SJ v RA* [2014] EWHC 4054 (Fam) where he said:

*“Why should someone receive more just on the basis of gender? There may have been an explanation when rules required the purchase of an annuity. However, to give the wife more than the husband, on account of either age or gender, would seem to me to be unacceptable discrimination unless it is a case which is governed solely by needs. If a person should receive more of a pension fund under the modern rules simply because she (or he in the case of a marriage where the husband is much younger) is likely to live longer, then such an approach would logically extend to all capital assets. Moreover, European Union judgments and rules are rapidly outlawing discrimination on account of gender. In cases where distribution is being made on a basis which is not guided by need it is, in my judgment, incorrect to distribute a pension fund on the basis of equality of income...”*

50. I could not agree more. If assets are to be divided equally, they should be divided equally. In general, there is no justification for awarding more to one party because they are younger or have a longer life expectancy. Both parties should share the fruits of the marriage equally. Moreover, in my experience, the only thing that can be said is that life hardly ever goes to plan, whether it be one party living far longer than expected or another remarrying immediately. It follows that I have become very troubled by directions that ask a pensions actuary to calculate a division on the basis of equality of income in retirement. Apart from the fact that such reports tend to be very expensive, the simple fact is that such a direction almost enshrines the *Duxbury* paradox into practice. It cannot be right, in general, that the younger you are, the greater your award. In any event, it has no place whatsoever in equal division cases.’ (original emphasis)

What is not clear is whether the qualification made much earlier in the judgment, at [14], is also to be applied to [49] and [50]:

‘14. At this stage, all I say is that I cannot conceive of a more inappropriate direction [for there to be a PODE report considering equality of income] when the assets in the case are between £22 and £28 million.’

So, if we are not to look at equality of income in bigger money cases, it is equality of capital. But what is meant by equality of capital?

## Option 1, Equality of Capital = Equality of CEVs

The simplest way to interpret equality of capital is to take the cash equivalent value (CEV) of the pensions, add them up and divide by two. Take a very simple case:

- H has a private sector defined benefit (DB) pension (which does not allow internal implementation of a pension sharing order (PSO)) with a CEV of £500,000, and this is the CEV of deferred, index linked, pension of £30,000 pa, payable at age 60.<sup>2</sup>
- W has a defined contribution (DC) fund of £100,000.
- Between them, H and W have CEVs of £600,000, therefore equality is achieved if both parties end up with

CEVs of £300,000, which requires £200,000 of CEV to be transferred, via a PSO from H to W, which in turn requires a PSO of 40% over H’s DB pension.

But what does this lead to in practice? Well, it depends on two dominating factors:

- (1) Is the CEV of the DB pension of good value?
- (2) Is there a material age difference between the two parties (what I refer to as the *age factor*)?

Let’s start by taking the *age factor* out of the equation (by assuming both H and W are the same age, and, for the purpose of this exercise, I will assume they are both aged 55). Such an approach (add up the CEVs and divide by two) will enshrine a disadvantageous position to the spouse if the CEV of H’s DB scheme is less than the true cost of such pensions on the open market (which is an increasingly common position following the fall in DB CEVs during 2022). Looking at the above scenario, where after a PSO of 40% over H’s DB pension, both parties have equal CEVs of £300,000, the income position may be as set out in Table A.

**Table A**

Husband		Wife	
CEV of H’s pension pre-PSO	£500,000	Pension credit received	£200,000
PSO	40.0%	Own DC fund	<u>£100,000</u>
<b>CEV of H’s pension post-PSO</b>	<b>£300,000</b>	<b>Total DC funds post-PSO</b>	<b>£300,000</b>
DB pension, payable at age 60 pre-PSO	£30,000 pa	Value of funds at age 60	£364,996
PSO	40.0%	Annuity bought at age 60	£14,600 pa
<b>DB pension payable at age 60 post-PSO</b>	<b>£18,000 pa</b>	<b>Annuity at age 60 in today’s terms</b>	<b>£13,224 pa</b>

We can see in Table A:

- (1) Following a PSO of 40%, both parties have pensions with a total CEV of £300,000. Equality of CEVs has been achieved.
- (2) However, the pension H expects at age 60 is £18,000 pa and for W it is £13,224 pa.

In this scenario, if we wish to achieve equality of income, a PSO of 49.2% is required, as we can see in Table B.

**Table B**

Husband		Wife	
CEV of H’s pension pre-PSO	£500,000	Pension credit received	£245,893
PSO	49.2%	Own DC fund	<u>£100,000</u>
<b>CEV of H’s pension post-PSO</b>	<b>£254,107</b>	<b>Total DC funds post-PSO</b>	<b>£345,893</b>
DB pension, payable at age 60 pre-PSO	£30,000 pa	Value of funds at age 60	£420,832
PSO	49.2%	Annuity bought at age 60	£16,833 pa
<b>DB pension payable at age 60 post-PSO</b>	<b>£15,246 pa</b>	<b>Annuity at age 60 in today’s terms</b>	<b>£15,246 pa</b>

Following a PSO of 49.2%:

- The CEV of H’s pension reduces by 49.2% from £500,000 to £254,107.
- At the same time, H’s preserved pension per annum within the DB scheme reduces by 49.2% from £30,000 pa to £15,246 pa.
- W gets a pension credit of £245,893, this being 49.2% of the £500,000 CEV, which when added to her own DC funds of £100,000 leaves her with total DC funds (CEV) after pension sharing of £345,893.
- Such a fund may be worth £420,832 at age 60, allowing W to buy an annuity of £16,833 pa, which when adjusted for inflation may be said to be worth £15,246 pa in today’s money, thus matching H’s income.<sup>3</sup>

Why, in the above scenario, does W need more than half of the pension capital in order to equalise incomes? It is *nothing* to do with age – we have assumed both parties are aged 55. Age is not the issue. It is because, as is often the case, the CEV of the DB pension of H understates the true/open market value of H’s pension.

I said above that there are two dominant factors which influence the outcome of a solution where the CEVs are added up and divided by two: (1) Is the CEV of the pension of good value? and (2) Is there an age differential?

I have shown above that where age differentials are stripped out, by assuming both parties are the same age and where the CEV of H’s DB pension understates a true value, then W will need more than 50% of the CEVs to equalise incomes.

What happens if we make age the dominating factor, and remove any influence of an understated CEV? We can do this by assuming H’s CEV of £500,000 is not in respect of a DB pension, but instead in respect of a DC fund. And thus (absent any guaranteed annuity rates<sup>4</sup>) the CEV is the open market value. At the same time, we will assume W is aged 50 and H aged 55.

Table C sets out the calculation for equality of income, using such assumptions.

**Table C**

Husband (currently aged 55)		Wife (currently aged 50)	
CEV of H's pension pre-PSO	£500,000	Pension credit received	£185,448
PSO	37.1%	Own DC fund	<u>£100,000</u>
<b>CEV of H's pension post-PSO</b>	<b>£314,552</b>	<b>Total DC funds post-PSO</b>	<b>£285,448</b>
Value of funds at age 60	£382,701 pa	Value of funds at age 60	£422,533
Annuity bought at age 60	£15,308 pa	Annuity bought at age 60	£16,901 pa
<b>Annuity at age 60 in today's money</b>	<b>£13,865 pa</b>	<b>Annuity at age 60 in today's terms</b>	<b>£13,865 pa</b>

We can now see from Table C that where there is no influence of a CEV undervaluing a pension, W is the younger party and both parties are pre-retirement, in order to equalise incomes, W needs less than half of the available CEV (£285,000 out of a total of £600,000, or around 47.5%).

It has been asked in judgments, 'Why should one party get more than the other party simply because he/she is younger?' The truth is, all other things being equal, *the younger party requires less than the older party*. If the PODE calculates the younger party needs more by way of CEV than the older party in order to equalise incomes, this is because the CEV of the DB pension is understating its true value and is not a function of being younger.

## Option 2, Equality of Capital = Equality of Open Market (or true or fair or actuarial) Value

So, having considered equalising capital values by reference to the CEVs above, and having found that approach perhaps to be wanting, not due to age but due to DB CEVs often understating the true open market value of a pension, is there a way in which we can look at equalisation of capital values which gets around this, and what does such a calculation achieve?

The way around the difficulties posed by the CEV of a DB scheme not representing full value, is to calculate for that pension a true open market value which could be the cost of buying an equivalent pension (in this case £30,000 pa from age 60) on the open market. In other words, we answer the question, 'How much would H, in this case, need to have invested in a DC fund to provide this pension of £30,000 pa?' In calculating such a figure, we are placing a value on H's pension which is directly comparable to the CEV of W's DC fund.

In this case, it may be that an open market value of £680,605 is placed on H's DB pension. In other words, in this case, the CEV of £500,000 is only 73% of the open market value of the pension. Using this open market value, instead of the CEV, we can say that a PSO of 49.2% over the DB pension of H is required to equalise capital values, if we use the true open market value instead of CEVs, as set out in Table D.

**Table D**

Husband (aged 55)		Wife (aged 55)	
Open market value of H's pension pre-PSO	£680,605	Pension credit received	£245,893
PSO	49.2%	Own DC fund	<u>£100,000</u>
<b>Open market value of H's pension post-PSO</b>	<b>£345,893</b>	<b>Total DC funds post-PSO</b>	<b>£345,893</b>
DB pension, payable at age 60 pre-PSO	£30,000 pa	Value of funds at age 60	£420,832
PSO	49.2%	Annuity bought at age 60	£16,833 pa
<b>DB pension payable at age 60 post-PSO</b>	<b>£15,246 pa</b>	<b>Annuity at age 60 in today's terms</b>	<b>£15,246 pa</b>

What do we note from the calculation in Table D?

- Although we have calculated the open market value of H's pension at £680,605, and this is the amount we use on his side of the balance sheet, W will still get a percentage of the CEV. Just because a PODE/actuary has said the true open market value is £680,605, the scheme is not going to change the CEV, and in this case W will receive by way of pension credit, 49.2% of the CEV.
- Both parties can then be said to have, post-pension sharing, pension assets with a capital value of £345,893.
- However, we can also see in this example, given the parties are the same age, that equality of capital, as measured by open market values, will also achieve equality of income.

In other words, if we use the open market value of pensions as a measure of capital, and if the parties are the same age, then a PSO to equalise incomes (49.2% in Table B) will be the same as the PSO required to achieve equality of capital values (Table D).

What happens, though, if we equalise capital values, as measured by open market values, and the parties are not of the same age? In Table E, we will revert to the assumption that H is 55 and W is 50.

**Table E**

Husband (aged 55)		Wife (aged 50)	
Open market value of H's pension pre-PSO	£680,605	Pension credit received	£245,893
PSO	49.2%	Own DC fund	£100,000
<b>Open market value of H's pension post-PSO</b>	<b>£345,893</b>	<b>Total DC funds post-PSO</b>	<b>£345,893</b>
DB pension, payable at age 60 pre-PSO	£30,000 pa	Value of funds at age 60	£512,006
PSO	49.2%	Annuity bought at age 60	£20,480 pa
<b>DB pension payable at age 60 post-PSO</b>	<b>£15,246 pa</b>	<b>Annuity at age 60 in today's terms</b>	<b>£16,801 pa</b>

We can see from Table E that where we use an open market value for DB pensions (instead of CEVs) and where W is younger than H (and both are pre-retirement) then a solution which provides equality of capital values will give W more by way of a PSO (49.2% of H's pension) than if we sought to achieve equality of income (37.1% in Table C).

**Conclusions**

So, what conclusions can we draw from all of the above?

- (1) If there is a DB scheme where the CEV understates the true value of the pension benefits, then a solution which uses the CEV as a measure of value will be to the detriment of the recipient of the pension credit.
- (2) If there is a DB scheme where the CEV understates the true value of the benefits, then a PSO which is greater than that achieved by an equal division of CEVs will be required in order to equalise incomes. This is nothing to do with age.
- (3) In fact, all other things being equal (if, *inter alia*, all pension funds are DC in nature and so there is no concept of a DB CEV understating the true value of a pension), and assuming the parties are pre-retirement, a wife who is younger than the husband will require less than half of the pension assets in order to equalise incomes, not more.
- (4) If equality of capital is required, and it is required in a manner which is fair and not distorted by CEVs of DB schemes understating true values, then a PODE will be required to calculate a fair open market value of any DB pension.
- (5) Only if you are prepared to accept the distortions and in-built unfairness created by a DB pension can you dispense with a PODE, and just use the CEVs of DB pensions without expert input.
- (6) Whether or not it is appropriate to treat a pension as a capital asset, and to be divided based on capital values or as an income stream is a legal point and outside my area of expertise. I note, however, what the first Pension Advisory Group report says about this matter.<sup>5</sup>

But if it is to be treated as a capital asset, and divided based on capital values, and there are DB schemes (or DC funds with guaranteed annuity rates), a PODE will still be required.

- (7) If you divide pensions based on fair capital values, then a wife who is younger than her husband will receive more from a capital-based division than she would from a division based on income.

NB: In all examples, it is assumed that both H and W are pre-retirement. If both parties are post-retirement, then the positions reverse: a younger wife would require more by way of PSO to equalise incomes than she would for equality of capital. It is also assumed that the DB schemes in question do not allow internal implementation of PSOs, which is the dominant position for private sector schemes.

**Risk warnings**

The value of investments, and any income from them, can fall and you may get back less than you invested. This does not constitute tax or legal advice. Tax treatment depends on the individual circumstances of each client and may be subject to change in the future. Information is provided only as an example and is not a recommendation to pursue a particular strategy. Opinions expressed in this article are not necessarily the views held throughout RBC Brewin Dolphin Ltd. Information contained in this article is believed to be reliable and accurate, but without further investigation cannot be warranted as to accuracy or completeness.

**Notes**

- 1 <https://financialremediesjournal.com/content/cm-x-v-ejx-french-marriage-contract-2020-ewfc-136.ef7a8d757c5a4e3bf461f5895345837.htm> and <https://financialremediesjournal.com/content/valuing-pensions-on-divorce-cm-x-v-ejx.a17d55f14b974e97bd16383d46ffa9b2.htm>
- 2 This is just a theoretical example. A DB deferred pension of £30,000 pa for a member aged 55, payable at age 60, may have a CEV higher or lower than the assumed £500,000, and this is dependent on the assumptions made by the scheme actuary. It is crucial to understand that the pension per annum from DB pension is not determined by the CEV, but the other way around – the pension promised per annum is calculated, and then an actuary works out an appropriate CEV. This is the opposite of a DC fund where you have a fund value (number of units x unit price) the size of which determines what pension per annum you can have.
- 3 Throughout this article we have assumed investment returns on DC funds of 4.0% pa after charges, an annuity rate of 4% pa (£1 of pension fund buys an annuity of £25 pa) and inflation of 2% pa.
- 4 The reader may wish to read the judgment of HHJ Hess in *YC v ZC* [2022] EWFC 137 to see the perils of ignoring guaranteed annuity rates.
- 5 *A Guide to the Treatment of Pensions on Divorce* (July 2019), published by the Nuffield Foundation, pursuant to the work of the Pension Advisory Group, in Part 5 (5.3) states: ‘Three basic points can be simply stated here by way of introduction (see further from paragraph 5.4 below): • If it is likely that either or both parties will draw a **tax-free lump sum** (whether commuted or not), this should be treated as **capital**. • The **balance of the pension fund**, or all of it if no lump sum is to be drawn, should usually be treated as **deferred income**. • A **pension in payment** should be treated as a **current income** stream.’

# Pensions on Divorce – Standard Family Order Template and Short Marriages

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This article deals with two points. The first relates to the publication of the new pension sharing order (PSO) template at paragraph number 95 in the Standard Family Orders suite. The second relates to the issue of short marriages in the context of pensions on divorce.

## The new Standard Family Order PSO template

### *The new clause*

- a. There shall be provision by way of [a] pension sharing order[s] as follows:
  - i. in favour of the [applicant] / [respondent] in respect of [percentage]% of the [respondent's] / [applicant's] rights under [his] / [her] pension arrangement[s] [pension name(s)]

- ii. [etc (repeat for as many pension sharing orders are to be made)]  
in accordance with the pension sharing annex[es] attached to this order.
- b. There be the following consequential directions:
  - i. It being agreed between the parties that in the event that the [applicant] / [respondent] non-member spouse predeceases the [respondent] / [applicant] member spouse after this order has taken effect but before its implementation the [respondent] / [applicant] member spouse shall [in order to prevent a loss of pension rights to the family overall] have the consent of the personal representatives of the [applicant] / [respondent] non-member spouse to apply to appeal out of time against the order under the Matrimonial Causes Act 1973, s 40A or s 40B (there being no requirement to obtain permission to apply to set aside an order under FPR 2010 r.9.9A).
  - ii. [Neither party shall apply for [decree absolute] / [the final [divorce] / [dissolution] order] until 28 days after the making of the pension sharing order, but the [applicant] / [respondent] will make such application promptly thereafter.]
  - iii. Both parties shall do all that is necessary to implement the pension sharing order[s] promptly, including, but not limited to, the signing and returning of any documents related to the implementation [promptly] / [within [21] / [28] days] from a written request by any person properly concerned with the implementation process and paying [promptly] / [within [21] / [28] days] from a proper written request for the share of the fee ordered by the court and required by the pension arrangement to effect implementation.
  - iv. [The [applicant] / [respondent] shall not intentionally claim, draw down, transfer or otherwise deal with any pension benefits subject to a pension sharing order in this order until the pension share so ordered has been implemented, save in the event of prior written agreement as between the parties].

### *The gremlins*

The old template had some gremlins in it. There was an erroneous 'vary' provision which cannot, in fact, take place after a PSO has taken effect (MCA 1973, s 31(2)(g)). It further implied that permission might be required from the deceased's executors for a set aside application. The permission provision originally related to appeals under MCA 1973, s 40A, for which leave to appeal is first required by the court (FPR 30.3). When the FPR 9.9A set aside provisions were introduced, the then amended draft failed to distinguish between a set aside and an appeal in this respect.

Aside from the gremlins, there have emerged common points of good practice which the new template seeks to formalise.

### *Delaying the application for a divorce final order*

Paragraph 95 b. ii. provides the option formally to provide that neither party shall apply for a final divorce order until 28 days after the making of the order, but that such applica-

tion shall be made promptly upon the expiration of that time.

Practitioners should be familiar with the fact that by virtue of a combination of MCA 1973, s 24B(2), s 24C(1) and Divorce etc (Pensions) Regulations 2000 (SI 2000/1123), reg 9, a PSO does not 'take effect' until the later of 7 days after the end of the appeal period (21 days) or order for final divorce order. At this point the 'Transfer Day' is reached and the PSO becomes effective.

The practical effect is that if a final divorce order is obtained prior to Transfer Day, and the transferor were to die in that narrow window of time, there is no effective PSO and by virtue of the final divorce order, any widow's/widower's or survivor's pension has evaporated. As people have a habit of dying at unexpected and inconvenient moments, it has long been conventional good practice to delay the application for the final divorce order until after 28 days.

There may be moments when this conventional approach may exceptionally not apply. One instance may be where there has been an order for a lump sum which is significant and there is a race to ensure that lump sum is effective prior to any bankruptcy proceedings being instigated. These situations are rare.

It was thought helpful to codify the practice of delaying the application of the divorce final order into the Standard Family Order template and, to ensure that affairs are brought to an orderly and timely conclusion, it also provides for the application for final divorce order to be made promptly after the expiration of 28 days.

### **Keeping everyone to timely and good behaviour**

Paragraph 95 b. iii. requires parties to cooperate with the timely implementation of a PSO.

The author receives a steady stream of enquiries each year as to what can be done when one party (often as a last lash of economic and coercive control) refuses to pay their share of the PSO implementation fee. Any steps to enforce compliance are likely to be time and cost disproportionate.

