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Chair's Column

HHJ Edward Hess

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

The first issue of the *Financial Remedies Journal* (FRJ) was launched in March 2022, alongside its own website, and (I am delighted to say) has already generated a huge amount of interest and engagement and we are already burgeoning with ideas for the third issue. I want to give a huge thank you to all those (and there are many) who have willingly given of their time to this project.

In my introduction to the first issue of the FRJ,[1] I reported that one of our missions is to promote serious and high-level debate and thought about the workings of the world of financial remedies. I could not have imagined a better example of this than the contents of this second issue. The transparency debate was already simmering when Mostyn J fanned the flames of the debate with his powerful judgment in *Xanthopoulos v Rakshina* [2022] EWFC 30, ruling as unlawful and misconceived the long accepted practice of confidentiality and (in most cases) first instance anonymity for financial remedies' litigants (the practice perhaps being described most clearly by Thorpe LJ in *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315 and *Allan v Clibbery* [2002] EWCA Civ 45). Sir James Munby, writing in this issue of the FRJ, under the title 'Some Sunlight Seeps In',[2] has given powerful support to the Mostyn J approach and in his final sentence throws down the gauntlet: 'What is required is reasoned refutation. Is anyone able to rise to the challenge?'[3] Christopher Wagstaffe QC, also writing in this issue of the FRJ, under the title 'Privacy and Transparency in the Financial Remedies Court',[4] has both picked up the gauntlet and risen to the challenge. Readers of these articles will make up their own minds as to the merits of the rival arguments, but they will certainly be supremely well informed and the FRJ is pleased to provide a platform for this important debate.

The second issue is packed with a variety of other stimulating and informative material. It would be unhelpful for me to list all the areas covered, but highlights include a number of really substantial contributions on the subject of applications under Schedule 1 to the Children Act 1989 (which are well worth mastering for practitioners in this field) and (a cautionary tale for judges!) a troubling articulation of the relative ease of producing presentationally convincing but entirely 'dodgy' documents before the court. I commend the second issue to you.

Financial Remedies Court valete

On 26 April 2022, Peel J took over from Mostyn J as national lead judge of the Financial Remedies Court (FRC) and as head of the money list in the Royal Courts of Justice. Although Mostyn J continues in post as a Judge of the Family Division, and is thus far from being lost to the world of financial remedies, it is appropriate to mark the change in his position by paying tribute to his very remarkable contribution to this world. He has been a powerful and irresistible force in the creation and development of the FRC, he has been the main driver of the Statements of Efficient Conduct at both High Court and below High Court level and the Standard Family Orders, 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. He has also been a strong supporter of the creation of the FRJ and contributed the opening article to the first issue.[5] If the FRJ were a medal awarding institution, Mostyn J would definitely be the recipient of the Legion D'Honneur and Knight of the Garter combined, but since it is not, I shall simply conclude by saying that I want to pay the warmest of tributes to his phenomenal contribution.

Notes

1 [2022] 1 FRJ 5.
2 [2022] 2 FRJ 79.
3 [2022] 2 FRJ 79, 94.
4 [2022] 2 FRJ 96.
5 'Notes on the Launch of the Financial Remedies Journal' [2022] 1 FRJ 3.

The Financial Remedies Court: The Road Ahead

Hon. Mr Justice Peel

National Lead Judge,
Financial Remedies Court

It is a great honour to be invited to contribute to issue 2 of the *Financial Remedies Journal*, which is an outstanding addition to the financial remedies landscape. As my illustrious predecessor, Mostyn J, remarked in the inaugural issue,[1] there has long been a 'gross and obvious gap' in the market for a journal dedicated to this important area of law. That gap is now filled.

The journal has not disappointed. Articles in the first issue on company valuations,[2] Galbraith Tables[3] (which will surely be carefully studied by the *At A Glance* committee), deferred compensation,[4] alternative dispute resolution (ADR)[5] and much more besides, have whetted the appetite. It deserves to become an essential read for all financial remedies practitioners and judges. Its companion website contains a wealth of invaluable resources and will, I suspect, now appear in the Favourites Bar of us all. I congratulate HHJ Hess and his editorial team on a stellar achievement.

Among many informative articles, I particularly enjoyed reading the chronological narrative of the origins of the Financial Remedies Court (FRC) by Sir James Munby,[6] who was President when the idea was first mooted by Edward Hess and Jo Miles in a prescient article in *Family Law* in 2016.[7] Despite hiccups along the way, by 2018 a pilot scheme was in place, and in February 2021 the FRC was formally initiated nationwide by Sir James's successor as President, Sir Andrew McFarlane. By the normal standards of our legal system, this was an astonishingly swift process. In such a short space of time it has become an integral part of the family justice system with a clear structure, 18 zones and some 900 judges (full and part time). For that, enormous credit must go to many who have worked tirelessly to bring the project to fruition where it now enjoys full status as part of the Family Court. It would be remiss of me not to record my unstinting admiration for Mostyn J for his leadership of the FRC through its gestation, birth and beyond, as well as his astonishing contribution to the landscape of financial remedies over the decade. Others deserve honourable mentions as well; in particular, HHJ Hess who has been a tireless Deputy National Lead Judge, and the past and current Presidents whose support for the project has been rock solid.

The need for a cadre of specialist financial remedies judges working in a specialist court has, in my view, never been clearer. Further, the devolved regional structure with zonal leaders is an indispensable part of the FRC, allowing local leadership, local judges and local court users to develop relationships, practices and guidance which suit local needs. Of course, nationwide guidance must be, and is, given from time to time, but I strongly support the ability of local zones and courts to operate proactively in developing their own, bespoke practices.

The FRC is barely a year and a half old, yet already well established. I am determined that we should continue to strive to make it an outstanding part of the family justice system in its own right, taking the lead where we can on practice and procedure. 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.

I encourage all judges to exercise robust case management, and all practitioners to assist the court in that regard. The *Statement on the Efficient Conduct of Financial Remedy Hearings proceeding in the Financial Remedies Court below High Court Judge Level*, rolled out on 11 January 2022 and to be seen in conjunction with FPR PD 27A and the *President's Memorandum: Witness Statements*, dated 10 November 2021, is there for a purpose. It contains essential requirements as to length of narrative statements (which must relate evidence, not rhetoric or argument) and skeleton arguments (all to be done in 12 pt font with 1.5 line spacing), a composite asset schedule template, a composite case summary, trial templates for the final hearing and more besides. The bundle limit at 350 pages should be scrupulously complied with, absent a court order to the contrary. The aim is to ensure that practitioners (and litigants in person, who are not exempt) present a case in a proportionate way, concentrating on the relevant facts and issues which the court must decide. Or, as Mostyn J recently put it in *Xanthopoulos v Rakshina* [2022] EWFC 30, non-compliance is a form of 'forensic cheating' and should not be tolerated. I hope to see a developing culture of robust case management in the FRC, and compliance by practitioners. It should not be too much to expect that the following words of Cohen J in *AG v VD* [2021] EWFC 9, [144] will not need to be repeated by any judge: 'I stated at the start of this judgment this case has been conducted as if the rules for efficient conduct have never been devised'.

It has sometimes seemed to me that many cases could be fairly disposed of with no oral evidence. After all, most financial dispute resolutions (FDRs) proceed upon the court being presented with the essential facts and figures in a bundle and written skeleton arguments, supplemented by oral submissions. The majority of FDRs (court or private) result in agreement. It is arguable that a perfectly fair outcome would be achieved at a final hearing with a similar approach, devoid of oral evidence. I suspect that many parties would willingly embrace such a process if it meant less delay and cost: most people would be willing to live with a figure, imposed on them, provided always that it is within a reasonable range of outcomes. Sir James Munby said something similar in his final *View from the President's Chambers*[8] before retirement; his perceptive remarks bear re-reading.

Of course, that is not the system we use, and I do not suggest that we abandon the traditional trial process. Oral evidence is, and will remain, a bedrock of the right to a fair hearing. But the point is that rigorous case management, and an emphasis on efficient conduct, will enhance, not diminish, the fair decision-making process. It will allow the judge to focus on the wood and not the trees, and reduce the length of hearings, delay and costs.

There is continuing impetus towards out of court resolution, which I welcome. The government is currently conducting a review of ADR in all areas of law, including family law. Financial remedies law and procedure have in some respects blazed a trail. The FDR was introduced on a trial basis as long ago as 1996, and implemented nationally in 2000. A fully established arbitration scheme is in place, and may receive further take-up after the Court of Appeal decision in *Haley v Haley* [2020] EWCA Civ 1369. Mediated agreements are a familiar route to settlement. Private FDRs have become increasingly common in certain parts of the country, particularly in London and the south-east where stretched judicial resources, pressure on court time and consequential listing delays all combine to encourage parties to opt out of the court FDR system. The vast majority of financial remedies cases are resolved by agreement before the final hearing. I encourage all court users and judges to encourage out of court settlement processes and, where appropriate, adjourn the court proceedings accordingly. I hope, and fully expect, that ADR processes will grow in popularity, and become part of the landscape around the country. May I commend the *Financial Remedies Journal* for creating the first Directory of Private FDR judges.[9] The popularity of private FDRs has increased dramatically. They are (in my view, rightly) seen as a very valuable tool in reaching settlement, but there has hitherto not been a comprehensive directory of those who put themselves forward as private FDR judges. This is a long overdue initiative and will, I hope, allow wider access to a broad range of specialists across the country, at different levels of seniority and experience, charging competitive and varying fees.

While each practitioner and judge will have their own preference, I believe that electronic bundles are here to stay, and paper bundles will become increasingly rare. E-bundles are, in my experience, quicker to navigate and easier to access. The days of witnesses being asked to go from hard copy Bundle C, p.323aa to Bundle G, p.27 are, I hope, the exception rather than the norm. However, I am acutely conscious that the Digital Contested Cases System, also known as the financial remedies portal, is, to put it politely, unpopular. I have met many users of it who are uniformly critical. Solicitors who upload documents, and judges who access documents, experience intense frustration at a system which is clunky, at times inadequate and not always accessible. HM Courts & Tribunals Service, which is responsible for delivering the portal, has acknowledged that much work needs to be done. I regard this as a priority for the FRC and its users, and there is much work going on behind the scenes to improve the portal as rapidly as possible. All judges to whom I have spoken are enthusiastic about the possibilities of digital systems, but are understandably frustrated by the slow rate of progress. The teething problems will, I hope, not deflect the FRC from embracing digital processes which will undoubtedly be rolled out throughout the court system in time.

Legal costs continue to shame financial remedies law. In *M v M* [2020] EWFC 41, the parties ended up with £5,000 each having spent £600,000 on costs. In *Crowther v Crowther & Ors* [2021] EWFC 88, where the costs were some £2.3m against net assets of barely £700,000, I described the litigation as 'nihilistic'. In *Xanthopoulos v Rakshina* [2022] EWFC 30, Mostyn J described the costs as 'apocalyptic'. There are many similar examples. The exasperation of judges is matched by an apparent inability of the family justice system to bring about change. In 2006, *Calderbank* offers were done away with and since then the starting point in financial remedies cases has been no order as to costs. There have been some advantages to the current costs regime, including allowing the court to survey the whole financial landscape, but there is no evidence that costs have reduced as a result, or that there is a greater incidence of early settlement. My personal recollection of *Calderbanks* at the Bar is that they incentivised parties to settle cases for fear of a costs order otherwise being made against them, and lawyers advised accordingly. I fear that the incentivisation has disappeared. The problem with the no order as to costs starting point is that parties and their lawyers are willing to contest cases on the basis that they have little to lose. The introduction of FPR 9.27A, which should be seen in conjunction with FPR PD 28A, para 4.4, makes plain that parties must negotiate openly. As Mostyn J said in *OG v AG* [2020] EWFC 52, [31]: 'if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs'. Unless it becomes apparent that these words are heeded, and parties routinely negotiate reasonably on an open basis, it may well be that a modified form of *Calderbank* should be considered for re-introduction.

The vexed question of transparency in the family justice system is being considered by the President's Transparency Implementation Group, which in turn includes an FRC subgroup headed by HHJ Stuart Farquhar. There are strong views on both sides of the debate. At one end of the debate, in *Xanthopoulos v Rakshina* [2022] EWFC 30, my predecessor challenges the whole basis upon which cases are conducted privately, and judgments anonymised; the judgment is essential reading, whatever one's point of view. On the other hand, there are those who argue that family proceedings are quintessentially private, there is no great call for change in the reporting of financial remedy cases, there would be a heightened risk of abusive or coercive

behaviour should one party be fearful of publicity, and the logistics for hard pressed judges would be onerous. The debate will no doubt be vigorous. The balance of Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is a delicate one, but I welcome the opportunity to achieve clarity on this difficult issue.

Also under review, but this time by the government, is the proposal made by the Farquhar group last year (endorsed by the FRC leadership and the President) for a pilot scheme to evaluate a new fast track of cases where the assets (excluding pensions) are below £250,000. Having sat on the group myself, I am a firm supporter of this proposal. The current procedure is, in my view, unwieldy for cases where the assets are modest, usually consisting of a property subject to mortgage and some additional indebtedness. The fast track would significantly reduce the time required to reach final hearing. I hope that the Ministry of Justice, when it completes its review later this year, will see the transformative possibilities of such a scheme, and give its blessing to the pilot.

Other items on the agenda include a proposed new enforcement procedure pilot scheme; the roll out of the new Form D81 and an ongoing project (currently tangled in technological weeds) to find a way to harvest and analyse the information; a review of the ticketing process and training for the FRC judges; training requirements; and, I hope, more judgments on BAILII (or its successor, the National Archives) from judges below High Court level, to build up a corpus of case law relevant to the more modest financial remedies cases.

While there are a number of ongoing projects, I am acutely conscious of the demands placed on hard pressed judges, including regular missives from regional and national leadership across multiple civil and family jurisdictions. Judges are expected to absorb and implement a great deal of guidance, practice and procedures almost as if by magic. In the spring 2022 issue of *Family Affairs*,[10] Jarndyced's column reflected on 'an overwhelming period of change' and demanded 'Stop!'. I think Jarndyced goes too far; we should not be enemies of change when such change is designed to improve the system of justice. But I am keen for the FRC to bed in, and for judges and practitioners to become accustomed to the multiple recent promulgations. The FRC leadership will have much to engage with, but I intend, as a last word in this article on my hopes for the road ahead, that the demands on judges for the foreseeable future will be kept to a manageable level.

Notes

1 'Notes on the Launch of the *Financial Remedies Journal*' [2022] 1 FRJ 3.
2 Nicholas Allen QC, 'Non-Matrimonial Property – Valuing the Family Business' [2022] 1 FRJ 6.
3 Jonathan Galbraith, Chris Goodwin and Rhys Taylor, 'The Galbraith Tables: a New Chapter for Pension Offsetting on Divorce?' [2022] 1 FRJ 26.
4 Joe Rainer and Thomas Rodwell, 'A Beginner's Guide to Deferred Compensation (and Other Forms of Renumeration)' [2022] 1 FRJ 11.
5 Sir Paul Coleridge, 'Private Alternative Dispute Resolution (pADR) – a Still Much Under-Used Process' [2022] 1 FRJ 63.
6 'The Origins of the Financial Remedies Court – an Insider's View, Part 1' [2022] 1 FRJ 19.
7 HHJ Edward Hess and Jo Miles, 'The recognition of money work as a specialty in the family courts by the creation of a national network of Financial Remedies Units' [2016] Fam Law 1335.
8 *View from the President's Chambers*, number 18, 23 January 2018.
9 Available online, at https://financialremediesjournal.com/directory.htm
10 [2022] 83 Family Affairs 114.

Some Sunlight Seeps In

Sir James Munby

In relation to transparency in the Financial Remedies Court (FRC) there are further signs that the tectonic plates are shifting.[1]

BT v CU

In November 2021, Mostyn J set the cat among the pigeons with his judgments in *BT v CU* [2021] EWFC 87, [2022] 1 WLR 1349, [100]–[114], and, four days later, in *A v M* [2021] EWFC 89, [101]–[106].

The headline message was clear and unequivocal (*A v M*, [104]):

> 'In step with the modern recognition of the vital public importance of transparency, my default position for the future will be to publish my financial remedy judgments in full without anonymisation, save as to the identity of children. Derogations from that default position will have to be distinctly justified.'

'Justified', that is, as spelt out in *BT v CU*, [113], 'by reference to specific facts, rather than by reliance on generalisations'.

Mostyn J explained his thinking (*BT v CU*, [103]–[105]) as follows:

> '103. … I accept that the current convention is that a judgment on a financial remedy application should be anonymised, although the decision whether to do so reposes in the discretion of the individual judge. Mr Chandler has cited the judgment of Stanley Burnton LJ in *Lykiardopulo v Lykiardopulo* [2011] 1 FLR 1427, para 79 where anonymisation is described as the "general practice" justified by reference to respect for the parties' private lives, the promotion of full and frank disclosure, and because the main information is provided under compulsion.
>
> 104. The move to transparency has questioned the logic of this secrecy. Almost all civil litigation requires candid and truthful disclosure, given under compulsion. The recently extended CPR PD51U – Disclosure Pilot for the Business and Property Courts – contains intricate and detailed compulsory disclosure obligations. Para 3.1(5) requires parties "to act honestly in relation to the process of giving disclosure". Many types of civil litigation involve intrusion into the parties' private lives. Yet judgments in those cases are almost invariably given without anonymisation.
>
> 105. I no longer hold the view that financial remedy proceedings are a special class of civil litigation justifying a veil of secrecy being thrown over the details of the case in the court's judgment. In my opinion it is another example of the Family Court occupying a legal Alsatia (*Richardson v Richardson* [2011] EWCA Civ 79, [2011] 2 FLR 244, para 53, per Munby LJ) or a desert island "in which general legal concepts are suspended or mean something different" (*Prest v Petrodel Resources Ltd and others* [2013] UKSC 34, [2013] 2 AC 415, para 37, per Lord Sumption).'

He went on ([109]): 'it is time for [the convention] to be abandoned'.

Mostyn J bolstered the argument by pointing out ([106]–[108]) the practice in relation to appeal judgments, whether the appeal is to a High Court Judge or to the Court of Appeal, of granting anonymity in such judgments only in rare cases where the specific facts warrant it. This, as he pointed out, makes 'secrecy … even more difficult to defend', indeed, 'impossible to defend'.

A v M

In *A v M*, [105]–[106], Mostyn J elaborated his reasoning:

> '105. There seems to have been a certain amount of surprise caused by my decision in *BT v CU* to abandon anonymisation of my future financial remedy judgments. Views have been expressed that I have snatched away an established right to anonymity in such judgments. This is not so. I do not believe that there is any such right. My personal research tells me that before the 1939–1945 War, and indeed until much more recently, there was no anonymity in the Probate Divorce and Admiralty Division ("PDA"), children and nullity cases apart, and even then only sometimes. For example, there is no example after 1858 of a first instance judgment in a variation of settlement case being published anonymously until as late as 2005 when *N v N and F Trust* [2005] EWHC 2908 (Fam), [2006] 1 FLR 856 was reported in that form. Even in nullity cases a general rule that they should be heard in camera was unlawful: *Scott v Scott* [1913] AC 417, HL. That case, far from being a paean to PDA exceptionality, is, in truth, precisely the contrary. It is a clear statement (to adopt modern metaphors) that the PDA was neither Alsatia nor a desert island: see Earl Loreburn at 447, where he succinctly stated:
>
> > "the Divorce Court is bound by the general rule of publicity applicable to the High Court and subject to the same exception."
>
> See also, to the same effect, Viscount Haldane LC at 434, 436; Earl of Halsbury at 443; Lord Atkinson at

462–463; and Lord Shaw of Dunfermline at 469, 475 and 478–480.

106. It is therefore difficult to understand how the practice arose of routinely anonymising ancillary relief judgments given in the Family Division (the successor to the PDA) or in the Family Court proceeding at High Court judge level. So far as I can tell, it is traceable back to the provisions in the Matrimonial Causes Rules ("MCR") that made the Registrar the usual first instance judge – see for example rule 77(1) of the 1973 rules which stated that "on or after the filing of a notice in Form 11 or 13 an appointment shall be fixed for the hearing of the application by the Registrar." The Registrar always sat in chambers. Rule 78(2) allowed an application to be referred to a judge, and rule 82(2) provided that the hearing of a referred matter "shall, unless otherwise directed, take place in chambers." I believe that the earlier versions of the MCR said the same. It is to this banal provision that all the secrecy that has surrounded financial remedy judgments can probably be traced, although routine anonymisation of first instance judgments does not seem to have taken hold until the 1990s. So far as I can tell, the practice of anonymising judgments given by High Court judges is explicable only by reference to the hearing having been in chambers and behind closed doors. But that of itself would not explain the adoption of the practice as a chambers judgment is not secret and is publishable whether or not anonymised: see *Clibbery v Allan and Another* [2001] 2 FLR 819 at [24]–[33], [74], [117]–[118] and [150]. I have not been able to discover any statement of practice made at any time before Thorpe LJ's judgment in *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315, [2011] 1 FLR 1427 (at [45] and [79][2]) explaining, let alone justifying, the convention (whenever it arose) of routinely anonymising almost all ancillary relief judgments given by High Court judges. That convention is very hard, if not impossible, to square with the true message of *Scott v Scott* which is that the Family Courts are not a desert island.'

On 16 November 2021, I published a comment on all this under the title *More Transparency in the Financial Remedies Court*. I wrote:

'It seems to me, if I may be permitted to say so, that Mostyn J is entirely correct, in his history, in his analysis and in his conclusion. His judgments in these two cases should be welcomed, accepted and applied by all.'

I observed that one commentator had pointed out that the reasoning in *BT v CU* and *A v M* is the complete opposite of what the same judge had previously said in *W v M (TOLATA Proceedings: Anonymity)* [2012] EWHC 1679 (Fam), [2013] 1 FLR 1513, and then in *DL v SL (Financial Remedy Proceedings: Privacy)* [2015] EWHC 2621 (Fam), [2016] 2 FLR 552 (and, I add, in *Appleton and Gallagher v News Group Newspapers and PA* [2015] EWHC 2689 (Fam), [2016] 2 FLR 1). However, as I went on:

'The issue is not that Mostyn J has changed his mind about anonymisation of judgments – as he explicitly accepts that he has: *BT v CU*, para 105. A judge is always entitled to revise his earlier thinking, not least to take account of changes and developments in the legal landscape. The question, put starkly, is whether he was right then, and is wrong now, or whether he was wrong then and is right now. We should all agree that, whatever his earlier thinking, Mostyn J has provided clear and compelling justification for his most recent views, views which, I suggest, are well founded in both history and principle. He is, if you like, recanting old heresy rather than descending into new heresy.'

I asked rhetorically, What are the objections? In substance, I said, there seemed to be two: 'first, that cases in the FRC involve private and sensitive matters which properly justify the anonymisation of the parties; secondly, that such cases involve massive and ongoing compulsory disclosure'. Neither contention, I went on to argue, was convincing.

I threw down a challenge:

'Those who wish to controvert what Mostyn J is now saying must do so by addressing the detail of what he is saying … and then coming up with an equally compelling counter-argument; an argument based on principle and not on a sentimental attachment to an allegedly established practice which is, in truth, of surprisingly recent origin.'

So far as I am aware, no one has risen to the challenge.

Xanthopoulos v Rakshina

Now, on 12 April 2022, Mostyn J has returned to the issue, with a masterly judgment which, while staying with the historical and analytical fundamentals of *BT v CU* and *A v M*, provides much more of the detail underpinning his reasoning and a richer and more profound analysis: *Xanthopoulos v Rakshina* [2022] EWFC 30, [74]–[141]. His judgment deserves to be read in full, so I eschew summary.

Suffice it to note that he gives us in turn: an extended treatment of the procedural history touched on in *A v M*, [106] ([77]–[88]); a fine *encomium* for the extraordinary dissenting judgment of Fletcher Moulton LJ in the Court of Appeal in *Scott v Scott* [1912] P 241 ([89]–[90]); compelling disquisitions on the true meaning of section 12 of the Administration of Justice Act 1960 ([91]–[93]), on the meaning and effect of the standard rubric ([94]–[97]), on the important judgment of Lord Woolf MR in *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056 ([98]–[100]), and on anonymity orders ([101]–[106]); a devastating analysis of *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261, observing that the opinions of Dame Elizabeth Butler-Sloss P and Thorpe LJ on the key point were *obiter*, that their reasoning 'stood on a very shaky foundation', and that they had in any event been overtaken by the rule changes in 2009 which entitled journalists to attend hearings in chambers ([107]–[116]); and an interesting discussion of the consequences of the introduction of the standard Family Division judgment template in about 2002 ([117]–[118]). At that point in the analysis, he provides this summary ([119]–[121]):

'119. In my opinion, for the reasons set out above, in a financial remedy case heard in private, which does not fall within section 12(1)(a) of the 1960 Act, the standard rubric is completely ineffective to prevent full reporting of the proceedings or of the judgment ...

120. For the reasons I have stated above, the justification identified in *Clibbery v Allan* for having a blanket ban on the full reporting of proceedings heard in private disappeared with the 2009 rule change.

121. Therefore it follows that anonymisation can only be imposed by the court making a specific anonymity order in the individual case. Such an order can only

> lawfully be made following the carrying out of the ultimate balancing test referred to by Lord Steyn in *Re S*. It cannot be made casually or off-the-cuff, and it certainly cannot be made systematically by a rubric. On the contrary, the default condition or starting point should be open justice, and open justice means that litigants should be named in any judgment, even if it is painful and humiliating for them, as Lord Atkinson recognised in *Scott v Scott*.'

He concludes with references to *In re Guardian News and Media Ltd & Ors* [2010] UKSC 1, [2010] 2 AC 697 ([122]); to the Practice Guidance I had issued as President on 16 January 2014, *Transparency in The Family Courts: Publication of Judgments*, paras 18–20 of which he subjects to what I have to confess is pointed and well-merited criticism ([123]–[124]); and then to the Consultation Papers issued by the President on 29 October 2021 and by the FRC lead judges, Mostyn J and HHJ Hess, on 28 October 2021 ([125]–[127]). He identifies the fallacy in posing the question in the form 'Why is it in the public interest that the parties should be named?' rather than, as it should be, in the form 'Why is it in the public interest that the parties should be anonymous?' ([128]). He has interesting and important things to say about the Judicial Proceedings (Regulation of Reports) Act 1926 ([129]–[134]), before explaining why on the facts of the case he has decided not to anonymise the names of the parties, while restraining the naming of their children ([135]–[139]). His final observations merit quotation in full ([140]–[141]):

> '140. My fundamental conclusion is that, irrespective of the terms of the standard rubric, section 12(1) of the 1960 Act, following long established principles, permits a financial remedy judgment (which is not mainly about child maintenance) to be fully reported without anonymity unless the court has made a reporting restriction order following a *Re S* balancing exercise. In my opinion this freedom can only be restricted by primary legislation and not by rules of court. Section 12(4) of the 1960 Act states that:
>
> > "Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section (and in particular where the publication is not so punishable by reason of being authorised by rules of court)."
>
> The power of the Family Procedure Rule Committee to make rules under this subsection is strictly confined to making something presently punishable as contempt not so punishable. It cannot make rules the other way round to make punishable as contempt something that is not presently so punishable. Therefore, any change to make financial remedy judgments systematically anonymous has to be done by primary legislation.'

Having fired this shot across their bows, he adds:

> '141. I accept and understand that the question of open justice in financial remedy cases is a matter of some controversy on which views are far from unanimous. I express the hope that the Financial Remedies Court Transparency Group (a sub-group of the Family Transparency Implementation Group) will consider carefully the legal issues raised in this judgment.'

Consistently with his reasoning, the rubric attached by Mostyn J to the judgment is in the following terms:

> 'This judgment was delivered in private. The judge hereby gives permission – if permission is needed – for it to be published. The judge has made a reporting restriction order which provides that in no report of, or commentary on, the proceedings or this judgment may the children be named or their schools or address identified. Failure to comply with that order will be a contempt of court.'

In *Xanthopoulos v Rakshina*, Mostyn J has delivered a judgment of tremendous range and power; a masterly and, at the end of the day, compelling demolition of commonly held but in truth, as he demonstrates, fundamentally flawed conceptions; and a judgment in which, I would respectfully urge, like its two predecessors, he is entirely correct, in his history, in his analysis and in his conclusion. His latest judgment, like the previous two, should be welcomed, accepted and applied by all.

I repeat my earlier challenge:

> 'Those who wish to controvert what Mostyn J is now saying must do so by addressing the detail of what he is saying … and then coming up with an equally compelling counter-argument; an argument based on principle and not on a sentimental attachment to an allegedly established practice which is, in truth, of surprisingly recent origin.'

Is there no one willing to take up the gage?

It has been suggested by the commentariat that Mostyn J violated the rule of *stare decisis* in changing his mind. This is not so. He was not bound by his previous view. High Court judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so: *Willers v Joyce & Anor (No 2)* [2016] UKSC 44, [2018] AC 843, [9]. Mostyn J clearly articulates powerful reasons for not adhering to his previous view, of which the foremost is that he now acknowledges it as fundamentally erroneous.

In the meantime, I venture to suggest that, despite the detail of the judgment, there is room for some additional exploration of these important issues, elaborating some of what Mostyn J has said and even, if he will forgive me, filling in a few gaps. I do not seek to challenge his conclusions, merely to add some additional support for his arguments.

Scott v Scott

I start with the great case of *Scott (Otherwise Morgan) v Scott* [1912] P 4, [1912] P 241, [1913] AC 417. The facts were simple. A wife petitioned for nullity on the ground of her husband's impotence. The Registrar made an order in common form that 'this cause be heard *in camera*'. At the trial before Sir Samuel Evans P, the suit was undefended, the husband having withdrawn his defence. The judge granted the wife a decree nisi. Subsequently, on her instructions, the wife's solicitor obtained an official transcript of the hearing, of which copies were sent to the husband's father, to a sister of the husband and to 'an intimate friend' of the wife. Her purpose was 'in defence of her reputation' and in response to allegations by the husband 'reflecting on her sanity'. Bargrave Deane J held that this was a contempt of court.

On appeal by the wife to the Court of Appeal and further appeal to the House of Lords, there were three issues: (1)

Did the court have jurisdiction to make the order that the case be heard *in camera*? (2) If so, did the order made by the Registrar prevent the subsequent publication of the proceedings? (3) Was the order made by Bargrave Deane J in a 'criminal cause or matter' so as to preclude any appeal to the Court of Appeal?

The full Court of Appeal by a majority (Cozens-Hardy MR, Farwell, Buckley and Kennedy LJJ, Vaughan-Williams and Fletcher Moulton LJJ dissenting) answered all three questions in the affirmative and dismissed the appeal.[3] The House of Lords (Viscount Haldane LC, the Earl of Halsbury, Earl Loreburn, Lord Atkinson and Lord Shaw of Dunfermline) unanimously allowed the appeal, answering all three questions in the negative.

We are all familiar with the ringing statements of the high constitutional importance of open justice which are to be found in *Scott v Scott*; in particular, in the dissenting judgment of Fletcher Moulton LJ[4] in the Court of Appeal (vitally important as foreshadowing so much of what was later to be said in the House of Lords) and in the famous speech of Lord Shaw of Dunfermline in the House of Lords. These are two great judicial declarations which ring down the ages. But for present purposes a narrower focus is sufficient.

In relation to what is now the Family Division, the case is of importance – great, and continuing, importance – for two reasons.

First, it established definitively and for all time that, as Viscount Haldane LC put it ([1913] AC 417, 436), referring to the Court for Divorce and Matrimonial Causes established by the Matrimonial Causes Act 1857:

> 'the Court which the statute constituted is a new Court governed by the same principles, so far as publicity is concerned, as govern other Courts.'

Earl Loreburn was equally pithy (447):

> 'the Divorce Court is bound by the general rule of publicity applicable to the High Court.'