At the other end of the spectrum, some PSO recipients put their paperwork in their top drawer after the case is over, causing havoc years later when the recipient seeks to take their pension and the chickens come home to roost.

The idea behind paragraph 95 b. iii. is to keep everyone to good and timely behaviour. The coercive controller will be wise to resist his (for it usually is the husband) darker impulses as such behaviour will now put him on the wrong side of a court order, whereas before he could act with apparent impunity.

### **Protecting the pension sharing order**

Paragraph 95 b. iv. provides the option to, in effect, injunct the pension holder from intentionally drawing down, transferring or otherwise dealing with the pension subject to a share, pending implementation.

The legal status of a PSO between the date of its making until Transfer Day is something of a black hole<sup>1</sup> and this provision, if selected, will provide some cover (and should be served upon the pension arrangement immediately, with the sealed final divorce order to follow).

The word 'intentionally' is included for a good reason. Where employees have left service, some public sector pensions will deem that the pension lump sum has been drawn at the pension holder's normal retirement date

(NRD), even if they have not, in fact, claimed their pension. A pension holder may have a PSO made against them and prior to Transfer Day they attain their NRD. By Welfare Reform and Pensions Act 1999, s 29, the pension arrangement must apply the PSO against pension benefits which were within the pension 'immediately before' Transfer Day. If the pension holder has reached his or her NRD before Transfer Day, the pension lump sum may not be considered to be a pension benefit (and therefore not form part of the PSO), even though it has not been drawn.

The legal status of the PSO between the date of Transfer Day and the implementation is less of a concern as the pension claimant's inchoate rights are considered to be 'in the bag' at this stage.

### **Generally**

It is therefore hoped that the new draft template will exorcise the gremlins, codify good practice and act as something of a bulwark against mischief after the order has been made.

The legal effect of the old template was considered by HHJ Farquhar in *Goodyear v Goodyear* [2022] EWFC 96. In that case the pension share recipient died unexpectedly after the order had taken effect but prior to its implementation.

The order did not, in fact, contain the standard wording about the recipient's executors giving permission to apply for permission to appeal, etc. An application for permission to appeal and a set aside application were both made. The application proceeded down the set aside route and was allowed by the judge.

The court held that its power was derived from MFPA 1984, s 31F(6) and FPR 9.9A:

'[12] The application is now before the Court and it must be considered on its merits. The fact that the standard order was not used cannot impact upon that decision. It is always recommended to utilise the carefully draft[ed] standard orders but a failure to do so in this instance cannot prove fatal to the application.'

There remains a debate as to which route will be the most appropriate when seeking to challenge a PSO. The learned authors of the Red Book 2022 suggest (para 2.1013[1]) that '... the normal method of challenging a pension sharing order will be by way of appeal under MCA 1973, s.40A rather than by an application to set the order aside under FPR 2010, r.9.9A (FPR PD 30A, para 4.1B).' This was not the route adopted in *Goodyear*, which proceeded to judgment on the set aside application only.

Of note is the fact that the application for permission to appeal out of time was allowed to 'lie on the file' as the fact it had been made acted as an automatic stay on the implementation of the order: Pension Sharing (Implementation and Discharge of Liability) Regulations 2000 (SI 2000/1053), reg 4. This was wrongly noted in *Goodyear* at [7] as being an issue related to Divorce etc (Pensions) Regulations 2000, reg 9(2), which has the effect of stopping a PSO 'taking effect' if the permission to appeal application is lodged prior to Transfer Day. In *Goodyear*, as the order had taken effect, reg 4 was the relevant provision.<sup>2</sup> No such regulation exists as yet for 'set aside', it being recommended by the Pension Advisory Group (PAG) at paragraph V.19 of its 2019 Report.

The exact choice between set aside and appeal will no doubt be the subject of further argument in future.

## Short marriages and pensions

Earlier in this issue, in 'Unilateral Assets and Short Marriages after *E v L* – Another White Leopard?', Nicholas Allen KC writes about short marriages. The key issue, which has rumbled along since *Miller*, is the application of the sharing principle to capital accrued during a short marriage. I would not seek to trespass on this excellent article, which I commend.

In those cases where the needs principle is to the fore, different considerations arise. A particularly thorny issue is the treatment of a pension claim following a short marriage, where the pension holder's pension was accrued in whole or in part before the marriage, but the claimant (perhaps in her late middle years) has pressing retirement income needs.

An inaccurate criticism of the 2019 PAG Report and the decision of HHJ Hess in *W v H (Divorce: Financial Remedies)* [2020] EWFC B10 is that there is some kind of iron rule for equalisation of income in all cases.

The 2019 PAG Report states at Part 6 'Key Points' seventh indent, 'In some cases, an equal division is not appropriate; for example in a short marriage with no children ...'.

HHJ Hess was keen to make clear in *W v H* that there is no 'one size fits all' solution to all pension conundrums.

A second edition of the PAG Report will be published this

Autumn. It is expected that it will deal more expressly with the question of a short marriage in the context of pensions.

Whilst all cases must turn on their own facts and be subject to a bespoke analysis pursuant to MCA 1973, s 25, it is suggested that it would not be unreasonable to place weight on whether any need for retirement income is causally related to the short marriage.<sup>3</sup> Absent of relationship-generated need or some other pressing s 25 factor, it is suggested that arguments concerning pre-acquired pension and apportionment may carry some significance after a short marriage.<sup>4</sup>

## Notes

- 1 Michael Horton KC, Rhys Taylor and Paul Cobley, 'Protecting the pension sharing order' [2021] Fam Law 266.
- 2 In fairness to HHJ Farquhar, the judgment was shared in draft and the writer unforgivably failed to draw this point to the court's attention.
- 3 Whether or not, save in a situation for real hardship, the needs *must* be causally related to the marriage has been the subject of some judicial disagreement. In both *SS v NS (Spousal Maintenance)* [2014] EWHC 4183, [2015] 2 FLR 1124 and *FF v KF* [2017] EWHC 1093 (Fam) Mostyn J took the view that they did need to be, whereas in *ND v GD (Financial Remedies)* [2021] EWFC 53, [2022] 1 FLR 716 Peel J expressed the contrary view.
- 4 See also Joseph Rainer, 'Non-matrimonial pensions: the forgotten discussion' [2020] Fam Law 95.



# Cohabitation Rights in England and Wales, Scotland and Australia

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## Introduction

Across the globe, the composition of families is changing. No longer is marriage the definitive means for defining a family; we have seen the growth of other formalised relationship statuses such as registered partnerships and civil

unions. The family outside marriage has now become a statistical reality and something that policymakers should not readily ignore.

This article reflects on cohabitation from a comparative perspective. It explores the legal position in England and Wales, Scotland and Australia with a view to analysing how far couples are protected and the efficacy of the relevant legal frameworks. As will be shown, the law in England and Wales lags considerably behind the other two jurisdictions, and a key method of unlocking reform here is to learn from the experience of other countries.

## Cohabitation rights in England and Wales

Cohabitation is the fastest growing family form.<sup>1</sup> It jumped from 1.5 million in 1996 to around 3.6 million in 2021, representing an increase of 144%.<sup>2</sup> That figure amounts to one in five couples today and is predicted to rise to one in four couples cohabiting by 2031. In 2021, of the 3.6 million couples cohabiting, around 1.2 million had dependent children and over half of all births were outside marriage (51.3%).

The legal position in England and Wales is complex, difficult to rationalise, and has failed to evolve adequately over time to reflect changing societal attitudes. There is no unified statutory regime, and any protections or entitlements cohabitants receive are highly context-specific. The definition of cohabitant in specific statutes is likely to vary as much as the eligibility criteria and remedies. In some contexts, cohabitants are treated in the same way as spouses or civil partners (e.g. applications for injunctions under the Family Law Act 1996) whereas in others they receive weaker protections or no protection at all.

Unlike the positions in Australia and Scotland, cohabitants in England and Wales receive inferior legal protections in two important contexts. Upon separation, courts possess no powers to adjust property rights and have no ability to order maintenance to a former partner. Instead, cohabitants are forced to use a property and trusts law framework to determine ownership of the family home, which is archaic, complex and difficult to navigate. Where children are involved, orders settling property for the benefit of a child can be sought under Children Act 1989, Sch 1, but this is under-used and generally only accessible by wealthy couples. The other context where a clear disparity in treatment arises is in relation to claims for financial provision following death. Unlike spouses or civil partners, cohabitants are not automatically entitled to property in an intestate succession. However, they are afforded slightly greater protection following death than separation as they can claim under the Inheritance (Provision for Family Dependents) Act 1975 for provision out of their former partner's estate.

As a result, cohabitants can be unable to claim relief for relationship-generated disadvantage which, practitioners have noted, in practice, is more likely to affect women.<sup>3</sup> The types of contributions made to a relationship and the division of labour within the home can have a huge impact on legal entitlements and there is clear potential for an economically stronger party to take advantage of the other.

This framework does not operate in a vacuum either. There is widespread misunderstanding among the population about legal entitlements, which is fuelled by the erro-

neous belief that merely living together creates a 'common law marriage'. A NatCen survey revealed in 2019 that 46% of the population believed in the so-called 'common law marriage myth', which increased to 55% where children were present.<sup>4</sup> Some might argue that the solution to this is better knowledge as to rights and the need to self-regulate, yet to date public awareness campaigns have not been able to dispel this myth. Equally, the potential of self-regulation as a 'solution' needs to be approached cautiously. While it is possible for couples to create cohabitation contracts, purchase property jointly and draft wills, cohabitants must be aware of the need to do that in the first place, which becomes complicated if they were labouring under the (incorrect) belief they were *already* protected by the law. And, of course, cohabitants must have the opportunity, financial resources and inclination to self-regulate. In practice, the uptake of cohabitation contracts is relatively low and the Law Commission estimated in 2017 that around 40% of the population do not have a will.<sup>5</sup>

## Cohabitation rights in Scotland

The Family Law (Scotland) Act 2006 (the 2006 Act) is Scotland's primary financial provision legislation for separating cohabitants. Prior to this enactment cohabitants had limited financial remedies when they separated. These were embedded mainly in statutory legislation<sup>6</sup> and common law remedies.<sup>7</sup> The Scottish Law Commission in its *Report on Family Law*<sup>8</sup> wanted to redress the situation where, following the breakup of a committed cohabiting relationship, one party found themselves in a position of financial vulnerability. The 2006 Act, s 28 (commonly referred to in Scotland as a 's 28 claim') was introduced in an attempt to address this.

### Qualifying criteria for a 's 28 claim'

In order to qualify, a couple must meet the test of being in a cohabiting relationship.<sup>9</sup> Parties, which include heterosexual or same sex couples, must have lived together as if they were husband and wife/civil partners. There is no length of time the couple must have lived together; the length of time is just one of the factors the court will take into account.

### Jurisdiction

The 2006 Act, s 22 provides that jurisdiction can be based on domicile. Many Scottish academics<sup>10</sup> believe that this section has retrospective effect. Accordingly, if your client has a Scottish domicile, while they currently live in England, Australia or elsewhere, they may be able to raise proceedings in Scotland.

### The financial remedies available

On the basis that the couple meet the s 25 test,<sup>11</sup> i.e. that they are in a cohabiting relationship, a separating cohabitant might be able to bring one of two main claims under s 28<sup>12</sup> where slightly different tests apply, but they combine (if both are pleaded) when the court is deciding whether to make an 'award'. An award takes the form of a capital sum payment which can be paid in instalments.<sup>13</sup> This excludes a variety of orders that separated married Scottish couples can access, such as pension sharing orders, property transfer orders and orders for spousal aliment.<sup>14</sup> Should cohabitants own a property in joint names then that prop-

erty can be transferred by agreement or one party can raise an action for division and sale.<sup>15</sup> The court does not have the power to make orders for periodical payments.

### The 's 28' tests

When considering the prospects of success for a s 28(2)(a) claim, i.e. for a capital sum, one should consider, first, whether one of the cohabitants has derived an economic advantage from contributions made by the other cohabitant who has suffered a corresponding economic disadvantage in the interests of the other cohabitant or the parties' children.<sup>16</sup> Secondly, the court will consider whether any economic advantage is offset by any economic disadvantage suffered by the other cohabitant in the interests of the other cohabitant or the parties' children and vice versa.<sup>17</sup>

Section 28(2)(b) empowers the court to make an award in respect of an economic burden of caring for any children of the parties' relationship after the end of the cohabitation. In order to be successful in this section, the offsetting provisions that we describe do not apply but it is still necessary for the cohabitant making a claim to persuade the court the s 28(3) test (noted in the previous paragraph, i.e. economic advantage and disadvantage) applies.

'Contributions' are defined<sup>18</sup> as including indirect and non-financial contributions and includes contributions by looking after any relevant child. 'Economic advantage/disadvantage' is defined as including gains/losses in capital, income and earning capacity.

### The significant 's 28' case

The most important case dealing with s 28 in Scotland has been the Supreme Court case of *Gow v Grant*<sup>19</sup> where it was decided that a 'broad brush'<sup>20</sup> approach should be taken with a focus on fairness rather than a precise calculation of loss.

### Ancillary points

Section 28 has a very strict time bar,<sup>21</sup> with no judicial discretion built in, that provides that a claim must be raised and served on the defender no later than 12 months from the date of their separation.

Written cohabitation agreements, akin to pre-nuptial agreements, are made between cohabiting couples in Scotland. There is, however, no provision in the current legislation for them to be recognised.

### Future of cohabitation claims

It is fair to say that the majority of Scottish family lawyers and some of the judiciary<sup>22</sup> have been dissatisfied with the s 28 test. The wording is complex, hard to interpret and it is difficult to advise clients of the level of claim that they are likely to receive from the court. In response, the Scottish Law Commission has very recently produced a report suggesting changes to s 28,<sup>23</sup> including the introduction of property transfer orders, a more lenient approach to the 12-month time bar and a set of guiding principles to help with the tests to be applied. Whether the Commission's recommendations will be taken forward, remains to be seen.

## Cohabitation rights in Australia

To understand the position in Australia it is necessary to go

as far back as the 1901 Constitution which established Australia as a Federation under a constitutional monarchy.

Before Federation, there were a series of independent colonies. Upon Federation, and through the Constitution, the new national ('Commonwealth') Parliament was given legislative power in relation to certain matters, while other residual legislative powers remained with the various Australian States.

Amongst the powers reserved to the Commonwealth Parliament was the power to make laws with respect to 'divorce and matrimonial causes'.<sup>24</sup> In the exercise of this power, in 1975, the Commonwealth Parliament passed legislation to create a comprehensive scheme regulating the rights of parties who had been married.<sup>25</sup> Family relationships outside marriage ('*de facto* partners') were left to the legislatures of the various States.

In practice, this left claims between former *de facto* partners to be determined by the application of the ordinary law of property and equity. However, in 2002, one of the Australian States (Western Australia) passed legislation to create a comprehensive scheme regulating the financial rights of former *de facto* partners.<sup>26</sup> In 2008, as a result of the Australian States referring their powers to the Commonwealth Parliament, legislation was passed at the federal level to create a national scheme regulating the rights of former *de facto* partners.<sup>27</sup>

As a result, since 2008 separated *de facto* parties have, in substance, had much the same rights to make financial claims as married parties.

### **Current legislation – eligibility to claim**

There are a number of criteria which must be satisfied for former *de facto* partners to be eligible to claim under the legislation:

- There must have been what constitutes a '*de facto* relationship'. This is defined as being 'a relationship as a couple living together on a genuine basis'.<sup>28</sup> The circumstances which can be taken into account include:
  - the duration of the relationship;
  - the nature and extent of their common residence;
  - whether a sexual relationship exists;
  - the degree of financial dependence and interdependence, and any arrangements for financial support, between them;
  - the ownership, use and acquisition of their property;
  - the degree of mutual commitment to a shared life;
  - whether the relationship is or was registered;
  - the care and support of children; and
  - the reputation and public aspects of the relationship.
- There must be a sufficient connection with Australia. This is satisfied if either of the parties is an Australian citizen, ordinarily resident in Australia or present in Australia on the day the application to commence proceedings is filed.<sup>29</sup>
- There must be a circumstance that warrants the making of an order – which is satisfied if any one or more of the following exists:<sup>30</sup>
  - the duration of the relationship was at least 2 years;

- there is a child of the relationship;
- the applicant made substantial contributions and a failure to make an order would result in serious injustice; or
- the relationship was registered.
- The application must ordinarily be made within 2 years after the end of the relationship.<sup>31</sup>

### **Alteration of property interests**

Where *de facto* parties are eligible to make a claim under the legislation, the court applies what is often described as a 4-step approach to determining the extent of their entitlements with respect to the alteration of property interests:

- (1) At the first step, the court identifies the assets, liabilities and financial resources of the parties. This is a wide-ranging enquiry. For example:
  - it is not limited to assets held in the personal names of the parties: it extends to any companies, trusts or other entities that they own or control;
  - it extends to superannuation and pension interests;
  - it is not limited to assets within Australia: it extends to assets wherever they are held worldwide; and
  - it is not limited to assets acquired during the relationship: it extends to assets acquired before and after the relationship.
- (2) The second step is to assess the respective contributions of the parties.<sup>32</sup> Again, this is a wide-ranging enquiry. It includes not only financial contributions, but also contributions in other spheres such as contributions made in the capacity of homemaker or parent.
- (3) The third step is to consider whether there are any factors that warrant an adjustment to what would otherwise be the contribution-based entitlements of the parties. The legislation specifies a range of factors which the court must consider in undertaking this exercise.<sup>33</sup> Those matters include:
  - age and state of health;
  - income and capacity for work;
  - care of a child;
  - standard of living the parties enjoyed during their relationship; and
  - enabling a party to undertake a course of education.
- (4) After the contribution-based entitlement has been assessed, together with any adjustment, the fourth step is to ensure that the overall result is 'just and equitable'.<sup>34</sup> This underscores the discretionary nature of the process.

The court has wide power to make the type of order appropriate to satisfy the parties' entitlement. This might include a combination of, for example, an order requiring the payment of an amount of money, an order for the sale or transfer of a particular piece of property, an order splitting a superannuation interest, etc.

### **Spousal maintenance**

In addition to claims for alteration of property interests, separated *de facto* parties can also, in appropriate circumstances, claim maintenance from their former partner.

### Ability to ‘contract out’

Parties have the option to make what might, in other contexts, be described as a pre-nuptial agreement. In the context of the Australian legislation, that type of agreement is described as a ‘financial agreement’. Essentially, the legislation gives parties the option to ‘contract out’ of what would otherwise be their legislative entitlements.

Once parties have made the decision to opt-out, there are essentially no rules as to the content or terms of their agreement. Instead, the parties are free to make an agreement on any terms that they find satisfactory.

The ‘safety net’ in the system is a requirement for each party to receive independent legal advice before they make such an agreement. The advice must cover matters including ‘the effect of the agreement’ and ‘the advantages and disadvantages ... of making the agreement’.<sup>35</sup>

### Conclusion

The question of cohabitation reform in England and Wales has received renewed interest over the past few years, most recently by the UK Parliament’s Women and Equalities Committee Report, *The Rights of Cohabiting Partners*.<sup>36</sup> Released in August 2022, the Report noted the vulnerability that could arise following relationship breakdown and death and that it was exacerbated by the common law marriage myth. It called for increased public awareness of the differences between marriage, civil partnership and cohabitation and the specific issues generated by religious-only marriages, where their lack of legal recognition treats such couples as cohabitants. In addition, it called for the introduction of opt-out legal protections along the lines of those proposed by the Law Commission in its 2007 Report and the immediate introduction of intestacy and family provision reforms advocated in the Law Commission’s 2011 Report. The government responded in November 2022 and largely rejected all recommendations on the basis that reform projects in other areas of family law, notably weddings law and financial remedies, needed to be completed before cohabitation could be reviewed.<sup>37</sup> The response is far from persuasive and reveals an unfortunate unwillingness by the government to tackle this important and pressing reform issue.