Specifically, it followed that, specific statutory provisions apart, the Divorce Court and its successors could, and can, sit *in camera* only in the very limited circumstances permissible in the other Divisions.

As I put it in *Re Webster, Norfolk County Council v Webster* [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146, [39]:

> '*Scott v Scott* established once and for all that there is in principle no difference for these purposes between the Family Division and the other two Divisions. It is impossible to argue that the Family Division as such has any greater powers to sit in secret or to enforce the confidentiality of its proceedings than any other part of the High Court. If it is to be argued that the Family Division has some such power, either generally or in some particular class or classes of case, that power is not to be derived from the fact that the Family Division is the Family Division or from any "practice" of the Family Division however inveterate; it has to be founded in specific statutory authority or, since the coming into force of the Human Rights Act 1998, justified by reference to the Convention.'

Scott v Scott demonstrated the astonishing fact that in a succession of cases between 1869 and 1903 the practice exemplified by the Registrar's order had grown up in disregard – one is tempted to say defiance – not merely of section 46 of the 1857 Act, which provided that 'the witnesses in all proceedings before the court … shall be sworn and examined orally in open court', but also of the definitive judgment of Bramwell B sitting in the Full Court in *H (Falsely Called C) v C* (1859) 29 LJ(P&M) 29, 1 Sw & Tr 605.

Lord Shaw of Dunfermline was scathing in his indictment of what had been allowed to happen ([1913] AC 417, 478–479):

> 'I think it would have been better had those attempts to evade the publicity commanded by the statute then ceased and the judgment of Bramwell B been accepted as law.'

Having referred to what Sir James Hannen JO had said in *A v A* (1875) LR 3 P&M 230, he continued:

> 'I must say … that, accepting this as historically accurate, it appears to me to be a confession of a progressive departure from the law. No doubt it bound the learned judge, but it is an illustration of … the liability, unless the most rigorous vigilance is practised, to have constitutional rights, and even the imperative of Parliament, whittled away by the practice of the judiciary.'

It might be thought that these magisterial pronouncements (and there is much else in *Scott v Scott* to similar effect) would have put an end, once and for all, to the idea that in some mysterious and unexplained fashion the Divorce Court and its successors the Probate Divorce and Admiralty Division and the Family Division are not bound by the same principles as the rest of the High Court. Not a bit of it. One hundred years on and the heresy is still with us. As I had to lament as recently as 2018 in *Kerman v Akhmedova* [2018] EWCA Civ 307, [2018] 2 FLR 354, [20]–[22]:

> '20. Mr Shepherd was … on much firmer ground when he asked rhetorically, "Whether the Family Court is to be permitted to adopt different trial and post trial procedures to those permitted by other divisions of the High Court." As a matter of generality, the answer to this is, and must be, an emphatic NO!
>
> 21. It is the best part of sixty years since Vaisey J explained in *In re Hastings (No 3)* [1959] Ch 368 that "there is now only one court – the High Court of Justice." It is now eleven years since I observed in *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467, paras 19, 21 (though, of course, at the time I was a mere *puisne*), that "the [Family Division cannot] simply ride roughshod over established principle" and that "the relevant legal principles which have to be applied are precisely the same in this division as in the other two divisions." In *Richardson v Richardson* [2011] EWCA Civ 79, [2011] 2 FLR 244, para 53, we said that, "The Family Division is part of the High Court. It is not some legal Alsatia where the common law and equity do not apply." And in *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34, [2013] 2 AC 415, para 37, Lord Sumption JSC observed that "Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different."
>
> 22. It is time to give this canard its final quietus. Let it be said and understood, once and for all: the legal principles – whether principles of the common law or principles of equity – which have to be applied in the Family Division (and, for that matter, also, of course, in the Family Court) are precisely the same as in the Chancery

> Division, the Queen's Bench Division and the County Court.'

I note, before passing on, that the House of Lords in *Scott v Scott* recognised three so-called exceptions to the principle of open justice: cases involving children, cases involving lunatics and cases relating to secret processes. None, as will be appreciated, has any bearing on the point with which we are here concerned.

The second point to be derived from *Scott v Scott* was the definitive statement that it is not, as such, a contempt of court to publish an account of what has gone on in chambers or to publish a judgment delivered in chambers. According to Bargrave Deane J ([1912] P 4, 6–7):

> 'It is gross contempt of Court to report anything heard *in camera*. It is the same even in regard to reporting summonses heard in chambers, or in Court as in chambers, which is, in effect, the same thing, unless by special leave of the judge.'[5]

Fletcher Moulton LJ, in his great dissenting judgment, later vindicated in the House of Lords, was pitiless in his demolition of Bargrave Deane J's intellectually lazy and simplistic decision ([1912] P 241, 271–272):

> 'The language of the order provides for privacy at the hearing. It has nothing to do with secrecy as to the facts of the case. The learned judge interprets it as enjoining such secrecy. He realizes that having done so he is logically compelled to put all hearings in chambers on the same footing, and he therefore declares that under the procedure of our Courts there is an absolute obligation to perpetual secrecy as to what passes at the hearing of all summonses in chambers. No one has ventured to say before us a single word in defence of this part of the judgment. It is not too much to say that it is ludicrously at variance with the actual practice. Many thousands of summonses in actions are heard in chambers in the course of each year, and during all my experience at the Bar and on the Bench I have never heard it suggested that there is the slightest obligation of secrecy as to what passes in chambers. Everything which there transpires is and always has been spoken of with precisely the same freedom as that which passes in Court. Yet, as the judge acknowledges, the phrases "*in camera*" and "in chambers" are synonymous. We start, therefore, from the datum line that the judgment which we are asked to declare unappealable is confessedly based on reasoning which makes the whole lives of those who are professionally engaged in litigation one long series of criminal contempts of Court.'

He went on (275):

> 'conclusive proof that the order cannot bear the interpretation contended for by the respondent is derived from an examination of the origin of such orders and the jurisdiction under which they are made. The result of such an examination is in my opinion to establish beyond doubt that the order that the case should be heard *in camera* has always been intended to relate and has in fact related to the mode of conducting the hearing and to nothing more.'

Ever since then, the law has been quite clear, and it applies as much to the Family Division as to any other part of the High Court. In the absence of any relevant restriction imposed by statute it is not a contempt of court to publish or report a judgment, whether in whole or in part, merely because it was given or handed down in private – in chambers – and not in open court: *Forbes v Smith* [1998] 1 All ER 973 and *Hodgson & Ors v Imperial Tobacco Ltd & Ors* [1998] 1 WLR 1056.

Fletcher Moulton (1844–1921): mathematician, barrister, MP, appeal court judge and Law Lord. He was at one point judged to be one of the twelve most intelligent men in the United Kingdom. During the Great War he served as Director-General of the Explosives Department.

Proceedings heard in chambers

Mostyn J in In *Xanthopoulos v Rakshina*, [98], has set out in full what he rightly describes as the 'vitally important synopsis of the status of proceedings heard in chambers' provided by Lord Woolf MR in *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056, 1071, a synopsis which he said, and I agree, 'stands in completely conformity with the judgment of Fletcher Moulton LJ'. I repeat the key propositions:

> '(1) The public has no right to attend hearings in chambers because of the nature of the work transacted in chambers … (2) What happens during the proceedings in chambers is not confidential or secret and information about what occurs in chambers and the judgment or order pronounced can, and in the case of any judgment or order should, be made available to the public when requested. (3) …. (4) To disclose what occurs in chambers does not constitute a breach of confidence or amount to contempt as long as any comment which is made does not substantially prejudice the administration of justice. (5) The position summarised above

> does not apply to the exceptional situations identified in s12(1) of the Act of 1960 or where the court, with the power to do so, orders otherwise.'

Exactly the same principle applies in the Family Division: *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261.

The litigant's right to speak about their case

Before proceeding further there is another crucially important point emphasised by Fletcher Moulton LJ in a key passage ([1912] P 241, 272–274) which is too long to quote but requires to be read in full. Mostyn J has set it all out in *Xanthopoulos v Rakshina*, [89], so I shall be selective. Fletcher Moulton LJ first explains that:

> 'Civil Courts exist solely to enforce the rights or redress the wrongs of those who appeal to them and for no other purpose. They have ample powers for so doing. They summon the defendant to come before them, they give both parties assistance in obtaining the necessary evidence, they hear the rival contentions, and finally they decree the appropriate relief if any. But they can do no more except that when called upon to do so they enforce the relief that they have granted. Beyond and besides this the Court acquires no power or jurisdiction over an individual by reason of his having become a litigant. He remains in all other respects as free and as independent of interference from the Court as he was before the suit was instituted or as any other member of the public is who has never been a litigant.'

Postulating a nullity suit in which the defendant has been successful, he continues:

> 'He was brought into the suit by no act of his own, but by the summons of the Court. He has been present at the hearing not by bargain with the judge, but of right. And now it has been declared that the charges were unfounded. In virtue of what authority can the judge control the future actions of that man and say that he shall never speak of that which has passed at the hearing, including of course the oral judgment pronounced by the judge? How has that defendant surrendered or forfeited any part of his personal freedom of action? He is *sui juris* and remains so, and the fact of his having been compelled to be a litigant cannot put him for all time in the position of being *in statu pupillari* to the judge before whom the cause has come, so that such judge can impose upon him his personal views as to propriety or duty.'

He then adds an important point which, as we will see, has its resonance in the modern jurisprudence of the Human Rights Act 1998:

> 'it is often not merely a solace but a duty which a man owes to himself and to those about him to inform them fully of all that has passed in these inexpressibly painful cases. It may be vital to him to clear away misconception in the minds of those who are dear to him or whose good opinion he values, and to obtain from them the sympathy and support that he needs.'

Turning to the converse situation he continues:

> 'the argument is equally strong in the case of the petitioner. She comes before the Court as of right to obtain its aid in enforcing her rights. In accepting that aid she no more relinquishes her personal freedom of action than does the defendant in entering an appearance. The Court can impose no terms as a condition of its rendering its aid to parties in the enforcement of their claims. They have the right to demand that aid of the Court and it is there to give it without conditions. The same considerations apply to a defendant who is unsuccessful. The Court has the right and the duty to decree the proper relief against him, but it can do no more. It cannot add to that relief directions or commands as to his future conduct. If they are not part of the relief itself they are pronounced without authority.'

He comes to his exordium:

> 'The magnitude of the danger is illustrated by the present case. The serious encroachment on personal liberty which is here proposed is not supported by a single decision. There is on record no case where the Courts have asserted a right to control the personal acts of litigants after the conclusion of the suit except to enforce the relief granted. Yet without the support of any precedent the learned judge has in this case arrogated to judges the power to do so and we are asked to support him. The nature of the encroachment emphasizes the warning. Most people feel that the unrestricted publication in newspapers of what passes at the hearing of certain types of cases is a great evil, and many proposals have been made for regulating it. But all agree that this must be done by the Legislature. The judges are not the tribunal to decide on the proper limitations of public rights. The order in the present case is an attempt to assert for judges indefinitely wide powers in this respect. Not even the strongest partisan of legislative action has ventured to propose that private communications between individuals as to that which passes at the hearing of a suit should be interfered with. This order proceeds on the basis that a judge can of his own initiative absolutely forbid them.'

Now that, of course, was said in a dissenting judgment, albeit one which received the approbation of the House of Lords. But the same views as those expressed by Fletcher Moulton LJ are to be found also in the speeches in the House of Lords of the Earl of Halsbury ([1913] AC 417, 441) and Earl Loreburn (449), who expressly associated themselves with the Lord Justice,[6] and of Lord Shaw of Dunfermline. Lord Shaw in striking language (483) denied the right of the judges to require a litigant to 'remain perpetually silent' and (484) denounced Bargrave Deane J's order as 'an exercise of judicial power violating the freedom of Mrs Scott in the exercise of those elementary and constitutional rights which she possessed'.

So what, if any, statutory provisions are there affecting, in a case such as this, what was laid down in *Scott v Scott*? The short answer is that, apart from the Human Rights Act 1998, there are none.

I first consider the position before the Human Rights Act 1998 came into effect on 2 October 2000.

Judicial Proceedings (Regulation of Reports) Act 1926

So far as concerns the Judicial Proceedings (Regulation of Reports) Act 1926, there is a much contested and still unresolved question as to whether it applies to proceedings for ancillary relief: see *Rapisarda v Colladon* [2014] EWFC 1406, [2015] 1 FLR 584, [31]–[35], *Cooper-Hohn v Hohn* [2014] EWHC 2314 (Fam), [2015] 1 FLR 745, [30]–[70], and, most

recently, *Norman v Norman* [2017] EWCA Civ 49, [2017] 1 WLR 2523, [2018] 1 FLR 426, [69]–[70]. And there is also a suggestion that, even if it does, it has no application to ancillary relief proceedings in chambers (see Mostyn J in *Appleton and Gallagher v News Group Newspapers and PA* [2015] EWHC 2689 (Fam), [2016] 2 FLR 1, [22]), a questionable proposition unsupported by the language of the Act. Be all that as it may, and even if the Act does apply to ancillary relief proceedings, including those heard in chambers, sections 1(b)(i) and 1(b)(iv) specifically exclude from the ambit of the statutory restrictions on publication 'the names, addresses and occupations of the parties and witnesses' and 'the judgment of the court and observations made by the judge in giving judgment'.

Section 12 of the Administration of Justice Act 1960

Section 12 of the Administration of Justice Act 1960 does not apply to ancillary relief proceedings except, conceivably, in a very limited class of very unusual cases (I am not aware of any reported example): see *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416, [10]–[15]. And, in any event, it is elementary that even in a case where section 12 does apply, it does not prevent identification of anybody involved in the proceedings, not even the children: see *Pickering v Liverpool Daily Post and Echo Newspapers plc; Pickering v Associated Newspapers Holdings plc* [1991] 2 AC 370, 421, a decision of the House of Lords on the analytically identical section 12(1)(b), and *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, [82(v)]. The reason why a child's anonymity is protected in children proceedings is not because of section 12 of the 1960 Act; it is because of section 97 of the Children Act 1989, a provision which applies only in proceedings brought under that Act (including, it may be noted, financial proceedings under Schedule 1).

For present purposes, therefore, both the 1926 Act and the 1960 Act can be ignored.

Section 11 of the Contempt of Court Act 1981

I need also to refer to section 11 of the Contempt of Court Act 1981, which provides that:

> 'In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.'

This seemingly applies only to proceedings held in open court (hence the reference to 'the public') and is therefore unlikely to be of much relevance to the hearing, almost invariably in chambers, of proceedings in the FRC. (For the use of section 11 in relation to the hearing in open court of proceedings about the medical treatment of an adult patient, see *Re G (Adult Patient: Publicity)* [1995] 2 FLR 528, as explained in *Re HM (Vulnerable Adult: Abduction) (No 2)* [2010] EWHC 1579 (Fam), [2011] 1 FLR 97.) Indeed, I am not aware of any financial remedies case where section 11 has been considered, let alone applied.

The inherent jurisdiction

Before turning to consider the impact of the 1998 Act, there are two other points to be borne in mind about the legal landscape before 2000:

- First, as was commonly understood, the undoubted power of the court to restrain the publication of the name of a *child*, or information about a *child*, was to be found in the inherent *parens patriae* jurisdiction in relation to *children*: see *In re Z (A Minor) (Identification: Restrictions on Publication)* [1997] Fam 1 and *Kelly (A Minor) v BBC* [2001] Fam 59. It was this jurisdiction which led to the creation, following the decision of Sir Stephen Brown P in the Cleveland case, *Re W & Ors (Wards) (Publication of Information)* [1989] 1 FLR 246, of what eventually, during the 1990s, became the familiar standard reporting restriction order: see, for the history, *Harris v Harris, Attorney-General v Harris* [2001] 2 FLR 895, [345]–[353].
- Secondly, it was equally the common understanding that the inherent jurisdiction in relation to *adults* had been abrogated in 1960 and not revived: *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.

It follows that, to put it no higher, it was not all obvious that there was any jurisdiction to restrain the publication of the name of an *adult* or information about an *adult* other than under section 11 of the 1981 Act. Nor, so far as I am aware, was the attempt ever made. Indeed, it is notable that when, as in *Re G (Adult Patient: Publicity)* [1995] 2 FLR 528, it was desired to impose such restraint, the jurisdictional basis was indeed found in section 11.

Human Rights Act 1998

As already noted, the Human Rights Act 1998 came into effect on 2 October 2000. It was very quickly identified as providing a mechanism enabling the grant, in an appropriate case, of an order restraining the publication of the name of an *adult* or information about an *adult*: see, for example, the judgments of Dame Elizabeth Butler-Sloss P in *Venables v News Group Newspapers Ltd & Ors* [2001] Fam 430, in *X (A Woman Formerly known as Mary Bell) v O'Brien* [2003] EWHC 1101 (QB), [2003] 2 FCR 686, and in *In re a Local Authority (Inquiry: Restraint on Publication)* [2004] EWHC 2746 (Fam), [2004] Fam 96.

The point emerged very early on in the context of proceedings, heard in chambers, under Part IV of the Family Law Act 1996. The claim was for an occupation order in a case involving unmarried partners. The question arose as to whether the man could obtain an injunction to restrain the woman talking about the proceedings and telling her story to a newspaper. I held that, at the end of the day, this question fell to be resolved by having regard to and balancing the interests of the parties and the public as protected by Articles 6, 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), considered in the particular circumstances of the case: *Clibbery v Allan & Anor* [2001] 2 FLR 819, [120]–[154]. It is important to recognise that this approach, and indeed my decision on the point, were unanimously upheld by the Court of Appeal, which dismissed the

appeal: *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261, [82]–[83], [86], [119], [121].

In *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, the House of Lords made clear ([23]) that:

> 'since the Human Rights Act 1998 came into force in October 2000, the earlier case-law about the existence and scope of the inherent jurisdiction need not be considered in this case or in similar cases. The foundation of the jurisdiction to restrain publicity in a case such as the present is now derived from convention rights under the European Convention. This is the simple and direct way to approach such cases.'

Thus the previous distinction in this context between the principles applying in the case of a child and those applying in the case of an adult have been swept away. In each case the governing principles are those to be found in the 1998 Act and the Convention.

It follows from all this that that the 1998 Act and the Convention are central to the issue we are considering. They are indeed, I suggest, determinative.

Fletcher Moulton LJ's ringing declaration of principle as to the litigant's right to speak is now to be found in the jurisprudence of the Convention. As the Court of Appeal has recently explained (*Tickle v Griffiths* [2021] EWCA Civ 1882, [27]–[28]):

> '27. The right to freedom of expression, protected by Article 10 of the Convention, encompasses a right to speak to others, including the public at large, about the events and experiences of one's private and family life. As Munby J (as he then was) pointed out in *Re Angela Roddy* [2003] EWHC 2927 (Fam), [2004] EMLR 8 [35–36] this is also a facet of the right to respect for private and family life:
>
> > "amongst the rights protected by Article 8 … is the right, as a human being, to share with others – and, if one so chooses, with the world at large – one's own story …".
>
> 28. Corresponding to the right of an individual to impart information about his or her private and family life, without interference by a public authority, is the fundamental right of others to receive such information, without such interference. That is a right enjoyed by the media parties here, as well as the general public.'

Of course, as the Court of Appeal went on to explain, this is not an absolute right, for both Article 8 and Article 10 are qualified by 'the need to protect the rights of others who are participants in the "story"'. To this extent the principle enunciated by Fletcher Moulton LJ is now modified, because section 6 of the Human Rights Act 1998 imposes on the court, as a public authority, the duty '[not] to act in a way which is incompatible with a Convention right'.

But – and for present purposes this is the vital point – the law requires that, before coming to the conclusion that a party to litigation is to be barred from speaking out (and, if that is what they wish, speaking out using their own name) the court must first undertake the well-known 'balancing exercise' mandated by the decision of the House of Lords in *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593: see, for a well-known example, *Re P (Enforced Caesarean: Reporting Restrictions)* [2013] EWHC 4048 (Fam), [2014] 2 FLR 410.

Moreover, as the Court of Appeal went on to observe in *Tickle v Griffiths*, [30], referring to *O (A Child) v Rhodes* [2014] EWHC 2468 (QB), [2014] EWCA Civ 1277, [2015] EMLR 4, [2015] UKSC 32, [2016] AC 219, 'the right to tell one's own story is likely to carry considerable weight'. Indeed, the one aspect of the judgment of Lieven J at first instance which the Court of Appeal criticised was when it observed ([70]) that 'Lieven J may, if anything, have slightly undervalued this aspect of the case'.

There is, moreover, clear authority as to how the balancing exercise is to be applied where what is sought is the anonymisation of the litigants. Mostyn J has set out for us in full (*Xanthopoulos v Rakshina*, [104]) what Lord Neuberger MR said in *H v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 1 WLR 1645, [21], so I confine myself to the key parts of Lord Neuberger's summary:

> '(1) The general rule is that the names of the parties to an action are included in orders and judgments of the court.
>
> (2) There is no general exception for cases where private matters are in issue.
>
> (3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.
>
> (4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.
>
> (5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.
>
> (6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less.
>
> (7) An order for anonymity or for reporting restrictions should not be made simply because the parties consent: parties cannot waive the rights of the public.'

In this connection one needs also to consider Lord Neuberger's subsequent *Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003. I quote the key parts:

> '4. Applications which seek to restrain publication of information engage article 10 of the Convention and section 12 of the Human Rights Act 1998 ("HRA"). In some, but not all, cases they will also engage article 8 of the Convention. Articles 8 and 10 of the Convention have equal status and, when both have to be considered, neither has automatic precedence over the other. The court's approach is set out in *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17. ...

> 9. Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public …
>
> 10. Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional … Derogations should, where justified, be no more than strictly necessary to achieve their purpose.
>
> 11. The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test …
>
> 12. There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case … Anonymity will only be granted where it is strictly necessary, and then only to that extent.
>
> 13. The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence ...
>
> 14. When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings … On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their article 8 Convention right is entitled.'

Ah, but I hear you murmuring, what is that to do with us? That was a civil case, not a family case, and things are different in the Family Court and the FRC. Why? This is simply another revival of the desert island heresy. And, in fact, the Court of Appeal has now three times applied Lord Neuberger's approach in financial remedy cases: *K v L* [2011] EWCA Civ 550, [2012] 1 WLR 306, *Norman v Norman* [2017] EWCA Civ 49, [2017] 1 WLR 2523, [2018] 1 FLR 426, and *XW v XH* [2019] EWCA Civ 549, [2019] 1 WLR 3757.

The emergence of the present practice in financial remedy cases

So what is the basis for the contention that judgments in financial remedy cases should be anonymised? And when did the present practice of almost routine anonymisation emerge?

Ancillary relief as we know it today, as provided for by Part II of the Matrimonial Causes Act 1973, did not exist prior to the enactment of the Matrimonial Proceedings and Property Act 1970. Before then, the court had wide powers to make orders in relation to income, variously described in different contexts – the details do not matter for present purposes – as alimony, maintenance and periodical payments. In relation to capital, in contrast, the court's powers were very limited. Under section 45 of the Matrimonial Causes Act 1857 and its successor provisions the court could direct the settlement of an adulterous wife's property (the scope of this was later extended to other forms of a wife's misconduct: see now section 24(1)(b) of the 1973 Act). Under section 5 of the Matrimonial Causes Act 1859 (see now section 24(1)(c) of the 1973 Act) the court could vary any ante-nuptial or post-nuptial settlement. That was all.

Mostyn J has summarised for us the development of the practice in relation to this: *Xanthopoulos v Rakshina*, [78]–[88]. There is no need for me to add anything to what he has said. I take it as read.

The important point for present purposes is to note how very infrequent was the anonymisation of financial remedies cases in that era. A useful snapshot is provided by *Tolstoy on Divorce*.[7] The chapter on financial provision (alimony, maintenance and periodical payments, and variation of settlements) runs to 44 pages. Of the scores of cases cited, only five are anonymised: *K v K (Otherwise R)* [1910] P 140, *M v M* [1928] P 123, *CL v CFW* [1928] P 223, *N v N* (1928) 138 LT 693 and *J-PC v J-AF* [1955] P 215. None of them, it may be noted, was a settlement case. Indeed, as Mostyn J has pointed out (*A v M*, [105]), the first anonymisation of such a case was as late as 2005 when *N v N and F Trust* [2005] EWHC 2908 (Fam), [2006] 1 FLR 856 was reported in that form.

Thirty years later the picture had begun to change, quite markedly, as illustrated by the following table: it shows the number of first instance ancillary relief cases reported in the *Family Law Reports* (FLR) since the first volume in 1980 and how many of those cases are anonymised.

	Total	*Anonymised*	*% of total*
1980–2021	554	364	65.7
Broken down			
1980–89	84	18	21.4
1990–99	70	51	72.9
2000–09	149	114	76.5
2010–19	219	158	72.1
2020–21	32	23	71.9
1990–2021	470	346	73.6

It can be seen that from 1990 onwards the overall anonymisation rate has been 73.6%.

This rate is supported by analysis of all the first instance ancillary relief cases listed in *At A Glance, 2021–2022*. This shows that of the 374 cases listed (covering the period since 1970 though with comparatively few cases from the 1970s and 1980s), 270 – 72.2% – are anonymised.

Plainly, something dramatic occurred in the 1990s.

Mostyn J has pointed to the significance of the introduction of the judgment template incorporating the standard rubric: *Xanthopoulos v Rakshina*, [117]–[121]. I would respectfully agree with him that this has had, and continues to have, a very significant causative effect on the practice of anonymisation in financial remedies cases. However, the picture is, I suggest, somewhat more complex than he has suggested – though I emphasise at once that this has no effect at all on the correctness of his ultimate conclusion.

At about the turn of the Millennium, five innovations created the practice with which we are now familiar:

(1) In 1999, BAILII started publishing the judgments of the judges of the Family Division in their original form (earlier judgments on BAILII seem to have been derived from what had been published in law reports): in the case of written judgments, the judgment as prepared by the judge; in the case of *extempore* judgments, the official transcript as approved by the judge.
(2) With effect from 11 January 2001, all judgments in the Family Division (as in the other Divisions of the High Court and Court of Appeal) were required to have single spacing and paragraph numbering: *Practice Direction (Judgments: Form and Citation)* [2001] 1 WLR 194, [1.1].
(3) During 2001[8] the practice emerged of attaching two standard form rubrics to written judgments handed down in the Family Division. In their developed form, one rubric read as follows:

> 'I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.'[9]

The only significance of this for present purposes was that the official shorthand-writers were no longer concerned with the transcribing of written judgments, only with the transcribing of judgments delivered *ex tempore*. The other rubric (what I shall refer to hereafter as 'the rubric'), in its developed form, read:

> 'This judgment was handed down in private on [date]. The judge hereby gives leave for it to be reported. The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.'[10]

(4) With effect from 14 January 2002, the use of neutral citation numbers (previously confined to the Court of Appeal and the Administrative Court) was extended to the Family Division (as to the other Divisions of the High Court): *Practice Direction (Judgments: Neutral Citations)* [2002] 1 WLR 346, [1].
(5) During 2002, electronic templates for the preparation of written judgments were made available to the judges. These templates: (a) automatically formatted the judgment so as to comply with *Practice Direction (Judgments: Form and Citation)* [2001] 1 WLR 194, [1.1]; (b) automatically generated the appropriate form of neutral citation number; and, in the case of the Family Division template, (c) automatically inserted both rubrics (though the judge could, if desired, alter the text of the rubrics or delete them altogether).

It will be appreciated that none of these developments can explain the increase of anonymised judgments from 21.4% in the 1980s to 72.9% in the 1990s.

It is important to recognise one crucially important factor which makes the anonymity of reported judgments an uncertain proxy for judicial behaviour. With only a handful of exceptions (I have in mind the Tax Cases – TC – 'Published under the direction of the Board of the Inland Revenue', and the Immigration Appeal Reports – Imm AR – published by The Stationery Office for the Upper Tribunal (Immigration and Asylum Chamber)), none of which is relevant for present purposes, law reports are not, and never have been, official publications sanctioned or controlled by the judges or, indeed, by any public authority. They are, as they always have been, produced by private commercial publishers (this is so even in the case of the so-called 'Official Reports' published by the Incorporated Council of Law Reporting, except that it operates as a charity). As Lord Woolf CJ said in *Practice Direction (Judgments: Neutral Citations)* [2002] 1 WLR 346, [6], 'the judges cannot dictate the form in which law publishers reproduce the judgments of the court'.

It follows from this that, although, if a judgment is reported with the names of the parties, we can be confident that the judge has not stipulated anonymity, the converse is by no means necessarily true. A case may have been anonymised by the judge; it may, on the other hand, have been anonymised by the law reporter.

In his judgment in *Scott v Scott* [1912] P 241, 281–282, Fletcher Moulton LJ referred to the change in practice in the 1850s and 1860s when the names of parties in nullity cases, which had previously been set out in full, were now replaced with initials. He attributed this change of practice to the 'private undertakings' responsible for the publication of law reports.

Prior to 1999 we have no means of knowing what was going on 'behind the scenes' in the case of first instance judgments: as we shall see, BAILII was to change all that. However, some information was, and is, available in relation to appellate judgments. Beginning in, I believe, 1951 an official collection, housed in the Royal Courts of Justice, was made of the official transcripts of judgments in the Court of Appeal (including many cases that were never published in any law report); and for many years the judgments of the House of Lords as handed down had been in the public domain. These sources are interesting for what they reveal.

I referred above to the five anonymised cases cited in *Tolstoy on Divorce*.[11] The first four are all judgments at first instance. All we can tell from the published reports is that *K v K (Otherwise R)* [1910] P 140 (a decision of Bargrave Deane J) arose in the context of a nullity case where the respondent wife was of unsound mind; and that *CL v CFW* [1928] P 223 (Lord Merrivale P) was a divorce case in which the respondent husband was of unsound mind. In neither case, therefore, was the anonymisation of the parties in any way unusual in terms of contemporary practice. In contrast, *M v M* [1928] P 123 (Lord Merrivale P) was a judicial separation case and *N v N* (1928) 138 LT 93 (Lord Merrivale P) a divorce case in which neither party was of unsound mind. Why they should have been anonymised is unclear.

In the fifth case, *J-PC v J-AF* [1955] P 215, also published as *J v J* [1955] 2 All ER 617, there is nothing to tell us why the judgment at first instance of Sachs J was published in anonymised form. It was a divorce case where neither party was of unsound mind. The original transcript of the judgments of the Court of Appeal as prepared by the Official Shorthand Writers, at that time the Association of Official Shorthandwriters Limited, is, however, available and is now accessible on JustisOne. It shows that the case was in fact

Jones v Jones and Goddard – though I note that Sachs J had referred to the woman named as Mrs W. So, the decision to anonymise was, seemingly, that of the law reporters, not the Court of Appeal.

We can see from BAILII, which reproduces the judgment of the House of Lords as handed down in the case reported as *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, that the House of Lords anonymised the handed down judgment and entitled it '*In re F (Respondent)*'. There was, however, no prohibition on the naming of F; indeed, the order made by the House of Lords on the appeal, which is in the public domain and is published by BAILII, sets out F's name in full, as well as the name of her mother, her next friend. So the decision to anonymise was that of the judges, but was not accompanied by any prohibition on the naming of the parties.

Unfortunately, so far as concerns first instance judgments, we are never likely to be able to get to the bottom of what was going on in the 1980s and 1990s before the arrival of BAILII. We cannot tell whether the anonymisation of any particular case was determined by the judge or by the law reporter. We can, however, be pretty confident that even if a judgment had been anonymised by the judge this will *not* have been accompanied by any direction for secrecy by the judge, whether by rubric (for the rubric had not yet been invented) or by reporting restriction order (for at that time such orders were confined to cases involving children) or otherwise. Put another way, anonymisation involved no more than a decision not to supply the names of the parties; it was not a prohibition on the naming of the parties.

With the advent of BAILII it is now possible to see in much more detail exactly what is going on. As I have said, what BAILII publishes is, in the case of a written judgment, the judgment as prepared by the judge; in the case of an *extempore* judgment, the official transcript as approved by the judge. Moreover, where a rubric has been attached to a judgment by the judge, BAILII publishes the rubric. Thus, anyone who studies a judgment as published on BAILII can readily see:

- Whether the judgment was *extempore* (in which case the name of the official shorthand-writer is given) or handed down in writing.
- Whether, where this was shown by the judge, a written judgment was handed down in private or in open court.
- Whether in the case of an anonymised judgment there is a rubric.

It follows that in the case of an anonymised written judgment the decision to anonymise will have been that of the judge. It should be noted that where what is published on BAILII is an anonymised official transcript, one cannot tell whether the anonymisation originated with the shorthand writer who prepared the transcript (as I suspect will have happened in many cases) or with the judge who approved it.

Examination of anonymised financial remedies cases published on BAILII reveals that there are many such cases (including many judgments of mine at first instance) where, although the judge has determined that there should be anonymisation, there is nonetheless no rubric. In other words, although the judge has decided not to supply the names of the parties, there is no judicial prohibition on the naming of the parties. The inevitable corollary of this is that one cannot assume, just because a judgment has been anonymised (even judicially anonymised), that there is any judicial prohibition on the naming of the parties.

In contrast, law reports still typically publish judgments in such a way as not to make clear whether the judgment was written or *extempore* and often, moreover, without including the rubric.[12] The consequence, as will be appreciated, is that the reader of an anonymised judgment in a law report will not be able to tell whether the anonymisation originated with a shorthand writer, with the judge or with the law reporter. Of much more importance, unless the judge has referred to it in the body of judgment itself, the reader of an anonymised judgment in a law report may not be able to tell whether there is a rubric.

The position, it might be thought, is most unsatisfactory.

The rubric

Let it be assumed, however, that an anonymised judgment has been published with a rubric. Where does this take us? If Mostyn J is right – and he is – the answer is simple: nowhere. Let me elaborate.

It is important to remember that, unless embodied in an order of the court, a judicial expression of view, a judicial warning, or a judicial statement of what can or cannot be published is a waste of breath and not worth the paper on which, if written, it is recorded: see *R v Socialist Worker Printers and Publishers Ltd ex parte Attorney-General* [1975] QB 637, 646 (Lord Widgery CJ), *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 473 (Lord Scarman).

In the context of ancillary relief, consider *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416, [19]–[22]. I had been invited by counsel 'to make abundantly clear to the media' that the 1926 Act applied to the proceedings before me. I refused to do so, observing ([21]) that:

> 'what I am being invited to do is to give an advisory opinion and to offer advice to the media – advice which it is insinuated will carry the more force because it comes from a judge. The difficulty is that although persons, the media included, may be obliged to obey the *orders* of a judge, if the judge offers advice they are entitled to accept or reject that advice as they wish, just as they are entitled to accept or reject advice from any other quarter. So, were I to express any views on the matter, and all the more so were I to address the media in the way suggested, not merely would I be stepping outside any proper judicial function, I would not, in fact, be achieving anything of utility to the parties.'

This was followed by Roberts J in *Cooper-Hohn v Hohn* [2014] EWHC 2314 (Fam), [2015] 1 FLR 745, [28].

Moreover, if it is to be effective and enforceable, if the need arises, as an order, it must be drafted in the way in which injunctions are usually drafted and, moreover, in terms which are clear, precise and unambiguous; there must be a penal notice; and the procedures required by section 12(3) of the Human Rights Act 1998 and Practice Direction 12I: Applications for Reporting Restriction Orders must be complied with: see *Re HM (Vulnerable Adult: Abduction) (No 2)* [2010] EWHC 1579 (Fam), [2011] 1 FLR

97, and *Re RB (Adult) (No 4)* [2011] EWHC 3017 (Fam), [2012] 1 FLR 466.

The purpose and effect of the rubric are, I suspect, still not as well understood as one would like.

For many years, so far as I am aware, the meaning and effect of the rubric attracted neither curiosity nor judicial consideration. I think I am correct in saying that the point first arose, as it happened before me, in *Re B, X Council v B* [2007] EWHC 1622 (Fam), [2008] 1 FLR 482, and then again *Re B, X Council v B (No 2)* [2008] EWHC 270 (Fam), [2008] 1 FLR 1460, when I was asked to make successive modifications to the rubric (the first to allow naming of the local authority, the second to allow naming of certain family members) which I had attached to an earlier judgment reported as *X Council v B (Emergency Protection Orders)* [2004] EWHC 2015 (Fam), [2005] 1 FLR 341. On each occasion as I made clear, I merely assumed, though without deciding the point, that 'the rubric is binding on anyone who seeks to make use of a judgment to which it is attached' – though I did not seek to explain how or why: *Re B, X Council v B (No 2)* [2008] EWHC 270 (Fam), [2008] 1 FLR 1460, [12].

Three years later, in 2011, I engaged with the question and sought to provide an answer.

The starting point, as I explained in *Re RB (Adult) (No 4)* [2011] EWHC 3017 (Fam), [2012] 1 FLR 466, [13], is that:

> 'The rubric is not an injunction: see *Re HM (Vulnerable Adult: Abduction) (No 2)* [2010] EWHC 1579 (Fam), [2011] 1 FLR 97. It is not drafted in the way in which injunctions are usually drafted. There is no penal notice. And the procedures required by section 12(3) of the Human Rights Act 1998 and Practice Direction 12I: Applications for Reporting Restriction Orders will not have been complied with.'

But, I went on, 'this does not mean that it is unenforceable and of no effect'. I went on to explain why ([15]–[16]):

> '15. … the publication of a judgment in a case in the Family Division involving children, is subject to the restrictions in section 12(1)(a) of the Administration of Justice Act 1960. To publish or report such a judgment without judicial approval is therefore a contempt of court irrespective of whether or not it is in a form which also breaches section 97(2) of the Children Act 1989.
>
> 16. The rubric is in two parts and serves two distinct functions. The first part ("The judge hereby gives leave for it to be reported") has the effect, as it were, of disapplying section 12 *pro tanto*, and thereby immunising the publisher or reporter from proceedings for contempt. But the second part ("The judgment is being distributed on the strict understanding that …") makes that permission conditional. A person publishing or reporting the judgment cannot take advantage of the judicial permission contained in the first part of the rubric, and will not be immunised from the penal consequences of section 12, unless he has complied with the requirements of the second part of the rubric. This is merely an application of a familiar principle which one comes across in many legal contexts and which finds expression in such aphorisms as that you cannot take the benefit without accepting the burden, that you cannot approbate and reprobate and that if a thing comes with conditions attached you take it subject to those conditions.'

Re RB was a case involving an incapacitated adult where I was exercising the inherent jurisdiction. Section 12, therefore, had no application (see [9]). I had handed down various judgments in private (in chambers), each including in the heading the words 'In Private'. I had deliberately omitted the rubric. I explained why ([20]):

> 'Since section 12 did not apply, there was no need for me to include the first part of the rubric; and absent the first part there was neither need nor justification for the second part.'

I have to confess that this had not always been my understanding. BAILII shows that in two cases, one reported as *Re S (Adult Patient: Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, and the other as *HE v A Hospital NHS Trust* [2003] EWHC 1017 (Fam), [2003] 2 FLR 408, each relating to the social or medical care of an incapacitated adult, my judgment as handed down in private was not merely anonymised but also included the full rubric. That, of course, as I must accept, was an error on my part.

It is convenient to mention also *Re X (A Child) (No 2)* [2016] EWHC 1668 (Fam), [2017] 2 FLR 70, where I had handed down a judgment in open court. It was suggested that, in error, the rubric had been omitted. I rejected the argument. Having referred to the analysis in *Re RB*, I said ([5]):

> 'Now none of this has any application to a judgment handed down *in public*. The rubric in its standard form applies, as a matter of language, only to judgments handed down in private. But there is a more fundamental point in play here. Section 12 (which applies only to reports of "proceedings before [a] court sitting in private") does not apply to the contents of a judgment handed down in public. Nor, as a quite separate point, does anyone need a judge's permission to publish or report a judgment given or handed down in public, unless, that is, there is in place, and there was not here, some specific injunctive or other order preventing publication. It will thus be seen that there was no basis for my including the rubric in my judgment.'

On 13 April 2022, the day after Mostyn J had handed down his judgment in *Xanthopoulos v Rakshina*, Moor J handed down, in public, a judgment in a financial remedies case (it was, in fact, an appeal) in which the parties were named: *Lockwood v Greenbaum* [2022] EWHC 845 (Fam). The attached rubric read:

> 'This judgment was delivered in public. It can be reported in full but the two children of the parties must not be identified other than as they are referred to in the judgment. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.'

With all respect to the judge, this surely invites two questions, to neither of which there is a satisfactory answer: (1) What (if any) is the effect of this in law? (2) What is the basis for the assertion that failure to comply 'will be a contempt of court'?[13]

It is fairly clear that Moor J's approach is not consistent with that of Mostyn J.

It can thus be seen that the rubric has no proper role to play in a financial remedy case where, to repeat, there is, in contrast to a case involving a child, no statutory prohibition

on the publication of a judgment handed down in chambers, and, absent any reporting restriction order, nothing to prevent anyone doing so. Absent any statutory prohibition, the first part of the rubric is unnecessary and, if nonetheless included, wholly redundant. For the would-be publisher does not need the permission of the court to publish and can justify publication, and defend a complaint of contempt, without reference to the first part of the rubric. That being so, there is nothing for the second part of the rubric to bite on. Since the would-be publisher does not need the permission of the court gratuitously granted by the first part of the rubric in order to defend a complaint of contempt, he can publish without having to comply with the requirements of the second part of the rubric.

I therefore agree entirely with Mostyn J's conclusion (*Xanthopoulos v Rakshina*, [119]) that 'in a financial remedy case heard in private … the standard rubric is completely ineffective to prevent full reporting of the proceedings or of the judgment'.

There is a further point to be noted. Use in this context of the current form of rubric raises the question whether it is appropriate, indeed lawful, to seek to threaten a penalty for contempt in a case where there is in fact no reporting restriction order.

Clibbery v Allan

As we have seen, Mostyn J has cast a critical eye over certain *dicta* in *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261, especially the statement by Thorpe LJ ([106]) that:

> 'I have no difficulty in concluding that in the important area of ancillary relief, … all the evidence (whether written, oral or disclosed documents) and all the pronouncements of the court are prohibited from reporting and from ulterior use unless derived from any part of the proceedings conducted in open court or otherwise released by the judge.'

The reasoning leading to this conclusion appears from what Thorpe LJ had previously said ([93], [100]):

> '93. In the family justice system the designation "in chambers" has always been accepted to mean strictly private. Judges, practitioners and court staff are vigilant to ensure that no one crosses the threshold of the court who has not got a direct involvement in the business of the day … This strict boundary has always been scrupulously observed by the press. Of course the judge always retains a residual discretion and, accordingly, a hearing in chambers may culminate in a judgment in open court. Alternatively the judge may make an abbreviated statement in order that the public interest in the proceedings may be at least partially satisfied.
>
> 100. … family proceedings are easily distinguishable from civil proceedings in the other Divisions of the High Court … in family proceedings the relationship between the court and the litigants is clearly distinguishable from the relationship between the litigants and the court in civil proceedings. In the latter the parties bring into the arena such material as they choose to bring together with such material as they may be ordered to bring during the development of the case … The determination of an ancillary relief application proceeds on a very different basis … All parties are under a duty of full and frank disclosure, clearly recognised well before the advent of the statutory powers for equitable redistribution of assets on divorce.'

He went on ([104]–[105]) to refer to the well-known speech of Lord Brandon of Oakbrook in *Livesey v Jenkins* [1985] AC 424 and to the implied undertaking not to disseminate litigation material 'for ulterior purposes'.

Thorpe LJ was, of course, entirely correct to emphasise just how extensive are the obligations under *Livesey v Jenkins* [1985] AC 424 and under the implied undertaking. But one is nonetheless entitled to question how he managed to get from there to his sweeping conclusion.

I do not propose to traverse again the ground which Mostyn J has already covered. And in venturing a view I am very conscious that I am *parti pris*, for I had been the judge at first instance whose judgment (*Clibbery v Allan & Anor* [2001] 2 FLR 819) was being dissected by the Court of Appeal. Nonetheless, I trust that a few observations are in order:

(1) It is not immediately apparent how Thorpe LJ's conclusion is to be reconciled with the proposition, accepted, as we have seen, by the Court of Appeal in the very same case, that a proposed prohibition of publication was to be resolved having regard to and balancing the interests of the parties and the public as protected by Articles 6, 8 and 10 of the Convention, considered in the particular circumstances of the case.
(2) Specifically, how is Thorpe LJ's conclusion to be reconciled with the litigant's right to speak, recognised both by Fletcher Moulton LJ and by the Court of Appeal in *Tickle v Griffiths* [2021] EWCA Civ 1882?
(3) Naming the parties as being parties to ancillary relief proceedings is not of itself a contempt: cf, *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416, [1].
(4) What is the basis for prohibiting the reporting of facts within the public domain, for example, that the family home of the warring Duke and Duchess of Loamshire is Loamshire Castle with its vast estates?
(5) What of elements in the dispute that, having nothing to do with the parties' assets, are plainly outside the scope of both *Livesey v Jenkins* [1985] AC 424 and the implied undertaking: for example, to take a recent case (*E v L* [2021] EWFC 60), an argument of law based on the facts that the marriage was short and childless; or where one party seeks to rely on groundless allegations of non-financial misconduct against the other?

Be that as it may, Thorpe LJ, as we have seen, placed great weight on the rigorous exclusion of the press from all hearings in chambers and to the differences, as he saw them, between family and civil litigation. The first, of course, has now been swept away. Since April 2009, and subject only to narrowly defined exceptions, journalists (and the same now applies to authorised legal bloggers) have a *right* to attend proceedings in chambers: see *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416. Moreover, it is important to note, the rules conferring that right (see now FPR 27.11(2)(f)) contain no prohibitions on what the journalist or blogger can publish. For that, one has to look to the general law.

What then if a reporter or legal blogger, having exercised their right to be present in chambers for the hearing of a

financial remedies case, reports the names of the parties and the judge's *extempore* judgment. Are they committing a contempt? Absent a reporting restriction order preventing it, the answer surely is 'no'. Let me turn it the other way round: if it is to be said that they have committed a contempt, why, how and on what basis? I know of none.

Suppose that the reporter or legal blogger goes on to report one party's comments outside court after the hearing about, let us say, the conduct of the other party – is that a contempt? The answer is surely the same.

In *Spencer v Spencer*, [41], I said:

> 'Plainly, on the other hand, the media have their rights under Article 10. Not, in the present case, a right to receive information from the parties (because neither of the parties wishes to give them any information) but a right to receive information by sitting in court and, subject to any other restraints which there may be upon their reporting the proceedings, their right to impart that information to the world at large.'

The restraints to which I was referring were those under the 1926 Act and section 12 of the 1960 Act – restraints which did not in the event apply so as to prevent reporting – and those which would arise if there was a reporting restriction order. The journalists present were therefore fully entitled to report what they heard in court unless either they were excluded or a reporting restriction order was made. I refused the joint application for an exclusion order; a prefigured application for a reporting restriction order was never heard as the case settled. I am not aware of any authority, either in the Court of Appeal or elsewhere, which holds my analysis to be wrong. If it is right, and I am convinced that it is, then Mostyn J's view that the policy of near blanket secrecy formulated in *Clibbery v Allan* has been overtaken by the reforms in 2009 must surely be correct.

In relation to Thorpe LJ's second point, the differences, as he saw them, between family and civil litigation, the fact is that there have been significant changes in civil litigation practice. Thus, as Mostyn J has observed (*BT v CU*, [104]) 'Almost all civil litigation requires candid and truthful disclosure, given under compulsion'.

Mostyn J has drawn our attention (*Xanthopoulos v Rakshina*, [127]) to what Lord Roskill said in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, 327, to the effect that there is no breach of the implied undertaking if documents are supplied to a journalist or law reporter for the purpose of reporting the proceedings:

> 'I would prefer to regard the assistance long given to press agencies, representatives of the media, and law reporters concerned with what I have called day-by-day reporting, in the interests of fair and accurate reporting, as being for the immediate purpose of the litigation in question and not as collateral or ulterior to it.'

Lord Diplock said much the same ([306]).

There is controversy as to whether the implied undertaking binds the press. Both Roberts J in *Cooper-Hohn v Hohn* [2014] EWHC 2314 (Fam), [2015] 1 FLR 745, and Mostyn J in *L v L (Ancillary Relief Proceedings: Anonymity)* [2015] EWHC 2621 (Fam), [2016] 1 WLR 1259, [2016] 2 FLR 552, and again in *Appleton and Gallagher v News Group Newspapers and PA* [2015] EWHC 2689 (Fam), [2016] 2 FLR 1, [9]–[11], [15], proceeded on the footing that it did, relying in large measure on *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261, and *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315, [2011] 1 FLR 1427, but without any more profound analysis of how an obligation existing as between the parties and the court can somehow bind a third party. Moreover, neither of them seems to have been referred to and neither referred to what Lord Diplock and Lord Roskill had said in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280. Nor did the Court of Appeal in its ultimately inconclusive consideration of the point in *Norman v Norman* [2017] EWCA Civ 49, [2017] 1 WLR 2523, [2018] 1 FLR 426.

Lykiardopulo v Lykiardopulo

As we have seen, Mostyn J made some reference to *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315, [2011] 1 FLR 1427, but did not engage with it in much detail. This is hardly surprising, given that, as Thorpe LJ explained ([1]), *Lykiardopulo v Lykiardopulo* was an appeal which:

> 'raises a narrow point: how should a Family Division judge decide whether or not to publish an ancillary relief judgment at the conclusion of a trial during which one of the parties conspired to present a perjured case.'

The appeal, it should be noted, was in relation to a trial in January 2009 in which Baron J had given judgment on 13 February 2009, in other words *before* the important rule change in April 2009 opening up the family courts to the media. In this context it is interesting to note the submission on behalf of the guilty husband (*Lykiardopulo v Lykiardopulo*, [28]) that:

> 'In the light of the parties' expectations, based on the law and practice as it was before February 2009, it would be disproportionate to report publicly to satisfy the wife's asserted sense of fairness.'

The judgments in *Lykiardopulo v Lykiardopulo* voice what may be called the conventional pieties. Thus Thorpe LJ ([30]) said:

> 'The practice of privacy has grown up in the Family Division to protect the welfare of children, to deny an inspection that is only prurient and to respect the fact that the financial affairs of any family are essentially private and not a matter of legitimate public interest.'

He added ([54(iii)]):

> 'The conclusion which [Baron J] reached accorded with the practice of the Division. The number of ancillary relief judgments published without an anonymisation direction has been tiny in recent times.'

Stanley Burnton LJ ([79]) said:

> 'I start from the premise that, as Article 6 requires, justice should be seen to be done, and in general the judgment of the court should be public unless there is good reason for it not to be published or for the identities of the parties not to be disclosed. Litigants have a right to respect for their private life under Article 8, but that right is qualified and in many, indeed most, cases the interests of justice, and of justice being seen to be done, require facts that would otherwise remain private to be made public in a judgment. The general practice of the Family Division is for judgments in

> ancillary relief cases not to be published, or if published to be anonymised. That is done out of respect for the private life of the litigants and in order to promote full and frank disclosure, and because the information in question has been provided under compulsion.'

He did not elaborate on the justification for the difference between the first part of what he was saying and the latter part. But he went on ([80]):

> 'However, different considerations apply where the information and documents provided by a litigant are false. That litigant has no entitlement to confidentiality in respect of that information or those documents. They do not evidence his private life. In general, there is no good reason why his conduct should not be public. In such a case, the court may order publication of a judgment without anonymisation, not as a sanction or punishment, but because there is no right to confidentiality in relation to that conduct.'

More important, however, is what the Court of Appeal had to say about the true nature of the exercise upon which Baron J at first instance and the Court of Appeal on appeal were actually engaged. Thorpe LJ put the point very clearly ([22]–[23], [53]):

> '22. … [Baron J] handed down a characteristically thorough judgment in which she dealt fully with the context in which she exercised her discretion.
>
> 23. She traced the origins of the rule of privacy in ancillary relief proceedings and its justification. She recorded the significant rule changes which came into effect on 27th April 2009 opening ancillary relief proceedings to accredited journalists. She cited the leading authorities concerning Articles 6, 8 and 10 of the European Convention of Human Rights which had to be applied to the issue before her. Finally in paragraphs 49 to 58 she struck the balance and announced her conclusion that the judgment should be reported after anonymisation. This was the middle path between public reporting sought by the wife and no reporting sought by the husband and his brother.
>
> 53. … the judgment of Baron J … is a model of conscientious and clear review of the law and its application to the facts. Particularly impressive is her review of the effect of the rule changes introduced on 27th April 2009. With great care and thoroughness she identifies the articles of the European Convention of Human Rights that were engaged and then balances them to arrive at her final conclusion.'

In the event, the Court of Appeal, having conducted the same balancing exercise, came to a different conclusion: there should be no anonymisation.

In other words, the Court of Appeal was acknowledging the significance of the rule change in 2009 and identifying the essential task for the court as being – and this in a case where the issue was whether or not there should be anonymisation – to undertake the balancing exercise mandated by the Convention.

The ratio of the decision was that both the first instance and appeal judgments would be published without anonymity, in particular because, having undertaken the balancing exercise, the husband had behaved badly. The general practice favouring anonymisation was not an essential reason for the decision; on the contrary that practice was of *no relevance* to the specific facts of that case which, in the final analysis, were decisive. Those specific facts meant that anonymisation would not be applied.

The irony of all this will not have escaped the reader. In both *Clibbery v Allan* and *Lykiardopulo v Lykiardopulo*, the decisions of the Court of Appeal most frequently cited in support of the conventional pieties, the actual ratio was that proposed prohibition of publication or anonymisation is to be resolved having regard to and balancing the interests of the parties and the public as protected by Articles 6, 8 and 10 of the Convention, considered in the particular circumstances of the case.

Anonymisation of financial remedy judgments in the Court of Appeal

As Mostyn J has pointed out, practice in the Court of Appeal (financial remedies appeals invariably heard in open court and rarely anonymised) stands in complete contrast to practice at first instance (financial remedies cases usually heard in private and anonymised). As he said in *BT v CU*, [106]–[108], this makes 'secrecy … even more difficult to defend', indeed, 'impossible to defend' and, where there has been an interlocutory appeal to the Court of Appeal, 'yet more arbitrary and irrational'.

The Court of Appeal has vigorously resisted arguments for the extension of confidentiality to financial remedies appeals, though it has to be said that the suggested justifications[14] for the difference in practice are not entirely convincing:[15] *Norman v Norman* [2017] EWCA Civ 49, [2017] 1 WLR 2523, [2018] 1 FLR 426. There are exceptions, though they are rare, where a decision of the Court of Appeal has been anonymised by the court following, it should be noted, a careful balancing of the various interests protected by Articles 6, 8 and 10: *K v L* [2011] EWCA Civ 550, [2012] 1 WLR 306, *XW v XH* [2019] EWCA Civ 549, [2019] 1 WLR 3757.

And, I might add, there are a number of recent financial remedies cases at first instance where restrictions either on naming the parties or on publishing other information were, in the final analysis, imposed following the same careful balancing exercise: see, for example, *Veluppillai v Veluppillai* [2015] EWHC 3095 (Fam), [2016] 2 FLR 681, *X v X (Anonymisation)* [2016] EWHC 3512 (Fam), [2017] 2 FCR 92, *HRH Prince of Luxembourg v HRH Princess of Luxembourg* [2017] EWHC 3095 (Fam), [2017] 4 WLR 223, [2018] 2 FLR 480, and *XW v XH (No 2) (Reporting Restrictions Order)* [2018] EWFC 44, [2019] 1 FLR 559.

Such is the Court of Appeal's disdain for the anonymisation of financial remedies appeals that it does not hesitate to publish the parties' names even where they have been anonymised at first instance, thus, as the inevitable consequence, enabling anyone to put the real name to the anonymised individual: see, for example, *Sareen v Sareen* [2010] EWCA Civ 951 (on appeal from *H v H (Financial Relief)* [2010] EWHC 158 (Fam), [2010] 1 FLR 1864), *Martin v Martin* [2018] EWCA Civ 2866, [2019] 2 FLR 291 (on appeal from *WM v HM* [2017] EWFC 25, [2018] 1 FLR 313, where Mostyn J himself had permitted anonymisation of his judgment), and *Siddiqui v Siddiqui & Anor* [2021] EWCA Civ 1572, [2022] 1 All ER 860, [140] (on appeal from *FS v RS & Anor* [2020] EWFC 63, [2020] 4 WLR 139, [2021] 2 FLR 641).

Hardly, it might be thought, a ringing endorsement of first instance practice!

Conclusion

What are the objections to what Mostyn J is saying? In substance, as I have said, there seem to be two: first, that cases in the FRC involve private and sensitive matters which properly justify the anonymisation of the parties; secondly, that such cases involve massive and ongoing compulsory disclosure. Neither contention is at all convincing.

The short answer to the first is, surely, that this is true of many types of litigation, including family litigation in the other Divisions, where anonymisation is virtually unheard of. Anonymisation must be a matter of principle, not sentiment. Is it to be granted merely out of feelings of delicacy, or because the case may be painful or humiliating to the parties? If that were enough, one wonders how many cases in any Division would end up not being anonymised. In other Divisions, as we have seen, the principles to be applied on an application for anonymity are tightly prescribed by the judgment of Lord Neuberger MR in *H v News Group Newspapers Ltd (Practice Note)* [2011] EWCA Civ 42, [2011] 1 WLR 1645. Why should different principles apply in the FRC? It is not as if the Article 8 rights of the parties in a financial remedy case are somehow qualitatively different from those of the parties in, say, a family dispute about the ownership of a company or the distribution of an estate.

The short answer to the second objection is twofold.

First, that the continuing obligation to give disclosure is no longer a unique feature of financial remedy litigation. As Mostyn J has observed (*BT v CU*, [104]) 'Almost all civil litigation requires candid and truthful disclosure, given under compulsion', adding, it may be noted, 'Many types of civil litigation involve intrusion into the parties' private lives. Yet judgments in those cases are almost invariably given without anonymisation.'

Secondly, that the reportability of materials disclosed under compulsion has nothing to do with the question of anonymisation of a judgment. The fact that there has been disclosure under compulsion may justify the grant of a reporting restriction order; but how can it justify the anonymisation of the parties?

In *BT v CU*, in *A v M* and now in *Xanthopoulos v Rakshina*, Mostyn J has presented us with a case which, whether or not one agrees with his conclusions (and although I for one do, many I suspect may not), is, it must be accepted, unequalled in the range, depth and profundity of its analysis. It is a formidable case which, unless and until it is demolished with equivalent learning, surely holds the field. It is not to be demolished by bare assertions or denials, least of all by unelaborated claims that 'everyone knows', that 'this is how we do things' least of all that 'this is what we have all grown up with'. That kind of argument is no more effective today than in 1913 when *Scott v Scott* exploded a habitual error in practice that went back to 1869.

What is required is reasoned refutation. Is anyone able to rise to the challenge?

Notes

1 The title to this piece derives from a tweet posted on 13 April 2022 by the well-known barrister blogger Matthew Scott commenting on the decision in *Xanthopoulos v Rakshina.* He wrote: 'notwithstanding that they usually take place in chambers, journalists & bloggers are now free to report most ancillary relief cases. A little more sunlight may seep into the dark and bitter underworld of matrimonial property disputes'. It was Louis D Brandeis who, in the justly celebrated passage with which he begins Chapter V, 'What Publicity Can Do', in his collected essays, *Other People's Money and How the Bankers Use It*, published in 1914, said: 'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants'.

2 Paragraph 79 was, in fact, part of the judgment of Stanley Burnton LJ.

3 The law reporter tells us ([1913] AC 417, 419) that the appeal was initially argued before Cozens-Hardy MR, Fletcher Moulton and Buckley LJJ but was 'ultimately ordered to be re-argued before the Full Court of Appeal'. Fletcher Moulton's son, in his biography of his father, H Fletcher Moulton, *The Life of Lord Moulton* (1922, Nisbet and Co Ltd) (*Life*), page 65, reveals what happened: 'The case came to the Court of Appeal, and the appeal would have been dismissed without even calling on counsel for the respondents, but for Lord Justice Fletcher Moulton expressing his desire to hear the case in full (a course which by an unwritten law is always followed unless the court are unanimous), and he finally convinced his colleagues that the points raised were of such importance that the hearing should be taken before the full court of six judges.' The rest is history. We have so much to be grateful for to Fletcher Moulton: had it not been for his pertinacity his monumental judgment would not have been written and this truly landmark case would never have reached the House of Lords.

4 John Fletcher Moulton (1844–1921) was a remarkable polymath. Senior Wrangler in 1868 and later elected a Fellow of the Royal Society for his researches elucidating the nature of positive and negative electricity, he was appointed direct to the Court of Appeal in 1906 – unprecedented for one who had not been a Law Officer – and became a Lord of Appeal in Ordinary only six years later in 1912. *The Times*, in his obituary on 10 March 1921, peevishly remarked that he 'was a man of striking and even extraordinary ability yet it can hardly be said that he was, or would ever have become, a great Judge'. No doubt he was thought guilty of the cardinal sin in any judge of having an intellectual cast of mind and, even worse, intellectual interests outside the law. For not merely was he a very gifted scientist, whose Rede Lecture in 1919, reflecting his distinguished scientific work during the First World War, was entitled 'Science and War', he was a philosopher whose paper 'Law and Manners', delivered as an after-dinner speech in 1912 and published posthumously in the *Atlantic Monthly* in July 1924, is justly famous for his concept of 'Obedience to the Unenforceable', 'the obedience of a man to that which he cannot be forced to obey' and in respect of which he 'is the enforcer of the law upon himself'. His son comments (*Life*, page 105) that 'Great as was his success at the Bar and on the Bench, there were many of those best able to judge who regretted that his life had not been wholly given to science, and it may well be found that what he did for her cause will have the most lasting effect'. That may be, but it is not to deny that he was also, as surely he was, the 'great Judge' *The Times* refused to acknowledge. We can leave the final word to the Earl of Birkenhead (*Life*, page xi): 'In many ways he was the quickest and ablest Judge before whom I ever practised at the Bar'.

5 Compare the text as given by Lord Atkinson [1913] AC 417, 466–467.

6 By the time the appeal was heard by the House of Lords Fletcher Moulton LJ had been appointed a Lord of Appeal in Ordinary taking the title Lord Moulton.

7 D Tolstoy, *The Law and Practice of Divorce and Matrimonial Causes, Including Proceedings in Magistrates' Courts* (Sweet & Maxwell, 4th edn, 1958).

8 The first recorded use on BAILII of what may be called a proto-rubric was in relation to Wall J's judgment reported as *N v N (Jurisdiction: Pre-nuptial Agreement)* [1999] 2 FLR 745, handed down on 1 July 1999. The first recorded use on BAILII of the rubric was in relation to the President's judgment in *M v The London Borough of Islington* handed down on 26 October 2001. The first recorded use on BAILII of the rubric in a financial remedies case was in relation to Coleridge J's judgment reported as *M v L* [2003] EWHC 328 (Fam), [2003] 2 FLR 425, handed down on 28 February 2003. It needs to be remembered that the number of family cases of any kind published on BAILII in those early years was very small.

9 Curiously, this rubric continues to be generated by the current template notwithstanding that CPR PD 39A was revoked on 6 April 2019.

10 Down the years there have been minor adjustments to the rubric. The current version (see *Xanthopoulos v Rakshina*, [76]) reads: 'This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.' For present purposes nothing turns on these changes.