On 8 March 2023 the government also confirmed – when announcing that it would be asking the Law Commission to investigate financial remedy provision upon divorce including by way of comparative studies of other jurisdictions such as Australia – that the review would not encompass cohabitation law.<sup>38</sup> This was reaffirmed by the Law Commission when it announced the scope of its investigation into financial provision on divorce on 4 April 2023. Whilst it is disappointing cohabitation reform is not higher on the government’s agenda, it is hoped that when the law regarding cohabitation is finally considered appropriate for reform by the government, it will look (as it is doing with financial provision on divorce) to the experiences in other jurisdictions where rights of cohabitants have been better protected for some time.

### Notes

1 Office for National Statistics, *Families and households in the UK: 2021* (9 March 2022).

- 2 Office for National Statistics, *Births in England and Wales: 2021* (9 August 2022).
- 3 See Resolution’s Written Evidence to the Women and Equalities Committee’s *The Rights of Cohabiting Partners Inquiry*, available at <https://committees.parliament.uk/work/1196/the-rights-of-cohabiting-partners/publications/>
- 4 National Centre for Social Research, *Common law marriage – a peculiarly persistent myth* (22 January 2019).
- 5 Law Commission, *Making a Will* (Consultation Paper 231) (2017) para 1.1. See also Brian Sloan, *Borkowski’s Law of Succession* (OUP, 4th edn, 2020).
- 6 For example, limited occupancy rights and rights to tackle domestic abuse were (and still are) available under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (now amended by Family Law (Scotland) Act 2006, ss 5–10), cohabitants were (and still are) entitled to child alimony via the Child Support Act 1991 and the status of cohabitants was recognised in certain social security, housing and mental health legislation.
- 7 For example, unjustified enrichment claims (*Pert v McCaffrey* [2020] CSIH 5) or cohabitants could claim they were married by virtue of a ‘Marriage by cohabitation with habit and repute’ (for a full discussion, see Eric M Clive, *The Law of Husband and Wife in Scotland* (W Green, 2nd edn, 1981), pp 59–76). Jointly owned property could be sold via raising a court action for division and sale (a pursuer does not need to give any justification for raising an action for division and sale). It is an accepted principle of the common law remedy that an individual cannot be forced to remain a co-owner of a property if they no longer wish to (see *Grant v George Heriot’s Trust* (1906) 8 F 647 and *Upper Crathes Fishings Ltd v Bailey’s Executors* 1991 SLT 747).
- 8 Scottish Law Commission, *Report on Family Law* (1992) (Scot Law Com No 135).
- 9 The 2006 Act, s 25: ‘(1) In sections 26 to 29, “cohabitant” means either member of a couple consisting of– (a) a man and a woman who are (or were) living together as if they were husband and wife; or (b) two persons of the same sex who are (or were) living together as if they were civil partners. (2) In determining for the purposes of any of sections 26 to 29 whether a person (“A”) is a cohabitant of another person (“B”), the court shall have regard to– (a) the length of the period during which A and B have been living together (or lived together); (b) the nature of their relationship during that period; and (c) the nature and extent of any financial arrangements subsisting, or which subsisted, during that period. (3) In subsection (2) and section 28, “court” means Court of Session or sheriff.’
- 10 ‘Applying s.21 and 22 as the test for determining domicile would mean that the closest connection test (subject to the displacement rule) is the criterion which Scots law must use for fixing the domicile of origin of any person at any time, whenever the issue is to be determined after 4 May 2006’, G Maher, ‘Reforming domicile: one step forward (but looking back)’, (2006) 24 SLT 149–154.
- 11 See note 8.
- 12 The 2006 Act, s 28(2)(a): ‘make an order requiring the other cohabitant (the “defender”) to pay a capital sum of an amount specified in the order to the applicant’ and s 28(2)(b): ‘make an order requiring the defender to pay such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are parents.’
- 13 The 2006 Act, s 28(7)(b): ‘In making an order under paragraph (a) or (b) of subsection (2), the appropriate court may specify that the amount shall be payable– ... (b) in instalments.’
- 14 Family Law (Scotland) Act 1985, s 8.
- 15 See note 6.
- 16 The 2006 Act, s 28(3).

- 17 The 2006 Act, s 28(5) and (6): ‘The first matter is the extent to which any economic advantage derived by the defender from contributions made by the applicant is offset by any economic disadvantage suffered by the defender in the interests of– (a) the applicant; or (b) any relevant child. (6) The second matter is the extent to which any economic disadvantage suffered by the applicant in the interests of– (a) the defender; or (b) any relevant child, is offset by any economic advantage the applicant has derived from contributions made by the defender.’
- 18 The 2006 Act, s 28(9).
- 19 *Gow v Grant* [2012] UKSC 29.
- 20 ‘what section 28 seeks to achieve is fairness in the assessment of compensation for contributions made or economic disadvantages suffered in the interests of the relationship. The wording of subsections (3), (5) and (6) should be read broadly rather than narrowly ... As Lady Hale points out (see para 54), in most cases it is quite impracticable to work out who has paid for what and who has enjoyed what benefits in kind during the cohabitation, as people do not keep such running accounts and the cost of working things out in detail is quite disproportionate to the task of doing justice between the parties.’ *Gow v Grant* [2012] UKSC 29 at [33].
- 21 The 2006 Act, s 28(8): ‘Any application under this section shall be made not later than one year after the day on which the cohabitants cease to cohabit.’
- 22 Sheriff Principal in the case of *Smith-Milne v Langler* [2013] ScotSC 18 where he stated ‘perhaps more critically, given determination, it is difficult for Family Practitioners in advising their clients what awards the Court is likely to make’.
- 23 See [www.scotlaw.com.gov.uk/files/4916/6781/8178/Cohabitation\\_Report\\_and\\_draft\\_Bill.pdf](http://www.scotlaw.com.gov.uk/files/4916/6781/8178/Cohabitation_Report_and_draft_Bill.pdf)
- 24 Australian Constitution, Section 51 (xii).
- 25 Family Law Act 1975 (Cth).
- 26 Family Court Act 1997 (WA), Part 5A – introduced by the Family Court Amendment Act 2002 (WA).
- 27 Family Law Amendment (De Facto Financial Matters & Other Measures) Act 2008 (Cth) which, amongst other things, inserted a new Part VIIIAB into the Family Law Act 1975 (Cth) dealing with financial matters relating to *de facto* relationships.
- 28 Family Law Act 1975 (Cth), Section 4AA (1) (c).
- 29 Family Law Act 1975 (Cth), Section 39A.
- 30 Family Law Act 1975 (Cth), Section 90SB.
- 31 Family Law Act 1975 (Cth), Section 44 (5).
- 32 Family Law Act 1975 (Cth), Section 90SM (4).
- 33 Family Law Act 1975 (Cth), Section 90SF (3).
- 34 Family Law Act 1975 (Cth), Section 90SM (3).
- 35 Family Law Act 1975 (Cth), Section 90UJ (1) (b).
- 36 Women and Equalities Committee, *The rights of cohabiting partners* (August 2022), available at <https://committees.parliament.uk/publications/23321/documents/170094/default/>
- 37 Women and Equalities Committee, *The rights of cohabiting partners: Government response to the Committee’s Second Report* (November 2022), available at <https://committees.parliament.uk/publications/31430/documents/176284/default/>
- 38 Debate in Parliament, ‘Divorce: Financial Provision’, *Hansard*, HL Deb, 8 March 2023, vol 828, col 791.

# What Family Lawyers Need to Know about Valuing Mixed Property Portfolios in Financial Remedy Proceedings

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## Introduction

Over the past decade, a number of cases have come before the Family Court involving property portfolios. These cases have ranged from the seminal case of *Prest v Petrodel Resources Ltd & Ors* [2013] UKSC 34 through to the case of *ND (By her Litigation Friend) v GD* [2021] EWFC 53, where provision for end-of-life care was in issue.

Property portfolios can be complex due to being comprised of different asset classes (residential, commercial and land) but also complicated further by use (by a family business for example). Where there are businesses, it is important to consider whether the property or land which is used by the business has its own value. Enterprises such as market gardening businesses or builders' merchants, for example, often own property in urban areas which can be very valuable. In April 2023, it was reported that Travis Perkins builders' merchants sold and leased back seven of its sites in the Midlands and Southeast raising £23 million. A further complicating feature of property portfolios are charges across the whole or part, such as floating charges. These must be properly understood as they are likely to impact both on computation and on distribution in a financial remedies case. Getting to grips not only with value, but also with how that can or will be released can be crucial and will often require expert evidence to be obtained. It is also important to note that in many cases involving a portfolio, one party may have significantly more knowledge and understanding than the other. When acting for the financially weaker party, instructing a shadow expert at an early stage to assist in understanding what expertise may be required and what needs to be produced can be vital.

## A tenancy schedule

A key starting point when it comes to valuation of a portfolio is a full tenancy schedule. This should contain an overview of all the main information contained in all leases/licences/tenancy agreements, identities of tenants, rents per annum, any concessions and square footage of the properties within the portfolio as well as the tenure the properties are held on. In some cases, where a portfolio is managed it may be done professionally. Where the portfolio is managed by the owners themselves, it may exist in various documents. However, where there is a portfolio there should be a tenancy schedule and this is the first document to request. This enables practitioners and clients to begin to build an understanding of the portfolio make up and can be used to inform questionnaires, Part 25 applications, valuations and (if necessary), cross-examination.

## A valuation

If you type into a search engine 'free local house valuation', the top results will include estate agents offering free 'valuations'. What is produced by estate agents are market appraisals or opinion based on experience of house sales in the local area. This is not the same or equivalent to a property valuation. Most estate agent market appraisals provided in writing will state clearly that what has been provided is not a 'formal valuation' and that as such, they will accept no liability for the appraisal of what the property

might fetch if put to the market. This is not to say that a market appraisal will be insufficient in certain cases involving a family home and perhaps one other asset. Estate agents are local experts and based on this expertise are able to provide an assessment of what a property may sell for. This is not a formal (or 'Red Book') valuation and may not be appropriate when it comes to valuing mixed asset property portfolios where valuation requires a more careful analysis.

A formal property valuation can only be carried out by Registered Valuers who are professional members of the Royal Institution of Chartered Surveyors (MRICS/FRICS Registered Valuer). When a formal valuation is carried out, it is completed in accordance with the *RICS Valuation – Global Standards* or the 'RICS Red Book'. Not unlike the Family Division Red Book, the RICS Red Book details mandatory practices for RICS members undertaking valuation services.

The process of undertaking a Red Book valuation involves inspection of the property; research into matters that might affect the property, for example, planning, land designations, contamination, title and tenure, rights of way, etc; gathering, analysing and recording comparables; and undertaking valuation calculations. Clear benefits of a formal valuation include the level of expertise that will be applied to the assessment of value and that the valuation is underpinned by the valuer's professional indemnity insurance. An obvious downside of a formal valuation is the higher cost to the client of obtaining a report and potential delay. There will be circumstances where the approach taken results in a RICS valuation coming in lower than a market appraisal. There will also be circumstances where a RICS valuer will identify hidden potential in a property which would increase its value if brought to market. A Red Book valuation is a reliable way in a portfolio case to compute value, which can then be used to inform distribution.

### Valuations of residential property versus valuations of commercial property – vacant possession versus tenants in situ

When it comes to valuing property, it is important to first understand what type of property you are valuing.

When it comes to residential property, the valuation will usually be done on the basis of a sale with vacant possession. Vacant possession is a property law concept that refers to the legal obligation on the selling party to guarantee that the property is fit to be occupied and able to be accessed by the buyer at the time of sale. Most buyers of residential property are looking for properties with vacant possession and it tends to increase value of residential property for it to be offered to the market on this basis. There are circumstances where a residential property will be valued on the basis of having tenants *in situ* alongside the income stream that the tenants produce. This may alter the valuation, depending on the property.

When it comes to commercial property, the valuation will usually be obtained on the basis of the property being sold with tenants *in situ*. While an assumption of vacant possession is the normal basis on which to value residential property, should that special assumption be used in relation

to commercial property it is more likely to have the effect of suppressing the value. Where a commercial property is sold with tenants *in situ*, the new owner will have the immediate benefit of that income and will not have to seek out new commercial tenants and absorb the costs in the interim. The value of a commercial property lies with tenants *in situ* and the income streams they provide to the owner, the reason most people own commercial property in the first place. To complete the valuation, the valuer will therefore need the full information on the terms of the occupation of the tenants in the property.

The decision as to whether a property should be valued with vacant possession or with tenants *in situ* is a very important one. If you are in any doubt about the basis on which you are instructing an expert to value a property, speak to the expert first to check.

### Experts and the Family Court

Readers will likely be familiar with the rules that apply to the instruction of experts in family proceedings (Family Procedure Rules 2010 (SI 2010/2955) (FPR), Part 25). Applications to instruct experts must be made ahead of the first appointment to avoid potential cost consequences. Where there is a property portfolio, and the value is disputed, expert knowledge is likely to be required and must be considered at an early stage.

While it is trite, issues of admissibility are always important for family practitioners to have in mind when instructing an expert and bear repeating. The 'Governing criteria' on admissibility are helpfully set out in the *President's Memorandum: Experts in the Family Court* (October 2021) (derived from the Supreme Court decision in *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6 (per Lord Reed PSC)). In family proceedings, FPR PD 25B sets out at para 4.1(b) the requirement on experts to comply with the Standards set out in the Annex to the Practice Direction. These include all of those matters contained in the 'Governing criteria' for admissibility, and include requirements to have been active in the area of work; to have sufficient experience of the issues; to have familiarity with the breadth of current practice or opinion; and if the expert's professional practice is regulated by a UK statutory body that they are in possession of a current licence, are up to date with CPD and have received appropriate training on the role of an expert in the Family Court. Where the expert is not subject to statutory registration, then FPR PD 25B, Annex, para 6 identifies alternative obligations to ensure compliance with appropriate professional standards.

The President's recent judgment in *Re C ('Parental Alienation'; Instruction of Expert)* [2023] EWHC 345 (Fam), reiterated the need for practitioners to ensure that experts comply with the standards set out in FPR PD 25B. At [31], the President repeated what he stated in his 2021 *Memorandum* that:

'The Family Court adopts a rigorous approach to the admission of expert evidence. As the references in this memorandum make plain, pseudo-science, which is not based on any established body of knowledge, will be inadmissible in the Family Court.'

Following *Re C* it is important for all practitioners to be satisfied ahead of experts being proposed to the court that they

meet the standards in FPR PD 25B and that the evidence produced will be admissible.

The impartiality of an expert witness is also a key criterion for the admissibility of their evidence. It is important to bear in mind that the property world can be a small one, it is important to take steps ahead of agreeing the identity of an expert to confirm that they have no interests that might impact on their partiality. In the case of *Field v Leeds City Council* [1999] EWCA Civ 3013, the Court of Appeal upheld a decision to exclude the evidence of a surveyor at an interim stage on the ground that his impartiality had not been demonstrated.

It may also be important to consider whether there needs to be a cap on the fees of experts under FPR 25.12(5) (see *Loggie v Loggie* [2022] EWFC 2). This may be particularly important in cases involving large and complex portfolios and where costs of valuation are likely to be significant.

## Letters of instruction

In *Kennedy v Cordia* the Supreme Court highlighted the responsibility of a party's legal team for 'making sure that an expert keeps to his or her role of giving the court useful information'.

In family proceedings, the key to ensuring that this responsibility is discharged is in the drafting of a clear and directive letter of instruction. This should include, by way of a link or copy enclosed, relevant parts of FPR Part 25 (including FPR 25.3 and FPR 25.14), FPR PD 25B and reference to the page limit set out in FPR PD 27A. The Law Society's standard terms and conditions<sup>1</sup> (dated January 2023) can be referenced for ease and include information to experts about the media attending hearings and transparency/the publication of judgments.

## Instructions and valuation assumptions

When it comes to formal valuation of property (individually and collectively), an expert will consider what assumptions a willing purchaser would make on the date of valuation and the assumptions that a willing vendor would accept at a price based upon.

Letters of instruction must clearly set out the basis on which a valuation is to be prepared and, if relevant, any assumptions that the valuer is to have in mind. It is important to understand that a valuation is an opinion of value on a given date. The valuer can only value under the market conditions at the time and will not take into account future events (positive or negative) that could not be known to him at the time of said valuation. It is therefore worth considering in advance if there are any specific dates that might impact on value (such as when a notice date on a break clause in a lease is approaching). This is particularly the case if the date being set for the valuation is in the past or if any major events that will have an effect on value are around the time of the valuation. This is a matter on which a shadow expert may be able to offer invaluable insights ahead of, or during, the drafting of a letter of instruction.

To help practitioners understand the impact of assumptions made on particular dates, two examples are set out below that are taken from real life examples but are intentionally extreme.

### **Example 1: What a difference a day makes – valuation of a commercial unit**

The expert is instructed to value a unit on an industrial estate. The distribution unit is leased to a well-known company with a very strong covenant on a 25-year lease. The lease has a break clause at 10 years if 6 months' notice is given by 25 November 2023. The unit is let of £500k per annum but with an Estimated Rental Value (ERV) of £400k per annum (over rented) and there are RPI increase at all reviews going forward within the lease.

*Scenario A:* The expert is instructed to value the property on 11 November 2023. The instructions provided do not detail any assumptions that the valuer is to make when approaching the valuation. In these circumstances, a prudent valuer would likely assume the following:

- the tenant is likely to exercise the break clause;
- consequently, there will be a void rental period;
- a new tenant will pay rent at £400k per annum ERV; and
- a new tenant may be weaker in lease terms than the strong previous tenant.

*Scenario B:* The expert is instructed to value the property on 26 November 2023, after the notice date on the break clause. The tenant did not break the lease and remains *in situ*. In these circumstances, a prudent valuer would likely assume the following:

- the rent is likely to increase in line with the last 5 years' RPI (with a top-up to the review date); and
- the attractiveness of a 15+ year term is certain to be a good covenant.

The valuation provided using the assumptions of Scenario A could very conceivably come out at a value of, say, c. £4.2m. The valuation provided using Scenario B could well be c. £10.25m. It is important to stress that in both scenarios the valuer has discharged their professional obligations to the requisite standard; the assumptions used were appropriate and prudent for the date when the property was valued. However, the assumptions made due to the date on which the valuation was done lead to vastly different valuations.

### **Example 2: The potential impact of planning permission and consideration of overage clauses**

It is also important to consider whether there could be any implications of, say, a new local plan in the pipeline for the value of property or land. In circumstances where you are dealing with land or property in areas where planning permission for a change of use might be achieved, the change in value can be very significant. In these circumstances ask your expert to consider the value of the property sold with an 'overage clause'. Overage clauses are known as uplift or clawback provisions. This means that if planning permission is subsequently obtained, the seller will be entitled to a share in the uplift in the property's value. A real example of this related to farmland which without planning was valued at £10k per acre. However, with increases in modern industrial land values and the benefit of a change of use, this could in certain parts of the country have easily moved to, say, £2m per acre (if planning permission is achieved). Put simplistically, if there were 100 acres of farmland, the overall difference to the value of the



land pre- and post-planning could then be as much as £199m. Even a share of this upside could be very considerable indeed and far exceed the original value. Specific legal advice may be required if overage clauses are to be considered.

## Conclusion

The two examples above highlight the challenges that may exist in valuing one asset within a portfolio. How those assets then interact with other assets in the portfolio, businesses or charges may also impact not only on value, but also as to distribution. Expert advice at an early stage may be invaluable in understanding not only the value of a portfolio but also, more importantly, how to extract from it what your client is seeking by way of a final settlement.