11 D Tolstoy, *The Law and Practice of Divorce and Matrimonial Causes, Including Proceedings in Magistrates' Courts* (Sweet & Maxwell, 4th edn, 1958).

12 Thus the practice with the *Family Law Reports*. The reports in the *Weekly Law Reports* and in the 'official' Family Division reports do not print the rubric as such but, generally speaking, refer to it in the introductory text, drafted by the law reporter, which appears between the headnote and the judgment.

13 FPR PD 30B para 2.1 provides that pursuant to FPR 30.12A(3)(a) the appeal court will ordinarily make an order for the appeal to be heard in public and in the same order impose restrictions under FPR 30.12A(3) in relation to the publication of information about the proceedings; FPR PD 30B para 2.2 provides that any such reporting restriction order will ordinarily be published on the judicial website. So far as I can see, no reporting restriction order in that case is to be found on the judicial website. Moor J's rubric is not, therefore, a summary of an earlier reporting restriction order.

14 Consider, for example, Lewison LJ in *Norman v Norman*, [83].

15 This is not, I emphasise, an argument for aligning practice in the Court of Appeal with practice at first instance. Quite the reverse.

Privacy and Transparency in the Financial Remedies Court

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Anyone who has had the benefit and privilege of listening to Mostyn J speak in an extra-judicial capacity will have been afforded a peek into the extraordinary breadth of knowledge and learning of one of England's most experienced family judges. The range of references that pepper his deliveries – cultural, scientific, legal, historical – is such that the occasion is seldom anything less than a complete *tour de force*. My own experiences in this regard enable me to mention his command of subjects ranging from the ongoing debate concerning the US Constitution between textual originalists and loose constructionists, all those *Downfall* parodies that can be found on the internet, the nature of human memory and how that impacts on witness testimony, and *Monty Python*'s iconic dead parrot sketch.

His judgments not infrequently reveal the same breadth of experience. A reasonably thorough history of family law in England and Wales might be compiled just by cutting and pasting together the relevant sections of many of his decisions. From others, a beginner's guide to the family law of many commonwealth jurisdictions might be similarly constructed. From the bench of Court 50 at the Royal Courts of Justice much detailed explanation has come forth on not just the current operation, but also the history and social policy/jurisprudential underpinnings of all manner of family law and non-family law issues. To give but a single example, his discussion of the use of *Mareva* injunctions in financial cases in *UL v BK* [2013] EWHC 1735 (Fam) changed the practice of obtaining *ex parte* freezing orders in financial remedy cases virtually overnight. Other judgments have dealt with subjects as diverse as the proper basis for disturbing consent orders, the nature of value judgments as opposed to the exercise of discretionary powers, and the ongoing tension between the objects of fairness and certainty, to name but a few of many, many topics addressed with the exceptional clarity and thoroughness that is his norm.

Bearing those experiences in mind, the wit, wisdom and scholarly industry evident behind his introductory note to this publication, 'Notes on the Launch of the Financial Remedies Journal' [2022] 1 FRJ 3, came as no surprise. Karl Marx was the first to make an appearance therein, in the context of certain observations he made on the rights of man as promulgated within the French Revolution. Marx was swiftly followed, in an array of different contexts, by Princess Diana, Sir James Munby, house prices, Lords Clarke, Brown and Carswell, *Private Eye* and, of course, the weather. If you have ever toggled between *The Times* and Stephen Cretney's *Family Law in the 20th Century: A History* whilst simultaneously listening to Radio 4's *Start The Week* with ITV's *Loose Women* being screened in the background, you may have found the experience familiar.

And yet, despite his customary mastery of the subject, it was as he discussed the issue of transparency in the family courts that I wondered whether Homer might briefly have nodded. (The origins of this phrase, I am of course indebted to Mostyn J to have discovered, can be traced back to Horace's *Ars*.[1]) I decided in the end that there was much good sense in what he said, but there was undoubtedly at least one point on which Homer, frankly, needed to give his head a good wobble.[2]

My anxiety began with the following observation:

> 'I pointed out in *BT v CU* [[2021] EWFC 87] and in *A v M* [2021] EWFC 89 that the current practice of anonymising almost all published financial remedy judgments had no historical constitutional validity; and certainly violated the high constitutional principle of open justice declared in *Scott v Scott* [1913] AC 417.'

As when those decisions were first published on BAILII, this observation provoked within me the thought, as EH Carr might have put it, 'What is history?' I decided to call on my own experiences to help answer this question.

I was called 30 years ago. In my early years at the Bar I earned much needed income from those good people who publish the *Family Law Reports* by settling headnotes for publication with the full judgments. (I remember my joy, following the publication of the first reported case in which I had appeared as counsel, that my name appeared at the top of the law report rather than the bottom. Equally, I remember the despair I felt, after I had summarised four Thorpe J judgments in the case of *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45 for the princely sum of £45, at the realisation that of the veritable army of lawyers involved one way or another in that titanic litigation, my fee was undoubtedly and by a considerable distance the lowest.)

With the sobering thought in mind that my own experiences might qualify as 'history', I crossed my room to the shelves where my own yellowing copies of the *Family Law Reports* abide, confident in my recollection that throughout

my 30 years at the Bar the practice has been – as *F v F* illustrates – that first instance ancillary relief decisions were published anonymously. My confidence, at least on this occasion, was not misplaced. The first such case I reported was *F v F*[3] [1994] 1 FLR 359, in which one Nicholas Mostyn coincidentally appeared for the wife. That case was indistinguishable from the overwhelming majority of first instance financial cases I subsequently reported in that it was published on an anonymised basis. Even the ones that were not called *F v F* were anonymised.

So, to the extent that my own career could be said to have begun at some point in history, my own experience persuades me that there is a clear historical basis for the current practice of reporting such cases anonymously. I appreciate that does not quite meet the point Mostyn J was making, but it is a relevant point to make that the current practice is a long-established convention and not simply some modern fad.

While on the whole that particular convention has not changed – at least, not yet – during the course of my own time in the profession, one convention that has changed has been the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), in the sense that the advent of the Human Rights Act 1998 moved the provisions of the Convention onto a statutory footing. Article 8 of the Convention, as is well known, provides:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

At this point, I segue to the supermodel Naomi Campbell and the difficulties she had with drug addiction in the late 1990s/early years of the 21st century.[4] This is relevant because after that deeply personal tragedy was exposed without her consent in a national newspaper in 2001, Ms Campbell sued the *Daily Mirror* for damages for breach of confidence. Her claim succeeded at first instance, was reversed in the Court of Appeal, and ended up before the House of Lords in 2004.

Campbell v MGN Limited [2004] UKHL 22 clearly established the proposition that English law does not recognise a tort of invasion of privacy. That said, as Lord Nicholls pointed out, the protection of privacy was at that time at least a fast-developing area of the law, spurred on by the enactment of the Human Rights Act 1998. He described the two competing rights recognised and respected within the human rights jurisprudence, and (crucially) recognised in the 1998 Act, namely the right to free expression and the above-cited right to respect for an individual's privacy, in these terms ([12]):

> 'Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual. And restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state ... '

Lord Hoffmann put the matter this way ([56]):

> 'While there is no contrary public interest recognised and protected by the law, the press is free to publish anything it likes. Subject to the law of defamation, it does not matter how trivial, spiteful or offensive the publication may be. But when press freedom comes into conflict with another interest protected by the law, the question is whether there is a sufficient public interest in that particular publication to justify curtailment of the conflicting right.'

Baroness Hale referred ([136]) to 'information which is obviously private, including information about health, personal relationships or finance' before adding ([137]):

> 'It should be emphasised that the "reasonable expectation of privacy" is a threshold test which brings the balancing exercise into play. It is not the end of the story.'

It is worth stressing that although the House of Lords decided only by a majority of 3–2 on the facts that Miss Campbell's claim should be allowed, no doubts were expressed as to the nature of the balancing exercise that must be conducted between the competing rights, nor of the need for interference with the Article 8(1) right by reference to Article 8(2) to be specifically justified.

Bearing in mind Baroness Hale's observations in particular, it is worth taking a moment to reflect on how exceptionally intrusive the enquiries made in an ordinary financial remedy claim can be. Form E requires a party to give details of: their health; the health of their children (who, of course, each have independent rights to respect for their own privacy); that party's plans for their children's schooling; whether they are living with a new partner or intend in the near future to do so; the financial circumstances, so far as these are known, of any such partner (thus invading the privacy and/or breaching the duty of confidence owed to a third party); what (so far as is known to them) their parents or any other elderly relative might have in mind for their wills (another third party); and of course the full range of information required in respect of their own capital and income position – which again potentially requires explanation of third party interests and expectations, thus impacting on the right to privacy and confidentiality enjoyed by yet more third parties.

Could it be any more intrusive?

Even the almost-sacrosanct principle of legal professional privilege is not completely immune from the reach of the duty of full and frank disclosure. A litigant who discloses to their lawyer ownership of property (say) that they have not disclosed to the court must of course either comply belatedly with the duty or find another lawyer. To those practising regularly in the financial remedies field, the need for the court to be furnished with this sort of detail and this level of intrusion into the lives of the parties and those who may surround them is neither new nor surprising. We understand it, we live with it. But such practitioners may be forgiven for perhaps taking the ordinary duty of full and frank disclosure for granted rather more than non-lawyers

might, and without necessarily reflecting, each time it is referred to or relied upon, on quite how intrusive it is.

In terms of Convention rights, recognising that these have rested on statutory foundations since the Human Rights Act 1998 came into force, it is easy to see how the disclosure obligation imposed by the Matrimonial Causes Act 1973 both offends the first part of Article 8 of the Convention – the statutory duty could scarcely be more intrusive – but is nonetheless permissible under the second limb as being necessary within a democratic society for various reasons. As Lord Brandon of Oakbrook said so famously in *Livesey v Jenkins* [1985] 1 AC 424:

> '[I]n proceedings in which parties invoke the exercise of the court's powers under sections 23 and 24, they must provide the court with information about all the circumstances of the case, including, inter alia, the particular matters so specified. Unless they do so, directly or indirectly, and ensure that the information provided is correct, complete and up to date, the court is not equipped to exercise, and cannot therefore lawfully and properly exercise, its discretion in the manner ordained by section 25(1).'

It is significant, however, that it is not the obligation in and of itself to provide full, frank and clear financial disclosure that contravenes the right to respect for a litigant's private and family life, for the court cannot properly protect the rights and freedoms of the parties without it. The problem is what happens afterwards, when the court is considering what material can or should be published, having been exacted under compulsion. Every reader of this article will be familiar with the clear warnings on the first page of the standard Form E that threaten proceedings for contempt of court and criminal proceedings under the Fraud Act 2006. Every reader will have experience of judges up and down the land delivering stern lectures about the consequences of breach of the duty to provide full, frank, clear, accurate and detailed information about the litigant's financial circumstances. What the Form E does not do – and neither on the whole do the judges – is explain to litigants that, once they have provided the court with the most private and personal information under threat of consequences of increasing severity, the court retains the right to release all that personal information to the entire world.

Nobody expects the Spanish inquisition, either.

It is instructive to consider other areas where the practice of extracting information under compulsion has consequences in terms of rights specifically protected by human rights legislation. In *R v K* [2009] EWCA Crim 1640, the Court of Appeal was concerned with an appeal against a conviction in a case where HM Revenue & Customs had been supplied with certain material the husband had been obliged to produce within ancillary relief proceedings. That material demonstrated the existence of undisclosed offshore bank accounts, and in time became the major evidence in a criminal prosecution of the husband for various offences under the taxing Acts. The Court of Appeal held, unsurprisingly, that the privilege against self-incrimination did not absolve a litigant from complying with the duty of full and frank disclosure. As Moore-Bick LJ said, the privilege against self-incrimination could not be invoked as a defence to the disclosure requirement of ancillary relief proceedings because 'it would be impossible for the court to discharge its duty under section 25 of the Act if it were deprived of the information on which it is required to act' ([32]). That said, the Court of Appeal followed decisions such as *Saunders v United Kingdom* (1997) 23 EHRR 313, *Procurator Fiscal v Brown (Scotland)* [2003] 1 AC 681 and *R v Kearns* [2002] EWCA Crim 748 in holding that where incriminating material was extracted under compulsion it would be a breach of the husband's right to a fair trial under Article 6 of the Convention for that material to be admitted in subsequent criminal proceedings. It is significant in terms of the human rights jurisprudence that the obligation to provide private material is, in itself, unobjectionable bearing in mind the fundamental purpose for which that material is generated. It is the subsequent use of that material that potentially creates a difficulty.

The same basic argument can be made in response to the suggestion that there should be greater transparency in the Financial Remedies Court (FRC). There is plainly a societal need for information to be produced, under compulsion, that enables the court to do justice in financial terms between the parties on the breakdown of their marriage. The subsequent and collateral use of material produced under compulsion, however, is much more difficult to justify. Paraphrasing Lord Hoffmann, and starting with Baroness Hale's point that the material produced under compulsion in financial remedy proceedings is such that it would otherwise be subject to a 'reasonable expectation of privacy', is there a sufficient public interest in the publication of otherwise private material to justify curtailment of the right protected by Article 8 of the Convention and the Human Rights Act 1998?

It is helpful to start with the current law. FPR 27.10 provides that 'proceedings to which these rules apply will be heard in private'. This is a qualified provision, of course, but absent a direction to the contrary, financial remedy proceedings will generally fall within the scope of this rule.

FPR 27.11 provides (so far as is material):

> '(1) This rule applies when proceedings are held in private …
>
> (2) When this rule applies, no person shall be present during any hearing other than— …
>
> (f) duly accredited representatives of news gathering and reporting organisations;
>
> (ff) a duly authorised lawyer attending for journalistic, research or public legal educational purposes; … '

So the rules permit duly accredited members of the press to attend financial remedy hearings, including of course the trial (but not the financial dispute resolution). There is a power to exclude the press from a hearing, but that is widely regarded as a draconian remedy that should only be exercised where there is a specific need that will not be met by the making of a reporting restrictions order (see e.g. *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416, *Giggs v Giggs* [2017] EWHC 822 and FPR PD 27A, para 5.4).

As Mostyn J observed in *A v M*, however, the mere fact that a hearing is conducted in private does not, without more, provide any basis for restricting publication of what is discussed in chambers. There is no 'default' presumption whereby the mere fact that a hearing takes place in chambers means that what is discussed during the course of the

hearing is immune from being divulged onwards without specific judicial approval – there would be little point in the rules permitting the attendance of the press if there were. Nonetheless, in view of the concentration within financial remedy proceedings on the most inherently private details, the starting point has been for some time that a degree of protection will be offered to such parties who ask for it in relation to private information disclosed under compulsion (see e.g *Appleton & Gallagher v News Group Newspapers Limited & Anor* [2015] EWHC 2689 (Fam)).

It is for this reason that while orders are rarely made excluding the press, it has at least thus far been significantly easier to show that an order can justly be made restricting the publication of information referred to during the course of any hearing to which the order applies (see e.g. *DL v SL* [2015] EWHC 2621 (Fam)). I personally am not aware of a single example of a case where a reporting restrictions order was sought, but refused, in a case where the applicant sought to protect private information that was not otherwise in the public domain.

What this line of cases establishes, however, is that the task of balancing the competing interests of privacy and free expression is left to the individual judge in the individual case. It is true that different considerations are engaged depending on whether one is seeking a reporting restrictions order, where a balance needs to be struck between the Article 8 rights of the litigants and the Article 10 rights of the press, and where a court is considering whether to anonymise a judgment, where the question is whether invading the litigant's Article 8 rights in the interests of open justice falls within the scope of Article 8(2). Either way, a balance needs to be struck between two competing interests, neither of which has any sort of primacy over the other. As Lord Hoffmann put it in *Campbell*, the question of whether a particular response is proportionate involves consideration of whether there is a sufficient public interest in publication to justify curtailment of the conflicting right to respect for one's private life. It would be curious if one test were to be applied at an early stage of the proceedings when an application was made for a reporting restrictions order, and a different test applied at the end of the case when the court was considering the question of anonymity. The balancing exercise should, on the face of it, be conducted in the same way, no matter what point in the proceedings it may arise.

It is worth returning at this point to Baroness Hale's speech in *Campbell*. She said ([139]–[140]):

> '139. ... Article 8(1) states that "everyone has the right to respect for his private and family life, his home and his correspondence". Article 10(1) states that "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers …" Unlike the article 8 right, however, it is accepted in article 10(2) that the exercise of this right "carries with it duties and responsibilities." Both rights are qualified. They may respectively be interfered with or restricted provided that three conditions are fulfilled:
>
> (a) The interference or restriction must be "in accordance with the law"; it must have a basis in national law which conforms to the Convention standards of legality.
>
> (b) It must pursue one of the legitimate aims set out in each article. Article 8(2) provides for "the protection of the rights and freedoms of others". Article 10(2) provides for "the protection of the reputation or rights of others" and for "preventing the disclosure of information received in confidence". The rights referred to may either be rights protected under the national law or, as in this case, other Convention rights.
>
> (c) Above all, the interference or restriction must be "necessary in a democratic society"; it must meet a "pressing social need" and be no greater than is proportionate to the legitimate aim pursued; the reasons given for it must be both "relevant" and "sufficient" for this purpose.
>
> 140. The application of the proportionality test is more straightforward when only one Convention right is in play: the question then is whether the private right claimed offers sufficient justification for the degree of interference with the fundamental right. It is much less straightforward when two Convention rights are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other.'

Shortly after *Campbell*, the need to balance the competing rights under Articles 8 and 10 of the Convention was revisited by the House of Lords in *In re S (A Child)* [2004] UKHL 47. At [17] in that case, Lord Steyn said:

> 'The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN Ltd* ... For present purposes the decision of the House on the facts of *Campbell* and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Second, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.'

A number of points can be made in this respect. First, it is at the very least questionable whether the routine publication without redaction or anonymisation of judgments containing information obtained under compulsion and examined in hearings conducted in private could, as required by the test formulated by Baroness Hale in *Campbell*, be said to be a restriction on a litigant's Article 8 right that has a 'basis in national law'. The points made above regarding the status of the Convention following the Human Rights Act 1998, the clear wording of FPR 27.11 and the case law developed in cases such as *Appleton*, *Spencer* and *Giggs* would suggest otherwise. Clearly, the domestic law would suggest that the competing interests must be carefully balanced in the light of the facts of the particular case. Neither a blanket approach in favour of privacy nor a blanket approach in favour of transparency is permissible. What is required *in every case* is a determination as to where the balance lies that is specific to the facts of that particular case. As Lord Steyn said in *In re S*, where the values under the two Articles come into conflict, what is required is an 'intense

focus on the comparative importance of the specific rights being claimed in the individual case'.

Moreover, that determination must result in a proportionate judgment. It is easy to see why, as Mostyn J said at [104] of *A v M*, the publication in full of judgments promotes the general public interest in transparency and thus engages a right or freedom recognised under Article 8(2) of the Convention. It is not so easy to see how balancing those rights in a proportionate manner could possibly involve ignoring completely the intensely private nature of the information divulged during the proceedings, and without which the court is unable to function. My own opinion, for what that is worth, is that once the sort of balancing exercise promulgated in *Campbell* and *In re S* has been conducted, a judge should be able to answer the following two questions:

(1) In giving effect to the principles of open justice and freedom of expression, what has been done to reflect the individual's right, recognised by statute, to respect for their privacy?
(2) In giving effect to the individual's right to respect for his privacy what has been done to reflect the principles of free expression and open justice?

If the answer to either of those questions is 'nothing', then in the absence of special facts such as those in *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315[5] that might suggest the balance has not been struck at all. It seems self-evident that, at least in the general run of cases (i.e. those not involving unusual or peculiar facts, such as *Lykiardopulo*) a proportionate response to a recognition that the rights protected by both Articles 8 and 10 are important will achieve a degree of balance between the two. That is, in essence, a compromise. As every reader of this article knows, a compromise between two competing parties will frequently leave neither party wholly satisfied; most if not every reader will be familiar with the feeling at the end of lengthy litigation that defeat has definitely been avoided, but outright victory cannot be claimed. I am not at all sure that achieving a compromise between two competing objectives is all that different.

That sort of compromise, however, is precisely what a proportionate balancing act involves. In the usual run of cases, I would respectfully suggest that a decision on publication that gives no effect to a litigant's right to privacy and gives full effect to the principle of open justice is not a balancing act at all. The requirement for the sort of balanced judgment envisaged in *Campbell* or *In re S* between the principles of transparency and privacy is not satisfied by a court paying no more than lip-service either to the legitimate right and expectation that private information should be kept private, or to the ordinary public interest in open justice.

It does not follow, however, that anonymity will inevitably be the answer. Just as there is more than one way to skin a cat, the authorities demonstrate that a balance between privacy and transparency has been achieved in different ways in different cases. In particular, two fundamental approaches can be recognised in the authorities. The first is the – ahem – historical practice of reporting judgments of ancillary relief awards in full but on an anonymised basis. The second is to publish the names of the parties but without revealing details that are private. The reader will, for instance, scan the judgments in cases such as *Appleton* or *Giggs* in vain if searching for details of the capital bases available to Ryan Giggs or Liam Gallagher, and equally in vain for the identity of the ubiquitous Mr and Mrs F.[6]

The first of these approaches lends itself to enabling the reader to understand why, in detail, an award has been made and thus promotes the public understanding of how the jurisdiction under the Matrimonial Causes Act 1973 is exercised. The second opens a window to the world of the Family Court without revealing the personal information that led that window to be closed in the first place. Where there are reasons for naming the parties, one might say, there are equally valid reasons for keeping private information private; and where there are reasons for making private information public, there are equally good reasons for keeping out of the public domain the identity of the individuals entitled to that respect for their privacy.

Either one of these approaches might suffice on the facts of any given case to give effect to the principle of open justice insofar as to do so is commensurate with the entitlement to respect for the litigants' privacy. Either might represent the striking of a proportionate balance between the rights – each of them qualified – protected by Article 8 and Article 10. This is the way in general that balance has been struck for decades. There may be good reasons on the facts of any given case why neither is appropriate, as was the case in, for instance, *Lykiardopulo*, or in *Xanthopoulos v Rakshina* [2022] EWFC 30 where Mostyn J held that public interest demands that the exorbitance of the litigation between these parties should be reported 'fully'. Cases of that sort, I venture to suggest, are likely to be the exceptions, not the rule.

An important feature in conducting the balancing exercise between privacy and transparency, it is suggested, will be the question of onwards disclosure of private information disclosed under compulsion. The right to respect for one's private life is, as noted above, a qualified right. One is entitled to respect for one's privacy, but it does not follow that there will never be occasions when that right must yield to a more compelling interest. 'Respect' in this sense, however, recognises that there are occasions when the parties themselves may wish to make details of their private circumstances public. It is their privacy that is being waived, and it is entirely open to them to release into the public domain material which others would choose to keep private. Compulsion removes that element of personal choice, and thus overrides the requirement that their privacy should be respected. That override is justifiable of course but equally overriding that right for one purpose does not give the court, in this sense an organ of the state, *carte blanche* to override it for other collateral purposes, too. Information that is obtained under compulsion therefore stands on a completely different footing to information that a litigant may choose to place before the court in pursuit of, or opposition to some application or other.

Returning to Baroness Hale's speech in *Campbell*, quite apart from the question of proportionality, it is particularly difficult to see that a default practice of publication in full without anonymisation answers a 'pressing social need'. There is a clear pressing need for justice to be done in public so far as is possible. Does that pressing need, however, extend to the point where the public interest generally will

be harmed by knowing only how Mr and Mrs F's finances are to be divided, but that harm is avoided if the public is informed that Mr and Mrs F are in fact the Fords of Croydon? That is more troubling. Sometimes, as in *Lykiardopulo*, the answer is 'yes' because the public interest in exposing the egregious nature of the husband's wrongdoing (to pray in aid the facts of that case) may outweigh his interest in keeping private information private. But in many other cases – a significant majority, one might think – the answer will be 'no'.

Then again, there may be no good reason for withholding from the public a decision about – say – whether a financial remedy claim could legitimately be pursued by a bigamous applicant, but even so it does not follow that the respondent's private financial circumstances should be made public. It may be difficult to postulate reasons why such a judgment should be anonymised, but it is equally difficult to see how the ordinary public interest in open justice extends in such a case to requiring that private information produced under compulsion and not crucial to the understanding of that particular decision should be released into the public domain.

Having mentioned the question of anonymity, it is worth pointing to the rules about this. In a nutshell, anonymity is not something that should be conferred by the court at the drop of a hat, but neither should it be regarded as being wholly exceptional in its nature. CPR 39.2(4) provides that:

> 'The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness.'

There are two aspects (at least) to the administration of justice that are relevant in this context. The first is the point that the proper administration of justice requires, amongst other things, that the public understands how justice operates. As such, a degree of openness to reflect and reveal the court's inner workings is appropriate. The second point is that the financial remedy justice system in particular depends upon litigants complying with the statutory duty of disclosure for the reasons already discussed, and that anything that tends to undermine or jeopardise compliance with that duty is to be regarded on the whole as A Bad Thing. It can sometimes be difficult enough to get lay clients to co-operate in terms of complying with that duty as things stand. Anything that might tend to encourage them not to do so, such as the realisation that their private affairs are highly likely to be made public, is not a step that would appear immediately to be in the public interest.

In cases where the court considers that the general interest in open justice requires that the private details of the litigants should be published to better enable a wider understanding of the particular decision, it is easy to see why the court may well conclude that non-disclosure is 'necessary to secure the proper administration of justice and in order to protect the interests of that party'. The fact that we have been doing it that way for years has served the proper administration of justice by enabling the lay and professional public to understand how a discretion has been exercised, or what principles were engaged, by making available a full exposition of the relevant facts. It does not seem necessary for that purpose that the parties should also be named, and their children exposed to the risk of 'jigsaw' identification even if not named directly. There is no difficulty, it is suggested, with anonymity being the *quid pro quo* for the publication of completely private information that is necessary for a proper understanding of the court's decision. By contrast, there are other cases where private information is of marginal relevance only to the determination in question. Where the 'anonymity' threshold is not met, that would seem to put greater emphasis on the need for reporting restrictions orders to ensure that private information does not unnecessarily enter the public domain.

The question referred to by Baroness Hale whether a 'pressing public need' is engaged by the transparency/privacy debate necessarily involves returning to Mostyn J's point that we have being doing it wrong for decades. Maybe we have, but the fact remains that that is how we have being doing it for decades. The expectation exists that we will continue to do it that way, and it is not helpful to pretend otherwise. The 'reasonable expectation of privacy' is underlined, not undermined, by the court's practice of routinely anonymising judgments.[7] There are times when the realisation that something has been wrong for ages results in the discovery that things are, in fact, rotten to the core; but there are other times when that discovery results in the conclusion that we might well have been doing it wrong for decades, but things are not so bad for all that. The law reports, after all, are full of cases where judges reached the right conclusion but for the wrong reasons.

All that said, there is much in Mostyn J's judgments in *A v M* and *BT v CU* that it is difficult to take issue with; the fundamental point I make above is that the human rights jurisprudence requires a proportionate balance to be struck between the right to respect for one's privacy and the invasion of that right whether in the name of open justice or free expression. The widescale practice of anonymisation via the imposition of the rubric, discussed at length in *Xanthopoulos v Rakshina* [2022] EWFC 30, no more represents the exercise of a proportionate and balanced judgment on that question than would a default practice of always ordering full disclosure. Equally, however, so would a balancing exercise that always came down the other way. It is for the judge to strike the appropriate and proportionate balance in the circumstances of the individual case, giving due weight to the rights of the parties to respect for their private lives whilst recognising the public interest in free expression, open justice and greater clarity as to how the powers available to the court under Part II of the Matrimonial Causes Act 1973 are exercised. Sometimes, the parties must resign themselves to the fact that their financial circumstances must be made public even though their identities should not. In other cases, the parties should resign themselves to the probability that they will be named in a public judgment even though their private financial circumstances will remain private. All that will fall to be decided by the judge tasked with carrying out that balancing exercise. But the cases where the litigants' Article 8 right to respect for their privacy is given no effect whatsoever should be few and far between.

What seems undoubtedly correct is that any restriction on what is made public following a chambers hearing can only be based on an application for, and the grant of, a reporting restrictions order which will necessarily involve

the balancing exercise discussed above. As Mostyn J put it in *Xanthopoulos* [121]:

> '[A]nonymisation can only be imposed by the court making a specific anonymity order in the individual case. Such an order can only lawfully be made following the carrying out of the ultimate balancing test referred to by Lord Steyn in *Re S*. It cannot be made casually or off-the-cuff, and it certainly cannot be made systematically by a rubric.'

Ultimately, it seems to me that the position must be this: if a decision is made that both the names of the parties and the details of their private financial circumstances should be made public, that decision will not survive a challenge based on the Human Rights Act 1998 *unless* it is the product of a bespoke judgment where the right to respect for the privacy of the litigants is fairly and proportionately balanced against the wider public good. As Baroness Hale said in *Campbell*, the essential question is whether the private right claimed offers sufficient justification for the degree of interference with the fundamental right. A right recognised under Article 8 may admit a degree of interference, but open justice is not a trump card that beats Article 8 come what may; neither are the rights protected under Article 10.

Thus far I have stressed the importance of the right to respect for the privacy of the individual litigants and the need for that right to be weighed in the balance in every case where it is sought to put a judgment into the public domain that contains private information revealed during court proceedings. In terms of the way in which the Family Court does its business this has been the norm, but in terms of the justice system generally it is very much the exception. It is worth pointing out, however, that the Family Court does not sit in secret as a sort of default setting. There are many situations where considerations far wider than the privacy of the individual litigants are engaged, where the practice of the courts is already to conduct its business with a high degree of transparency. In the context of a divorce per se, such hearings concern questions of status – a divorce is a judgment of the court that one is entitled to rely on against the rest of the world, not merely the other party to the marriage. Such cases are not heard behind closed doors and there are sound reasons why that is the case. Likewise, committal applications involve the liberty of the subject. Such cases provide obvious examples where there is a clear public interest in ensuring that proceedings which are conducted in public. Even appeals in financial remedy cases involve more nuanced questions than the hearings that preceded them. At first instance, the arguments revolve around the fair outcome as between Mr X and Mrs X.[8] On appeal, the sole basis for challenging the order made in the court below is that one of Her Majesty's judges, entrusted by Parliament with the duty of exercising the Family Court's powers under Part II of the Matrimonial Causes Act 1973 in such a way as to achieve a fair outcome as between the parties, has in some way, shape or form made a complete Horlicks of it. An appeal is not therefore simply a matter of re-running the arguments about what is fair between the spouses, there is an obvious public law aspect to a challenge to the way a public body has exercised a statutory function. That being so, there is an obvious justification for greater transparency in relation to appeals than in relation to first instance decisions.

In the sphere of Children Act litigation, recognising the danger of straying off one tangent onto an even more oblique angle, public law cases in particular involve consideration of the actions of local authorities and other public bodies such as the police or the National Health Service insofar as they impact on the family life of the respondents to such applications. There are very obvious reasons for concluding that such proceedings should be conducted with as much transparency as is possible without harming the interests of the children who are the subject of the proceedings. Similar concerns arise where the state is acting as the Central Authority in Hague Convention cases.

Analogous considerations may apply even in the financial remedy sphere, where the hearing in question is not a first instance financial remedy determination, but is perhaps something in the nature of a set-aside application. In such cases, as with appeals, the point can be made that a claim that a public body has unwittingly exercised its statutory function in a manner that is unlawful for some reason or other is a matter that should not be heard behind closed doors as a matter of principle. In such a case, there is no question of disclosing information obtained under compulsion – all that information was obtained during the original proceedings. Such evidence as is put before the court is that which the parties choose to put before the court. (Mostyn J made precisely that point in *BF v CU* [2021] EWFC 87, [102], although that was not the basis upon which he decided that case.) The duty of full and frank disclosure does not – indeed, cannot – apply to such proceedings unless and until the original order is set aside and the court is asked to exercise its powers under Part II anew. In such cases, the arguments in favour of respecting the litigants' right to respect for their privacy are perhaps therefore rather more nuanced.