In some cases, distribution may require further expert evidence from a forensic accountant to advise on how liquid capital may be released from the portfolio to meet needs or for sharing, and how a fair outcome can ultimately be achieved.

It is hoped that this article has provided useful starting points and considerations for practitioners when it comes to dealing with cases involving a property portfolio comprised of different asset classes.

## Notes

- 1 [www.lawsociety.org.uk/topics/family-and-children/instructing-experts-in-family-and-children-court-proceedings#standard-terms-and-conditions](http://www.lawsociety.org.uk/topics/family-and-children/instructing-experts-in-family-and-children-court-proceedings#standard-terms-and-conditions)

# Has the Sign on the Blind Alley Been Lifted? The Possible Return of Compensation

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The concept of compensation in financial remedy proceedings has, since its inception in 2006, been a divisive principle. On the one hand, it is a principle that underpins the very reason that the justice system exists: to compel restitution; on the other hand, it can be seen to be a double counting exercise that does not sit comfortably with the principle of fairness. *TM v KM* [2022] EWFC 155 marks the second case in as many years where a litigant was given an award based on the principle of compensation. One cannot help but wonder, are we seeing a resurgence in claims for compensation?

## The law

Those reading will no doubt be familiar with the introduc-

tion of the compensation principle in the seminal authority of *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 and in particular the speeches of Lord Nicholls and Baroness Hale. On compensation, Lord Nicholls said at [13]:

‘the parties may have arranged their affairs in a way that has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband’s enhanced income [...] women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and child-carer.’

Therefore, the double loss suffered by the wife in this scenario is required to be taken into account when considering a fair division of the assets. Lord Nicholls warns of double-counting at [15] emphasising that ‘they are distinct concepts, and they are far from co-terminous. A claimant wife may be able to earn her own living but she may still be entitled to a measure of compensation’. Baroness Hale highlights that what may distinguish compensation from needs is that ‘the economic disadvantage generated by the relationship may go beyond needs, however generously interpreted’ (at [140]).

In practice, however, compensation has been a battleground of debate with many prominent members of the judiciary voicing their disagreement with the principle.

First, in *RP v RP* [2006] EWHC 3409 (Fam), Coleridge J famously said that freestanding compensation claims were a ‘blind alley at the mouth of which a “no entry” sign should now be planted’ (at [62]). This was in circumstances where the wife gave up work to care for children while the husband continued to work, both parties made a life-choice and both contributed equally to the marriage, for which both would be entitled to the ‘full share of the combined and equal contribution’ (at [63]).

In *VB v JP* [2008] EWHC 112 (Fam), Sir Mark Potter remarked that while compensation provided an exceptional caveat in scenarios of relationship-generated unfairness where a needs-based award would not suffice, ‘it is no more than an aspect of fairness, important to be identified as a strand or step in the thinking of the court’ (at [45]). Sir Mark Potter went on to say that in cases where ongoing periodical payments are required, compensation should be dealt with by a generous assessment of needs (at [59]).

In *SA v PA* [2014] EWHC 392 (Fam), Mostyn J disagreed with the principle of compensation both conceptually and legally. In that case, a wife gave up her career as a solicitor to care for her family but there was no record of her working for an appreciable period of time during the marriage, thus making a reasoned estimation of her earning capacity a difficult exercise. On his difficulties with the theory of compensation, Mostyn J said that the House of Lords refer to ‘hardship’, ‘handicap’, ‘sacrifice’ or ‘disadvantage’ in a situation where the person who has been disadvantaged has been a willing and active participant in their own relationship-generated disadvantage. The willingness of the party to give up work, Mostyn J says, is the dominant factor for consideration (at [28]) and that should not be ‘characterised as a loss “suffered” by entitling her to an award in excess of her reasonable needs’ (at [28]). Furthermore, Mostyn J highlighted that the exercise to be

undertaken by the court when determining whether an award for compensation should be made requires the court to enter into ‘extremely dangerous territory’ (at [30]) dealing in hypothetical scenarios ‘which is not based on any kind of hard evidence but usually on hunch, guesswork and speculation’ (at [30]). Mostyn J went on to say that not only is the exercise ‘highly arbitrary’ (at [31]), but also one that is ‘extremely difficult to compute rationally, let alone predictably’ (at [31]) as a premium element on top of a needs-based claim.

Whilst there have been some instances of compensation awards being made, see for example Baron J in *Lauder v Lauder* [2007] EWHC 1227 (Fam), the principle of compensation has been mired in controversy since 2006. It seemed that making successful claims in compensation would be limited to only the most fact-specific of circumstances with quantification of such claims remaining a real difficulty.

### **The implications of *Waggott v Waggott* [2018] EWCA Civ 727 on the principle of compensation**

The decision of *Waggott* and the exclusion of earning capacity as a resource capable of being shared on divorce shook up the debate as regards compensation.

On compensation, the wife argued that the husband had the benefit of a relationship-generated advantage by way of his earnings and that the judge at first instance had failed to take this into account when making the award. Similar to previous objections of Mostyn J in *SA v PA* [2014] EWHC 392 (Fam), the Court of Appeal struggled to reconcile how the court would quantify a claim for compensation in such terms since such quantification would require a hypothetical analysis of what a career would, or indeed would not, have looked like and whether it would have been, or indeed not have been, enhanced or disadvantaged by the marriage (at [98]).

It seemed, therefore, that the bar to proving compensation was unattainable. If the court was required to conclude that the disadvantaged party’s earnings, had they not given up work, would have resulted in the parties having greater resources than those awarded on a needs or sharing basis, then surely compensation was effectively now extinct. Similarly, if future earnings are not available to share, then any claim for relationship-generated disadvantage being supplemented by a compensation-based award could not, in principle, extend beyond the date of separation.

### **The two enigmas – *RC v JC* [2020] EWHC 466 (Fam) and *TM v KM* [2022] EWFC 155**

The post-*Waggott* era has seen two cases where arguments for compensation have been successful. Both exceedingly similar on their facts, it may be that there is a factual exception to the now general rule that compensation is a blind alley at which a ‘no entry’ sign has indeed been firmly placed.

First, *RC v JC* [2020] EWHC 466 (Fam). The husband was 48 and a partner in a well-known law firm, the wife was 45 and a homemaker. The wife qualified as a solicitor and ‘had a very good chance’ (at [50]) at partnership, with particular reliance placed on appraisal reviews, but had not practised for some time. On becoming a full-time wife and home-

maker, the wife ‘gave up the chance, as opposed to the certainty, of far higher remuneration’ (at [53]) and thus, extinguished her earning capacity. On divorce, the wife sought a compensation award by way of periodical payments of £360,000 per annum in addition to her equal share of the liquid assets and a pension sharing order of 20.5% against the husband’s pension to equalise pension assets. Moor J found that whilst she may be able to earn in the future, any money earned would simply enable her to live to a higher standard (at [54]). Moor J awarded the wife £4.85m to meet her housing and income needs. In addition, he made a compensation award of £400,000, i.e. an additional 8.25% of her lump sum award, which stood as £100,000 per annum for the next 4 years. As regards the total assets in the case, the wife received 54%.

Secondly, *TM v KM* [2022] EWFC 155. The husband aged 48 had a very successful career in the Middle East as an investment banker earning approximately US\$2m per annum. The wife was aged 50 and previously had a very successful career in the USA, earning at the height of her career US\$800,000 per annum as an investment banker. The wife relocated twice during the marriage, each time following the husband’s career first to London and then to the Middle East. HHJ Hess found on the facts that the wife had suffered a relationship-generated hardship as she had followed the husband to London, then to the Middle East and her departure from employment to become a full-time carer for the parties’ children. Taken cumulatively, had these events not happened, the wife would have continued to be a very high earner (at [64]–[65]). HHJ Hess found it unlikely that after 15 years out of employment and aged 50 the wife would be able to return to earning at a comparable level to previously. He did however assign her an earning capacity of circa £50,000 per annum gross. The wife was awarded a lump sum of £2,592,126 and an additional compensation award of £500,000. On the total realisable assets, the wife received a 54.3% share. HHJ Hess was explicit in his quantification of the compensation award, stating it was awarded on the same methodology as Moor J in *RC v JC*.

### **Conclusion**

There have now been two cases in which compensation awards have been made in as many years since *Waggott*. Can it be said, therefore, that there is a re-emerging case for compensation in financial remedy cases? Or are cases of compensation seemingly confined to cases of wealth, where there is a clear factual pattern of one party being ‘fledged’ before adopting the role of homemaker?

In this author’s submission, the law as it concerns compensation is confused, fraught with conflicting authorities that condemn the House of Lords’ adoption of the principle. It is a principle in desperate need of clarificatory appellate authority. Only litigants with significant assets are likely to be able to afford to litigate a compensation argument, and in reality there are likely to be factual scenarios that walk the tightrope between a potential claim for compensation, and one confined to principles of needs and sharing. The risks and costs of litigating compensation are such that many are likely to err on the side of caution. Caution is also more likely to be adopted when considering, more widely, that litigating compensation requires the

court 'to indulge in a detailed and lengthy retrospective involving a general rummage through the attic' (per Coleridge J in *G v G* [2002] EWHC 1339 (Fam) at [49]). What is clear from *RC v JC* and *TM v KM* is that one must be able to show a demonstrable career which has then been subsequently compromised. Therefore, only the rarest of factual scenarios are likely to result in a compensation award being made.

Whilst many baulk at the principle of compensation, surely we must address the reason behind its existence. We, as a society, have evolved on the understanding that women are to conform to their traditional biological roles upon having children, whereas men are able to continue working full-time. Whilst Mostyn J is correct that the decision to leave work is a choice, made freely by those able to do so, the reality is that the majority of women still struggle to balance a successful career with the crushing pressures that society places on them to be a present and active parent. That is not to say there is no pressure on men to do the same, it is however still very much a legacy of the past that women should be at home. The COVID-19 pandemic, in this author's opinion, marked a huge step forward in changing wider societal attitudes towards child-caring responsibilities. The ability to work from home has taken away the stigma of leaving the office early to do the school run without the pressures of office culture interfering. But

more must be done. Until we, as a society, cut the tension between the need to choose between a career and parenthood, the more likely that claims for compensation will continue. A clear resolution to the tension would be to reduce the crushing costs of outsourcing childcare. Another solution would be to address the painstakingly little parental leave available in this country, when compared to countries such as Sweden. In Sweden, both parents may take a combined 480 days' parental leave for their first-born child, with an additional 180 days granted following the birth of each additional child. Removing the archaic biological tradition that women are homemakers and men are breadwinners is surely the only way to ensure that arguments based on compensation become defunct.

In conclusion, one cannot fail to notice that the law as it relates to compensation seems confined to the most specific factual circumstances of relationship-generated disadvantage. Perhaps it is the case that *RC v JC* and *TM v KM* are mere exceptions to the widely accepted and general rule that compensation claims no longer have a place in financial remedy proceedings. Until such a time as we have further appellate authority on the issue of compensation, and wider issues of childcare are addressed in society, the law is, and will remain, confused; where seemingly only the most specific of factual patterns will yield a successful claim for compensation.

# Are You There ChatGPT? It's Me, Charlotte – ChatGPT, Generative AI and the Law

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Readers will probably have heard by now of OpenAI's ChatGPT. Many of you will have experimented with it, or one of the other available generative artificial intelligence (AI) models such as Microsoft's Bing. If you have not yet utilised any of these new technologies, you will very likely have read about them. This article is based on my experience with this novel technology, chiefly ChatGPT, as at May 2023, and aims to provide some thoughts on the potential benefits and pitfalls for the legal profession in its use as well as examples of potential use cases.

ChatGPT first became publicly available as a free-to-use research preview in November 2022. Within just 5 days of its launch, it had attracted one million users, and in 2 months, this number had rocketed to 100 million. The AI's human-like conversation abilities and its capacity to generate novel content generated a flurry of excitement, with social media soon filled with ChatGPT-produced lyrics, sonnets, stories, and so on.

The model initially launched was GPT-3.5, which is still

the model available for non-subscribers. In March 2023, OpenAI released GPT-4, presently accessible to subscribers to ChatGPT Plus at a cost of US\$20 per month. GPT-4 marks a significant improvement over its predecessor. Any ChatGPT output in this article is generated by GPT-4 and has been produced specifically for this article.

The AI landscape is evolving rapidly. Since ChatGPT's initial launch, several competitor products have emerged, including Bing (which is based on OpenAI's GPT-4 with the added functionality of internet access), Google Bard and Anthropic Claude. Microsoft has also announced a partnership with OpenAI to integrate GPT-4 into its Office apps. Given the current pace of change, the AI landscape is likely to have evolved further by the time you read this article.

It seems likely that these developments will significantly impact the working lives for all white-collar workers, including in the practice of law. Bill Gates, in a blog post published on 21 March 2023, hailed AI development as:<sup>1</sup>

'as fundamental as the creation of the microprocessor, the personal computer, the Internet, and the mobile phone. It will change the way people work, learn, travel, get health care, and communicate with each other. Entire industries will reorient around it. Businesses will distinguish themselves by how well they use it.'

## An introduction to generative AI and ChatGPT

Let's ask ChatGPT to provide you with a short introduction to ChatGPT and generative AI.

**Prompt:** 'Please provide a brief single paragraph introduction, written for an intelligent lay audience, to generative AI models such as ChatGPT and GPT-4. Please include brief details of the training process for such models and explain key technical terms.'

Generative AI models, like ChatGPT and GPT-4, are a type of artificial intelligence that can produce human-like text, transforming the landscape of natural language processing. These models are trained through a process called deep learning, which involves feeding massive amounts of text data into a neural network, which is a complex mathematical system inspired by the structure and function of the human brain. The neural network learns to recognize patterns and relationships in the data, allowing it to generate contextually appropriate responses to user inputs. A core concept in the architecture of these models is the 'transformer,' which excels at processing and understanding sequences of information, making it particularly well-suited for tasks involving language. By leveraging the power of transformers and the sheer scale of data, generative AI models such as ChatGPT and GPT-4 continue to push the boundaries of what is possible in the realm of human-AI interaction.

This, somewhat self-congratulatory explanation requires some unpacking. It is important to understand what ChatGPT is and what it is not.

ChatGPT was trained on vast amounts of data scraped from the internet, as well as repositories of books and articles. This dataset enables it to converse fluently on a vast array of subject matters.

However, ChatGPT is not a search engine. The cut-off

date for the dataset it was trained on is September 2021. As I write this, various plugins and applications are being developed that enable OpenAI's GPT models to be connected to other sources of content (Microsoft's Bing being one such example). However, none of the GPT models available for general use through OpenAI's web application are able to access the internet. Consequently, it cannot look things up online (although it may sometimes respond as though it does).

Further, the resulting abilities should not be mistaken for the cognitive capabilities that characterise human intelligence. Without wishing to get too bogged down in terminology and contested definitions, artificial general intelligence (AGI) refers to the possibility of machines that possess human-like cognitive abilities and remains theoretical.<sup>2</sup>

You should therefore heed ChatGPT when it tells you that it is generating 'contextually appropriate responses to user inputs'. It is not truly thinking or reasoning in the way that humans do. This might be an oversimplification, but it may be helpful to think of ChatGPT as super-smart predictive text – a hyper-intelligent version of that which you have on your mobile phone. When you give it a prompt, what it is doing is generating a statistically plausible response to the prompt. That response is based on the data it has been fed from millions of books and webpages and so is often not merely plausible, but accurate as well. However, ChatGPT will also on occasion plug gaps with confabulation, including inventing facts (often referred to as 'hallucinations'). This tendency to produce plausible sounding but factually false or otherwise erroneous responses has been reduced in GPT-4, as compared with GPT-3.5, as a result of a more extensive training process. Nonetheless, it is still present.

While the AI has been trained on vast amounts of data and can produce impressive results, ChatGPT may also be described as being 'black box' technology, in that the inner workings of the AI model, particularly how it processes inputs and generates outputs, are not easily understandable or transparent.

## ChatGPT and the legal profession

There appears to be a new article daily about the repercussions of ChatGPT and generative AI for the legal profession, varying wildly between gloomy prognostications about the end of the legal profession and over-hyped proselytising about its transformative potential.

Goldman Sachs in a recently published report posited that two-thirds of current occupations could be partially automated by AI, suggesting that the legal profession has particularly high exposure (second only to office and administrative support).<sup>3</sup>

It seems unlikely, so long as the legal profession continues to be regulated, that advances in AI will spell the end of the legal profession, as some commentators have suggested. It is reasonable to suppose that there will be job losses, however, particularly in support roles.

You may also have read that Sir Geoffrey Vos, Master of the Rolls, has even suggested that some judicial decision-making could be delegated to AI.<sup>4</sup> Whilst generally being a tech enthusiast myself, the ethical implications of AI-assisted or AI-driven judicial decision-making strike me as matters requiring particularly anxious scrutiny, particularly

given the 'black box' nature of this sort of technology and its propensity to replicate bias.

Thought needs to be given too as to the implications of AI for the teaching of law and training of future lawyers. I imagine that many educational institutions are giving careful consideration as to how to weed out ChatGPT plagiarism, as well as how to ensure that students learn to think independently and to make judicious use of these tools.

Exactly what this nascent technology heralds for the legal profession is a matter of considerable speculation. I will confine myself to three, less serious, short-term predictions:

- (1) By the end of the year, you will grow tired of seminars where speakers shoehorn in GPT-authored sonnets, limericks, or raps.
- (2) At least one hapless legal professional will find themselves notifying their insurer because they relied on erroneous GPT-generated content.
- (3) You will have used AI in some shape or form, whether via any of the aforementioned AI tools or integrated into the software or hardware you utilise.

On the longer-term view, whilst it would be easy to dismiss the excitement surrounding AI as mere hype, there is reason to be paying attention to what is happening in this field. The legal profession parses and produces enormous amounts of complex text, and it seems inevitable that generative AI will play a significant role in shaping its future.

Further support for that view can be drawn from the testing of GPT-3.5 and GPT-4 against the Universal Bar Exam (UBE), a standardised test used by many US jurisdictions to test the skills and knowledge required for legal practice, including of core subjects such as contract, tort, real property, evidence and procedure, and so on, prior to becoming licensed to practice law.

Whereas GPT-3 scored in the 10th percentile as compared to a human cohort, GPT-4 demonstrated a very significant improvement and scored in the 90th percentile.<sup>5</sup> It is important to note that the UBE is not merely a multiple-choice test, which one might expect AI trained on internet data to be proficient at. The UBE also consists of problem-based essay questions, as well as competence in certain drafting tasks.

Interestingly, GPT-4 performed poorly on certain questions related to my own practice area. It failed to calculate the distribution of assets from a testamentary trust deemed to be invalid and also erred in its analysis of a real property question involving the designation of a future interest and struggled to apply the rule against perpetuities (a struggle that many a trust lawyer would empathise with!).

However, before one concludes that trusts lawyers, like cockroaches, will be the last remaining legal life form after the AI apocalypse, it is also worth noting that these results were produced based on 'zero shot' prompting. In other words, the model was simply given the test questions and received no prior examples or training specific to the task and there was no follow up to check its reasoning.

Given those innate capabilities, things are likely to get particularly interesting once generative AI is coupled with specialist legal databases. At present, there does not appear to be much going on that is specific to this jurisdiction but that is surely only a matter of time.

## Warnings – the three maxims of ChatGPT usage

### **(1) Do not share confidential information with ChatGPT**

You may be wondering if ChatGPT will absorb your prompt and then offer that information back to other users who enquire about similar topics. As things currently stand, that is not the case. The model is continuing to be trained based on rating and monitoring its responses, but is not adding information from user prompts to its training data.

Privacy is still a concern, however, because OpenAI can review your content. Note the following from OpenAI's FAQs:

- '5. Who can view my conversations?
- As part of our commitment to safe and responsible AI, we review conversations to improve our systems and to ensure the content complies with our policies and safety requirements.
6. Will you use my conversations for training?
- Yes. Your conversations may be reviewed by our AI trainers to improve our systems.
8. Can you delete specific prompts?
- No, we are not able to delete specific prompts from your history. Please don't share any sensitive information in your conversations.'

It is now possible to opt out from your conversations being used for training – this can be done via submitting a form to OpenAI if you wish to retain your chat history or, otherwise, there is an option in account settings to disable chat history, in which case OpenAI will delete new conversations after 30 days. However, OpenAI make it clear that they can still review your content (when needed to 'monitor for abuse' according to their FAQs) even if you opt out for this purpose.

For all of its easy conversational manner, you should therefore resist being lulled into oversharing with ChatGPT. You are not having a cosy chat with a colleague. Nor even are you having an affable discussion with opposing counsel. You should work on the basis that you are posting in a publicly viewable forum. The same caution should be exercised with plugins and the many third-party applications which route user queries back to OpenAI.

If you are going to experiment with ChatGPT for legal work, it is essential that you not only remove all confidential or private information, but that you also sufficiently edit any information that could allow jigsaw identification.

### **(2) Verify content produced by ChatGPT before you rely on it**

Remember that ChatGPT is designed to do no more than provide a statistically plausible answer to the prompt. It is incapable of searching and verifying its response. Although Bing notionally is capable of doing this and will offer citations, personally I have found this functionality to be weak. It cannot distinguish authoritative citations from junk and often the citations do not actually support the proposition made.

ChatGPT simply cannot be relied upon as a means of undertaking any form of legal research. Bear in mind that it is chiefly trained on content scrapped from the internet, much of which is likely to be poor quality or superficial at

best. It may do a reasonable enough task of providing an outline of a landmark decision, however it is likely to know next to nothing about more niche legal topics.

GPT-3.5 invented wildly. It will make false assertions with total confidence and which sound convincing. Whilst that has been improved somewhat in GPT-4, it will still invent: see Example 1 in the Appendix in which GPT-4 provides a response citing cases that either do not exist or do not concern the topic at hand. Anything produced by ChatGPT requires careful review, therefore, before you make use of it.

ChatGPT also replicates the biases of the data it has been trained on, including gender, racial and ideological biases.<sup>6</sup> Moreover, it is prone to being swayed by the way in which a query is phrased or formulated and will eventually start to forget context in longer conversations.

Intellectual property is also currently a hot topic in AI development. OpenAI's terms of use provide that the input provided to ChatGPT is owned by the user and OpenAI further assigns use of the output to you as the user.<sup>7</sup> However, it is possible that its response could draw on copyrighted material in a way that could amount to plagiarism if not copyright infringement and, depending on the intended use of the material, this may be a further reason for checking its content before you make use of it.

### **(3) Assign tasks to ChatGPT, but don't delegate your thinking**

It may be helpful to regard ChatGPT as an eager intern with a second-year university degree not just in law but in *everything*, capable of saving you time when they have grasped the task but with a tendency to go off piste and requiring careful supervision and checking. I am sure that this is an obvious thing to say to a legal readership acutely aware of their professional obligations and liability risks, but, at best, any content that ChatGPT offers is a starting point.

Until we have legal market specific AI powered resources, ChatGPT cannot be regarded as a useful standalone source of information. Its current iteration offers promise as a tool to support your legal expertise, but it is important not to mistake it for true intelligence. Whilst it may be capable of generating an idea or angle that has not occurred to you, largely what it produces (consistent with its nature as a complex predictive text generator) is shallow and predictable and it certainly cannot be relied upon to think for you.

There is scope for utilising ChatGPT to enhance your analysis, by asking ChatGPT to critique or refine your content (see Example 7 in the Appendix), or brainstorm alternative viewpoints. But I suggest if you are planning to use ChatGPT in this sort of way, you do your own thinking first.

As things presently stand, its current potential lies principally in efficiency savings in tasks where you can delegate some of the basic labour and in which you have the expertise to supervise and correct its work (see the checklist at Example 4 in the Appendix) or where otherwise the nature of the task is something low stakes or not client work (such as the committee terms of reference at Example 6 in the Appendix). It is particularly adept at tasks such as text summarisation, paraphrasing, or extracting key points from a passage (see Example 3 in the Appendix).

## Basics of prompting

A ‘prompt’ is a text input given to an AI language model, which serves as a starting point or cue to generate a response. The art of ‘prompting’ (or to use the current lingo ‘prompt engineering’) lies in skilfully crafting input statements or questions to elicit a useful response.

To my mind, one of the most interesting aspects of all of this is the fact that natural language has now become a medium for giving instructions to machines. This is something that the legal profession should be naturally adept at, given we are trained to use language with precision and to ask incisive questions.

GPT-4 has a 25,000-word input and a memory capacity of 64,000 words. Within the confines of that memory capacity, it generates a response based upon the user’s most recent input, previous prompts and its own responses. This means that ChatGPT can hold a sustained conversation, retaining, within those limitations, prior context provided.

**Prompt:** ‘Provide a basic anatomy of a prompt, please.’

A basic anatomy of a prompt consists of three primary components:

- (1) **Context:** The context sets the stage for the prompt, providing background information or specifying the scenario to ensure the AI model understands the situation or subject matter it needs to address.
- (2) **Task description:** The task description clearly outlines the objective or request for the AI model, guiding it towards the desired action or output. This can include tasks like answering a question, summarizing a passage, translating text, or generating an explanation.
- (3) **Constraints or guidance:** This component is optional but can be useful to refine the AI model’s response. It may include limitations on response length, a preferred format, or specific aspects the answer should focus on. Constraints or guidance help tailor the model’s output to better suit the user’s requirements.

Here are some general tips on generating useful output from ChatGPT based upon my reading and experimentation to date:

- Observe the basic anatomy, as above.
- Employ Chain-of-Thought (CoT) prompting: ask ChatGPT to generate step-by-step explanations or to provide a detailed breakdown of its reasoning process. Research shows that ChatGPT performs better and with greater accuracy on common sense, symbolic and other reasoning tasks when the prompt includes a request to think step-by-step.<sup>8</sup>
- Incorporate external sources: provide relevant passages from legal texts or cases or articles to help inform the response. One useful strategy, particularly working around prompt word limits, can be to approach this iteratively by repeatedly providing a new extract and each time asking ChatGPT to review its previous answer in light of the new information and to consider whether or not the new information changes its previous answer.
- Ask for self-reflection and correction: research also

shows that GPT-4 has the ability to self-reflect, by asking it to review, analyse and potentially correct or improve its response, and that reflection can improve its accuracy by around 30%.<sup>9</sup>

- Iterate and experiment: if the model’s response is not as desired, try different prompt variations, rephrase or resolve any ambiguity in the initial prompt, or ask follow-up questions to guide the model towards the output you require.

## Use cases worth exploring further

I will close with offering a few ideas, by way of inspiration, for ways in which you might make use of ChatGPT. Examples of most of these use cases can be found in the Appendix.

- *Summarising, paraphrasing or identifying key concepts.* ChatGPT generally does a good job of breaking down dense texts such as passages of judgments or practitioner texts. See Example 3 in the Appendix in which I asked ChatGPT to provide a bullet point summary of a passage from HHJ Matthews’ recent judgment in *James v Scudamore & Ors* [2023] EWHC 996 (Ch). ChatGPT performed reasonably well here. While it mistakenly attributed some of the judge’s reasoning to the previously cited authorities, requiring editing, it still effectively distilled the essential points established in the extract.
- *Explaining complex legislation.* ChatGPT can be used to break a statutory provision down, for example, into IF, AND, THEN, ELSE, MAY statements.<sup>10</sup> See Example 2 in the Appendix in which I asked ChatGPT to break down Trustee Act 1925, s 31. I might have unpacked the section differently, but ChatGPT did a good job of breaking down a provision that, based upon my experience from my lecturing days, is prone to cause confusion. Note, too, the benefit in this example of asking it to check and correct its analysis, which prompted ChatGPT to produce a result that teased out the nuances of the section with greater clarity. After completing this process, ChatGPT correctly identified that a beneficiary with a contingent interest is entitled to be entitled to the income arising on their expectant share of the fund at 18 but not the accumulations, which required the application of the provision (a complete answer here would consider Trustee Act 1925, s 32 and the possibility of advancing capital, but that had not been provided).
- *Critiquing reasoning.* ChatGPT can be used to identifying potential weaknesses in a line or argument, or logical errors, and to brainstorm alternative perspectives and counterarguments. Somewhat cheekily, I invited ChatGPT to critique the reasoning of the Court of Appeal in *Haley v Haley* [2020] EWCA Civ 1369 in Example 7 in the Appendix. It would be better to provide it with more of the judgment to work with, which would have produced a more nuanced response, but at least some of the points raised have been picked up by commentators on the decision.
- *Finessing language.* ChatGPT can aid drafting and writing tasks if asked to improve grammar and syntax or, for example, asking it to make the language of a



passage more persuasive or to substitute legalese for plain English.

- *Generating practice management tools.* ChatGPT may be usefully deployed in tasks such as generating templates or checklists, such as the trusts of land checklist in Example 4 in the Appendix. This example demonstrates the ability of ChatGPT to format output into a table. The content is generally pretty sensible (promissory estoppel as opposed to proprietary estoppel aside) and here ChatGPT produced in a matter of seconds a very useful starting point that requires a little refinement but which would have taken me considerably more time to put together.
- *Getting started and overcoming the barrier of the blank page.* ChatGPT may be helpful in reducing some of the resistance that one can sometimes experience getting started on a new project. Personally, I am not a huge fan of ChatGPT's writing style, which is somewhat bland and flabby, and cannot imagine that I would ever be interested in delegating my writing to ChatGPT beyond drawing on it for tasks such as editing or summarisation. However, it is very useful for brainstorming ideas to get going, suggesting an outline or structure, offering ideas when you get stuck and so on. In Example 5 in the Appendix, I used it to put together a first draft of a book proposal on professional negligence in financial remedy work. The result is rather generic and would need refinement but is certainly a useful starting point.
- *Non-fee earning time.* There are many other tasks that occupy our time outside the fee-earning work that ChatGPT can assist with. Generating marketing copy, tidying up notes from a meeting into a summary and action points for circulation, social media content, formulating your rough concept into seminar blurb, etc. In Example 6 in the Appendix, I asked it to generate terms of reference for a chambers looking to establish an internal working party to explore. Unforgivable acronym aside, ChatGPT generated a pretty thorough first draft picking up the need to consider ethical and data privacy considerations.

My personal conclusion at this particular juncture of AI development, and based upon my experimentation so far, is that generative AI technologies certainly show promise for saving time in at least some aspects of our core legal work, and more generally in alleviating some of the burden of admin and assisting with the 'extra-curricular' activities many of us engage in outside fee-earning work.

I have touched on the need to apply this technology with a degree of caution and critical thinking. Beyond the practical considerations I have focused on here, these advancements are going to necessitate much bigger conversations about their implications not just for the legal profession but more broadly for society as a whole. As the legal industry grapples with integrating AI into its practices, we are going to need to strike a balance between embracing innovation, while engaging in thoughtful discussions around the ethical, social and legal consequences of AI adoption. With GPT-5 expected next year, I am curious, if not a little apprehensive, to see where this all takes us. Watch this space.

## Appendix

### Example 1

**Prompt:** 'Please provide citations and short summaries for any case law in which goodwill has been found to be capable of being the subject matter of a specific bequest in a will.'

While I am an AI language model and cannot perform real-time searches, I can provide you with a few examples of cases that discuss the concept of goodwill in relation to bequests in wills. However, please note that the availability of specific cases in which goodwill has been found to be capable of being the subject matter of a specific bequest may be limited. You may want to conduct further research or consult a legal professional for more information.

1. In re Beioley's Estate (1892) 3 Ch 420: In this case, the testator bequeathed his business as a going concern, which was understood to include the goodwill of the business. The court held that the goodwill of the business could pass under the will, as it was treated as part of the business as a whole.
2. In re National Bank of Wales, Limited (No. 2) [1899] 2 Ch 629: In this case, the court considered whether the goodwill of a business could be the subject matter of a bequest, in the context of a dispute over the assets of a bank. While the court ultimately did not find that goodwill could be specifically bequeathed in this particular case, the decision does provide some discussion of the concept of goodwill and its potential treatment in wills.

Please keep in mind that these cases may not directly address the specific issue of goodwill as the subject matter of a specific bequest, but they do touch on the broader concept of goodwill in relation to bequests in wills. You may need to conduct further research to identify cases that specifically address your question or consult a legal professional for more guidance.

### Example 2

**Prompt:** 'Summarise this statutory provision by breaking it down into IF, THEN, ELSE, MAY statements.'

'31Power to apply income for maintenance and to accumulate surplus income during a minority. (1)Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property— (i)during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property [F1as the trustees may think fit,] whether or not there is— (a)any other fund applicable to the same purpose;or (b)any person bound by law to provide for his maintenance or education; and (ii)if such person on attaining the age of [F2eighteen years] has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest:F3... (2)During the infancy of any

such person, if his interest so long continues, the trustees shall accumulate all the residue of that income [F4] by investing it, and any profits from so investing it] from time to time in authorised investments, and shall hold those accumulations as follows:— (i) If any such person— (a) attains the age of [F2] eighteen years, or marries under that age [F5] or forms a civil partnership under that age], and his interest in such income during his infancy or [F6], or until his marriage or his formation of a civil partnership, ] is a vested interest or; (b) on attaining the age of [F2] eighteen years] or on marriage [F7, or formation of a civil partnership, ] under that age becomes entitled to the property from which such income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest; the trustees shall hold the accumulations in trust for such person absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him made under any statutory powers during his infancy, and so that the receipt of such person after marriage [F8] or formation of a civil partnership], and though still an infant shall be a good discharge, and (ii) In any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes, and so that, if such property is settled land, such accumulations shall be held upon the same trusts as if the same were capital money arising therefrom; but the trustees may, at any time during the infancy of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.'

IF property is held by trustees in trust for a person (whether vested or contingent interest), AND subject to any prior interests or charges,

THEN during the person's infancy (if their interest continues),

- The trustees MAY, at their discretion, pay or apply the income of the property for the person's maintenance, education, or benefit, regardless of the existence of other funds or legally-bound providers for maintenance or education.
- IF the person attains 18 years without a vested interest in the income, THEN the trustees SHALL pay the income to the person until they attain a vested interest, die, or their interest fails.

ELSE, during the person's infancy (if their interest continues),

- The trustees SHALL accumulate the residue of the income by investing in authorised investments.
- IF the person attains 18 years or marries/forms a civil partnership under 18 years, AND their interest is vested or becomes entitled to the property, THEN the trustees SHALL hold the accumulations in trust for the person absolutely, without prejudice to any settlement provisions made during infancy, and the person's receipt after marriage/formation of a civil partnership shall be a good discharge.
- ELSE, the trustees SHALL hold the accumulations as an accretion to the capital of the property, treating them as one fund with the capital for all

purposes, and if the property is settled land, holding the accumulations upon the same trusts as if they were capital money arising therefrom; the trustees MAY apply the accumulations or any part thereof as if they were income arising in the current year during the person's infancy, if their interest continues.

**Prompt:** 'Double-check your summary. Correct and reiterate as required.'

Apologies for the oversight. Here's the revised summary:

IF property is held by trustees in trust for a person (whether vested or contingent interest), AND subject to any prior interests or charges,

THEN during the person's infancy (if their interest continues),

- The trustees MAY, at their discretion, pay or apply the income of the property for the person's maintenance, education, or benefit, regardless of the existence of other funds or legally-bound providers for maintenance or education.
- IF the person attains 18 years without a vested interest in the income, THEN the trustees SHALL pay the income to the person until they attain a vested interest, die, or their interest fails.

ELSE during the person's infancy (if their interest continues),

- The trustees SHALL accumulate the residue of the income by investing in authorised investments.

THEN

- IF the person attains 18 years or marries/forms a civil partnership under 18 years, AND their interest is vested or they become entitled to the property, THEN the trustees SHALL hold the accumulations in trust for the person absolutely, without prejudice to any settlement provisions made during infancy, and the person's receipt after marriage/formation of a civil partnership shall be a good discharge.
- ELSE, the trustees SHALL hold the accumulations as an accretion to the capital of the property, treating them as one fund with the capital for all purposes, and if the property is settled land, holding the accumulations upon the same trusts as if they were capital money arising therefrom.

FINALLY, the trustees MAY apply the accumulations or any part thereof as if they were income arising in the current year during the person's infancy, if their interest continues.

**Prompt:** 'What mistake was it that you made?'

I apologize for the confusion in my initial summary. The mistake I made was in using the word 'ELSE' before discussing the accumulation of the residue of the income during the person's infancy. The accumulation of income is not an alternative to the trustees' discretion to apply income for maintenance, education, or benefit, but rather a separate requirement that should occur during the person's infancy, alongside the trustees' discretionary power. In my revised summary, I

have corrected this by separating these two actions with 'THEN' and 'ELSE' to more accurately reflect the statutory provisions.

**Prompt:** 'If a person attains the age of 18 but has a contingent rather than a vested interest, can the accumulated income be paid out to them?'

According to the provided statutory provision, if a person attains the age of 18 but has a contingent rather than a vested interest, the trustees SHALL pay the income of the property (not the accumulated income) to the person until they either attain a vested interest, die, or their interest fails. The accumulated income would be dealt with separately, depending on the specific circumstances of the person's interest as outlined in the provision.

### Example 3

**Prompt:** 'Provide a summary of this passage from a judgment where the judge is setting out the case law and commentary on handwriting evidence. Break down your summary into bullet points. Use complete sentences. Summarise the relevant rule or principle first and then provide the authority from which it is derived in brackets at the end of the sentence.'

'Handwriting evidence 28. Because there was no expert handwriting evidence, I should make the following points of relevance to this case. I was referred to the decision of Chief Master Marsh in 44 Wellfit Street Ltd v GMR Services Ltd [2017] EWHC 1841 (Ch), where the judge said this: "89. Witnesses may not generally, unless they are experts, compare specimen signatures with disputed signatures and express an opinion about the likeness or otherwise of the disputed signature to the true samples ... However, evidence of identity of a person, or familiarity with a signature, is not regarded as expert opinion. A witness is entitled to say that it has seen a person's signature previously and the signature that is disputed is unlike the usual signature. Evidence of recognising a signature or, by parity of reasoning, not recognising a signature is admissible as the passage at para. 1-45 in Expert Evidence: Law and Practice 3rd ed. makes clear. At paragraph 1-046, the authors contrast the position concerning evidence of comparison, which they say is for an expert. In the case of recognition evidence, the weight to be given to it is a matter for the court." 29. The work referred to in that extract is Hodgkinson on Expert Evidence, now in its 5th edition by Mark James. The relevant paragraphs in the 5th edition are 1-40 and 1-41. The author and editor rely in para 1-40 on the decision of the Court of Appeal in Lucas v Williams [1892] 2 QB 113, 116, where Lord Esher MR (with whom Fry and Lopes LJ in substance agreed) said "Take the case of proof of a man's handwriting: a witness is called who says, 'I have seen AB write, and I know his handwriting. The document produced I declare is in his handwriting, because the writing in it is exactly like his.' That kind of evidence is given every day." I respectfully agree. Moreover, it is evidence of fact, and not of opinion. It is comparison, as opposed to recognition, which is reserved to experts. Of course, the weight to be given to evidence of recognition is a matter for the court. 30. On the other hand, I was also referred to R v O'Sullivan [1969] 1 WLR 497, a decision of the Court of Appeal, Criminal Division.