'Nuance' is perhaps the operative word in relation to the wider question of whether greater transparency is appropriate throughout the FRC. Blanket approaches either way fail to discharge the duty upon the court to make a balanced judgment between the competing interests of privacy and transparency. Each has to be respected with the degree of particularity appropriate to the individual case. That will involve an appraisal of the nature of the information that is sought to be protected and the nature of the proceedings in which it was disclosed. It will involve the extent to which the competing principles can be, if not quite reconciled, then given effect to in a way that ensures neither is trampled underfoot.

My own impression of the degree of anxiety that has followed the decisions emanating from the bench of Mostyn J is that it is based on a misconception that he intends routinely to divulge private information about named individuals. If he does, in my respectful opinion, he goes too far. But I am not so sure on reflection that he does. His reference in *Xanthopoulos* to the ultimate balancing test is precisely the balancing exercise the law requires him to undertake. I do not believe that either he or any other judge will not give the weight that is due to the legitimate expectation that the litigants' right to privacy will be respected in accordance with Article 8 of the Convention that is merited by the facts of the particular case.

I close, by way of summary, by advancing the following propositions:

(1) The litigant's right to respect for their privacy is an important right, enshrined by statute. They have a reasonable expectation that their private information, obtained under compulsion, will not be made public.
(2) While that expectation is entirely legitimate it must, nonetheless, be balanced against the principles of open justice and freedom of expression, and a proportionate judgment exercised that is specific to the facts of the particular case as to what should be disclosed.
(3) The practice of routinely anonymising financial remedy judgments without conducting the balancing exercise described above seems to be unlawful.
(4) In many cases, the long-established practice of anonymisation will, in fact, strike the right balance between the competing interests. In other cases, anonymisation may not be appropriate, but that is not to say that private information should not be protected in some other way, for example, by redacting a judgment. Unless there are special circumstances, it would not generally be a proportionate judgment to give no effect whatsoever to the litigants' right to respect for their privacy.
(5) The need for a balancing exercise between privacy and transparency to be conducted is exactly the same whether it arises at an early stage of the proceedings in the context of an application for a reporting restrictions order, or whether it arises post-judgment in the context of a request for anonymity. Either way, the court cannot wholly overlook the litigant's right to respect for their privacy in favour of either a right of free expression or a principle of open justice, but neither can it ignore those principles in favour of the right of privacy.

By the way, the other thing of interest Mostyn J said in 'Notes on the Launch of the Financial Remedies Journal' [2022] 1 FRJ 3 was that judges should have no problem at all with serious, well-thought-out criticism if judicial observations are considered to be wrong; but as and when they do attract unfair criticism, their response should be to 'shrug their shoulders and get on with it'.

I am glad he said that, because the thing I really wanted to get off my chest is (*continued on page 94*).

Notes

1 Line 359 of Horace's *Ars Poetica* reads '*indignor quandoque bonus dormitat Homerus*' ('I become annoyed when the great Homer is being drowsy'). The English translation 'Homer nods' has become standard following Pope (1709), but is perhaps more properly attributed to Dryden (1677). These days, of course, it is routine that members of the House of Lords fall asleep during the passage of important legislation, but apparently this was not a Thing in ancient Greece.
2 Just sayin'.
3 A different one.
4 In your *face*, Karl Marx.
5 Where the egregious conduct of the husband was held to have disentitled him to any protection of his privacy.
6 Not really. The subsequent appeal revealed the parties to be a German couple named Flick. Those old enough to recall *'Allo 'Allo* will smile at the ultimate realisation of Herr Flick's desire to relocate to England one way or another.
7 There is, by the by, a whole body of law about interests one had no right to in the first place, but which crystallise and can be enforced when one relies to one's detriment on that mistaken belief, but that would be too much of a tangent even for this article.
8 Or, indeed, Mr and Mrs F.

Sharing and the Family Home

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Historically, a wife's property was absorbed into that of her husband on marriage, and she was not capable of ownership in her own name thereafter. This situation, after some modest changes in the 1870s, finally changed for good with the Married Women's Property Act 1882 (MWPA 1882). This transformative statute meant that marriage no longer altered property rights simply by coming into existence: what the parties owned prior to marriage remained theirs upon it, and a wife could also own property acquired during marriage. This created the possibility of title and possession disputes between spouses. The statute empowered the court to resolve those disputes under MWPA 1882, s 17, which stipulated that the judge could, in summary proceedings, 'make such order with respect to the property in dispute as he thinks fit'.

This provision remained the outstanding forum for property dispute between spouses until the Matrimonial Proceedings and Property Act 1970 (MPPA 1970).

Up to the early post-war era, the court approached MWPA 1882, s 17 disputes as strictly declaratory. The court's function was to establish parties' true ownership intention at the time of acquisition, and then give effect to that intention. For example, in *Re Roger's Question* [1948] 1 All ER, Evershed LJ described his task as:

> 'to try to conclude what at the time was in the parties' minds and then to make an order which, in the changed conditions, now fairly gives effect in law to what the parties, in the judge's finding, must be taken to have intended at the time of the transaction itself.'

The primary analytic method was to work out what funds the parties had respectively contributed and order a division that reflected those figures. Given the need to prove intention/contribution, the main asset that came before the court under MWPA 1882, s 17 was the family home, and its contents. Proving 'intention' to share in a business, for example, was beyond the intellectual bounds of the law at that stage, and proving financial contribution to the same would have been impossible for almost all spouses as well.

However, the approach of focussing strictly on financial contribution became harder for the court to sustain in the face of social change during the post-war era. Rising house prices produced financial windfalls, and came alongside increasing rates of owner occupation. Both phenomena were spurred by the development of consumer mortgage products, which, being paid off over time, often made it more complicated to say who had actually 'paid' for an asset, especially when one factored in the 'freeing up' of the breadwinner's income that was facilitated by the homemaker. The unfairness done to women by focussing strictly on the money in these circumstances became more obvious. For example, the Moreton Commission 1956,[1] discussing the witness evidence of the respondents to its paper, noted (paras 626–627, p 170):

> 'There were witnesses who were primarily concerned about the status of the wife in the marriage partnership … the aim of these witnesses was therefore to secure that the law should effectively recognise that the wife's contribution to the marriage partnership, by her services in the home, is equal to that of the husband as breadwinner.
>
> As specific instances of injustice to the wife, the following were cited: …
>
> (iv) she can lay no claim to a share in the home and the furniture except to the extent that she can prove that she as contributed out of her own separate income.'

What was more, the statute book was not keeping up with the pace of change and the demand for reform. The court's powers were limited to maintenance until the Matrimonial Causes Act 1963, when the power to award a lump sum was conferred. It was only with the MPPA 1970 that the court received expressly discretionary powers to transfer property between spouses.

In these changing circumstances, the cases heard under MWPA 1882, s 17 between 1953 and 1969 show a move away from a 'strict' assessment of intended ownership, and toward an expansive approach intended specifically for the matrimonial context. This approach involved the invention of the concept of the 'family asset', as can be seen below.

(1) In *Rimmer v Rimmer* [1953] 1 QB 63, the Court of Appeal dealt with a claim under MWPA 1882, s 17 in respect of a home in the husband's name, contributed to in unequal shares (the wife overall providing less). The husband 'turned out' the wife and sold the property at a significant profit. At first instance, the court awarded rateable shares on a resulting trust basis. Evershed MR, sitting with Denning and Romer LLJ (Evershed and Romer were both judges with a Chancery background) unanimously allowed the wife's appeal for the proceeds to be divided equally, holding that where it was impossible to come to a clear view of intention, 'equality is equity'. Romer LJ concluded his judgment with the following observation, suggesting

different principles may apply to the case of a husband and wife:

> 'It seems to me that the only general principles which emerge from our decision are, first, that cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of property, and, secondly, that the old-established doctrine that equity leans towards equality is peculiarly applicable to disputes between husband and wife, where the facts, as a whole, permit of its application.'

(2) In *Cobb v Cobb* [1955] 2 All ER 696, the court at first instance found the couple intended for their jointly owned property to be theirs jointly, but went on to make an order treating the property as belonging to the husband, with a charge in favour of the wife amounting to the level of her contributions. The wife successfully appealed. Denning LJ gave the lead judgment, articulating the concept of a 'family asset', the quintessential example being the matrimonial home:

> 'in the case of the family assets, if I may so describe them, such as the matrimonial home and the furniture in it, when both husband and wife contribute to the cost and the property is intended to be a continuing provision for them during their joint lives, the court leans towards the view that the property belongs to them both jointly in equal shares. This is so, even though the conveyance is taken in the name of one of them only and their contributions to the cost are unequal … '

The concept of the 'family asset' is linguistically important in the judgment as it creates the possibility of a new form of asset onto which the court is capable of imposing a result that may conflict with title, equity, contribution or original intention.

(3) In *Fribance v Fribance* [1957] 1 All ER 357, the Court of Appeal (again with Denning LJ giving the lead judgment) leaned toward a presumption of equality still further. Another property almost entirely financed by the husband and in his name, at first instance the wife got a modest interest on a resulting trust basis. The High Court on appeal made a declaration of a trust in equal shares. The Court of Appeal dismissed the husband's second appeal. Denning LJ, giving the lead judgment, declined to find an intention, but instead held as follows:

> 'In many cases, however, the intention of the parties is not clear, for the simple reason that they never formed an intention: so the court has to attribute an intention to them. This is particularly the case with the family assets, by which I mean the things intended to be a continuing provision for them during their joint lives, such as the matrimonial home and the furniture in it … So long as they are living together, it does not matter which of them does the saving and which does the paying, or which of them goes out to work or which looks after the home, so long as the things they buy are used for their joint benefit … The title to the family assets does not depend on the mere chance of which way round it was. It does not depend on how they happened to allocate their earnings and their expenditure. The whole of their resources were expended for their joint benefit – either in food and clothes and living expenses for which there was nothing to see or in the house and furniture which are family assets – and the product should belong to them jointly. It belongs to them in equal shares.'

(4) While *Fribance* at least mentioned 'intention', in *Hine v Hine* [1962] 3 All ER 345, the court departed from it completely. In this case, the wife made the preponderant contribution through inheritance and her business to a property bought shortly before the end of the marriage. The court below found the intention was to share equally and made an order on that basis. The wife appealed. The Court of Appeal allowed her appeal, Denning MR giving the lead judgment that, in our view, represents the high water mark of treating MWPA 1882, s 17 as a 'discretionary' jurisdiction:

> 'We are here considering a "family asset", the matrimonial home, something acquired by the spouses for their joint use, with no thought of what is to happen should the marriage break down. In such a case, it is rarely of any use to ask what the parties intended to be done if the marriage broke down; for, as a rule, they do not contemplate any such thing … It seems to me that the jurisdiction of the court over family assets under s 17 is entirely discretionary. Its discretion transcends all rights, legal or equitable, and enables the court to make such order as it thinks fit. This means, as I understand it, that the court is entitled to make such order as appears to be fair and just in all the circumstances of the case.'

It is notable that his judgment in this case departs from the (effective) presumption of equality which appears in the cases since *Rimmer*. The crucial conceptual step is identifying the family home as a 'family asset'. Denning MR takes this as a licence to treat an asset in a discretionary manner to achieve fairness: something otherwise impossible under any other Act. If an asset was not a 'family asset', it follows, there would not be the equivalent freedom to make a 'fair and just' order.

(5) Similarly, in *Appleton v Appleton* [1965] 1 All ER 44, the husband sought a declaration of an interest in a family home solely funded by the wife and in his sole name on the basis of work done to improve the value of the property. This was a case where there was no direct financial contribution at all. At first instance, his claim was dismissed. Denning MR allowed him a share in the property commensurate to the increase in value from his work, holding as follows:

> 'As the husband pointed out to us, when he was doing the work in the house, the matrimonial home, it was done for the sake of the family as a whole. None of them had any thought of separation at that time. There could be no occasion for any bargain to be made as to what was to happen in case there was a separation, for it was a thing which no one contemplated at all … [in those circumstances] … I prefer to take the simple test: What is reasonable and fair in the circumstances as they have developed, seeing that they are

> circumstances which no one contemplated before?'

(6) Lastly, *Ulrich v Ulrich & Fenton* [1968] 1 All ER 67, Diplock LJ, dealing with a case for a variation of marriage settlement, discussed applications under MWPA 1882, s 17, and approved the use of the phrase family assets, saying as follows:

> 'It comes to this: where a couple, by their joint efforts, get a house and furniture, intending it to be a continuing provision for them for their joint lives, it is a *prima facie* inference from their conduct that the house and furniture is a "family asset" in which each is entitled to an equal share. It matters not in whose name it stands: or who pays for what: or who goes out to work and who stays at home. If they both contribute to it by their joint efforts, the *prima facie* inference is that it belongs to them both equally …'

Diplock LJ's conceptualisation of the 'family asset' is slightly different to Lord Denning's: he treats it as an entitlement to an equal share, whereas Denning LJ, by this stage, sees identification of a family asset as a licence to make an order that achieves fairness (frequently the same as equality). This nuance aside, the collective effect of these judgments meant that by the late '60s, the test being applied under MWPA 1882, s 17 was vastly different from the 'true intention' approach contemplated by the earlier cases. To our ears, it sounds very much like the *White/*post-*White* jurisprudence,[2] albeit couched in slightly different terms and confined to the family home in scope.

However, *Ulrich* was to be the last Court of Appeal case before the House of Lords came – for the first time – to grapple with the issue of real property distribution arising from the breakdown of marriage in two cases. The first was *Pettitt v Pettitt* [1969] 2 WLR 966 and the second was *Gissing v Gissing* [1970] UKHL 3. Together, they put a firm stop to the development of the law summarised above.

In *Pettitt*, the husband sought an interest in property the wife had inherited during their marriage, and they had lived in as a family home, under MWPA 1882, s 17, by way of having made a contribution arising from his labour on the property. His share was upheld by a reluctant Court of Appeal, which felt bound by *Appleton*. Allowing the wife's appeal, the House of Lords took the chance to consider the development of the concept of 'family assets' and claims under MWPA 1882, s 17 more generally. Lord Reid indicated his disapproval of the state of the law in trenchant terms:

> 'The meaning of the section cannot have altered since it was passed in 1882. At that time the certainty and security of rights of property were still generally regarded as of paramount importance and I find it incredible that any Parliament of that era could have intended to put husbands' property at the hazard of the unfettered discretion of a judge (including a county court judge) if the wife raised a dispute about it.'

Lord Morris took a similar view:

> 'One of the main purposes of the Act of 1882 was to make it fully possible for the property rights of the parties to a marriage to be kept entirely separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this, in my view, negatives any idea that s17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to the title to property the question for the court was – "Whose is this" and not – "To whom shall this be given."'

The House of Lords disapproved *Appleton* and *Hine*, and (in *Gissing*) Diplock LJ's discussion of the concept of family assets in *Ulrich*. The '*Rimmer*' approach of imputing an equality where it was not possible to ascertain intention was strictly confined to those cases where it was genuinely not possible to work out what the parties intended. The House of Lords – implicitly disapproving Romer LJ in *Rimmer* – took the view that the principles that bound questions of determination of property as between husband and wife were identical to those that bound unrelated parties, Lord Morris concluding:

> 'The duty of the court in an application under section 17 will not differ from its duty in a situation where the question of title arises not as between husband and wife but by reason of an outside claim.'

Gissing put an end to the development in the '50s and '60s of the law under the MWPA 1882 and effectively ended the concept of the 'family asset', at least for the time being.

However, those judgments were themselves almost immediately overtaken by events with the advent of the MPPA 1970. This provided the court with its first power to deal directly with real property via transfer of property orders, on an expressly discretionary basis. This power was then re-enacted unaltered in the Matrimonial Causes Act 1973 (MCA 1973).

It was initially unclear what the effect of the Act was – and whether it was 'radical'. The Law Commission Report No 25 (1969),[3] which recommended the Act, had considered, but rejected, the creation of a 'family property' regime:

> 'We do not, in the present exercise, wish to introduce any concept of matrimonial or family property, which, if it is to be introduced, will require the most careful consideration and present difficult problems of definition.'

Proposals to introduce community of property regime were also rejected by the government in debate during the bill's passage. When Lady Summerskill proposed the introduction of a presumption of equal division, Lord Chancellor Gardiner answered as follows:[4]

> 'Are half the wife's hard earned savings to go to pay the husband's bookmaker? Are half his business assets acquired independently of his domestic life, to be taken away from the business and given to a woman who knows nothing about business?'

Whether the statute would change the court's approach was accordingly unclear. Lord Denning got the first go at clarifying the issue, in *Wachtel v Wachtel* [1973] 1 All ER 829. The court at first instance had made an order that the husband pay to the wife a half share in the family home and a maintenance order of £2,000 p.a. (a high proportion of his income). The appellant husband contended that:

> 'the judge had but lightly concealed his view that the 1970 Act had brought about a new concept of community of property so that it was just to give every wife – or at least almost every wife – half the value of the

> matrimonial home on the break-up of the marriage, and about half her husband's income.'

Giving the lead judgment, Lord Denning pronounced the MPPA 1970 a revolutionary statute that should fundamentally change the approach of the court. Having despatched 'conduct' as the main feature of the statutory principles, he went on consider the effect of the statute on the family home. A little disingenuously, given his own form in the area, he characterised the history of the cases under MWPA 1882, s 17 as being bound by proving actual financial contribution:

> 'But by a long line of cases … it has been held by this court that, if a wife contributes directly or indirectly, in money or money's worth, to the initial deposit or to the mortgage instalments, she gets an interest proportionate to her contribution. In some cases it is a half-share. In others less.
>
> The court never succeeded, however, in getting a wife a share in the house by reason of her other contributions; other, that is, than her financial contributions.'

However, in his view, the MPPA 1970 was an express recognition that non-financial contributions could found an interest in marital property:

> 'we may take it that Parliament recognised that the wife who looks after the home and family contributes as much to the family assets as the wife who goes out to work. The one contributes in kind. The other in money or money's worth. If the court comes to the conclusion that the home has been acquired and maintained by the joint efforts of both, then, when the marriage breaks down, it should be regarded as the joint property of both of them, no matter in whose name it stands. Just as the wife who makes substantial money contributions usually gets a share, so should the wife who looks after the home and cares for the family for 20 years or more.'

In *Wachtel*, however, the court treated both capital and income as amenable to 'sharing', and, if the wife was to have a share in both, she could not expect as much as 50%, given the ongoing demand on the husband's income by way of an income share:

> 'If we were only concerned with the capital assets of the family, and particularly with the matrimonial home, it would be tempting to divide them half and half, as the judge did. That would be fair enough if the wife afterwards went her own way, making no further demands on the husband. It would be simply a division of the assets of the partnership. That may come in the future … But we do not think it should be as much as one-half, if she is also to get periodical payments for her maintenance and support …'

Wachtel is nowadays often mocked for its patriarchal language and the unsatisfactory nature of the 'one-third rule'. But the judgment is far sighted in its focus on the equal importance of the non-financial contribution made, and the entitlement of the financially weaker spouse to 'share' in assets through their incommensurate contribution. As we will see, this sort of language did not truly find favour again until *White*.

The *Wachtel* route was, after a few years, unfollowed: in modest claims the one-third rule was of limited assistance in meeting needs in most ordinary cases. Denning MR himself refused to extend the concept of sharing into business assets, holding, in *Trippas v Trippas* [1973] Fam 173, that:

> 'The wife cannot claim a share in the business as such. She did not give any active help in it. She did not work in it herself. All she did was what a good wife does do. She gave moral support to her husband by looking after the home. If he was depressed or in difficulty, she would encourage him to keep going. That does not give her a share.'

Instead, the court became almost entirely focussed on the concept of 'reasonable requirements', i.e. a solely needs-based award. The Court of Appeal began to firmly deprecate the approach of looking at percentage shares. In 1978, for example, Cummings-Bruce LJ in *Scott v Scott* [1978] 1 All ER 65 declared that the court's task 'had nothing to do with fractions and the one-third rule, it is an attempt to deal with the future of the two parties … the dominant feature is the necessity of providing for three young children and the requirement of providing a home for them by means of mortgage payments'. Ormrod LJ similarly cautioned against its use in *Preston v Preston* [1981] 3 FLR 46, again, focussing on the practicalities of need.

By the late '70s, 'reasonable requirements' completely supplanted the 'sharing' approach mooted in the '50s and '60s cases discussed above and canvassed by Denning MR in *Wachtel*. Many of the reported cases involved comparatively high levels of wealth, in which the family home was only a small element. In this context the departure from equality (or even the *Wachtel* one-third) could be stark, while still meeting a generous assessment of need. To take three of the 'big' cases from the era:

(1) In *Preston v Preston* [1982] Fam 17, the assets amounted to £2.35m, £100k of which was in the jointly owned family home. The wife received a lump sum by instalments of £600k on the basis of 'reasonable requirements'.
(2) In *Gojkovic v Gojkovic* [1992] Fam 40, the wife received a payment of approximately 35% of the overall asset base (a £1m lump sum and a maisonette worth £295k).
(3) In *Dart v Dart* [1996] EWCA Civ 1343, [1996] 2 FLR 286 the wife received the family home and a payment of £9m, in the context of a case she asserted to be worth c. £244m.

Specific consideration of the 'share' in the family home was not relevant to the overall determination of these cases. And, at a lower level, just as now, the driver of the award was needs, which tended to be governed by children and mortgage raising capacity, rather than anything more high-flown.

White ended this line of 'reasonable requirements' cases. Interestingly, it is one of very few House of Lords' cases that discuss the MCA 1973 at all (the only other, *Piglowski v Piglowska* [1999] UKHL 27, [1999] 1 WLR 1360, turned chiefly on the interference with discretion on appeal). Rather like the law pre-*Pettitt*, financial remedies had developed almost entirely at Court of Appeal level.

Lord Nicholls gave the lead judgment. Called to the Bar in 1958, his time as a law student and early years as a Chancery barrister had coincided with the high water mark of equitable concepts as applied to divorce, largely by Lord

Denning. Lord Nicholls was a huge admirer of Lord Denning: his 2015 memoir (pointedly titled *Let Equity Prevail*[5]) concludes with a chapter in praise of him as one of the greatest influences on his career. Remembering his days as a law student when he had 'loved' Lord Denning for his 'determination to find or fashion a way to give effect to the "merits" of a case', and eulogising his radical judgments of the '50s and '60s that prioritised purposive fairness over strict notions of law, he concluded, 'The judgments of Lord Denning are not cited as much now as in the last century. This is not an adverse reflection on his jurisprudence. Rather, the system has now accepted and absorbed his reforms and moved on from there'.

In *White*, Lord Nicholls was himself doing much of the 'absorbing' of Lord Denning. His judgment is of a piece with those earlier Lord Denning authorities that had been left largely unfollowed (*Wachtel*) or disapproved (*Appleton* and *Hine*). The famous passage of *White* would have equally found a home in *Fribance* or *Ulrich* (quoted above):

> 'But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contributions … If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer … '

The debt to Lord Denning is clear even in the staccato sentence style.

White looked radical largely because *Pettitt* and *Gissing* had put an end to this sort of discussion in the earlier cases, and 'reasonable requirements' had overtaken the nascent sharing theory set out in *Wachtel*. But, at least as far as 'sharing' goes, *White* was a revival, rather than a creation, of an equitable language that had been developed nearly half a century before. Insofar as *White* had a radical quality, it was that it did not confine the analysis to simply the capital in the home.

When the court got to *Miller v Miller; McFarlane v McFarlane* [2006] AC 618, [2006] 1 FLR 1186, it was concerned with the ambit of family property, the principle of 'sharing' in the marital assets in the modern era having been established in *White*. Lord Nicholls' judgment raises the possibility that a family home is a '*de facto*' matrimonial asset, whatever the duration of the marriage, and it is therefore amenable to sharing ([22]):

> 'One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavour, the latter is not. The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.'

Lord Nicholls' judgment formed the minority opinion of the House of Lords (in a fairly technical way, as their Lordships agreed with substantial parts of the judgment), as the analysis of the case by McFarlane LJ in *Sharp v Sharp* [2017] EWCA Civ 408, [2017] 2 FLR 1095 made clear. It is not, however, clear that this part of Lord Nicholls' judgment was in the minority, as their Lordships who agreed with Baroness Hale only made express their disagreement with different parts of his decision.

The majority accepted Baroness Hale's view that there was a category of 'family assets'. However, throughout her discussion, she made clear that the family home is a prime example of a 'family asset' irrespective of contribution. Baroness Hale did not spend a great deal of time on the family home per se, apparently taking it as read this would be a 'family asset' and it would generally be divided equally. She approved (at least in part) Lord Denning's definition of family asset in *Wachtel*. Of course, Lord Denning's concept of 'family assets' was not a shorthand for treating assets equally, but a device for treating assets fairly.

Subsequent case law has been consistent in considering the family home as matrimonial property to be subject to sharing, with the above *dicta* from Lord Nicholls oft cited in support. In one of the first cases post-*Miller; McFarlane*, in *S v S (Non-Matrimonial Property: Conduct)* [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496, Burton J stated the former matrimonial home was matrimonial property whatever the source and duration of the marriage.

This was further reflected on by Wilson LJ in *K v L (Non-Matrimonial Property: Special Contribution)* [2011] EWCA Civ 550, [2011] 2 FLR 980, who used non-matrimonial contributions towards a former matrimonial home as an example to demonstrate when the important of the source of the assets may diminish over time ([18], original emphasis):

> 'Thus, with respect to Baroness Hale of Richmond, I believe that the true proposition is that the importance of the source of the assets *may* diminish over time. Three situations come to mind: …
>
> (c) The contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name, has – as in most cases one would expect – come over time to be treated by the parties as a central item of matrimonial property.'

However, the theme through most of the cases following *Miller; McFarlane* has been that, while the matrimonial home is usually subject to sharing, it does not necessarily follow that the sharing should be equal, particularly where there has been an unmatched contribution. This has often been 'asserted' more than justified, in our view. This perhaps reflects the conceptual strangeness of defining

something as a central 'matrimonial asset' but not considering in fairness that the entitlement is equal. Notwithstanding this, prior to *Sharp* the sharing of the family home has been part of a discretionary exercise in considering the treatment of the asset as part of overall fairness. Consequently, the treatment of the former matrimonial home bears a resemblance to Denning's discretionary approach under MWPA 1882, s 17, particularly in *Hine*, in departing from the (effective) presumption of equality, while recognising that the family home is a special form of asset to which different considerations apply.

(1) In *NA v MA* [2006] EWHC 2900 (Fam), [2007] 1 FLR 1760, the assets Baron J had to consider comprised of the husband's inheritance. It was therefore 'not a case where there should be an equal division of assets' as there was little marital property but 'the former matrimonial home falls into a somewhat different category position' citing the above *dicta* from Lord Nicholls. However, Baron J concluded 'I do not take that to mean that the property must be divided equally but its value and the lifestyle that it produced are relevant factors in the court's consideration of fairness'. She later repeated this view in *Y v Y (Financial Orders: Inherited Wealth)* [2012] EWHC 2063 (Fam), [2013] 2 FLR 924.

(2) In *Vaughan v Vaughan* [2007] EWCA Civ 1085, [2008] 1 FLR 1108, Wilson LJ considered a former matrimonial home which had been owned by the husband mortgage-free prior to the marriage with an inheritance from his father. The property was placed into the parties' joint names towards the end of the marriage. Wilson LJ noted that even after a long marriage with two children ([49]):

> 'Although, in the words of Baroness Hale in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [2006] 1 FLR 1186 at 663E and 1223 respectively, "the importance of the source of the assets will diminish over time", I consider that the husband's prior ownership of the home carried somewhat greater significance than either the district or circuit judge appears to have ascribed to it.'

(3) Similarly, Mostyn J cited *Vaughan* in *S v AG (Financial Orders: Lottery Prize)* [2011] EWHC 2637 (Fam), [2012] 1 FLR 651, [9] when considering principles of matrimonial and non-matrimonial property in relation to a lottery prize, that despite the matrimonial home being matrimonial property 'even the matrimonial home is not necessarily divided equally under the sharing principle; an unequal division may be justified if unequal contributions to its acquisition can be demonstrated'. He later repeated this view in *JL v SL (No 2) (Appeal: Non-Matrimonial Property)* [2015] EWHC 360 (Fam), [2015] 2 FLR 1202.

(4) In *FB v PS* [2015] EWHC 2797 (Fam), [2016] 2 FLR 697, [120]–[121] and [123], Moor J considered a former matrimonial home which was effectively owned by the husband's father and purchased prior to the marriage. The husband's father funded substantial refurbishment works to the property for the husband and wife after their marriage and the property was subsequently transferred to the husband's name during the marriage:

> '120. AR was therefore the matrimonial home for some 15 years. Given the *dicta* of Lord Nicholls of Birkenhead, I can only find that it is matrimonial property but I do not accept that this means that it is to be shared between the parties. AR was not acquired by the parties themselves during the marriage. It had been a matrimonial home of TS and his wife, since 1982. The husband and his siblings were brought up there. The transfer itself is a very significant unmatched contribution, now worth some £3.5m gross.
>
> 121. In exactly the same way, the cost of the refurbishment works was a large unmatched contribution. I have already found that TS was properly remunerated for his work with Co X, even after deducting the living expenses of £500,000 that he paid on behalf of the husband and wife. I did not include the expenses of refurbishing AR when I made this finding. Indeed, these costs came at a time when the management fees paid to TS were far lower than they became later when Co X was far more successful. …
>
> 123. Moreover, I am sure that the works will not have increased the value by anything like the full amount spent. The husband is therefore entitled to a significant departure from equality to reflect these unmatched contributions.'

Thus, the value of the property was removed from the schedule of assets, less £500,000 to reflect sums invested in Co X and the increase in value which would have occurred had the parties purchased an alternative property. The approach used by Moor J in determining what was fair for the wife to share in has some similarities to Denning MR's quantification of post-marriage contribution by the husband in *Appleton*.

However, in *Sharp*, McFarlane LJ gave a careful analysis of the ratio in *Miller*, but appeared to take the view that the former matrimonial homes fell to be divided equally even in a short marriage notwithstanding the unmatched contributions to the properties, saying that it was inappropriate to exclude the properties from equal division, given he was excluding liquid capital that he had determined was to be treated as a unilateral asset ([115]):

> 'In calculating the award, and in view of the fact that the wife's liquid capital is not to be treated as part of the matrimonial assets for equal sharing, it is not appropriate to take account of the husband's concession regarding the SD property, which was purchased prior to the marriage. Both properties were matrimonial homes and, as such, properly fall to be divided equally between the parties.'

Again, this shows the elision between two concepts: on the one hand, McFarlane LJ notes that they fall to be divided equally as a matter of principle (as Diplock LJ suggested in *Ulrich*, and as accords with a reading of Lord Nicholls' judgment in *Miller; McFarlane*). On the other hand, he has only decided to do so after standing back and looking at the overall award (suggesting it is still a discretionary exercise concerning overall fairness). It is interesting that the husband's legal team had made a concession on this point, presumably on the basis they were expecting pre-marital

contributions to this property to be counted as significant, and that they would succeed on equal division of the funds generated by the wife during the marriage.

Other cases following *Sharp* have subsequently reverted back to imposing an unequal division of the former matrimonial home in circumstances where it is fair to do so. Instead of there being a mechanical equal share of the asset regardless of the length of the marriage and contributions, the broad discretionary exercise continues to take priority.