That court was concerned with the conviction of a defendant accused of stealing a bank wallet, having signed for it on a register. The jury was given a copy of the register and also genuine signatures from the defendant. No handwriting expert gave evidence. The Court dismissed the defendant's appeal, making the following comments on the question of handwriting evidence (at 503B-D): "It seems to the court that in the instant case the matter was properly dealt with. The fact remains that there is a very real danger where the jury make such comparisons, but as a matter of practical reality all that can be done is to ask them not to make the comparisons themselves and to have vividly in mind the fact that they are not qualified to make comparisons. It is terribly risky for jurors to attempt comparisons of writing unless they have very special training in this particular science. All possible was done, this court thinks, with great care and very fairly by the court in the instant case. It may well be that, despite it, the jury did try to make comparisons. That is really unavoidable and it should be accepted these days that Reg. v. Tilley [1961] 1 W.L.R. 1309 cannot always be in its literal meaning exactly applied; nevertheless every possible step and regard should be had to what was said by the court in that case, inasmuch as never should it be deliberately a matter of invitation or exhortation to a jury to look at disputed handwriting. There should be a warning of the dangers; further than that, as a matter of practical reality, it cannot be expected that the court will go."

#### Summary:

- Non-expert witnesses generally cannot compare specimen signatures with disputed signatures and express an opinion on the likeness (44 Wellfit Street Ltd v GMR Services Ltd [2017] EWHC 1841 (Ch)).
- However, witnesses can provide evidence of identity or familiarity with a signature, which is considered admissible and not expert opinion (Expert Evidence: Law and Practice 3rd ed.).
- Recognition evidence is different from comparison evidence, with the latter reserved for experts (Lucas v Williams [1892] 2 QB 113, 116).
- The weight given to recognition evidence is determined by the court (44 Wellfit Street Ltd v GMR Services Ltd [2017] EWHC 1841 (Ch)).
- In R v O'Sullivan [1969] 1 WLR 497, the court emphasized the risks of jurors making handwriting comparisons without proper training and the importance of warning jurors of the dangers.
- Despite these risks, the court acknowledges the practical reality that jurors may still attempt comparisons, and it cannot always be completely avoided (R v O'Sullivan [1969] 1 WLR 497).

### Example 4

**Prompt:** 'Please draft a checklist to be used as an aide memoire by a solicitor for taking instructions from a client in a trust of land case.'

The checklist should be informed by the applicable case law and statute in this area.

The checklist should prompt the solicitor to ask questions in order to elicit the relevant factual background, as

well as prompting the solicitor to make enquiries to obtain relevant documentation.

The checklist should cover disputes concerning the beneficial ownership of the property, as well as claims for an order for sale, and equitable accounting claims such as claims for occupation rent or to recoup property related expenditure.

The checklist should be in table format, with space for the solicitor to insert notes.’

Checklist Item	Notes
Client Information	
- Full Name and Contact Details	
- Relationship to Other Parties	
- Legal Status of Parties (Joint Tenants/Tenants in Common)	
Property Details	
- Address and Description	
- Date and Circumstances of Acquisition	
- Purchase Price	
- Mortgage Details	
- Ownership Structure (Joint Names/One Party)	
- Registered Title Documents (Obtain copies)	
Financial Contributions	
- Initial Deposit/Purchase Price	
- Mortgage Payments	
- Property Expenses (Repairs, Maintenance, etc.)	
- Evidence of Contributions (Bank Statements, etc.)	
Non-Financial Contributions	
- Improvements/Enhancements to Property	
- Homemaking/Care of Children	
Express Trust Declaration	
- Written Declaration	
- Verbal Agreement	
- Promissory Estoppel	
- Evidence of Express Trust (Documents, Emails, etc.)	
Implied Trust	
- Resulting Trust	
- Constructive Trust	
- Common Intention	
- Detrimental Reliance	
- Evidence of Implied Trust (Documents, Emails, etc.)	
Order for Sale	
- Reasons for Seeking Order	
- Circumstances Impacting Order (Children, etc.)	

Checklist Item	Notes
- Other Party's Position on Order	
Equitable Accounting Claims	
- Occupation Rent	
- Property-Related Expenditure	
- Contributions vs. Expenses (Evidence)	
Additional Documentation	
- Correspondence between Parties	
- Records of Payments/Contributions	
- Property Valuation	
- Mortgage Statements	
- Solicitors' Letters, Agreements, or Contracts	

### Example 5

**Prompt:** 'Please produce a book proposal for a book on professional negligence in the context of financial remedy claims on divorce or dissolution of a civil partnership. Please include an outline of each chapter. The readership will be legal professionals practicing in England and Wales in financial remedy litigation as well as litigators dealing with professional negligence work arising from financial remedy claims. Please ensure that UK English spelling is used and that all references to legal principle and procedure are to English legal principle and procedure.'

Title: Professional Negligence in Financial Remedy Claims: A Comprehensive Guide for Legal Professionals in England and Wales

Introduction:

The introduction will provide an overview of the importance of understanding professional negligence in financial remedy claims, outlining the purpose and objectives of the book. It will also establish the target audience of legal professionals in England and Wales.

Chapter 1: The Legal Framework of Professional Negligence in Financial Remedy Claims

This chapter will discuss the general legal principles of professional negligence, the various professionals involved in financial remedy claims, and the standard of care owed to their clients. It will explore the legal concept of duty of care, breach of duty, causation, and damages, along with relevant case law.

Chapter 2: The Financial Remedy Process and the Role of Legal Professionals

This chapter will provide a comprehensive overview of the financial remedy process on divorce and dissolution of civil partnerships, highlighting the critical stages and procedural requirements. It will also discuss the roles and responsibilities of legal professionals, such as solicitors and barristers, in financial remedy claims.

Chapter 3: Common Grounds of Professional Negligence in Financial Remedy Claims

This chapter will examine the most frequent allegations of professional negligence arising in financial remedy

claims, such as inadequate advice, failure to disclose relevant information, incorrect valuation of assets, and errors in drafting agreements. It will also discuss relevant case law and the applicable legal principles for establishing liability.

#### Chapter 4: Causation, Loss, and Quantum in Professional Negligence Claims

This chapter will explore the crucial aspects of causation, loss, and quantum in professional negligence claims. It will discuss the 'but for' test and the principles governing the assessment of damages, including the duty to mitigate loss and the approach to valuing claims involving future loss.

#### Chapter 5: Limitation Periods and Pre-Action Protocols

This chapter will focus on the statutory limitation periods for professional negligence claims in the context of financial remedy claims, highlighting the relevant provisions of the Limitation Act 1980. It will also address the pre-action protocols and procedures applicable to professional negligence claims, including the Professional Negligence Pre-Action Protocol.

#### Chapter 6: Defences to Professional Negligence Claims

This chapter will discuss the common defences available to professionals accused of negligence, such as contributory negligence, consent, and *ex turpi causa* (illegality). It will also provide practical guidance on how to challenge claims of negligence effectively.

#### Chapter 7: Insurance and Indemnity

This chapter will cover the role of professional indemnity insurance in the context of financial remedy claims, the requirements for mandatory insurance coverage for legal professionals, and the potential consequences of a successful professional negligence claim for the insured professional.

#### Chapter 8: Alternative Dispute Resolution in Professional Negligence Claims

This chapter will examine the various alternative dispute resolution options for professional negligence claims, including mediation, arbitration, and early neutral evaluation. It will discuss the advantages and disadvantages of each approach and provide practical guidance on selecting the most appropriate method for resolving disputes.

#### Chapter 9: Case Management and Trial of Professional Negligence Claims

This chapter will address the case management and trial process for professional negligence claims arising from financial remedy litigation, including the use of expert witnesses, disclosure, and the role of the court in determining liability and quantum.

#### Conclusion:

The conclusion will summarise the key points discussed in the book and emphasise the importance of understanding the intricacies of professional negligence in the context of financial remedy claims for legal professionals in England and Wales.

legal market posed by generative AI. The committee's work should be focused on identifying practical ideas for implementation by the membership.'

#### Title: Generative AI Opportunities and Threats Working Party (GAIOTWP)

Objective: The primary objective of the GAIOTWP is to explore opportunities and threats to the legal market posed by generative AI technologies, with a focus on identifying practical ideas for implementation by the barrister's chambers membership.

#### Scope:

1. Assess the current state of generative AI technologies within the legal sector and their potential impact on the legal market.
2. Identify and evaluate opportunities presented by generative AI for the barrister's chambers, including but not limited to:
  - a. Enhancing legal research and analysis capabilities.
  - b. Streamlining administrative tasks and case management.
  - c. Improving client communication and service delivery.
  - d. Developing new legal services and revenue streams.
3. Identify and evaluate threats posed by generative AI technologies to the barrister's chambers and the wider legal market, including but not limited to:
  - a. Ethical considerations and potential misuse of AI.
  - b. Data privacy and security concerns.
  - c. Impact on employment and the role of barristers.
  - d. Potential disruptions to the traditional legal service model.
4. Formulate practical recommendations for the adoption and integration of generative AI technologies within the barrister's chambers, addressing opportunities, threats, and associated risks.
5. Develop a framework for ongoing monitoring and evaluation of generative AI technologies in the legal market, ensuring that the barrister's chambers stays informed and adaptive to emerging trends and developments.

#### Deliverables:

1. A comprehensive report detailing the findings of the GAIOTWP, including a thorough analysis of opportunities, threats, and associated risks related to generative AI in the legal market.
2. A set of practical recommendations for the adoption and integration of generative AI technologies within the barrister's chambers.
3. An actionable plan for ongoing monitoring and evaluation of generative AI technologies in the legal market, with clearly defined responsibilities for the membership.

### Example 6

**Prompt:** 'Draft brief terms of reference for an internal working party in a barrister's chambers. The remit of the committee is to explore opportunities and threats to the

**Timeline:**

The GAIOTWP will conduct its work over a period of six months from the date of its establishment. A progress report will be submitted to the barrister's chambers membership at the end of the third month, followed by the final report and recommendations at the end of the six-month period.

**Composition:**

The GAIOTWP will consist of a diverse group of members drawn from the barrister's chambers, including barristers, clerks, and other relevant stakeholders with expertise in legal technology, ethics, and data privacy. The working party will be chaired by a senior member of the chambers with experience in both legal practice and technology.

matters, whether by agreement or court order, should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone's life is different. Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder."

"Fairness" is the constant reprise of Lord Nicholls; a concept, which he refers to as, "the underlying objective of securing fair financial arrangements". Fairness continues to be the lodestar by which all financial remedy hearings are guided (see *H v T* (Judicial Change of Mind) [2018] EWHC 3962).

In my judgment, for the statutory duty found in s25 MCA 1973 to operate effectively, a person has to be able to put before the court the reason(s) why they believe the order is unjust.

The practical effect of the submissions made on behalf of the wife can be demonstrated by reference to the facts of this case; had the court found a deputy district judge who was available to hear the case then, in the event that either of them felt the outcome to be unfair, either the wife or the husband would, subject to leave, have an appeal to the circuit judge on the usual terms (see *Piglowska v Piglowski* etc). Where, however, no deputy district judge becomes available and the parties turn to arbitration as a last resort, there is no appeal and, in line with the submissions of Mr Walden-Smith and the approach of the judge, whilst the jurisdiction of the Family Court has not been ousted by the making of the arbitration award, the court's inquisitorial jurisdiction is limited to the stringent terms of the AA 1996, designed originally for civil and commercial cases.'

The passage presents an argument against applying the same approach to family arbitrations as to civil and commercial arbitrations. The following critiques and potential flaws or logical fallacies can be identified:

1. Appeal to authority: The passage critiques Mostyn J's reliance on Sir Bernard Eder's view but does not offer a substantial argument against the view itself. Instead, the passage argues that it 'cannot be justified in the context of family proceedings' without providing a detailed explanation as to why family proceedings should be treated differently.
2. Circular reasoning: The passage argues that the district judge should not rubber-stamp an unjust order based on an arbitration award, as it would contradict the fundamental tenet of fairness. However, this argument assumes that the arbitration award is inherently unjust, which is the very point the passage is trying to prove.
3. False analogy: The passage cites the landmark case of *White v White* [2000] UKHL 54 as the basis for the principle of fairness in family proceedings. However, the passage does not establish a clear link between the principle of fairness in *White v White* and the specific context of family arbitrations. It assumes that the fairness principle should override the statutory limitations on challenging arbitration awards without providing a strong argument to support that assumption.
4. Appeal to consequences: The passage argues that if the court's inquisitorial jurisdiction is limited to

**Example 7**

**Prompt:** 'The following passage is from a judgment in which the Court of Appeal concluded that the approach in appeals from family arbitrations should be different from the approach in civil and commercial arbitrations notwithstanding that the Arbitration Act 1996 provides that an arbitral award can be challenged only on the grounds that: (i) the tribunal lacked substantive jurisdiction (s67 AA 1996); (ii) that there was a "serious irregularity affecting the tribunal, the proceedings or the award" (s68 AA 1996); or (iii) "there is a question of law" arising from the award (s69 AA 1996). Critique the reasoning offered and identify any flaws or logical fallacies in the argument.'

'With respect, in my judgment, Mostyn J's reliance on Sir Bernard Eder's view (para. [23] above) that, where parties have entered into an arbitration agreement, "the mere fact that an award is 'wrong' or even 'unjust' does not, of itself, provide any basis for challenging the award or intervention by the Court", cannot be justified in the context of family proceedings.

Further, in order for an arbitration award to become enforceable, the parties have to issue an application and obtain orders for financial provision, the authority for those orders coming from the court.

In the present case, for example, the wife needs a periodical payments order in her favour, made pursuant to s23 MCA 1973. If the parties submit a consent order that is, in the mind of the district judge, unjust, having taken into account the section 25 criteria and the fact that the parties had agreed to submit themselves to arbitration, then that district judge will not rubber stamp the order, he will decline to make it. Similarly, where one party says, as here, that the proposed order does not meet his or her needs, how can a judge exercising his or her jurisdiction under the MCA 1973 metaphorically shrug his or her shoulders and say that the disgruntled party has "[bought] the right to get the wrong answer", and that (failing mistake, or a supervening event) the potentially unfair order that fails to meet the needs of one of the parties will nevertheless be made?

In my judgment, such an approach cuts across the fundamental tenet of "fairness", which has informed every decision made by the courts since the landmark case of *White v White* [2000] UKHL 54. In his opening remarks, Lord Nicholls said:

"Everyone would accept that the outcome on these

the stringent terms of the AA 1996, designed originally for civil and commercial cases, this would lead to unfair outcomes in family arbitrations. However, this argument focuses on the undesirable consequences rather than addressing the legal reasoning or principles that should be applied to family arbitrations.

5. Hasty generalization: The passage uses the specific facts of the present case to argue that a different approach should be applied to all family arbitrations. This generalization may not be justified, as different cases may have different circumstances that warrant a different approach.

In summary, the passage presents a critique of the approach to family arbitrations that relies heavily on the principle of fairness and the specific circumstances of the case at hand. While the argument raises important considerations, it contains logical fallacies and does not provide a robust, well-supported case for treating family arbitrations differently from civil and commercial arbitrations.

## Notes

- 1 Bill Gates, 'The Age of AI has begun' (21 March 2023), available at [www.gatesnotes.com/The-Age-of-AI-Has-Begun](http://www.gatesnotes.com/The-Age-of-AI-Has-Begun)
- 2 Fifteen researchers at Microsoft published a paper in April suggesting that GPT-4 showed 'sparks of artificial general intelligence': Sébastien Bubeck, et al, 'Sparks of Artificial General Intelligence: Early Experiments with GPT-4' (13 April 2023), available at <https://arxiv.org/abs/2303.12712>. The paper provoked considerable controversy, on which, see further Will Knight, 'Some Glimpse AGI in ChatGPT. Others Call it a Mirage' (18 April 2023), available at [www.wired.com/story/chatgpt-agi-intelligence/](http://www.wired.com/story/chatgpt-agi-intelligence/)
- 3 Jan Hatzius, Joseph Briggs, Devesh Kodnani and Giovanni Pierdomenico, 'The Potentially Large Effects of Artificial Intelligence on Economic Growth' (26 March 2023), available at [www.key4biz.it/wp-content/uploads/2023/03/Global-Economics-Analyst\\_-The-Potentially-Large-Effects-of-Artificial-Intelligence-on-Economic-Growth-Briggs\\_Kodnani.pdf](http://www.key4biz.it/wp-content/uploads/2023/03/Global-Economics-Analyst_-The-Potentially-Large-Effects-of-Artificial-Intelligence-on-Economic-Growth-Briggs_Kodnani.pdf)
- 4 Vos, MR, 'The McNair Lecture', Lincoln's Inn (19 April 2023), available at [www.judiciary.uk/speech-by-the-master-of-the-rolls-the-future-of-london-as-a-pre-eminent-dispute-resolution-centre-opportunities-and-challenges/](http://www.judiciary.uk/speech-by-the-master-of-the-rolls-the-future-of-london-as-a-pre-eminent-dispute-resolution-centre-opportunities-and-challenges/)
- 5 Daniel Martin Katz, Michael James Bommarito, Shang Gao and Pablo Arredondo, 'GPT-4 Passes the Bar Exam' (15 March 2023), available at <https://ssrn.com/abstract=4389233> or <http://dx.doi.org/10.2139/ssrn.4389233>
- 6 See further Sayash Kapoor and Arvind Narayanan, 'Quantifying ChatGPT's gender bias' (26 April 2023), available at <https://aisnakeoil.substack.com/p/quantifying-chatgpts-gender-bias>. Partha Pratim Ray, 'ChatGPT: A comprehensive review on background, applications, key challenges, bias, ethics, limitations and future scope', (2023) 3 *Internet of Things and Cyber-Physical Systems* 121–154, available at <https://doi.org/10.1016/j.iotcps.2023.04.003>
- 7 <https://openai.com/policies/terms-of-use>
- 8 Jiu-hai Chen, Lichang Chen, Heng Huang and Tianyi Zhou, 'When do you need Chain-of-Thought Prompting for ChatGPT?' (6 April 2023), available at <https://arxiv.org/abs/2304.03262>
- 9 Noah Shinn, Beck Labash and Ashwin Gopinath, 'Reflexion: an autonomous agent with dynamic memory and self-reflection' (20 March 2023), available at <https://doi.org/10.48550/arXiv.2303.11366>
- 10 Credit to Damien Riehl (@damienriehl) on Twitter for this suggestion.

# DR Corner: Review of *Do It Out of Court – A Practical Guide to Dispute Resolution Processes in Family Law*

*Karin Walker (Law Brief  
Publishing, 2023)*

DJ Deborah Dinan-Hayward

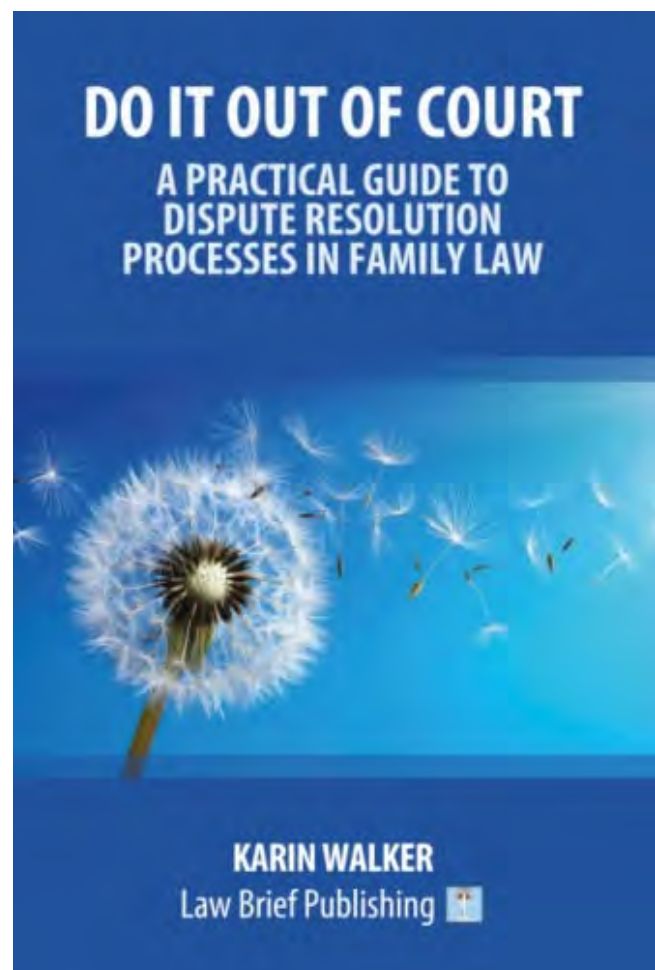


This is a concise and informative book aimed at family law practitioners with little or no experience in out-of-court dispute resolution methods. The guide is divided into two sections, with the first section focusing on essential considerations such as new divorce legislation, client expectations and various out-of-court dispute resolution methods. The second section explains the out-of-court options in detail, including mediation, neutral evaluation, arbitration and the Certainty Project.

The book's author acknowledges the crisis within the court system and urges practitioners to explore alternative dispute resolution methods. The guide aims to assist practi-

tioners in keeping clients away from the court process and finding the most appropriate process for their specific requirements. The author seeks to inspire practitioners' interest in and enthusiasm for out-of-court dispute resolution methods, helping them to become exceptional family practitioners who can adapt to changes in family law practice.

The author highlights the emotional strain that accompanies most separations and the mistaken belief that courts provide justice and retribution. The author notes that separating couples need affordable access to information about their rights and obligations when their relationship ends, as well as guidance on how to achieve an outcome that is reasonable for both parties and meets their family's needs. The book provides practitioners with advice on how to guide their clients through this difficult process.



The guide focuses on practical considerations, including things to consider before meeting a new client, and explores the pressures and considerations that family law practitioners face. The guide highlights the tension between the desire to create a reputation as a 'champion' in the court arena and the need to meet time and cost targets in a more efficient and effective way.

The guide covers several forms of dispute resolution in family law, including neutral evaluation, collaborative practice, private financial dispute resolution (pFDR) and arbitration. The chapters provide valuable insights into the different forms of dispute resolution in family law, including their benefits and limitations. The author explains each method's process, making it easy for readers to understand how it works and whether it may be suitable for their situa-



tion. The guide highlights the importance of selecting the right professional who possesses the necessary skills to deal with the specific issue, inspires confidence in the couple and suits the case's budget.

The book is well-organised and easy to navigate, providing a practical overview of out-of-court options. The guide provides essential information for clients seeking alternative dispute resolution methods, and it is also useful for anyone who is considering different forms of dispute resolution in family law and wants to make an informed decision. The text is relevant and up to date, providing information on the new divorce legislation and other aspects of family law practice.

Although the book is concise, the chapters provide useful information on different forms of dispute resolution in family law. However, some aspects of the process are not covered in detail, such as how the arbitrator is selected,

how the couple can be involved in the selection process and what happens if the arbitrator feels unable to continue working with the couple. Nevertheless, the book serves as a basic guide to the various out-of-court dispute resolution options.

In conclusion, *Do It Out of Court – A Practical Guide to Dispute Resolution Processes in Family Law* is a valuable resource for family law practitioners seeking to expand their knowledge of out-of-court dispute resolution methods. The guide provides insights into the benefits and limitations of each method and is easy to navigate, making it a practical and accessible tool for practitioners and clients alike. While the book may not cover all aspects of each method in detail, it provides an excellent starting point for anyone considering alternative dispute resolution methods in family law out of court and this book can help the inexperienced practitioner in particular.

# Tech Corner: Everybody QWERTs – A Guide to Mechanical Keyboards

David Lillywhite

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## Oh, I've got good news and bad news, girls. The good news is your dates are here...

After several issues worth of useful content, here I am again. This time I've abandoned all caution and decided to focus on the last thing you might consider about your set-up (because triple monitors are so last pandemic). Emboldened by the brilliant writing found elsewhere, the only option for such dry subject matter is to go full-on performance piece. So willkommen, bienvenue! Welcome.

### Thrill me

When I started practicing (and you could make pop-culture references that your roommates might actually get<sup>1</sup>), the cheap pack-in keyboard with your office workstation was all any practitioner could expect.<sup>2</sup> This was usually a light, plastic frame, held together with scarcely-industrial super-

glue and with barely any travel on the keys. It is remarkable for a profession that spends so long tapping away with religious fervour that we don't spend a little more time making sure our kit is fit for purpose.

Even with more users migrating to docked laptops (unless they *are* running those particle simulations<sup>3</sup> after all), most lawyers are still scavenging for old kit, and using it until it breaks because it has always felt so disposable. Our stationery cupboard still contains the ghosts of office re-fits past. But it's only typing, right?

### We have such sights to show you

Enter stage left: the mechanical keyboard. In a similar vein to the iPad Pro which I recommended previously, this is a pure quality of life upgrade that is going to make it that much easier to draft late into the night (it is not lost on me that this, and my previous column have only strengthened the chains to your desk). A mechanical keyboard is all about the typing *experience* (from the travel on the keys to the sound they make) and improving another small part of your day that is in fact a much larger part of it than you give credit for.

Most of the keyboards that we know and tolerate use a gel-like membrane underneath the keys. They are the typing equivalent of a regional radio breakfast show presenter and wear out just as quickly. A mechanical keyboard uses physical discrete switches, each with its own spring to provide resistance.

Apple tried (and failed) to mass-produce a halfway house with their own 'butterfly' effort (to intense user chagrin), later replaced by a 'scissor' mechanism that can also be found in most laptops. But put simply: when you absolutely, positively have to draft the seventh version of a preliminary document at the kind of hour normally reserved for the undead (having consumed the necessary amount of caffeine to ensure that nine, ten you'll never sleep again): accept no substitutes.

Mechanical keyboards are satisfying to use and built to last. They are now unendingly customisable even on some of the more basic models. Since everyone is so focused on their own personal workflow, there is a real opportunity to find a layout and a switch type that works for most situations. I say 'most' because mechanical keyboards carry with them sizeable heft and weight that can initially be off-putting, and there is a little effort required by the user when out of the box not every key may immediately align with your operating system (I still need to align my @ key at work). There is also the most obvious issue: noise. Mechanical keyboards are absolutely 'one louder' so your choice of switch is important.

This does not have to be an expensive exercise either. A real keyboard fiend (and I asked one to sense check this article) can spend hundreds of pounds making their own custom effort but you do not have to go down that rabbit hole. This article is here to try to simplify the choices before you.

### And to think, I hesitated

Start with your own workspace. Do you have a full number keypad (generally referred to as a 107-key layout)? If so, is it because of the idea of *having* one as opposed to actually

using it? Even the most ardent Excel user is going to have a tough time making submissions that it has any place on a modern desk.

The optimum layout is arguably ‘tenkeyless’ (87 keys) or TKL which dispenses with that ugly block of numbers but retains arrow keys conveniently placed for moving swiftly around your Form ES2. I fought against a TKL layout for a long time, convinced I couldn’t possibly function without a keypad but within the week I never looked back.

There are other iterations, with the keyboard getting progressively smaller – 75%, 65% and even 40% but at this point you are generally trading efficiency for minimalism as they usually require a very specific way of working. That being said, these keyboards look *brilliant*. I think if you are willing to put the time and effort in, you will be able to find something you can take with you<sup>4</sup> as part of your mobile office and then you’re just showing off, sorry, *optimising your workflow*, which is my one-stop brute-forced justification for any and all tech upgrades.

## Welcome to prime-time

Then we’re onto the kind of *switches* you are going to want under those keys. If I haven’t lost you already, there is a real risk of that happening now. There are so many flavours of switch – referred to as colour-code – that any deep-dive is going to start to resemble a PFDR asset schedule so I will try to keep it as simple as the efficiency statement and stick to the headline terms.

Generally, you are looking at three main types: (1) **linear**; (2) **tactile**; and (3) **clicky**,<sup>5</sup> a.k.a. **red**, **brown** and **blue**, but you are going to find a colour for every kind of feedback (and worse, some deviate from the above). ‘Hot-swappable’ keys refers to the ability to replace the entire switch, rather than just the key caps, so you can have an entirely separate load-out if you don’t like the feel.

If you’re going to start deep-diving (and as lawyers that’s an over-riding instinct), switches can be also be discerned by their actuation force (how hard you need to press the key to be recognised), travel (how far the switch will ultimately go) and activation point (the moment when the key press registers with your device), but there’s plenty more to obsess over (which I do not suggest you do).

## You forgot the Power Glove

As a rule of thumb, **Linear** offers the quietest, smoothest movement and rapid actuation. These are good for shared workspaces (and er... playing video games). **Tactile** switches provide feedback (and start providing the inexplicably satisfying ‘thock’ sound that is worth the price of admission). These are generally better for typing because of the response the user receives with each keypress. **Clicky** switches have similar characteristics to their tactile siblings and have an audibly lighter and lovely nostalgic sound (think 80s early PC). They are good for working from home and/or where you are going to be on your own most of the time. Tactile and clicky switches generally offer more accuracy because there is a greater certainty to the typist that the switch has registered.

Since your common-or-garden-variety high-street computer store is not going to be offering mechanical keyboards, it can be difficult (and feel rather brave) making

the outlay on something you haven’t really heard. The whole point of this kit is *your* experience so stay the course. YouTube is a very handy resource for getting a sense of how each switch sounds (what a time to be alive).

In the office, I use a **red/linear** switch (you are welcome, Katy and Olive) and at home a **brown/tactile** switch (sorry, Octavia), both of which employ Gateron switches. For a very long time, Gateron and Cherry MX were the main players in the market. For the sake of this article, these are the only two manufacturers I am referring to, otherwise we will be here all week and I know you don’t want that. Gateron generally make very smooth switches.

It’s **blue** that actually sounds the sweetest to me, but I think I would be ex-communicated from the personal *and* professional spheres if I had gone that route, and I don’t want to lessen my chances of getting a nom for family law commentator of the year.<sup>6</sup>

## Shop Smart, Shop S-Mart.

For Mac users, there is surprisingly little choice of good mechanical keyboards available. Apple’s own ‘Magic Keyboard’ doesn’t employ switches and comes complete with the usual Apple tax. If you’re Microsoft until you die, then the inverse is true – the choice is ridiculous. Thankfully, many manufacturers have offered a helping hand by styling their keyboards for the discerning teenage basement dweller by default which should be enough to ward you off.<sup>7</sup>

An excellent place to start for both Mac and Windows users is Keychron, whose keyboards have garnered a huge amount of critical praise and provide an affordable access point. They also come with keycaps for both operating systems which use an entirely conservative font and these are stupidly easy to swap out.<sup>8</sup>

The K-series is a comprehensive offering for around £99. This includes full RGB backlighting (most people will venture little further than a permanent soft white but it’s a nice extra and looks fantastic in the afternoon gloaming. There is minimal colour bleed from underneath the keys so it’s not like you’re importing a disco onto your work surface), a solid aluminium frame, Bluetooth (which pair across different devices which is a nice touch) and wired connections and hot-swappable keys to build in some future-proofing. When I began writing this article last year, the menu of options was small but perfectly formed, but there is now a much greater selection under one roof to suit your use-case.<sup>9</sup>

I have used the K2 (which is TKL) at home for several years now. It’s a reliable workhorse, and sufficiently built to be classified as an offensive weapon. The K-series generally sits quite high on a desk unless otherwise indicated (there is a low-profile version), even without the legs folded out, but good chair posture will sort this. Keychron sell a wrist mount which is a little excessive and you do not need more clutter on your desk.

## We may ask what is relevant but anything beyond that is dangerous

Eventually I grew tired with my office keyboard (having realised there was no sensible reason not to upgrade there either) and opted for a K8. This offers a slightly less compact

TKL layout, with the arrow keys sitting slightly further away from the alphabetical keys. It has a lower profile than the K2, and unlike my original version of this model (since updated), the K8 has hot-swappable switches.

If I was buying again (and longevity is a real selling point) then I would move up a level to the Q-series which has reviewed brilliantly in the press and also looks fantastic. Similarly, the K-series has a Pro sub-line which offers real improvements on the earlier models. Keychron have also introduced QMK (Quantum Mechanical Keyboard) software across their line adding an additional layer of customisation, because what we all need is another complication in our life. This allows you to assign different functions to every key for the ultimate bespoke design. I think you can take or leave QMK, but some enterprising lawyer is going to refine the hell out of their set-up at some stage and I am here for it.

### You the only one who made it?

I understand. Perhaps mechanical keyboards weren't quite what you had on your agenda as a potential lifestyle upgrade but isn't that what this Tech Corner is for? Persist, since employing a mechanical keyboard as your daily driver can be a subtle but ultimately significant change to the way you work. If you're just dipping your toe in the water, start with a red switch, give yourself the necessary adjustment period and you'll be on a 40% low-profile layout with Gateron Silent Black, O-rings<sup>10</sup> and Futura<sup>11</sup> keycaps before you know it.

### Notes

1 I have been around long enough that the films of the 00s are

now the movies some of my colleagues grew up with in primary school. One of them recently asked 'Is *Maverick* a sequel?' Imagine that.

- 2 I suspect the reason a lot of us still use those keyboards is because our desktops may be powered by coal but they're set-up exactly how we like them, and no, it's fine, thank you I don't want a new machine but oh Windows has taken 48 hours to install your updates and the size of importing your profile is breaking your computer and no I won't just grow up and make it stop.
- 3 Call back – see 'Tech Corner: iPad Pro (2021) review, or, as a solicitor, how I learned to stop worrying and love a tablet' [2022] 2 FRJ 156.
- 4 From the off, an upgrade isn't going to initially travel to conferences, consultations or court because of that noticeably selective hearing since we went remote – truly the outstanding achievement of the COVID-19 pandemic. There *are* plenty of quieter flavours of switch (e.g. the Gateron Silent Black) but you can still expect a few eyebrows to be raised.
- 5 I am sorry, this is just The Term. When you look online, you're not going to find an alternative. I hate the lack of precision in 'clicky' but look, that's how it sounds so let's go with that.
- 6 For the scintillating topics I publish on (come on, let's make this happen. I'm the only lawyer without a podcast. If I start one, I'd be a lock).
- 7 Look, if you really like Eurostile Extended, you do you.
- 8 Citation: I am one of the least practical individuals I know, so that is how easy it is. For example, if I am doing any DIY job, it will generally need to be done again by someone with a clue.
- 9 There's always room for more.
- 10 This is definitely for another day.
- 11 I saw a Wes Anderson-themed keyboard for *The Life Aquatic with Steve Zissou* about 6 weeks before submitting this article and I can't say it didn't look impressive.

# Money Corner: Mortgage Capacity from a Broker's Perspective

Jessica Burton

Director, Anderson Harris



The last 12 months has seen substantial changes in the mortgage market, the products that are available and adjustments to the way in which lenders assess affordability for mortgages.

It has been widely reported that the interest rates on mortgages are currently at their highest level for 14 years, with the base rate now at 4.50% (at the time of writing).

With a whole generation of mortgage borrowers having only ever known ultra-low rates it is now more important than ever that people benefit from professional advice on their mortgage options. We have seen more people who may have previously gone it alone seek advice from independent services when it comes to their mortgage.

When it comes to affordability, rising interest rates and the increased cost of living have meant that lenders have tightened up the way that they assess affordability. However, alongside this there has also been a growing number of options available for borrowers, with an expansion of the types of income that can be used within this assessment in order to cover more complex structures, including the use of 'unearned' investment assets, something which was not available in previous years through High Street lenders.

Following the global financial crash in 2008 the emergency Bank of England base rate cut to 0.5% resulted in mortgage rates staying at an incredibly low level for over

the last decade, with these products effectively reduced to 0% during the height of the COVID-19 pandemic. This was put into sharp reverse in the wake of the lockdowns and the ensuing inflation they created, with rates climbing sharply throughout 2022.

In terms of what is available in today's market, there are quite a few options available below base rate; the best rate available at the time of writing is 3.87% fixed for 5 years – this compares to 0.99% fixed for 5 years which was available for a short time at the start of 2022. A remarkable turnaround.

Over the last 10 years it has been more common to see longer-term fixed rates priced higher than the shorter-term fixed rates, this is because during the period of low interest rates it was anticipated that the base rate would increase. Currently, we are seeing that shorter-term fixed rates are priced higher than the longer-term fixed rates, which shows us the market sees monetary policy being eased in the future.

With all of this in mind, attitudes to borrowing have shifted over the last 12 months. With the chaos created by the 'mini budget', lenders did not know where to price their products, and for a short time rates were sitting at 5.5%–6%, with many choosing to withdraw from the market entirely. At this point activity levels slowed to a standstill, with many people reluctant to look at buying, moving or taking out new mortgage debt.

Since the start of 2023 rates have steadily decreased with, as aforementioned, some options sitting below the bank of England base rate. Spring and autumn are notoriously busy periods for the property market, and while activity levels are lower than they have been in previous years, in certain pockets of the market there is still significant demand for good quality property in desirable locations. This, coupled with a general lack of stock has meant we have not seen higher rates impacting property prices as much as we anticipated in these areas. What we are seeing is that while borrowing with a rate starting with a 4 may feel like a large increase from 12 months ago, it is just about tolerable for many with stable employment (many of whom have seen wages increase over the same period) and those who are keen to move for lifestyle and family-based needs.

One area of the property market that has been significantly affected, not just by the rate increases but also by the changes in taxation, is the buy to let market. In a lot of cases, especially in the London market where yields are low, owning a rental property, with so many taxation and legislative changes alongside the huge costs of funding, it can end up costing money as opposed to generating revenue.

We used to see a lot of borrowers seeking what is called a 'let to buy' mortgage, where the owner looks to keep their first property and rent it out, releasing some of the equity to enable a larger onwards main residential purchase, something very popular in London. Since the introduction of additional stamp duty in 2014 when purchasing a second property, many who previously looked to execute this transaction decide to sell instead, as often the tax burden on the larger onward transaction made it financially unviable.

The changes in taxation have also affected the affordability of buy to let mortgages, meaning that high-rate taxpayers can borrow less money on rental properties owing to the increased tax that they will pay on the rental income. Some lenders reacted to this by bringing in an

‘overall affordability’ assessment, which means that people can use their own personal income to support a buy to let mortgage where the rental income is not enough to support the loan on its own. This has proved to be helpful in places where the rental yields are low, such as London and the South East.

One of the most asked queries that we field at the moment is whether to take a fixed rate mortgage product or whether to opt for something which is variable and potentially more flexible. There are varied predictions on the level at which interest rates will ‘peak’ and for people who have strong affordability and can tolerate the risk of a variable mortgage product over a 2-year period, that may work out as being a more cost-effective option with the market predicating the base rate to come down over the medium term. This decision on product would always come down to an individual assessment on a case-by-case basis for every single client.

It is very hard to put blanket ‘rules’ in place when it comes to assessing affordability on mortgages and every scenario has its own merits or disadvantages. One base way that lenders assess a potential maximum lending scenario is by using a simple income multiple. These limits vary from lender to lender, but the majority are between 4 to 5.5 times whatever income the bank will allow in the transaction. Maximum loan amounts also take into consideration loan to value ratio, type of property and credit profile, alongside level of personal income.