Cohen J in *AD v BD* [2020] EWHC 857 (Fam), [123] considered treatment of the matrimonial home in circumstances where he found that the entire purchase and renovation costs were provided to the husband as a gift just 3 years before the marriage came to an end:

> 'Notwithstanding the provenance of the funds there is no doubt that all property is available to be shared between the parties on divorce. However, normally non-matrimonial property will not be shared unless need requires. Is the matrimonial home in these circumstances to be treated as matrimonial property?'

After reconsidering Lord Nicholls in *Miller; McFarlane* and Wilson LJ in *K v L* as quoted above, Cohen J concluded 40% of the home would be deemed to be a matrimonial asset and he would add to the acquest £1.648m on the following basis:

> '127. There are a range of cases in which homes, often homes on family estates, which became matrimonial homes upon marriage have been excluded from division between the parties or subject to a sharing whereby the division was far from an equal one. It is unnecessary for me to lengthen this judgment by going through them. …
>
> 128. In my judgment it would not be right for me to treat the whole of the matrimonial home as subject to equal sharing between the parties. I bear in mind in particular the following:
>
> i) This is the first property owned by the parties and was bought only 3 years before separation;
>
> ii) The whole of the purchase price came not from H but from F;
>
> iii) The property was, no doubt at the direction of H's father, registered in the sole name of H.
>
> 129. On the other hand, it would not be right for me to exclude it entirely. I bear in mind that:
>
> i) This was not a short marriage. It was a marriage of 8 years that produced 2 children;
>
> ii) On H's own proposal it will remain the home of W and the children for some 17 years until the younger child finishes a first degree.'

Similarly, in *E v L (Financial Remedies)* [2021] EWFC 60, [2022] 1 FLR 952, [45], Mostyn J reiterated that the court could still order the unequal sharing of the former matrimonial home which was non-marital:

> 'For my part I would say (as I have said before when talking about the rarity of sharing of non-matrimonial property) that a case where there can be a legitimate non-discriminatory 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 a 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* … '

Thus, it appears that *Sharp* was the anomaly in ignoring the substantial unmatched non-matrimonial contributions to the former matrimonial home and 'automatically' awarding the other party an equal share of the asset.

Having considered the full run of the cases, we think *Sharp* probably *is* anomalous on this point. The court has never equally shared a family home in a mechanical fashion. The development of the jurisprudence of the family home in the '50s and '60s shows that, at the high water mark of those cases, the characterisation of a home as a 'family asset', subject to special considerations was a linguistic device that enabled the court to escape the strictures of the traditional MWPA 1882, s 17 exercise, and instead attempt to impose a discretionary solution they felt was fair in all the circumstances: they were frank on this point by *Hine*. The law at this point was developing in the context where the only capital that the court would entertain interference with was the family home.

The function that identification of the asset as a 'family asset' served was to open it up to discretionary remedies that transcended the normal rules of law and equity. It was not to impose a mechanical equal share, although one of the obvious discretionary solutions to achieve fairness was to share in the asset equally. We believe that this is the long-dormant thread that was revived and extended by Lord Nicholls in *White* and by him and Baroness Hale in *Miller; McFarlane*. Even though Lord Nicholls identified the family home as, almost inevitably, matrimonial property, exploring the intellectual genesis of this idea as it relates to the family home suggests that he cannot be taken to have meant that this would automatically lead to an equal sharing of this asset, rather, that it would be dealt with fairly, recognising its special status at the centre of the marriage. The court should not be abashed about sharing unequally in the family home in the right case: the genesis of the concept of 'matrimonial property' shows that fairness is its lodestar, which, while often the same thing as equality, can also take many other forms.

Notes

1 *Royal Commission on Marriage and Divorce* (Morton Commission) (HMSO, 1956).
2 *White v White* [2001] 1 AC 596, [2000] 2 FLR 981.
3 *Financial Provision in Matrimonial Proceedings* (Law Commission, Law Com No 25, 1969), para 67.
4 *Hansard*, HL Deb, 18 November 1969, vol 305, col 864.
5 Lord Nicholls of Birkenhead, *Let Equity Prevail: Recollections and Reflections* (D&M Heritage Press, 2015).

Both Sides Now: *DN v UD*

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Introduction

UD v DN (Schedule 1, Children Act 1989; Capital Provision) [2021] EWCA Civ 1947 is one of only a handful of cases under Schedule 1 to the Children Act 1989 (Schedule 1) to have made it to the Court of Appeal since *Re P (Child: Financial Provision)* [2003] EWCA Civ 837, and it is of great significance both in terms of the legal principles it analyses and the practical impact it will have for family practitioners specialising in this area.

Laura Moys was junior counsel for the mother (M) (led by Charles Howard QC) and Katherine Kelsey was junior counsel for the father (F) (led by Christopher Pocock QC). The first instance decision is reported as *DN v UD (Sch 1 Children Act: Capital Provision)* [2020] EWHC 627 (Fam). What follows is an analysis of the case from the unique perspective of counsel appearing on each side.

Joint case summary

In a nutshell …

UD v DN is principally concerned with two issues arising under Schedule 1.

(1) First, the Court of Appeal concluded that on an application *by a parent* for financial provision for a child, the court retained jurisdiction to make an order in respect of a child who was over 18 years of age by the time of its order, provided that the *application* for the order had been made before they reached that age.
(2) Secondly, the Court of Appeal considered the circumstances in which *outright* capital provision could or should be made for a child. It concluded that special circumstances required to be shown, and that those circumstances had to relate to the child in question and to a consequent continuing financial need into adulthood. The court allowed F's appeal against an order that he provide funds outright for the purchase of homes for two children once they reached adulthood, made on the basis that he might otherwise use his financial muscle to impose some form of 'financial ultimatum' on them.

What does this mean for practitioners?

Schedule 1 permits (at paragraph 2) adult *children* to apply for provision for themselves, but the relief available on such application is more restricted than on an application made by a *parent* on the child's behalf (paragraph 1). Most applications by unmarried parents for financial provision are made when the child or children are young. Here, the relevant children were aged 17 and 12 when M made her application, and 19 and 14, respectively, when that application was determined. However, the full range of provision remains available on a parent's application provided it is *issued* before the relevant child's 18th birthday. It is therefore important for applicant *parents* to ensure that their application is issued while the relevant child remains a minor if they wish to be sure that the broader relief is available.

However, the court confirmed that even on a parent's application, outright provision or provision otherwise enduring into adulthood *after* completion of education can only be justified if there are: (1) exceptional circumstances; which (2) relate to the children themselves; and (3) create a continuing financial need. It is not to be made in order to protect children, for instance, from a future decision by F not to make provision for them as adults, nor even to use his financial strength to attempt to put pressure on them as adults.

At first instance …

It was a significant feature of the case that in earlier child arrangements proceedings significant findings of fact had been made against F. M sought both the standard provision of a home and income for the children during their minority and education, but also outright capital provision for the parties' two younger children once they left education on the basis that: (1) but for F's conduct and M's decision to seek orders to protect the children, F would have purchased homes for each child equivalent to that bought for their older sibling; (2) F's conduct meant that he would not meet his parental responsibilities, making it appropriate for there to be an order to enable them to purchase a first home; and (3) there was no requirement for special circumstances but, if there was, this was such a case given the level of abuse suffered by the children.

At first instance, Williams J raised the issue of whether, once the children became adults or ceased their education, they would be vulnerable to the financial muscle and coercive behaviour of F, so that the only way to protect them was to give them a level of financial independence. F was ordered to pay lump sums to M for the purchase of a car and for other expenses, and substantial periodical payments during the children's minority or until the end of full-time tertiary education. The family home in London was settled on trust as a home for the benefit of the two younger children during their minority, but at the end of

that period rather than reverting in its entirety to F, the judge ordered that 6.5% of its value should become the absolute property of each of those two children themselves.

On appeal …

The Court of Appeal first concluded that the court has power to make an order under Schedule 1, paragraph 1 (i.e. on a parent's application) notwithstanding the relevant child having attained the age of 18 between the date of the application and its determination. This point had not been considered by the courts before (possibly because the factual matrix rarely arises). To conclude otherwise would mean that a *parent's* right to the determination of their application for an order for their child, which right accrued on the making of the application, might be defeated by the effluxion of time. It would also cause parties and the court real practical problems if the jurisdiction were not tied to the 'clear cut-off' of date of the application. A similar point *was* addressed in *Jones v Jones* [2001] Fam 96 in the context of an application by a former spouse for the extension of the term of a periodical payments order. In that case the Court of Appeal concluded that the power endured after the term had expired provided that the application was issued before that expiry. The same considerations applied in this case.

Note that the court did not deal with whether the court might have the power to make orders on the application of a parent if the application were made *after* the child attained the age of 18.

The outcome …

In this case, however, the outright capital orders made by the judge could not stand. The court reviewed the authorities on making orders for provision for children enduring into adulthood – as any outright capital order would do. It concluded that those authorities are clear, and correct. Before orders are made for adult children who have completed their education, there must be 'special' or 'exceptional' circumstances – see in particular *Chamberlain v Chamberlain* [1973] 1 WLR 1557, *Lilford (Lord) v Glynn* [1979] 1 WLR 78, *Kiely v Kiely* [1988] 1 FLR 248, *J v C (Child: Financial Provision)* [1999] 1 FLR 152 and *Re N (Payments for Benefit of Child)* [2009] EWHC 11 (Fam), [2009] 1 FLR 1442. Scarman LJ's 'proviso' in *Chamberlain* that parents should have met 'their responsibilities to their children' referred to parents meeting those responsibilities 'while the children *are* dependent'. Moreover, the 'special circumstances' must relate to the *children*, and must be circumstances which create a *financial need* in adulthood, such as physical or mental disability.

The protection of children, once adults, from financial pressure or manipulation by their father 'does not begin to come within the scope' of the circumstances required to justify outright provision. On the contrary, far from being a circumstance relating to the *children* giving rise to a continuing need for *financial* provision (the cost of therapy might qualify – but there was no evidence in this case to support such a need), the judge's order was based on F's prospective behaviour and the judge's concern that he would not make financial provision for these children (in the way in which he had for their older sibling), in light of the judge's views: (1) of F himself; and (2) that most wealthy fathers would or should make provision for their adult children. This could not amount to a 'special' circumstance relating to the children which justified an award in their favour as adults.

Laura's analysis

Importantly, whilst the award of outright capital for the children was set aside in this case (the court declined to interfere with housing provision or the carer's allowance of c.£120k p.a.), the Court of Appeal agreed that courts do have the *power*, under Schedule 1, to make orders of outright capital for the benefit of a child. The difficulty is in defining (and evidencing) 'special circumstances'; a judicial 'gloss' that does not feature anywhere in the language of Schedule 1, paragraph 1.

In our case, the children had suffered significant physical and emotional abuse and were undergoing therapy. It might have been thought fairly obvious that the level and nature of the abuse they had experienced would have an enduring impact on their lives well into adulthood (M had been able to rely on a number of factual findings made in parallel proceedings under section 8 of the Children Act 1989, including that F coerced one of the children into assaulting their sibling and then – when they would not go through with it – threatened to kill the sibling and M, leading to the child experiencing suicidal ideation). However, the upshot of the Court of Appeal's decision is that in future cases in which it is alleged that children have suffered in such a way that will have a *financial* impact on them into adulthood (e.g. affecting their education/career prospects or requiring long-term therapy), there will likely be a need to instruct an expert at an early stage in the proceedings to attempt to substantiate and quantify that impact.

The obvious downside to this is the increased cost associated with pursuing these arguments, as well as the costs risk to applicants if they are not successful; a danger that is particularly off-putting in a Schedule 1 claim where the applicant is often the financially weaker party and where the claim is being brought on behalf of the children and not for the applicant's own benefit.

I wonder whether, in more extreme cases, children who have been the victims of abuse (whether physical and/or psychological) might consider whether they have grounds to bring a personal injury claim against the parent perpetrator. At the least, it may be sensible to obtain advice from practitioners specialising in personal injury litigation to consider whether the value of the claim justifies separate civil proceedings being explored.

I also think that it *may* well be easier to satisfy the 'special circumstances' test in a case involving a disabled child where there is evidence that the nature of the disability is such that the child will never be independent or fully independent. If, for example, a child requires a specially adapted home, it might be argued that the child requires the indefinite use of that property rather than it reverting to the parent once the child is an adult. My concern for future cases like these is the risk that first instance judges will simply not feel sufficiently emboldened – following the Court of Appeal's decision – to make outright capital orders even in cases where, arguably, 'special circumstances' do exist.

It is also a curious feature of the judicial interpretation of Schedule 1 that courts routinely make what are, in fact,

'outright capital' orders where the 'capital' concerned is of relatively low value. For example, no one has to return a laptop or a car to the other parent when a child turns 18, and courts do not require low value capital items like these to be settled on trust. The difficulty arises when the 'capital' is a large sum to provide housing, at which point (absent 'special circumstances') the convention continues to be that the property that is purchased will be settled on trust for the child's minority/completion of education only. There seems to me to be no logical explanation for this inconsistency; indeed, in certain ultra-high net worth cases the cost of buying a flat for a child might make actually no more significant a dent in the finances of the paying parent than a laptop or a car.

I wonder – rhetorically of course – whether the true 'mischief' behind the difference in treatment for laptops and houses is not so much the value of the respective claims, but the historic 'concern' that the outright purchase of a home might end up accidentally benefiting an unmarried applicant as it was/is assumed children will allow their mother to continue to live in the house for the remainder of her life. This theory brings into sharper focus the need for reform of the law relating to cohabitants more generally, as Schedule 1 remains a poor substitute for the relief available to divorcing applicants under the Matrimonial Causes Act 1973.

Much of the first instance legal analysis of Williams J relating to the jurisdiction to make orders survived the appeal. Both judgments are lengthy, so I provide some (hopefully) helpful takeaway points below:

- As noted above, as long as the application was made by the parent when the child was under 18 the court can still make the order if the child subsequently turns 18 during the course of the proceedings. To interpret the provision otherwise could lead to all sorts of problems: delay outside the parties' control (such as delay in listing hearings) could cause the court to 'lose' jurisdiction; a party could thwart the court's powers by deliberately prevaricating; the court might have to separately join an adult child midway through; the applicant would lose the power to claim backdated periodical payments.
- This jurisdictional approach applies in theory in respect of capital orders and property transfer/settlement orders as much as periodical payments orders and is also consistent with rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms because it means the children of unmarried parents are in the same jurisdictional position as those of married parents where the application is brought under the Matrimonial Causes Act 1973.
- The Court of Appeal also agreed with M that in this case the order that Williams J had made was a settlement of property order, and that the nature of such an order is that it takes effect immediately even if the beneficial interest is contingent (in the sense that the children have to outlive the 'trigger' events and would both be adults by the time those trigger events happened).
- The Court of Appeal has *not* resolved the issue of whether an applicant *parent* can bring an application under Schedule 1, paragraph 1 on behalf of a child who is already 18 at the date of the *application* (rather than the adult child making their own application under paragraph 2). This is for another day. There are potentially very good reasons why a parent might want to be the one making the application such as where the parent has spent (or will spend) money on the adult child's behalf but the adult child does not want to make an application, or where the child lacks capacity to make their own application and would have to be represented by a litigation friend.

Katherine's analysis

The award of outright property for the children was the standout feature of the decision at first instance. I remember it having a certain gasp factor and sending shockwaves through the profession. Various solicitors raised with me their concern as to what they should or should not be advising their clients. The Court of Appeal's decision has provided some much-needed clarity in this area:

- The Court of Appeal made clear the *limited* circumstances in which the court may legitimately make financial provision for children with the intention of benefitting them after they have reached the age of 18. I think one of the most helpful aspects of the judgment is the Court of Appeal's analysis of what the court will consider constitutes a 'special circumstance' justifying an award under Schedule 1, benefitting a child into their adulthood.
- The distinction between vulnerability and dependency is an important one. While vulnerability and dependency are very likely to overlap, they are not one and the same, with the former encompassing a much broader category than the latter. Vulnerability is a broad spectrum on which many people fall, but not everyone with a vulnerability is 'dependent' in the sense of requiring financial support. The parameters of Schedule 1 would potentially be stretched too far if every adult with a vulnerability could make a claim under Schedule 1 against their parents.
- Also, in contrast to the Matrimonial Causes Act 1973, conduct of the parties is not a factor included within the statutory checklist under Schedule 1. The case law suggests that 'special' or 'exceptional circumstances' should not include consideration of the conduct of the parent, but rather the circumstances of the child and any need/dependency of that child. The conduct of a parent is only relevant if it has created circumstances for the child which have led to a dependency (e.g. physical abuse that has led to a physical disability), but it should not be factored in as a way of punishing a parent through Schedule 1.
- I think these principles will translate into everyday practice and be particularly important in the smaller/medium asset Schedule 1 cases which rarely (if ever) get reported. Practitioners are now much better placed to assess from a case management (and costs) perspective whether/when expert evidence will be necessary and whether/when disclosure of historic/concurrent fact-finding proceedings will be required.

- During the course of the hearing, I remember King LJ (in particular) making the point that Schedule 1 principles are *equally* applicable to litigants of much more modest means. This was particularly important when considering arguments about what (if any) ongoing financial support can or should be made available by parents to their adult children.
- While the Court of Appeal accepted that many wealthy fathers *choose* to make generous provision for their children, their choice of whether or not to do so is entirely a matter for their discretion, and having rich parents should certainly not constitute special circumstances for the purposes of the statute. Schedule 1 does not exist to enable adults from wealthy families to make financial claims against their wealthy parents (see also the judgment of Sir James Munby in *FS v RS* [2020] EWFC 62) for the provision of housing:
  - wealth will inevitably be a factor of consideration when making awards for children (under 18) under Schedule 1, as 'income, earning capacity, property and other financial resources' of the parties is a specified factor under paragraph 4(1);
  - the parties' standard(s) of living is also to be factored into the discretionary exercise (*Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865).

  But, while these principles are central to the making of standard awards for dependent children under Schedule 1, they do not have a place in establishing exceptional circumstances to justify a special award for adult children. Different rules should not apply to adult children from wealthy families.
- My final thought is that there were issues raised at first instance and in F's application for permission to appeal which were not dealt with (at all) by the Court of Appeal – and which are perhaps even more relevant to our day-to-day practices in this area when trying to calibrate and ultimately predict likely outcomes for our clients:
  - *level of housing need*: M was allowed to remain living with the children in a property valued at c. £10m;
  - *quantum of 'carer's allowance'*: M received a carer's allowance of £120k per annum (on top of child maintenance of £40k per annum per child);
  - *provision of a home*: by way of a trust rather than a lease, notwithstanding the potential tax implications for F;
  - *refurbishment of/repairs to second home*: M received £80k towards the same.

As Laura identifies, there are still many questions left to be answered!

Schedule 1 Property Structures

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The main focus in cases under Schedule 1 to the Children Act 1989 is often on how to meet the housing needs of a child; understandably so, as it is usually the largest cost. It can also be the starting point for settlement as the type of property and location can affect other payments, such as furnishings. However, the focus in negotiations is commonly on the 'how much' and 'where' aspects of the housing provision, rather than on the practicalities of how the property will be owned.

In this article, we review the ownership structures that can be used in Schedule 1 cases and the associated benefits and practice points for each. In doing so, it is important to acknowledge at the outset that a Schedule 1 order sets up a structure for a family's home, often for many years. If care is not taken over the arrangements, the consequences can be very significant: from ongoing disputes, to unexpected tax consequences, to the practicality of who pays for a new boiler when it breaks in the middle of winter. We have the benefit of working together on such cases to advise clients on tax implications and documenting property structures, as well as what happens if either party dies or has financial issues. Our focus is, therefore, on the practicalities that should be explored at the outset of negotiations in Schedule 1 cases so that the structure actually works in reality.

Preface: the legal framework

The power for a court to order property provision is set out in paragraphs 1(2)(d) and (e) of Schedule 1 to the Children Act 1989. These provisions allow an order that a parent either settles a property for the benefit of the child or transfers a property to the applicant or, at least in theory, the child, for that child's benefit. As clarified in *UD v DN* [2021] EWCA Civ 1947, Schedule 1 provision lasts while a child is under the age of 18 or in education or training, save in 'special' or 'exceptional' circumstances. Accordingly, the property usually reverts to the paying parent when the child attains their majority or completes their education.

It is important to remember that only one settlement or transfer of property order can be made by the court against the same person in respect of the same child (paragraph 1(5)(b)), although there can be 'rollover' provisions.

The wording of these paragraphs, particularly the use of the word 'settlement', may explain why Schedule 1 has become synonymous with trusts; many reported cases involve property held in formal trust arrangements. That may also reflect the wealth of the paying parent, where the property value, tax position or other financial arrangements make a trust a suitable structure. However, in many other cases, a trust may not be appropriate for the family, particularly where the establishment and running costs are disproportionate to the property value or general financial position.

Working example

For ease when discussing different structures, we use an example of an unmarried mother and father of two young children, aged 6 and 2. The father is the financially stronger party, though not of high wealth. His income is approximately £100,000 per annum, so under the Child Maintenance Service (CMS) threshold. However, from a combination of savings and inheritance, he owns a mortgage-free house and has sufficient liquid capital to purchase a property for the mother and children, albeit at a lower standard than his main home. The mother works part time and has a small amount in savings but no other assets.

The parents have recently separated but remain living in the father's house at present. They have agreed that a new property will be purchased for the mother and the children near to the father's property and the eldest child's school, which they can live in until 6 months after the youngest child finishes tertiary education (c. 20 years).

What are their options for the ownership of that property?

Traditional trust

We start where many reported cases do – the trust structure. The father in our scenario would settle funds into a trust for the purchase of the new property. The property would be owned by the trust with trustees managing it for the benefit of the children during their minority, with the mother having a right to live there. At the end of the term, the property would revert to the father (though there is nothing preventing the children from being the ultimate beneficiaries if the father so chose).

Benefits

The key benefit, and the reason why trusts are commonly used in high net worth cases, is that a trust formally secures

the property for the child's benefit. It has detailed provisions about what happens during the lifetime of the trust, but without the property remaining in the father's name or control. For the mother, it also provides some security that the property will be managed by trustees and that it will be protected if the father becomes bankrupt, his circumstances change or he dies.

Points to consider

Trust structures can be very detailed, and specialist private client advice is essential. There are a few points, in particular, to consider early in negotiations if a trust is an option:

- *Tax/costs*: this is always a key consideration but is particularly so in relation to the establishment of a trust. There is an inheritance tax regime that applies to trusts known as the 'relevant property' regime. This could mean ongoing tax charges every 10 years and on capital distributions (including termination) of the trust. Capital gains tax (CGT) is also pertinent – the settlor of the trust in Schedule 1 cases will rarely be in occupation of the property, so when it comes to be sold, there may be significant gains without principal private residence relief. Trusts pay both Stamp Duty Land Tax (SDLT) and CGT higher rates, which could mean significant tax consequences. As well as the costs of establishing a trust, there are also reporting obligations to HM Revenue & Customs, which may require professional advisers and further cost.
- *Selection of trustees*: some cases may justify the appointment of independent professional trustees, but this comes at a significant cost and is not proportionate for many families. Would it be appropriate for the mother and the father to be trustees, or for them each to appoint a friend or family member to fulfil that role?
- *Class of beneficiaries*: should this include the mother? If it is an existing trust, is there an ability to extend the beneficiaries to other family members or future children of the father and, if so, could that impact upon the ability of the mother and children to remain in the property?
- *Occupation*: if the mother is not a beneficiary of the trust, careful consideration needs to be given to her right to live at the property. This is particularly important if the mother is going to be a trustee as granting her the ability to live at the trust property could cause issues such as with conflicts for her co-trustees or personal interest transactions. Consider whether the mother's occupation can be regulated by the trust deed or whether a tenancy/lease is needed (and, if so, ensure that the appropriate structure is chosen, including considering the impact of the mother paying a peppercorn rent if this is the case). Also consider which other people are able to occupy the property: What happens if the mother cohabits/marries during the lifetime of the trust?
- *Contributions*: in some cases, particularly if the father in our scenario had less liquid capital, the mother may contribute to increase the housing fund, whether with her own funds or by raising a mortgage. Alternatively, the mother may wish to fund a renovation of the property during the time that she lives there. Having a trust in place makes it more difficult for this to happen, given the ownership and trustee structure.

Property owned in the father's name

This option would, in our scenario, mean that the father would purchase the property with a right of occupation granted to the mother and the children.

Benefits

This is a common structure where a trust is not appropriate as it allows the purchase of a property by the father which he can retain/sell at the end of the term, but with a secure right of occupation for the mother and the children prior to that. The option is most appropriate where the mother is not investing in the property or where there are wider consequences of the mother owning it, including if she has other assets so would then have additional tax liabilities. The property may then be seen as more of a long-term investment for the father as his ownership would mean that he benefits entirely from any increase in value.

Points to consider

- *Occupation*: as with a trust, consideration needs to be given to how the mother will be given the right to occupy the property. It is important to seek advice on this early in negotiations as it could cause significant problems for the parties when they come to purchase a specific property or in relation to the mother's long-term occupation. For example, a licence to occupy would not be appropriate in many Schedule 1 situations because they are designed to be temporary arrangements. This means that they do not grant a right of exclusive occupation (i.e. for the mother to the exclusion of the father/owner), they are capable of being terminated on very short notice, and usually contain very restrictive obligations on the occupier in relation to alterations/decoration.
- *Tax*: as the mother in our scenario would not have any interest in the property, the tax consequences of this structure fall on the father. SDLT would be incurred initially on the purchase cost. It would be likely that he would have to pay CGT when the property is sold as it will not have been his main residence, and this could be fairly significant if the children are young (as for our family). It is therefore vital that tax advice is sought for the father and that he is aware of this from the outset.
- *Payments and responsibilities*: for the mother, the responsibility for the costs of the property may be clearer and less worrying in this structure as her position would be akin to a tenant. This would usually allow her to decorate the property, but with the father responsible for structural and repair costs. There can also be specific provisions regarding payment of ground rent and service charge if it is a leasehold property.
- *Investment*: if it is intended that the mother will make a financial investment into the property herself, whether at the outset or in the future, a declaration of trust may be required. Whilst this is easier in this structure than with a trust, this could require further negotiations and documentation in the future, so the mother in our scenario may prefer to build up a

separate investment to provide for her accommodation once the ownership structure comes to an end.

- *Bankruptcy*: this ownership structure also has significant risk from any change in the father's financial circumstances. If the father was made bankrupt, any property owned by him would vest in the bankruptcy estate, and the trustee in bankruptcy would decide whether or not to sell the property with a sitting tenant (i.e. the mother). This could be unlikely if the mother pays little or no rent, as is likely in Schedule 1 cases. Otherwise, the trustee may disclaim the lease, serve notice on the mother and sell the property with vacant possession, leaving the mother and children seeking alternative accommodation. This is therefore a significant risk that should be considered depending upon the father's financial circumstances and source of income.
- *Death of the father*: this could present some difficulties as the property would be in the estate of the father. There may be potential recourse for the mother or the child under the Inheritance (Provision for Family and Dependants) Act 1975, but if the father is non-domiciled there may be little, if any, protection.
- *Cohabitation/marriage*: a new relationship is always a tricky subject following a separation, particularly where there are children. This is escalated where a mother (in our example) cohabits or marries a new partner while living in a property owned by the father. This scenario should be specifically addressed so that everyone is aware of the position in advance. Our experience is that many agreements allow a new partner to move into the property, but with some conditions. Commonly, the mother is required to pay a percentage of the property's market rent to the father, representing the occupation by her partner. The mother can also be required to arrange for her partner to sign a declaration of no interest to ensure that they do not obtain a beneficial interest in the property and to regulate their occupation. Similarly, terms can include what happens to the property if the mother and the children cease to live there as their main home (such as if they move in with the mother's new partner).
- *Will the mother ever feel that this property is her home?* It is understandable that some people may not want to live in a property owned by their ex-partner, with any changes or future move requiring their consent. It is important not to forget the emotional consequences for parents in the negotiations, particularly if there have been control or domestic abuse issues during the relationship.

Property owned in the mother's name

As Schedule 1 orders provide a home for children with one parent while the other parent is not directly involved with the property, the most appropriate option may be for the parent who will be living at the property to own it. This can be done alongside a loan/charge to protect the interest of the other parent who contributes to the purchase.

Benefits

The main benefit of this structure is the clarity that it brings in ownership and responsibility for the property. In our scenario, the mother would own the property and may feel that it is more her home than she would if it was owned by someone else. It also gives the parents more flexibility going forward, particularly if the mother wishes to invest into the property, or even to retain it entirely if she is able to buy-out the father's contribution at any stage.

Points to consider

- *Tax*: if the mother does not own another property, as in our scenario, there might be less SDLT paid on the purchase (if she was a first-time buyer) than if the father purchased the property. In addition, if the mother lives at the property as her main home and does not purchase another property, there will be no CGT for her to pay on sale. Any CGT payable by the father will be dependent upon how his contribution is structured, such as whether it is expressed as a fixed amount or a percentage share, and whether it has provision for interest or a return on his investment.
- *Investment structure*: if the father in our scenario wishes to have a return on the amount that he contributes, his contribution may be recorded as a beneficial interest in the property under a declaration of trust. Alternatively, either parent may prefer for it to be arranged as a loan secured by way of a legal charge, with a fixed rate of interest, rather than the father having a beneficial interest in the property. Where a property is being acquired with a mortgage, the availability of the latter structure will depend on the willingness of the mortgage lender to consent to a second charge being secured against the property. Thought should also be given to the likelihood of a future lender consenting to the arrangement if/when the property is re-mortgaged.
- *Rollover*: given that Schedule 1 property structures are often in place for many years, it is not uncommon for a house move to occur during the term, particularly if the children are very young and a move is necessary for school catchment areas. This is far easier on a practical level if the property is owned in the mother's name. It allows her to choose a suitable property (perhaps subject to the father's consent, not to be unreasonably withheld, to ensure that his contribution is secure) and to make arrangements for the sale/purchase, with the father's interest or loan then transferred to the new property.
- *Property repairs*: if the person who owns the property has limited assets, as in our scenario, this structure may create greater concerns about responsibility for costs. This could be regular expenses, such as buildings insurance and service charges, or larger one-off repair costs. The mother here has limited assets and her child maintenance will be set by the CMS formula, so she may struggle to meet such expenses. Consideration should therefore be given to how these could be funded, such as a lump sum from the father to allow for re-decoration or a property expenses fund for unexpected costs.
- *Future consequences*: it is important to be aware of potential wider consequences for one parent of owning a property, particularly if the other parent has contributed the majority of the funds. This could

require advice on the impact of a property purchase on benefits payments. At the other end of the scale, if the mother has other assets now or in the future, she may have additional tax liabilities by virtue of owning this property. Lastly, consideration is needed of what would happen to the property if the mother were to die during the lifetime of the trust, taking into account the father's contribution and who would inherit the property.

Joint ownership

If the parents purchase or retain a property in joint names, similar considerations would apply as those if the property is owned solely by the father. While the mother's position would be clearer given her joint ownership of the property, detailed provisions would still be needed to clarify the beneficial interests (and, therefore, the tax position of the father), the occupation and the responsibilities for costs and maintenance.

Property advice

Once an agreement is finalised and the family lawyers step away, it is important that the parents have continuing advice while a property is chosen and the structure implemented. This allows the input of a property lawyer in relation to matters such as whether the proposed property is freehold or leasehold and the options for documenting the arrangement as the purchase progresses. It is particularly important to ensure that any property document accurately reflects the terms of the Schedule 1 order, particularly relating to the term of the occupation and responsibility for costs.

Particular care needs to be taken where the proposed property is a leasehold property and the parent occupying will be doing so pursuant to a sub-lease. The headlease may be subject to restrictions on sub-letting, and freeholders (or superior landlords) may require direct covenants from a sub-tenant (the mother in our example). This could expose her to liability for unpaid service charges/insurance contributions, or other sums due under the headlease, if not paid by the owner of the property.