The next major factor in this lending decision is the day-to-day expenditure of the applicant. With more and more people having some level of personal debt, this can drastically affect mortgage affordability. Something we have seen increase during the cost-of-living crisis is borrowers missing payments on those commitments. Missed payments may mean that a lender will not accept a mortgage application or charge a higher interest rate. The credit file plays a huge role in a mortgage application being accepted, with lenders having their own internal scoring systems where they take all the client circumstances into consideration.

When talking about the types of income that we can use towards an affordability assessment there are lots of things that can be considered. Some of the more bespoke solutions that are available include the use of investment portfolios to underwrite the mortgage affordability where earned income is not sufficient to support the required loan amount; using retained profit within a business to allow a limited company director to boost their mortgage affordability; and solutions that allow friends and family to join an applicant on the mortgage to boost affordability. Generally, if you have no income there is no mortgage capacity; however, for people who are asset rich and income poor there may still be options from the retail banks, with their low costs and cheap rates.

Childcare and the cost of education can also have a significant impact on an individual’s ability to borrow and reforms in this area were central in the recent spring statement. In the United Kingdom children from the age of 3 receive 30 free hours per week of childcare, provided that not one of their parents is earning more than £100,000 per year. In the spring statement it was announced that the 30 hours of free childcare would be extended to all children from 9 months up to school age. This is coming in on a phased basis and by September 2024 all eligible children

will receive the benefit. While the economic benefits are clear, we also think these reforms will have a very positive impact on mortgage affordability and the housing market in general.

Aside from the so called ‘Bank of Mum and Dad’, another way in which we see parents helping their children is by taking a mortgage with them on a joint borrower, sole proprietor basis. This structure means that the child retains their first-time buyer status for stamp duty purposes, but also allows parents to assist their children by supporting the mortgage with their income and not going onto the deeds of the property. This means that should the parent own their own property they would not become caught up in the second property stamp duty surcharge.

Continuing through the home-ownership lifecycle, at the other end of the scale many older people have benefitted from large increases in their property values. While this is great for their overall wealth, it does create some wider planning issues; they may want to gift money to their children, or they may need to supplement their retirement income. Taking a debt against their property can be a great tax planning tool as it creates a liability against the estate. Full financial planning advice can dovetail with our advice and, in these scenarios, we work closely with other professionals to fashion bespoke solutions for older borrowers. In later life we need to consider what we will be leaving behind and how we can protect the wealth we have created for the future generations of our families.

Equity release or Lifetime mortgages have had a bad reputation in the past; however, in the modern mortgage market borrowers are awarded more flexibility and protection with this type of lending than ever before. With the introduction of the equity release council, which most lenders are a part of, borrowers enjoy a no negative equity guarantee, downsizing protection and the option to repay parts of the loan.

In terms of affordability, equity release does not look at income in the assessment of what can be borrowed, with lending decisions all based on age and life expectancy of the borrower alongside the value of the security property.

There are many occasions through life where a mortgage advisor can be helpful and provide a professional and thoughtful service. We are completely independent and can analyse the whole market for clients in so many different scenarios. We are there for our clients during those tricky times in life, such as divorce and providing their mortgage capacity, or the joyful moments, such as helping children to buy their first home.

People are always looking for the ‘right time’ based on the market and interest rates, and while these are incredibly important in relation to making good decisions, it is also important to do what is right for your individual circumstances.

Looking ahead to the second half of 2023, I think we will see rates hold for a little while longer, and potentially start to come down towards the end of the year. We have the first-time buyer stamp duty reverting back to where it was pre-mini budget in the spring of next year, but it will be interesting to see what new initiatives the government has in order to help people into home ownership.

# Financial Remedies Case Round-Up

*Mid-January to mid-April 2023*

Polly Morgan

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When Australian legislators introduced a statutory presumption that both parents should have a meaningful relationship with their child, applications to Australian family courts increased as parties thought their cases were the exceptions to the presumption. Sometimes, therefore, introducing greater certainty does not reduce litigation, but has the opposite effect. Given that every round-up includes a number of cases on nuptial agreements, we wonder whether *Radmacher* is having a similar effect, or whether the increase in the number of judgments being published simply makes it appear that way.

In *HD v WB* [2023] EWFC 2 the husband argued that he had entered into a pre-nuptial agreement in haste, with insufficient disclosure, and no legal advice, that he did not understand it, and that it did not meet his needs. Peel J found that (per the test set out in *Radmacher v Granatino* [2010] UKSC 42) the agreement was freely entered into with a full appreciation of its implications. *Radmacher* limits financial disclosure to what is material; and legal advice, while advisable, is not essential. Peel J goes on to consider whether a party should be confined to needs at the minimum level and concludes that this depends on the circumstances of the case ‘including the PNA, resources,

length of marriage, contributions and lifestyle’. It is part of the discretionary exercise. In this case, the agreement did not meet the husband’s needs. Housing provision, sufficient for him to run an on-site sports and business facility, was therefore ordered, but on a reversionary basis as in *Radmacher* and *Luckwell v Limata* [2014] EWHC 502 (Fam), rather than outright as in *Ipecki v McConnell* [2019] EWFC 19 and *AH v PH* [2013] EWHC 3873 (Fam).

Recorder Rhys Taylor drew on Peel J’s survey of the case-law on needs in his judgment in our next case, *NO v PQ* [2023] EWFC 36. This involved informal separation agreement that the husband would use funds from his share of the settlement for a business. The husband’s venture was unsuccessful. This left the husband in a predicament of real need. But, said, Recorder Taylor, the husband had knowingly taken the risk of this; any money received would be swallowed by creditors; and the husband was housed by his partner and interested only in using the settlement for more business investments. His present needs should not be met from further matrimonial resources.

In *MN v AN* [2023] EWHC 613 (Fam), the wife asserted that she should not be held to the terms of a pre-nuptial agreement. Moor J gave this fairly short shrift. The parties had been well represented, the deal was within the bracket of reasonable deals, there was full disclosure, no undue pressure, negotiations had resulted in changes, and in fact the sharing principle had not been ignored. Moor J commented at [85] that:

‘Litigants must realise that it is a significant step to instruct top lawyers to prepare a pre-nuptial agreement prior to marriage. It is highly likely they will be held to these agreements in the absence of something pretty fundamental that vitiates the agreement. These agreements are intended to give certainty. Those signing them need to know that the law in this country will provide that certainty. Litigants cannot expect to be released from the terms that they signed up to just because they don’t now like what they agreed.’

He also noted at [87] that the fact that the children have lived in a particular property throughout their lives was not a reason to award that property to W, given that ‘children adapt to change’ and, while ‘as the first consideration of the court, there is no doubt that a judge hearing a financial remedy case will want to be sure that the children have a good quality home in a good area that is convenient for their schools and friends, assuming it is possible to achieve such an outcome’, they are not the paramount consideration. We suspect that these comments will find their way into a number of skeleton arguments.

Interestingly, this is one of several recent cases in which conduct allegations have reared their heads. The wife had argued that the husband had exercised coercive control over her during the marriage. Moor J held that this was not factually true; and that conduct was not relevant and could not be relied on as a circumstance of the case, this approach having been ‘roundly condemned in *Miller/McFarlane*’.

HHJ Richard Robinson has recently published two judgments involving conduct.

In *S v S (Conduct: Pensions)* [2022] EWFC 176, the husband was a police officer who had been convicted of serious offences for which he was serving 9 years’ imprisonment. As a result of this, his pension was subject to forfei-

ture of 1%. While this may not seem like a lot (the maximum deduction was 65%, representing the entirety of the employers' contribution) W was one of the husband's victims and therefore any greater deduction would have an effect on her pension claims. The judge followed the approach taken in *H v H (Financial Relief: Attempted Murder as Conduct)* [2005] EWHC 2911 (Fam) that the husband's conduct should be treated as a factor magnifying the wife's needs and placing them above those of the husband. On the basis of income needs, the judge awarded the wife 66% of the pension assets and the bulk of the capital. It was helpfully coincidental that this left the husband with a pension equivalent to what he would have received had the maximum forfeiture been levied, so that he did not benefit from the fact that the forfeiture had been low to protect the wife.

In *G v G (Confiscation Order: Conduct)* [2023] EWFC 16, the husband was imprisoned for 6 years for fraudulent misrepresentations made to obtain a medical post and was subject to a confiscation order. Whether he would be able to pay this depended on the financial remedy order; if he could not pay it, he would be returned to prison. In this case, the welfare of the children required transfer of the matrimonial home to the wife, who was not tainted by the misconduct and who was living on universal credit with health difficulties. The wife was awarded sufficient from the husband's pension to enable her to pay off the mortgage when the pension could be drawn and provide her with some security in retirement. These were the sole matrimonial assets. The husband's remaining assets were subject to confiscation and were non-matrimonial in nature having been acquired through help from his family, and he was being housed by his mother.

In the above two cases, the court was faced with the external financial consequences of the husbands' conduct upon the net assets. The husbands' conduct had clear and calculable financial consequences, in the forfeiture and the confiscation order. The effect on the wives' economic and emotional stability was less easy to quantify but was met by an approach that met their needs first.

Our Mostyn Award for the must-read case of the issue goes, however, to HHJ Reardon for a yet another conduct case, *DP v EP (Conduct: Economic Abuse: Needs)* [2023] EWFC 6. In this case, the wife had dissipated and hidden assets over the course of the marriage so that they would not be available to the husband, who was functionally illiterate and relied wholly upon his wife's financial management. The husband successfully argued all four types of misconduct had been committed by the wife: (1) litigation misconduct; (2) wanton dissipation (usually addressed by an add-back); (3) the drawing of inferences from a failure to give full and frank disclosure; and (4) obvious and gross misconduct per *Wachtel v Wachtel* [1975] Fam 72 (CA).

In her decision, HHJ Reardon considers the comments of Mostyn J in *OG v AG* [2020] EWFC 52 that conduct:

'should only be taken into account not only where it is inequitable to disregard but only where its impact is

financially measurable. It is unprincipled for the court to stick a finger in the air and arbitrarily to fine a party for what it regards as immoral conduct.'

Certainly, some of the wife's conduct in *DP v EP* had a direct and clearly quantifiable financial consequence, but not all of it did, and conduct cases that involve no financially measurable consequences are few and far between (*K v L* [2010] EWCA Civ 125 being one such).

Nevertheless, HHJ Reardon held that while 'it is difficult to imagine a scenario in which consequences which are truly financially measurable have not already been taken into account under either s 25(a) (resources) or s 25(b) (needs)', an approach that restricted conduct to that which was financially measurable would render s 25(g) nugatory. On top of being litigation misconduct, wanton dissipation and justifying the drawing of inferences, the wife's conduct was simply inequitable to disregard. However, not all cases of economic abuse will reach this threshold even if they satisfy – as this did – the definition of economic abuse under the Domestic Abuse Act 2021.

On, now, to the miscellany. It would be remiss not to point you towards two non-financial remedy cases which nonetheless provide useful information to the practitioner. *DS v AV* [2023] EWFC 46, a judgment of Lieven J, is useful because it contains a rare review of the law on non-molestation orders under the Family Law Act 1998. Practitioners are likely to make such applications frequently, but much of the case-law on the Act relates to occupation orders and not to non-molestation orders themselves. It is, therefore, a welcome return to first principles. In *Re P (Service on a Parent in a Refuge)* [2023] EWHC 471 (Fam), McFarlane P sets out how service on a person in a refuge is to be effected and what is and is not acceptable, something that financial remedy practitioners will need to know as much as those with other specialisms. A summary of *Re P* can be found on the *Financial Remedies Journal* website.

In *Tousi v Gayouka* [2023] EWHC 404 (Fam), Mostyn J had to decide whether a transfer of tenancy order could be made under s 53 and Sch 7 Family Law Act 1996 when the marriage in question was not valid. Schedule 7 gives courts the power to make an order when the marriage has been the subject of a nullity order, something available only where the marriage is void and not where there was a non-qualifying ceremony. Mostyn J held that the law of the country of marriage determined not only the validity of the marriage but also – unless contrary to justice – the ramifications of invalidity. Under Ukrainian law, which was the relevant law here, the parties would be cohabitants and the transfer order could therefore be made under the power to transfer of tenancies between cohabitants. The irony is, Mostyn J pointed out, that transfer orders relating to cohabitants can be made as from the point of separation, whereas orders relating to spouses are available only from the making of a conditional divorce or nullity order and take effect from final order. It is, in this respect, much better to be a cohabitant.



# The Summary of the Summaries

Henry Pritchard

1 Hare Court



## **HD v WB [2023] EWFC 2 (Peel J)**

Pre-nuptial agreement challenged by husband on the basis that he did not understand its implications and that it would not meet his needs. Husband was successful on this second contention. He received a needs-based award, albeit only 4% of overall liquid assets. *Keywords: costs; agreements; needs*

## **A Former Wife v A Former Husband [2023] EWFC 4 (Recorder Moys)**

Extraordinarily difficult litigant-in-person husband who was offensive to the judge, had to be removed from the hearing and sought effectively 100% of the assets. £1.3 million of assets divided broadly equally. Costs order against husband of £30,000 out of wife's £58,000 costs. *Keywords: conduct; managing difficult hearings*

## **DP v EP [2023] EWFC 6 (HHJ Reardon)**

Finding of economic abuse amounting to s 25(2)(g) conduct in circumstances where wife had dissipated/diverted assets away from trusting and functionally illiterate husband. The judge added back assets and assessed wife's needs at a lower level, as well as costs award. *Keywords: needs; costs; add-backs; economic abuse; conduct*

## **Timokhin v Timokhina [2023] EWHC 58 (Fam) (Roberts J)**

Appeal of decision of to stay Schedule 1 proceedings pending the outcome of concurrent Russian litigation dismissed. Consideration of the court's statutory and common law powers to stay proceedings. *Keywords: striking out applications; jurisdiction; appeals; Children Act 1989 Schedule 1 applications*

## **G v G (Confiscation Order: Conduct) [2023] EWFC 16 (HHJ Robinson)**

Consideration of the fair way to deal with a £411,000 confiscation order against husband following a conviction for fraud. The CPS intervened in the claim. Found that the order amounted to s 25(2)(g) conduct, but that the sum should be repaid out of matrimonial funds to prevent husband being re-imprisoned. *Keywords: conduct*

## **Goddard-Watts v Goddard-Watts [2023] EWCA Civ 115 (Macur, Nicola Davies and Carr LJ)**

Successful appeal by the wife against financial remedy order, based on *Kingdon* approach, following two successful set-aside applications for fraudulent non-disclosure. Held that husband's fraud amounted to s 25(2)(g) conduct and was so far reaching that case needed to be reheard entirely. *Keywords: disclosure; setting aside orders (including Barder applications)*

## **Kaur v Singh [2023] EWHC 304 (Fam) (Peel J)**

Inheritance Act claim by widow where her husband's will had left his estate in equal shares to their two children. Claim brought under Part 8 and unopposed. Divorce cross-check applied and widow awarded 50% of the net value of the estate. *Keywords: needs; Inheritance Act applications; reasonable financial provision*

## **KM v CV No 1 [2022] EWFC 174 (HHJ Robinson)**

Case concerning treatment of wife's two police pensions where neither party had any capital. PODE report identified likely loss of value from pension sharing. Concluded that pension sharing would be inappropriate. £10,000 lump sum order in husband's favour instead. *Keywords: pensions on divorce; benefits; needs*

## **KM v CV No 2 [2020] B22**

Appeal allowed where the first instance judge had declined to make a pension sharing order in husband's favour. Held that the original judgment had relied too heavily on the non-matrimonial character of the pension assets in circumstances where needs were the primary issue. *Keywords: modest asset cases; needs; pensions on divorce*

## **Tousi v Gayukova [2023] EWHC 404 (Fam) (Mostyn J)**

Consideration of whether the court had jurisdiction to

transfer a housing association tenancy between parties to an invalid marriage. Commentary on the state of the law with relation to non-qualifying ceremonies. *Keywords: validity of marriage; void marriage; jurisdiction; locus celebratoris; transfer of tenancy; non-qualifying ceremony*

### **Re P (Service on Parent in Refuge) [2023] EWHC 471 (Fam) (McFarlane P)**

The President provided guidance on the correct service of legal documents on a person thought to be living in a refuge. *Keywords: refuge; service*

### **Teasdale v Carter and Teasdale [2023] EWHC 490 (Fam) (Moor J)**

Proprietary estoppel case in which daughter of divorcing parties sought declaration of her ownership of a property on her parents' farm. Wife's appeal against daughter being granted the property dismissed. Guidance on costs in respect of interveners. *Keywords: TOLATA; joinder of third parties; costs*

### **SS v RS [2023] EWFC 32 (Sir Jonathan Cohen)**

Strike out of husband's misconceived attempt to apply for compensation under the Domestic Abuse Act 2021 relating to wife's delay in complying with an undertaking to use best endeavours to procure husband's release from the mortgage on former family home after 2019 order. *Keywords: costs; domestic abuse; undertakings; compensation principle; striking out applications*

### **A v V [2022] EWHC 3501 (Fam) (Francis J)**

Schedule 1 award with astronomical costs despite father being a litigant in person at the final hearing. Father's attempt to rely on agreement pre-dating birth of child by 7 years not permitted. Straightforward provision of housing fund and other sums. Children Act 1989, s 91(14) order made for 5 years against both parties. *Keywords: costs; Children Act 1989 Schedule 1 applications; millionaire's defence; trusts*

### **X v Y, Re Z (No 4 Schedule 1 Award) [2023] EWFC 25 (Cobb J)**

Schedule 1 award in long-running litigation in which father had withdrawn from engagement in the proceedings by the time of the final hearing. Consideration of the effect of mother's misleading of the court in respect of alleged debts and improper transfers. *Keywords: conduct; Children Act 1989 Schedule 1 applications; enforcement*

### **S v S (Conduct: Pensions) [2022] EWFC 176 (HHJ Robinson)**

Financial remedy proceedings involving police officer

whose pension had been deducted in civil proceedings following his conviction for rape of the wife and other serious offenses. Husband's behaviour amounted to conduct under s 25(2)(g), which led to her receiving 85% of the capital and 66% of the pensions. *Keywords: pensions on divorce; conduct*

### **MN v AN [2023] EWHC 613 (Fam) (Moor J)**

Notice to Show Cause application by which husband sought to hold wife to the terms of a pre-nuptial agreement. Wife's arguments that she had been coerced into the pre-nuptial agreement and that it did not meet her needs were both rejected by Moor J. *Keywords: agreements; conduct*

### **NO v PQ [2023] EWFC 36 (Recorder Taylor)**

Consideration of informal post-nuptial agreement by which parties agreed to divide their assets. Husband, who had taken his share and invested it in a disastrous business venture, later sought 50% of the former family home as well. Held that he ought not receive this, despite placing him in a predicament of real need. *Keywords: agreements; needs*

### **EL v ML [2023] EWFC 43 (HHJ Hess)**

Permission refused in circumstances whether wife had sought to appeal a consent order entered into by the parties in 2019 on the basis that no Form D81 had been submitted to the court. Wife's solicitor's approach was found to have misconceived. *Keywords: setting aside orders (including Barder applications); appeals; waiver of privilege; consent orders*

### **Xanthopoulos v Rakshina [2023] EWFC 50 (Sir Jonathan Cohen)**

Final hearing of long-running Part III proceedings at which the husband did not appear. The judge found that the post-nuptial agreement had been freely entered into and made a 'needs-light' based award with a lifetime reversionary housing fund and short-term maintenance. *Keywords: professional ethics; legal services payment orders; companies; conduct; costs; overseas divorce and the 1984 Act*

### **HP v AP [2023] EWFC 49 (HHJ Willans)**

Application to set aside a consent order for material non-disclosure on the basis that husband had failed to disclose information which undermined his case as to a property being owned beneficially by his father. Application dismissed. *Keywords: disclosure; undue influence; non-disclosure; setting aside orders (including Barder applications)*

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