Conclusion

As the above points demonstrate, there are many options and a degree of flexibility in how Schedule 1 properties can be purchased for the benefit of a child. The key is giving full consideration to the family, private client, tax and property consequences of the proposed structure before an agreement is finalised to prevent unintended consequences arising in the future. Dealing with this in advance will ensure that the structure works for the whole family from the outset, with enough flexibility for any changes that life brings for them.

Schedule 1 Remedies for the Older Child

Gwynfor Evans

36 Family

HHJ Hess recently handed down a helpful decision as to jurisdiction under Schedule 1 for an adult child in *J & K v L (Schedule 1: Older Children)* [2021] EWFC B104.

While this decision is non-binding,[1] the judgment offers an exceptionally lucid and helpful analysis of existing case law, of the remedies available in Schedule 1 cases involving older children, and of the court's jurisdiction.

The parties' two daughters, N and K, were aged 20 and 18 at the time of judgment (on 30 December 2021). K suffered from a range of debilitating illnesses and conditions, and reliance had been placed upon the report of a consultant community paediatrician. K was due to attend tertiary education in September 2022. Neither child had had any form of relationship with their father, and they had been 'brought up against a background of conflict and confrontation between their parents' which had 'been significantly emotionally harmful to them' ([3]).

It is significant that, during the course of the litigation, each child respectively turned 18. K made a Schedule 1 application in her own right, which was heard at the same time. Following an unsuccessful earlier appeal of an interim order to HHJ Everall QC, the application in respect of N was no longer pursued. However, HHJ Hess differed in his analysis of the applicability of Schedule 1 to N, as discussed below.

Relevant history

The mother's (J's) first Schedule 1 application had been made in 2001, shortly after the birth of N, and had led by consent to an order for a housing fund. However, a court later found J had delayed and, to some extent, obstructed a property purchase in a rising property market, and thereafter discharged the order. J remained in rented property. This led to ill-feeling.

There was a brief reconciliation, during which K was born, but the relationship broke down and what followed was 'twenty years of litigation echoing Dickens' depressing tale of *Jarndyce v Jarndyce'* ([5]), which included an order in 2006 for periodical payments but what amounted to a dismissal of J's applications for capital/school fees orders. The court at that time was critical of the manner in which J had presented and pursued her case, and she was ordered to pay substantial costs to L, not to be enforced without leave of the court. J appealed and lost, leading to a further costs order against her. Immediately thereafter, J applied again for a school fees order, meeting with partial success.

In 2011, J applied for an increase in child periodical payments and for further lump sums. A consent order provided for an increase in child periodical payments, now including money towards rent, and a lump sum order for a car. Periodical payments were expressed (significantly) so as to end, for each child respectively, on the later of that child attaining the age of 17 or completing full-time *secondary* education.

In August 2018, with each child still under the age of 18, J made a further variation application and sought further lump sums for the benefit of the children.

On 1 July 2019, in the year of N's completion of her secondary education, but *after N had turned 18*, J made an application for interim child periodical payments, J envisaging that N would shortly be entering tertiary education. On 19 August 2019, a deputy district judge dismissed that application on its merits (N's exam results being insufficient to secure her a university place). The court also determined that there was no jurisdiction to make an order on the interim application as N had turned 18. J appealed. HHJ Everall QC agreed with the lower court on the issue of jurisdiction, and added that the court had no jurisdiction with respect to N to hear the main application of August 2018. King LJ declined to give permission to appeal to the Court of Appeal.

What was expected to be the final hearing of the August 2018 application took place in November 2020, the court hearing full evidence and submissions. However, due to judicial illness the reserved judgment was never handed down. By late spring of 2021, J's solicitors became concerned with likely jurisdictional arguments, K imminently turning 18. J issued a further application, before K's birthday, leading to an urgent listing before a different judge, HHJ Hess. It was ultimately agreed that HHJ Hess would listen to the tapes of the November 2020 hearing, read further legal submissions and at the same time determine any application to be made by K (upon her attaining 18). Such an application was made in October 2021 and the court determined the two applications together by the end of the year. While HHJ Hess was considering this case, the Court of Appeal's judgment in *UD v DN* [2021] EWCA Civ 1947 was handed down.

Jurisdiction – difficulties facing the court

In this judgment, HHJ Hess was required to grapple with a problem already identified by the authors of 'Illegitimate claims? Schedule 1 claims for periodical payments by parents of adult children' [2019] Fam Law 505[2] (Harrison and Benson).

Who may apply?

Paragraph 1 of Schedule 1 provides for child periodical payment orders/lump sums to be payable to a parent, upon their application. Paragraph 2 provides for the same to be payable directly to a child, upon an application by the child. Paragraph 1 also makes broader provision for various property orders for the benefit of the child. Those were not in issue here.

Who is a 'child'?

Section 105 of the Children Act 1989 defines a child as 'subject to paragraph 16 of Schedule 1, a person under the age of eighteen'. Paragraph 16 of Schedule 1, in turn, states that: '"child" includes, in any case where an application is made under paragraph 2 or 6 [of Schedule 1] in relation to a person who has reached the age of eighteen, that person'. Therefore a 'child' who is aged 18 or over, provided that 'extension conditions' (a term coined by HHJ Hess, explained below) apply, may seek orders from their parents for periodical payments or lump sums.

Two further points should be noted: the word 'child' is not in fact used in paragraph 2 of Schedule 1, and the word 'child' in paragraph 1 remains (presumably) as defined in section 105, hence being limited to persons under the age of 18.

Extension conditions

The 'extension conditions' ([21]) are that:

> '(i) the child is, or will be, or if an order were made … would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not [while also] in gainful employment; or
>
> (ii) there are special circumstances [justifying] the making of an order … .'

The court observed that the wording is, for all practical purposes, identical as between the Matrimonial Causes Act 1973 and Schedule 1 to the Children Act 1989.

Relevance of/analogy with children of married parents

Commenting on the *matrimonial* jurisdiction, HHJ Hess stated ([24]) that:

> 'there seems to be a general power to allow an adult child to intervene in divorce proceedings to force a parent's hand: see *Downing v Downing (Downing intervening)* [1976] 3 All ER 474. The remedy of financial support is thus available to be pursued by either the parent for the benefit of the child or by the adult child himself or herself. It is not apparent that the co-existence of the remedies causes any particular problems for the legal system [although] [i]t is usual in practice for the divorcing parent to make the application … '

HHJ Hess reiterated earlier judicial observations that the aim of Schedule 1 was 'to make available a financial remedy to secure an appropriate level of financial support for a child who's now separated parents were not married which is commensurate with the support that a child of parents who were married but are now divorced or divorcing could expect to receive' ([18]). This echoed comments of the Law Commission in 'Family Law, Illegitimacy'[3] and in 'Family Law: Review of Child Law Guardianship and Custody',[4] endorsed *inter alia* by Hale J (as she then was) in *J v C (Child: Financial Provision)* [1999] 1 FLR 152, 155. Sir James Munby had also more recently referred to the same passages from 'Family Law, Illegitimacy' with approval in *FS v RS & JS* [2020] EWFC 63.

The court noted that the passing of the baton (in terms of making the application) from the parent to the child as the child becomes an adult was 'not at all straightforward' ([25]).

HHJ Hess referred to *Pepper v Hart* [1993] AC 593 and adopted a purposive approach to interpretation of the statute (e.g. at [34(vi)]), similar to that advocated by Harrison and Benson in their article, and adopted by the Court of Appeal in *UD v DN* [2021] EWCA Civ 1947 (at e.g. [73]).

The judgment can be divided into aspects that summarise jurisdiction, and aspects that clarify or determine jurisdiction.

The summary of the relevant jurisdiction for adult children

The court helpfully summarised the position in respect of adult children:

(1) Remedies for the children of married and unmarried parents can differ without this necessarily amounting to unlawful discrimination, i.e. without being in breach of Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (as Harrison and Benson had argued), it being appropriate for any ambiguities to be construed purposively, with the overall scheme of non-discrimination in mind ([20]).

(2) It would be 'bold' for a court at this level to rule that a statute had been – as Harrison and Benson contended – incorrectly drafted and that the reference to paragraph 2 at paragraph 16 should be read, instead, as a reference to paragraph 1. Further, the Court of Appeal in *UD v DN* had also declined to deal with the question of the restriction on parents making fresh Schedule 1 applications for children aged over 18 as at the date of application. The court therefore conservatively assumed that there was indeed such a prohibition on a parent making a such fresh application ([26]).

(3) An order made while a child is under 18 can continue for as long as one of the extension conditions is satisfied, i.e. well beyond the child attaining the age of 18: see paragraph 3(2) of Schedule 1.

(4) An order made before a child is 18 can lawfully require a payment of a lump sum or a transfer of property which takes place after the child is 18: see *UD v DN*, [63].

(5) The court may at any time make a further periodical payments or lump sum order under paragraph 1, but only if the child has not reached the age of 18 ([29]).

(6) '[P]ursuant to [Schedule 1] paragraph 6(4), a child of 16 or above may himself apply to vary a paragraph 1

periodical payments order previously made on the application of one of his parents' ([30]).

(7) '[W]here a [previous Schedule 1] paragraph 1 periodical payments order … has expired on a date between the child's 16th and 18th birthdays, the child who is over 16 may apply for its revival, but not from a date earlier than the date of the application made by him' except where the original order expires after the child's 18th birthday (e.g. where the original order is expressed to cease at the later of the conclusion of secondary education or age 18) ([31]). NB:
   (a) this will not generally arise for children whose support has been via the Child Maintenance Service (CMS), but 'it seems to be a possible lacuna in Schedule 1'; and
   (b) the question of when precisely secondary education ceases is moot. Is it:
      (i) end of school summer term (typically mid- to late July); or
      (ii) the completion of A-levels (typically mid-June); or
      (iii) some other, possibly later, date (e.g. 31 August, when child benefit ends)?

(8) Pursuant to paragraphs 2(1) and (2), an adult child who satisfies one of the extension conditions above may make an application for a periodical payments order and/or lump sum order, except where immediately before the applicant became 16, a periodical payments order was in force in relation to them: see paragraph 2(3) (that preventing K, in this case, from making a fresh application) ([32] and [34(i)]).

(9) An order made under paragraphs 2(1) and 2(2) of Schedule 1 may subsequently be varied (see paragraph 2(5)), or a further such order may be made (see paragraph 2(8)).

(10) The periodical payments order in favour of K made in 2011 was in existence when K attained the age of 16 in 2019, thus preventing K from bringing a fresh application under paragraph 2 for periodical payments/lump sum orders.

(11) The court agreed with the analogous reasoning of Thorpe LJ in *Jones v Jones* [2000] 2 FLR 307 (in relation to MCA 1973, s 31) that there would be 'considerable practical inconvenience as well as pressure on the court' if J were to have lost her right to lump sum and periodical payments orders purely because of the elapse of time, and particularly where that was not her fault. This had recently been affirmed by the Court of Appeal in *UD v DN*.

The more controversial determinations

The following aspects are likely to be considered further in the future by the higher courts:

(1) As the interim periodical payments order made in March 2020 was stated to endure until 'the conclusion of the present proceedings', then, pursuant to paragraph 6(4), K had the right to vary it, and that is how the October 2021 application by K would be treated ([34(ii)] and [34(iii)]);

(2) Secondly, the court determined that an order varying periodical payments did not fall within the meaning of 'further order' in paragraph 1(5)(a), and hence would not be subject to the requirement there for the child still to be aged under 18 ([34(iv)], [34(v)] and [34(vi)]). In this respect the court took the contrary view to that of HHJ Everall QC on the earlier appeal ([28], [34(iv)], [34(v)] and [34(xii)]).

(3) '[I]n my view … a variation application (as opposed to a fresh application, for example after the expiry of an earlier order) can be pursued at any time. In my view that includes the period from the child attaining the age of 18 to the child ceasing to satisfy one of the extension conditions. To decide otherwise produces an absurd result …' ([34(vi)]).

Summary of court's decision on jurisdiction

The court determined that there was jurisdiction to hear J's variation application in respect of periodical payments and of lump sums ([34(iv)] and [34(xi)]), the court taking the view, based on its purposive interpretation of Schedule 1, that paragraph 1(5)(a) of Schedule 1 did not function so as to 'knock out' either aspect of the application, despite K having attained the age of 18 mid-proceedings.

The court further determined that it had power to backdate the periodical payments to the date of the application (although, for various reasons, it did not exercise that power), and to order that they endure to the date at which K ceases to satisfy the extension conditions in *Re N* [2009] EWHC 11.

More controversially, but 'without at all wishing to create more argument', the court opined that the situation was the same with respect to N. HHJ Everall QC had taken the view on the appeal that N could have made an application herself pursuant to paragraphs 6(5) and 6(6) of Schedule 1, to revive the periodical payments order, but N had chosen not to do so, and in her evidence J had repeatedly said 'this is not about N, this is about K' ([34(xii)]).

Substantive order

Having determined jurisdiction, the court traversed the guidance on the exercise of its discretion pursuant to paragraphs 4, 5 and 6 of Schedule 1, and considered the relevant case law (including *CB v KB* [2019] EWFC 78, in which Mostyn J stated that in 'top-up' cases the CMS percentages are the starting point up to a gross income of £650,000 ([37]).

The court commented at [39(iii)] that '[a]ny objective observer would be bemused and horrified' at combined legal costs of c. £600,000 in an argument about child support.

Having set out the financial position of each party, the court considered the medical evidence, determining that K's health was not such as to meet the relevant extension condition for disability. However, the court determined that K would attend tertiary education and extended the periodical payments order to the end of tertiary education to first degree level including (in effect) the gap year currently taking place, but stipulating that the periodical payments would not endure if K's tertiary education were to come to an end ([54]). They would be CPI linked.

The court ordered a lump sum of £5,000 to be paid directly to K, who could decide how to spend it, the court

having in mind computer equipment, tuition or counselling. Two further staggered lump sums in the low thousands, one for a motor car, the other untied, were ordered to be paid to J for the benefit of K.

Periodical payments would continue as payable to the mother for the benefit of K, but from the month K commences tertiary education they would be apportioned (save for a rental element) equally between J and K ([54]).

The court heard submissions as to costs, the 'clean sheet' rules applying, but was unpersuaded to make a costs order either way ([54]), despite heavy reliance being placed by L on a *Calderbank* offer. Having seen the offer, the court stated that this 'should be a lesson to judges to be very reluctant indeed to allow a case to proceed without an FDR' ([75]).

Notes

1 Practice Direction (Citation of Authorities) [2001] 1 WLR 1001.
2 Richard Harrison QC and Millicent Benson.
3 (Law Com No 118), 20 December 1982.
4 (Law Com No 172), 25 July 1988.

Domestic Abuse in Financial Remedy Cases

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Introduction

While domestic abuse is one of the issues currently at the top of the family law agenda,[1] it is not as prominent in financial remedy work as it is in children work and professional discussion is limited.[2] The absence of a practice direction for financial proceedings equivalent to Family Procedure Rules 2010 (SI 2010/2955) (FPR) PD 12J in child arrangements cases and the perceived high threshold for 'conduct' under section 25(2)(g) of the Matrimonial Causes Act 1973 (MCA 1973) have meant that domestic abuse may not be routinely considered in financial cases. While there has been very little research on domestic abuse in financial proceedings in England and Wales (or, indeed, anywhere else), the research that does exist suggests that issues of domestic abuse may be present in a significant proportion of financial proceedings, with approximately one-third of contested cases and one-quarter of consent order cases containing some conduct which amounts to domestic abuse.[3] Research has also found that financial proceedings may be used by an abusive spouse as part of an ongoing pattern of coercive control,[4] and that the outcomes of financial proceedings may perpetuate economic abuse.[5] A history of domestic abuse in the relationship is correlated with poorer financial outcomes for women, which in turn have long-term consequences for those women and their children.[6]

The aim of this article is to explore how family justice professionals working in the field of financial remedies can identify where domestic abuse may be present and the ways in which economic abuse and coercive and controlling behaviour may be relevant in such proceedings. In addition, we make a number of suggestions as to how family justice professionals should approach a financial remedies case when issues of domestic abuse might be raised. In light of recent developments primarily in the area of domestic abuse in private child cases, the article begins by considering the reforms introduced by the Domestic Abuse Act 2021 (DAA 2021), followed by discussion of some contextual issues.

Definition and scope of domestic abuse

DAA 2021, s 1 provides a statutory definition of domestic abuse. This has been incorporated into FPR PD 12J for child arrangements cases where domestic abuse is present. Section 1 provides a definition to be applied consistently in all areas of the law where the intention is to protect and support the victim. It covers a wide range of behaviours including physical or sexual abuse, violent or threatening behaviour, controlling or coercive behaviour and economic abuse (s 1(4)). While all forms of domestic abuse should be considered in financial remedy cases, coercive and controlling behaviour and economic abuse may be particularly relevant.

The DAA 2021 does not specifically define coercive or controlling behaviour, although it is further explained in FPR PD 12J, para 3:

> '"coercive behaviour" means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim;
>
> "controlling behaviour" means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.'

Economic abuse is further defined in DAA 2021, s 1(5), as 'any behaviour that has a substantial effect on [the victim's] ability to acquire, use or maintain money or other property, or obtain goods or services'. With economic abuse, abusers control their partner's access to money and finances and thereby limit their freedom and autonomy. This can include the abuser:

- Limiting the victim's access to money or information on finances, for example by:
  - telling the victim that they have no rights in relation to the matrimonial home;
  - holding all the family assets in their sole name;
  - refusing to discuss household income and expenditure with the victim.

- Having control of all household finances.
- Not allowing the victim to work, train or study:
  - thereby preventing them from becoming financially independent and being able to accumulate a pension for financial security in later life;
  - this, of course, has significant consequences upon separation and divorce when considering the emphasis on the parties becoming self-sufficient and finally independent of each other.
- Appropriating the victim's wages:
  - this can also include the abuser restricting their access to other income including welfare benefits.
- Controlling how money is spent:
  - including dictating what a partner can buy, closely examining their bank statements/receipts and requiring them to justify all purchases.
- Making the victim personally liable for loans or debts, coercing them into taking out credit cards, adversely affecting their credit rating, depleting their financial resources:
  - conversely the abuser may also not have told the victim when taking out loans or other debt.
- Refusing to pay bills leading to debt.
- Refusing to pay child support, or minimising their own child support liability.

Background and context

Over the past 2 years, there have been legal, research and policy developments covering a range of domestic abuse related issues. While the DAA 2021 introduced the new statutory definition of domestic abuse which includes controlling or coercive behaviour and economic abuse, there is a need to remain cognisant of the difficulties associated with recognising and approaching a case where allegations of abuse are made. For example, this issue was reflected in the Private Law Working Group report, which highlighted concerns amongst consultees about there being a low level of understanding of abuse, particularly the issue of coercive control, by some family judges and magistrates.[7] Limitations in the effectiveness of the family courts in identifying and responding to allegations of domestic abuse in private child cases were also identified by the Harm Panel in the Ministry of Justice's 2020 report.[8]

Recent case law has also highlighted these limitations, alongside providing some helpful pointers as to how the Family Court should deal with allegations of domestic abuse. The case of *Re H-N & Ors (Children) (Domestic Abuse: Finding of Fact Hearings)* [2021] EWCA Civ 448, albeit not a financial remedies case, provided an opportunity for the Court of Appeal to give some guidance on the issue by reiterating a movement away from the emphasis on specific 'incidents' of abuse, to a focus on the wider context illustrated by patterns of behaviour. The Court of Appeal criticised the judge for accepting the father's submission that the mother in this case had taken trivial incidents and blown them 'out of all proportion',[9] noting that the judge had wrongly characterised a slap to a heavily pregnant woman as 'trivial' because she had remonstrated with him for opening her private mail. Rather than being 'trivial', these incidents taken together appear to be clear indicators of coercive and controlling behaviour on the part of the husband. Furthermore, as Adrienne Barnett has noted, this case resonates with the findings of the Harm Panel that 'victims of domestic abuse are often judged according to idealised stereotypes of the "real" or blameless victim, which means that they are expected to behave in particular ways both in and outside the courtroom in order for their allegations to be taken seriously'.[10]

The difficulties for the judiciary in assessing the presence of coercive and controlling behaviour and potential issues of the 'idealised stereotype' of the 'blameless' victim, can be seen in the recent case of *Traharne v Limb* [2022] EWFC 27, where Cohen J considered the issue of coercive control in the context of a post-nuptial agreement. The court dismissed the wife's allegation of coercive control in this case noting that the parties' relationship was 'at times tempestuous' and the very different characters of the parties.[11] However, in this case, Cohen J did note how the approach in *Edgar v Edgar* [1981] 2 FLR 19 has stood the test of time, and that coercive and controlling behaviour is 'plainly an example of undue pressure, exploitation of a dominant position or of relevant conduct' when it comes to considering whether an existing financial agreement can be vitiated.[12]

Although these recent developments appear to reflect the increasing willingness of policy-makers and the courts to recognise the existence of coercive and controlling behaviour, they also emphasise the difficulties for the court in assessing whether such abuse has taken place. Given that research has suggested that approximately one-third of contested financial remedy cases within the court will have a domestic abuse background, it is imperative that consideration is given to the potential relevance of domestic abuse in financial proceedings especially where it may clearly be affecting the parties' positions and their ability or willingness to negotiate. In the sections that follow, we provide some suggestions as to how family justice professionals should approach and deal with this issue.

Identifying domestic abuse in financial remedy cases

In financial remedy cases, controlling or coercive behaviour may be manifested by the abuser's refusal to comply with orders or reach agreement; by the abusive party's refusal to engage with proceedings; a refusal by the abusive party to give disclosure, and/or deliberately prolonging the process of disclosing assets, or in the alternative, the abuser may appear to comply in proceedings but presents the victim as a liar or claims that they are exaggerating their situation.

Economic abuse may be manifested in efforts to exhaust the victim's financial resources by engaging in protracted court proceedings, and/or by making repeated and unnecessary applications which have the effect of prolonging proceedings and negatively affecting the other party both economically and emotionally; one party having limited access to money or to information regarding the other party's finances; one party being made solely liable for loans or debts.

In their initial and subsequent meetings with clients, family justice professionals should be alert to these potential flags. In the event that a legal representative becomes aware of any issue of domestic abuse of relevance to the case, but where they do not feel that the level of domestic

abuse meets the threshold under MCA 1973, s 25(2)(g) to be raised separately as a serious 'conduct' allegation,[13] then legal practitioners should be alive to the broad discretionary nature of s 25 and the statutory steer to 'have regard to all the circumstances of the case' in s 25(1). If a victim has been deprived of money or financial independence during the marriage, if they have been prevented from working or studying thereby preventing them from becoming financially independent, if their financial resources have been depleted, or if they have no or limited pension accrual due to economic abuse, then this speaks to their current circumstances and future financial needs.

The task for the judge is particularly tricky, given the reliance on paperwork only at the initial stages. At a first appointment hearing, the only papers the judge will have are the respective parties' Form Es and, if the parties have complied with directions a statement of issues, chronology, questionnaire, and Forms H and G. Therefore, possible indicators of domestic abuse for the judiciary might include:

- a mediation information and assessment meeting (MIAM) exemption due to domestic abuse;
- a non-molestation order or undertakings in force and identified on the Form E as other proceedings;
- allegations in filed material – statement of issues, questionnaires;
- a party requesting special measures (now known as 'participation directions' under FPR PD 3AA);
- one party being in receipt of public funding (although lack of public funding is not a contra-indication, given the low means threshold and the fact that not all victims will meet the evidential requirements for legal aid);
- a request that a party's address be kept confidential.

How to approach a financial remedies case when issues of domestic abuse might be raised – how proceedings should be conducted

If domestic abuse is of relevance or potential relevance, then the court should consider whether that may impact on the party's ability to participate fully in the proceedings. FPR Part 3A and PD 3AA require the court to consider whether either of the parties is vulnerable.

FPR 3A.2A provides that where a party is, or is at risk of being, a victim of domestic abuse, they will be considered vulnerable and therefore automatically eligible for available measures in family proceedings. The court must then consider whether it is necessary to make a participation direction. It will, however, remain a matter for the court to decide which of the available measures are necessary in the particular circumstances of the case.

In considering this, attention should be given to the fact that domestic abuse may also exacerbate other forms of vulnerability (such as mental ill-health, disabilities, learning difficulties or lack of English language skills), but it is also a factor that may create vulnerability in and of itself. In particular, the traumatic effects of domestic abuse may mean that the victim is unable to attend a hearing in close proximity to their abuser without significant distress, and may have cognitive and/or physiological difficulty concentrating or speaking if a traumatic reaction is triggered. A party may also feel inhibited or be intimidated from putting their views to the court in the presence of their abuser.

Participation directions apply as soon as possible after the start of proceedings and continue until the resolution of the case. The directions the judge can make are set out in FPR 3A.8. In cases raising issues of domestic abuse, the relevant measures will be those which:

> '(a) Prevent a party or witness from seeing another party or witness
>
> (b) Allow a party or witness to participate in hearings and give evidence by live link
>
> …
>
> (f) Do anything else which is set out in Practice Direction 3AA.'

The judge should consider making directions for screens or other measures such as video links or a hybrid hearing to ensure a party's safety or to prevent intimidation and minimise distress during the proceedings. If a party is to give evidence, the judge should consider what measures might be necessary in accordance with FPR PD 3AA, para 5. In November 2020, the Family Justice Council (FJC) published guidance on the practical considerations to be adopted to ensure safety and protection from abuse in all family proceedings where remote and hybrid hearings are being considered.[14] In particular, the FJC guidance provides an important checklist that should be used to decide upon the format of the hearing, including identifying any need for appropriate personal protection or additional measures.

A particular issue in financial proceedings, if both parties are in person and domestic abuse is present or considered as a risk, is how an effective Financial Dispute Resolution (FDR) hearing can take place. FPR 9.51(4) requires the court to refer a case to an FDR appointment unless: (1) there has been an effective FDR at the first appointment; or (2) there are exceptional reasons for making an FDR referral inappropriate. If the abused party or both parties are litigants in person, should they be expected to negotiate directly out of court in an FDR? Does this fall within the definition of exceptional reasons?

If the judge has already made a participation direction on the basis of a party's vulnerability, it would not be reasonable to expect that party to engage in negotiation with the other party out of court. The judge may decide to keep both parties in court for reasons of safety and security, but it may still not be reasonable to expect that party to engage in negotiations directly with the other party, or the judge may need to give a particularly strong indication to try to ensure the fairness of any agreement and that it does not perpetuate domestic abuse.

The judge should also consider how to deal with a situation when the other party refuses to negotiate and places the vulnerable party in a situation where a final hearing is the only option available. If a vulnerable person is to give evidence at a final hearing, then FPR PD 3AA provides that a ground rules hearing must first be held to give directions for their participation at the hearing.

The final order

In considering either consent applications or a final order following contested proceedings, the judge should bear in

mind that the experience of having survived an abusive relationship is likely to impact on the victim's future needs. If a party has been deprived of money or financial independence during the marriage, if their financial resources have been depleted, if they have limited or no pension provision, then their future financial needs will be increased accordingly. There is also a significant gender element to this.

Research has found that outcomes in financial proceedings are gendered, with women more likely than men to 'give up' on a fair settlement in the interests of pragmatism, good relations, self-preservation or sacrifice (prioritising the maintenance of peace and not 'provoking' the abuser over their longer-term financial well-being).[15] This has particular resonance when it comes to the issue of pensions. Victims of abuse may be reluctant to make a claim against their husband's pension for fear of repercussions, and when considered alongside the low number of pension sharing orders,[16] and the considerable wealth that may be placed in pensions, an awareness of the potential consequences of offsetting or being coerced into ignoring the pension for victims of abuse should be considered.

Concluding thoughts

Domestic abuse has the potential to affect all stages of financial remedy proceedings and pre-proceedings discussions with clients. Increased awareness of economic abuse and coercive control through, *inter alia*, the new statutory definition, should help family justice professionals to recognise where it has been a feature of the marriage and is ongoing during the divorce. This should hopefully enable practitioners to take steps to minimise the risk of financial remedy proceedings providing further opportunities for abuse.

Notes

1 This article is based on work undertaken by two of the authors as part of the Family Justice Council's Domestic Abuse Working Group. An earlier version of the issues raised in this piece was published in 'Domestic abuse in financial remedy applications' [2019] Fam Law 1440.

2 For some discussion of economic abuse from a practical perspective, see E Da Costa-Waldman, 'Economic abuse: its impact on financial remedy cases and how to manage it' [2021] Fam Law 1395 and R Christie, 'Economic Abuse and Divorce', *Family Law Week*, 2020, available online, at www.familylawweek.co.uk/site.aspx?i=ed213947

3 In a court file survey of 399 financial remedy cases in 2011–12, alleged conduct amounting to domestic abuse was described in the divorce paperwork in 25% of consent order cases and 38% of contested cases (E Hitchings, J Miles and H Woodward, *Assembling the Jigsaw Puzzle: Understanding Financial Settlement on Divorce*, Nuffield Foundation and University of Bristol, November 2013, 101–2). Given the fact that the divorce paperwork will not necessarily reflect a history of domestic abuse in the relationship, these figures are likely to be an underestimate. See also L Trinder et al, *Litigants in Person in Private Family Law Cases* (Ministry of Justice, 2014), where 35% of the financial remedy cases had evidence of domestic abuse either on the file or disclosed by a party in interview. All were wives and almost all were applicants in the financial remedy proceedings.

4 In A Barlow et al, *Mapping Paths to Family Justice* (Palgrave Macmillan, 2017), the authors found that screening in MIAMs had been inadequate and mediation had been inappropriately attempted in a number of financial cases involving domestic abuse. In one case, despite a history of physical violence and the victim having refused mediation, the judge ordered the parties to attend mediation to sort out their financial dispute.

5 R Kaspiew et al, *Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report* (Australian Institute of Family Studies and Australian National Research Organisation for Women's Safety, 2017) and B Felhberg and C Millward, 'Family Violence and Financial Outcomes After Parental Separation' in A Hayes and D Higgins (eds) *Families, Policy and the Law: Selected essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

6 See Kaspiew et al (n 5 above) and Fehlberg and Millward (n 5 above).

7 *President of the Family Division's 'Private Law Working Group'*, 2nd report, 2020, p 16.

8 Ministry of Justice, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report* (Ministry of Justice, 2020).

9 *Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearings)* [2021] EWCA Civ 448, [202].

10 M Burton, 'What can go wrong in child arrangement proceedings where there are allegations of domestic abuse?' [2021] 43(4) JSWFL 471, 473.

11 *Traharne v Limb* [2022] EWFC 27, [32]–[33].

12 *Traharne v Limb* [2022] EWFC 27, [27].

13 See *OG v AG (Financial Remedies: Conduct)* [2020] EWFC 52, [2021] 1 FLR 1105.

14 Family Justice Council, *Safety from Domestic Abuse and Special Measures in Remote and Hybrid Hearings*, November 2020, available online, at www.judiciary.uk/wp-content/uploads/2020/11/Safety-from-Domestic-Abuse-and-Special-Measures-in-Remote-and-Hybrid-Hearings-Family-Justice-Council-guidance.pdf

15 Barlow et al (n 4 above).

16 H Woodward with M Sefton, *Pensions on Divorce: An Empirical Study* (Cardiff University, 2014).

The Origins of the Financial Remedies Court – an Insider's View, Part 2

Sir James Munby

On 29 October 2018, the President announced that, following further consultation, he had given the 'green light' for the pilot to start working in each of the additional eight courts I had identified: *Financial Remedies Pilot extended* [2018] Fam Law 1610. As he commented in his first *View from the President's Chambers* in January 2019 [2019] Fam Law 26, 27:

> 'The new scheme … is working well in Birmingham and the West Midlands, which was the first pilot area, and I am confident that this will be a successful and popular development in the other areas which are now beginning to come on stream.'

On 29 November 2018, the Court of Appeal (Sir Andrew McFarlane P, King and Coulson LJJ) gave judgment in *Wodehouse v Wodehouse* [2018] EWCA Civ 3009. It was serendipitous that the happenstance of litigation should have brought this case – a second appeal from the decision of a deputy district judge in an ancillary relief case – to the Court of Appeal, including the President, just when it did. For, what can only be thought of as the amazing decision at first instance surely squashed once and for all the ridiculous idea, voiced by some close to the 'coal face' who ought to have known better, who had opposed the concept of the Financial Remedies Court (FRC) on the basis that it was all a matter of 'common sense'. The President was robust ([56]):

> 'Unfortunately, … this case did not receive an adjudication which met with the requirements of the law relating to financial relief. In short terms, the Deputy District Judge made an order which was simply not open for the court to make. I hope that this decision is evidence of the value of creating a Financial Remedies Court – which is currently being piloted – so that only judges who are recognised for their knowledge of, and experience in, financial remedies cases following divorce will, in the future, sit on cases of this type.'

In his next *View from the President's Chambers* on 7 May 2019, [2019] Fam Law 726, the President said:

> 'Reports of the progress of the Pilot for the Financial Remedy Court at Birmingham continue to be entirely positive. The Pilot is now being rolled out in a further nine areas and I have made it plain that I would be happy to approve its adoption in any additional areas which indicate that they are ready to do so … its potential to provide a professional and experienced court to deal with Financial Remedy work is a prize of true worth that should be readily achievable and available in all parts of England and Wales.'

On 20 June 2019, Mostyn J, as the National Lead Judge, issued an appropriately upbeat *Press Release* [2019] Fam Law 1085:

> 'I am delighted to draw attention to the successful extension of the Financial Remedies Courts project from its single original pilot zone (in operation since last year in Birmingham) to eight new zones … Lead Judges are in post in all zones. FRC ticketed judges have been identified in all zones. All zones are now operationally up and running, as planned … We are enthusiastically working on plans to develop the project. Our plan is to digitalise all financial remedies work and the necessary IT development is well under way, being in use in some areas with a plan to spread it rapidly and widely. We expect to make further announcements in the coming months to extend the project to geographical areas not currently covered … We plan to move the approval of financial remedies consent orders away from the Regional Divorce Centres to the FRCs as soon as this can be administratively achieved.'

On 7 November 2019, two important documents were issued, what one may think of as the founding constitutional documents of the FRC: *View from the President's Chambers, December 2019* [2020] Fam Law 162, 165. One was *Financial Remedies Courts: Good Practice Protocol*: see *At A Glance 2020–2021*, Table 19. The other, more significant for present purposes, was *Financial Remedies Courts: Overall Structure of the Financial Remedies Courts and the Role and Function of the Lead Judge*. It described the FRCs as having been established as a subsidiary structure working within the Family Court and explained that:

> 'For the operation of the FRCs the PFD has established geographical zones across England and Wales. The zones so far created are set out in the schedule below. It is anticipated that more will be created in due course. In each zone a FRC will operate.'

The schedule listed 11 zones as being in existence in November 2019, the nine listed in my announcement of 27 July 2018 being joined by two more: in all, London (CFC), West Midlands (Birmingham), East Midlands (Nottingham), South East Wales (Newport), Mid & West Wales (Swansea), Cheshire & Merseyside (Liverpool), Humberside & South

Yorkshire (Sheffield), Cleveland, Newcastle & Durham (Newcastle Upon Tyne), North & West Yorkshire (Leeds), Kent, Surrey & Sussex (Medway) and Greater Manchester (Manchester).

By the time *At A Glance 2020–2021* was published in May 2020 (see pp iv and 28), the roll-out of the FRC pilot had been completed, another seven pilot zones having come into existence, making a total of 18 covering the whole jurisdiction: Norfolk, Essex & Suffolk and Bedfordshire, Cambridgeshire & Hertfordshire (Peterborough), Thames Valley (Oxford), Bristol, Gloucestershire & Wiltshire, BANES & North Somerset (Bristol), Dorset & Hampshire (Bournemouth), Devon, Cornwall & South Somerset (Plymouth), North Wales (Wrexham) and Lancashire & Cumbria (Preston). In 11 of these 18 FRC zones the lead judge was a Circuit Judge; in the other seven zones a District Judge.

In his *View from the President's Chambers* on 18 November 2020 [2021] Fam Law 17, the President said:

> 'The Financial Remedies Court pilot has now been rolled out to all areas in England and Wales and is bedding down well as a regular aspect in the working of the Family Court. This is excellent news and all those involved are to be congratulated for taking up and implementing this project.'

On 24 February 2021, he issued his *Message from the President of the Family Division: The Financial Remedies Courts* [2021] Fam Law 469. He said:

> 'I am pleased to announce 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 FRCs have a clearly defined structure. The zones and membership of the courts are set out in a helpful organogram published by the Ministry of Justice … 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.'

The organogram listed for each FRC zone every judge authorised to sit in the FRC in that zone. Referring to what he had said in *Wodehouse v Wodehouse*, the President continued: 'The experience of the pilot project has vindicated my hopes'.

As the editors commented in *At A Glance 2021–2022* (pp iii and 33):

> 'No longer will the FRC be operating as an experimental scheme in a handful of pilot zones; it now covers the entire jurisdiction and its specialist judges will deal with all financial remedy cases from beginning to end … To have progressed from a mere idea in late 2016 to a permanent structure in early 2021 has been an outstanding achievement.'

The editors were too coy to suggest, so others must say, that so much of that outstanding achievement was due to the two national lead judges, Mostyn J and HHJ Hess.

Reporting on progress, the President said:

> 'Almost all hearings are now successfully conducted remotely by video. Electronic bundles are universally used.
>
> Consent orders are now all dealt with online, which has substantially increased efficiency. With effect from 15 February 2021, Forms A are to be issued at the zone hub rather than the regional divorce centre. Allocation will take place immediately and the case will find its way to the right judge in the right place without delay. In about half of the zones it is possible now to issue Form A and to upload all relevant documents online;[1] this will be extended to all the remaining zones in the coming months. I am expecting that online issue and filing will become the standard process before the year is out.'

To flesh this out a little.

In autumn 2018, a pilot had begun allowing *consent* order applications to be made and considered online; it was administered at the South West RDC in Southampton. In a joint letter dated 3 July 2019 from the President and HM Courts & Tribunals Service (HMCTS) to the judges and HMCTS staff, it was noted that:

> 'The pilot has proven popular with the solicitors and the judges taking part, and it has broken down the locational barriers for the judiciary that meant, all too often, there was an inadequate number of judges at the location where the work was. The judges involved can access the digital files and consider the applications from wherever they are working, all that is needed is access to the internet. The number of firms and judges taking part has increased significantly recently and the pilot is continually being improved based on feedback from those taking part.'

On 27 May 2019, a new pilot began allowing solicitors to make *contested* financial remedy applications online, now in the FRC hubs, starting with the CFC in London before being rolled out more widely: *Pilot for online filing and progression of certain applications for a financial remedy* [2019] Fam Law 866. The letter went on to announce:

> 'Within the financial remedy element of the project more releases will follow during 2019, which will see the whole process from application to final order digitised, and hearings supported by better software and equipment to view documents and bundles in the court room and produce orders and track compliance with them.
>
> Later this year, once both the consented and contested financial remedy products have been sufficiently tested and refined, they will be released to solicitors across England and Wales.'

On 24 August 2019, it became mandatory for represented *applicants* to file *consent* orders online at the FRC rather than in RDCs, with the orders being approved by FRC judges logging on remotely to the digital platform. With effect from 16 November 2020 these were moved administratively to a zonal based system. The represented *respondent* journey became live for financial remedy consent order cases in March 2021.[2]

In relation to the increasing use of modern IT, we should also note the *Financial Remedies Courts – e-bundles protocol* issued by Mostyn J on 3 March 2020 [2020] Fam Law 787.

The progress of reform did not come to an end with the President's announcement on 24 February 2021.

A working group was set up, chaired by HHJ Stuart Farquhar, lead judge for the FRC zone for Kent, Surrey & Sussex, and with a geographically diverse membership of judges at all levels of the judiciary and practitioners. It was tasked to examine the 'way forward' for the FRC. It

produced two immensely valuable reports: first, in May 2021, *The Financial Remedies Court – The Way Forward: A Paper to consider the future use of Remote Hearings in the FRC*; then, in September 2021, and with a more wide-ranging remit, *The Financial Remedies Court – The Way Forward: A Paper to consider changes to the Practices and Procedures in the Financial Remedies Court*. In his *View from the President's Chambers* on 12 July 2021, the President rightly applauded 'the enormous amount of time and effort put in by the members of the group in the preparation of these important pieces of work'. Both reports were published on 20 October 2021: [2021] Fam Law 1481.

The fruits of these vital endeavours were soon apparent. On 11 January 2022, Mostyn J and HHJ Hess, with the authority of the President, issued a Notice, to which were attached three documents, each dated 11 January 2022:

- *Statement on the Efficient Conduct of Financial Remedy Hearings proceeding in the Financial Remedies Court below High Court Judge level*: as the Notice explained, this was modelled in terms of structure, language and content on the existing High Court Statement:

  > 'That High Court Statement is now nearly six years' old and is generally considered to have stood the test of time well … In devising the final version of the FRC Efficiency Statement we have given full consideration to the views of [consultation] respondents, while at the same time endeavouring to reflect the recommendations of the Farquhar Committee and the principles in the High Court Statement.'

- *Financial Remedies Court: Primary Principles*: as the Notice explained, much material previously in the *Financial Remedies Courts: Good Practice Protocol* is now found in the new FRC Efficiency Statement. 'Therefore, the Protocol has been substantially abridged and renamed the FRC Primary Principles'.
- A revised version of *Financial Remedies Court: Overall Structure of the Financial Remedies Court and the Role and Function of the Lead Judge*.

The attentive reader will note that what were previously called Financial Remedies Courts are now called the Financial Remedies Court. Truly, this new court has come of age.

At the same time, on 13 January 2022, the up-dated *Financial Remedies Court Organogram* was published by HMCTS showing matters as at November 2021.

On 14 January 2022, Mostyn J, with the endorsement of the President, announced that a team of practitioners and judges led by HHJ Hess would be reviewing the standard financial orders. The ambit of the review is perhaps indicated by Mostyn J's comment that:

> 'The drafting of the money SFOs was completed in 2017 … There have been some amendments since then … but they have largely remained as they were first drafted. In the ensuing years they have become almost universally used in … money … cases; very few problems have been identified.
>
> But if this success is to continue the SFOs need to be kept up to date in a world of continuously changing events and developments. The Covid pandemic, Brexit, the increased use of electronic working methods, as well as developments in the substantive law, have all contributed changes which need to be reflected in the SFOs.'

The same day, the President circulated to all family judges an App – The Family App – designed by Johnson J, the Judge-in-charge of Live Services. The importance of this impressive tool in the present context is that it includes all the standard financial orders, and the software enables them to be easily populated and filled in. We are all much indebted to Johnson J.

As all this shows, nothing stands still. Wisely, if I may say so, the architects of the FRC and its lead judges recognise the need for a continual striving after improvement. And, if I may be permitted to suggest, they have ready to hand the tried and tested Farquhar Working Group which has already so convincingly proved its value.

What then of the future?

Recognising that historians are not seers, may I nonetheless be so bold as to identify certain topics that require early attention?

First, the question of remote working in the post-COVID-19 world. In the specific context of the FRC this has, of course, been considered in detail by the Farquhar Working Group, but there is, naturally, a much wider debate going on across all parts of the justice system. What the outcome of all this will be is not yet clear. On the general issue of remote-working, I venture to make four points:

- The idea that, once we have managed to put COVID-19 behind us, the courts will, or even can, expect to return to the status quo ante is absurd, tantamount to the idea that in 1946 the country could simply go back to how things were in 1938.
- We need a debate infinitely more subtle, analytical, nuanced and sophisticated than anything which, so far as I am aware, had occurred pre-COVID-19.
- We need to recognise, and this is crucially important, that the (sometimes complacent) views of professionals – judges, lawyers and others – are not always shared by litigants. Those designing systems for remote working in the post-COVID-19 world need to take into account the views of both professionals and litigants. The views of the two groups may differ and their interests may conflict. The decisions may be difficult, but that is no reason why the views of litigants should not be given great weight. After all, to put the point starkly: For whose benefit does the system exist – the lawyers or the litigants? Surely the latter.
- Lastly, we cannot assume that what is appropriate for civil cases will be equally appropriate for family cases; nor, within the family justice system itself, that what is appropriate for children cases will be equally appropriate for money cases. My own view, for what it is worth, is that it almost certainly is not. It is therefore vital that whatever model for future remote working is applied in the FRC is the one which best suits the specific needs and requirements of the FRC and its litigants.

Secondly, the pressing issue of transparency. In the context of the FRC, this has been brought to necessary prominence, first, by the publication on 28 October 2021 by Mostyn J and HHJ Hess, the FRC Lead Judges, with the authority of the President, of their *Consultation on a Proposal for a*

Standard Reporting Permission Order in Financial Remedy Proceedings, followed shortly thereafter and in quick succession by Mostyn J's judgments in *BT v CU* [2021] EWFC 87, [100]–[114], and *A v M* [2021] EWFC 89, [101]–[106]. For my own part, I unequivocally applaud these developments. Wisely, however, the decision has been taken to seek the views of the Farquhar Working Group before proceeding further.

Next, there is the important question of public and media access to judgments. There are two aspects to this.

First, is the fact that published and reported judgments from the FRC are overwhelmingly confined to those in 'big money' cases, whereas the vast bulk of cases in FRC are of much more modest proportions, and thus fall to be determined by a different approach, the focus being on meeting need rather than equal division. This means that perceptions and understanding of what the FRC is doing are seriously skewed. What is needed is the publication on BAILII (not necessarily reporting in a law report) of many more judgments in these more typical cases, including, I emphasise, judgments by Circuit Judges and District Judges. This is not because such judgments will usually constitute citable precedents (which is why I am not advocating that they be reported) but because it is important for the public to be able to see how the FRC is operating and because the publication of such judgments will enable litigants and their advisers to have a better 'feel' for how the judges are dealing with such cases.

Secondly, and building on such thinking, there is a vital need for a publicly accessible case-law database. The principle here is simple: key data from every FRC case should be collected and then presented, anonymised, in a standard format available to all. One thinks, for example, of the standardised case reports in *Current Law* showing the damages awarded in personal injury (PI) cases. Other examples which spring to mind are, for PI, *Kemp & Kemp*[3] and, for criminal law, the Sentencing Encyclopaedia.[4] Initially, this could be done manually but once there is proper IT the entire exercise can be automated. And proper IT would enable the database to be used, if desired, as a predictive tool. In response to feeding in the relevant data from the case, modern AI, which, like it or not, is going to play an increasingly important role across the justice systems (as the Master of the Rolls has recently been explaining), could produce an indicative answer as to what the court might do in a particular case.

I claim no originality for these ideas, which have emerged from a joint project of the FRC judiciary and the Law Commission.

In his *View from the President's Chambers* on 7 May 2019 [2019] Fam Law 726, the President said this:

> 'As I described in my address to the Resolution Conference, the development of the FRC should bring additional benefits, for example, by adapting the data that is captured on the D81 Form, providing a ready resource that records the basic features and outcome of every Financial Remedy case so that, within a short time, it should be possible to publish tables identifying in broad terms the "norm" for particular categories of case or commonly encountered circumstances.'

In his *Press Release* of 20 June 2019 [2019] Fam Law 1085, Mostyn J said:

> 'Recognising that reported cases often involve very big amounts of money not found in the normal run of cases, we are working, with the support of the Law Commission, on a unique web-based scheme to capture case final order data which in due course we hope will assist the achievement of consistency and predictability in mainstream financial remedies cases.'

This bold, exciting and innovative project, designed to maximise the use of modern IT, was further described in *At A Glance 2019–2020*, p iv:

> 'The FRC judiciary and the Law Commission have established a joint project to gather the essential details of every case decided finally by the FRC, whether following a hearing or a compromise. Should the idea come to fruition, an interactive form will be devised to be completed in every case. The data will be assimilated and published online and will be fully publicly available. The idea is that within a year or so, a statistically viable sample, amounting to several thousand cases, will have arisen to enable an understanding of what is being done up and down the country by first instance judges in the exercise of their powers. This will enable the development of principles bottom-up, rather than being handed down in completely irrelevant cases from the lofty heights of big-money disposals at High Court judge level. The data when published and analysed will likely lead to far more cases settling, and a freeing up of resources in the family justice system generally. It is a radical idea, whose time has now come.'

Amen to that. I could not agree more. Who could possibly disagree? Surely not the judges or practitioners in the FRC. Yet this has not been achieved. Why not? For from that point it all seemed to be downhill.

In *At A Glance 2020–2021*, p 31, we were told:

> 'The joint project of the FRC judiciary and the Law Commission to gather the essential details of every case decided finally by the FRC, whether following a hearing or a compromise, as referred to in the last edition, has proceeded slowly. It is hoped that progress will be made in the current year.'

In *At A Glance 2021–2022*, p 36, we were told:

> 'The joint project of the FRC judiciary and the Law Commission to gather the essential details of every case decided finally by the FRC, whether following a hearing or a compromise, as referred to in the last edition, has stalled. At present the focus is on devising a new Form D81 (Statement of information for a Consent Order in relation to a financial remedy), which will show clearly the financial positions of the parties both before, and following, implementation of the consent order. This new form will be the foundation for the development of the essential data collection tool for the joint project. It is hoped that the new form will be approved for use during the current year and that the joint project can then move forward.'

This was very dispiriting news. The Minutes of the meetings of the Family Procedure Rule Committee during 2021 provide fitful if far from reassuring illumination and indicate clearly enough the cause of the problem.

In a world where legal aid is unavailable for many who have to litigate in the FRC, and where many are thus compelled to act as litigants in person, a case law database would be an invaluable tool. Is it too idealistic to think that

it would enhance the administration of justice in the FRC while at the same time saving money – public money? I think not. Rapid implementation ought to be a priority, whatever the Ministry of Justice (MoJ) may think. That we are not further forward is, I am sure, not for want of energy on the part of the FRC Lead Judges. The responsibility, the fault, lies elsewhere.

Work on the revised Form D81 was in fact complete by the end of 2021. This was welcome news as was the 'workaround' for the absent IT announced by Mostyn J in 'Notes on the Launch of the *Financial Remedies Journal*' [2022] 1 FRJ 3, 4:

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

This is good news so far as it goes, but there has been too much delay. It is surely vital that the original project is resumed and driven forward with maximum commitment and energy.

This naturally leads on to wider IT issues.

An accessible process for court users using state-of-the-art IT and digital processes is both necessary and achievable. There are two aspects to this:

- One is the outward-facing process by which the litigant interacts with the court – for the future, online, rather than by post or email.
- The other is the back-office process (increasingly computerised and with little or no human input except where a judicial decision is needed) by which the court processes its cases and its orders.

The objective must be a system where applications to the court, court files and trial bundles are all electronic – where the FRC, in other words, is paperless.

We must harness the full power of modern IT in every part of the system. I draw attention to two key requirements:

- Electronic generation of orders using interactive electronic forms of order which enable some parts to be automatically populated and others to be completed using 'drop-down' boxes. What this means is that the electronic court files must be able to interact electronically with the electronic database of standard financial orders. The simple reality, as I have consistently proclaimed, is that we will achieve the full potential of standard court orders only if the necessary IT in place.
- Electronic generation of spreadsheets and other forensic tools from underlying case data.

This is all perfectly feasible, as the availability of commercial products so clearly demonstrates: consider the wonderful electronic tools provided by Class Publishing. And, thanks to Johnson J, The Family App enables the judges of the FRC to generate orders electronically. This is much to be applauded, but it only goes so far, for these tools are accessible only to the judges. They should also be made accessible to litigants, but the responsibility for that cannot rest solely with the judges. As described above, we have made great strides in making the FRC online and its processes electronic. But there is still much to be done before we achieve the vision I have outlined. I have no doubt that the necessary vision, commitment and urgency are not lacking in the judges and practitioners of the FRC. But are they to be found in Whitehall?

Next, proper accessibility to the FRC by its users and the public at large requires more than is currently provided by the 'official' websites, those provided by the MoJ, HMCTS and the Judiciary. These are better stocked and more easily searchable than previously (and I understand that work is currently under way to make further improvements), but they have their limitations. Crucially, there is yet, so far as I am aware, no single website providing free access, for anyone who wants it, to all the materials relevant to the FRC.

What is needed, I suggest, is a dedicated FRC website, controlled and managed by the judges of the FRC, containing, or providing links to, everything needed by a user of the FRC, professional or lay: for example, in addition to the proposed Guide to FRC, the relevant statutes, rules and practice directions, judicial guidance (whether issued by the President of the Family Division or by the Lead Judge in charge of the FRC), non-judicial guidance issued by the Family Justice Council (e.g. that prepared by the groups chaired by Roberts J and Francis J/HHJ Hess), forms, the Standard Family Orders applicable to financial cases, published judgments, and the case law database.

There is one final matter.

As I pointed out in my *View from the President's Chambers (17)* [2017] Fam Law 607:

> 'Ancillary relief is only one of the various types of financial remedy that are dealt with in family courts; others (see the definition in FPR 2.3) include claims under Part III of the Matrimonial and Family Proceedings Act 1984, claims under Schedule 1 to the Children Act 1989, claims under the Inheritance (Provision for Family and Dependants) Act 1975 and claims under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA).'

I went on:

> 'Surely what is called for is a system under which … all money claims as I have described them above are dealt with in accordance with a single set of rules providing, so far as possible, for a common form of application, a common set of forms, a common process and common procedure.'

But there was, as I observed, a particular problem which surely demanded a solution:

> 'There is, as most family practitioners are all too aware, an obstacle to the bringing of 1975 Act claims or TOLATA claims in the Family Court. Section 25 of the 1975 Act and section 23 of TOLATA confine the two jurisdictions to the High Court (which of course includes the Family Division) and the County Court (which is now, of course, an entity quite distinct from the new Family Court). These claims do not, usually, require to be dealt with in the Family Division; the Family Court is their natural home. Practitioners are

> driven to the stratagem of issuing in the County Court and then inviting the District or Circuit Judge to sit for this purpose in the County Court whilst at the same time sitting in the Family Court to deal with any related family money claims, eg for ancillary relief. This nonsense is exacerbated in places – the Central Family Court being the most prominent example – where the County Court and the Family Court and their associated court offices are in different buildings. I cannot believe that this was intended; my assumption is that the point was overlooked by the draftsman of Schedule 11 to the Crime and Courts Act 2013.
>
> The remedy could not be simpler. Section 25(1) of the 1975 Act requires that the definition of "the court" be amended by adding after the words "the High Court," the words "or the family court,". Section 23(3) of TOLATA likewise requires that the definition of "the court" be amended by adding after the words "the High Court, or (b)" the words "or the family court, or (c)". This simple solution was identified and recommended by Sir Michael Briggs, as he then was, in his report on civil justice reform. It was rejected, without any adequate explanation by Government for reasons which are unfathomable. Is it really too late for Government to reconsider? Or does the inconvenience of litigants and the administrative burden on HMCTS count for nothing?'

So far as I am aware, this was simply ignored. Government has provided neither an explanation of why this nonsense should be perpetuated nor any indication of whether, and when, it might be remedied. The best part of 4 years later, in his *Message from the President of the Family Division: The Financial Remedies Courts* on 24 February 2021 [2021] Fam Law 469, 470, the President remarked mournfully:

> 'I am hopeful that in due course legislation will be passed which will allow the FRCs to hear applications under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) and the Inheritance (Provision for Family and Dependants) Act 1975.'

We can be sure he is doing his best, but, noting that he speaks in the language of hope rather than expectation, it is difficult to feel optimistic. Sometimes – as here – one simply despairs of the seeming lack of interest and obtuseness of Government.

And what, at the end of all this, is the vision?

Key to this, as will be apparent from what I have already said, is the need to harness and exploit the most up-to-date IT.

My vision is of the FRC as a flagship for the modern 21st-century digital court, a court which has finally abandoned the paper processes more characteristic of the world of Dickens.

If I may be allowed to say so, the FRC is blessed with a gifted and determined judicial leadership, both national and regional; a dedicated corps of dedicated and enthusiastic judges; highly skilled and supportive professionals; and a national and regional structure which ought to be the envy of less fortunate parts of the system. With all that going in its favour, why should the vision not become the reality?

Notes

1 For the details of where online issue was possible, see the Table in *At A Glance 2021–2022* (Class Legal, 2021), p 33.

2 It should be noted that, at present, the online process is not available for financial claims on divorce involving applications for maintenance pending suit, a legal services payment order, a freezing order or other injunction or an order under section 37 of the Matrimonial Causes Act 1973. Nor for variation applications (unless the original order resulted from an online application), applications pursuant to Part III of the Matrimonial and Family Proceedings Act 1984 or Schedule 1 to the Children Act 1989, financial claims on divorce where personal service on the respondent is required (save for London FRCs) or applications requiring translation into the Welsh language.

3 *Kemp & Kemp: The Quantum of Damages* (Sweet & Maxwell, 4th edn).

4 *Current Sentencing Practice* (Sweet & Maxwell, 2021).

Getting Blood Out of a Stone – Handling the Uncooperative Ex-Spouse

Simon Rowe

Partner, Milsted Langdon

Sadly, what follows is not an uncommon scenario. Hotly contested divorce proceedings result in an order being made that requires one spouse to make financial payments to the other over a period of months or years.

Everyone breathes a sigh of relief that the worst is behind them, that they have achieved 'closure' and the parties can start to build their new lives.

But then the first payment does not materialise, legal advisers are re-engaged and strongly worded letters are sent. These are met with one (or a sometimes all) of the following:

(1) denial;
(2) claims of impecuniosity;
(3) attempts to challenge the original order (outside any permissible timescale); or
(4) a paltry part-payment.

Discussions are then held amongst the legal team representing the party that has not been paid what was ordered about what steps can be taken to force or coerce the defaulting party to comply. Clients typically express righteous indignation. After all, they reasonably ask, the court made an order – how can it be ignored?

Often, the affairs of the defaulting party can be complex, sometimes even purposefully opaque. After all, if the only asset was a large pile of cash in a bank account there would have been no need for the court to have ordered deferred, staged payments. In most cases in which I am instructed, the defaulting spouse will have an interest in a privately owned and operated business to which a significant value will have been ascribed by a single joint accountancy expert in the divorce proceedings. The million-dollar question is how that value can be 'unlocked' and realised without cooperation from the defaulting party.

This is where a court appointed receiver can help. Section 37(1) of the Senior Courts Act 1981 states that:

> 'The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.'

Sub-section 6 goes on explicitly to state:

> 'This section applies in relation to the family court as it applies in relation to the High Court.'

This sub-section was added by the Crime and Courts Act 2013, which also made available to the Family Court a number of powers that had previously been the sole preserve of the High Court.

Appointing a receiver over someone's assets (whether in family proceedings or otherwise) is clearly a draconian step. The court recognises this by making such appointments only where it is satisfied that to do so will not cause disproportionate damage to the person against whom the order is made or to any other stakeholders.

As a consequence, it is rarely appropriate to use this form of application as a first step to recover funds and other more traditional remedies should be explored first. In most instances, an order to appoint a receiver will not be granted at the first application. Instead, the court will typically give the defaulting party a period of time to comply and make good any shortfalls, on the basis that failure to do so within the prescribed timescale will result in the receivership appointment being made.

Often the mere threat of a receiver's appointment is sufficient to make the defaulting party 'see the light' and comply. However, sometimes it is necessary to go further.

So, if one can satisfy the court that a receivership is a proportional remedy and the defaulting party is sufficiently intransigent that the threat of an appointment has been insufficient, one needs to consider how a receivership can be implemented in practice.

The key advantage of a court appointed receivership is flexibility. The two short statutory provisions quoted above comprise a significant proportion of all the legislation that exists on the subject. Unlike collective insolvency regimes such as bankruptcy and administration, there is very little by way of a prescriptive framework of complex statutory regulation.

This means that, when considering applying for the appointment of a receiver and preparing the draft order, careful consideration needs to be given as to what strategy the receiver should be encouraged to adopt, what assets can be most easily realised and what powers the receiver will need to achieve these realisations. It is therefore crucial for the legal team to liaise with the prospective appointee at an early stage and to select an insolvency practitioner experienced in court appointed receiverships. This will ensure that the order by which the receiver is appointed is drafted so as to provide the relevant provisions to allow an efficient implementation.

Often, the assumption is that the asset with the biggest value attributed to it is the most important. While one would never want to exclude the big-ticket items, it is important not to be too blinkered in selecting the assets over which the receiver is to be appointed. In my personal experience, there are a couple of things I have found it important bear in mind when considering what assets to include within the terms of the order.

First, one should not be limited simply to those assets listed in the original matrimonial order. Just because the court might have originally stated that a particular asset was to be retained by the defaulting party or transferred to the other party as part of the financial settlement, that should not restrict what assets are listed as those over which the receiver is to be appointed. Consideration should also be given to the possibility that new assets exist at the time of the appointment of the receiver that did not exist at the time of the original court order, perhaps because they have been acquired subsequently.

Secondly, sentimental value should never be overlooked. The threat of the loss of an asset to which the defaulting party attaches significant emotional value can sometimes be more persuasive than the threat of losing an asset of greater financial value. It is important to bear in mind that the purpose of the receivership application is primarily to coerce the defaulting party into compliance with the terms of the original court order rather than to achieve a realisation of assets per se. The receiver may be given wide-ranging powers by the court, but sometimes the best outcome can be one in which they never have to use them because the threat of doing so is sufficient. If, ultimately, they do have to implement the terms of the order by which they are appointed, things can get costly, complicated and, depending on the nature of the assets that are being realised, prolonged. For that reason, the threat of the loss of assets of high emotional value (even if, in the grand scheme of things, they are of relatively low financial value) can be dramatic, encouraging the defaulting party miraculously to 'find' the money that was previously said to have been unavailable.

Examples of assets to which I have found defaulting parties tend to have emotional attachments include yachts, classic car collections and even antique shotguns. The proceeds from their realisation may be insufficient to make a huge dent in the amount outstanding, but they are capable of being sold far more quickly than some other categories of asset such as shares in privately owned businesses or assets in foreign jurisdictions. If the receiver's first step is to realise the assets with the greatest sentimental value, this also 'brings home' to the defaulting party the reality of the receivership and the futility of continued default.

The flexibility of the receivership process comes at a cost. Appointments under the Insolvency Act 1986 are governed by reams of detailed regulation and legislation. By contrast, the lacuna of detailed statutory provisions that govern the appointment of a court receiver means they only have the powers that are specifically and explicitly granted to them by the terms of the court order by which they are appointed.

For that reason, it is vitally important that there is close liaison between the prospective receiver and the legal team that represents the party on whose behalf they will be appointed. The previous experience of the prospective appointee will be crucial. In virtually every receivership that I have ever done, I have learned something new that has been factored into future cases. In my experience, there is no better example of work in which one should expect the unexpected.

A prospective receiver with relevant experience should be able to provide helpful insight as to what provisions should be included in the court order by which they are to be appointed. This will vary depending on the assets and circumstances but, critically, it will need to include the following:

(1) Detail of the assets over which the receiver is to be appointed. While draft orders often include a 'and all other assets belonging to the debtor' clause, this is usually hotly contested so it is crucial to be clear as to precisely which assets are to be subject to the receivership.
(2) Explicitly stating that the receiver has the power to deal with, sell, rent or leverage security against those assets.
(3) Where one of the assets is something that confers additional rights or powers, most notably in the case of shares in an unlisted company, explicit provisions which make it clear that the receiver shall also be entitled to exercise those powers.
(4) Provisions as to the basis on which the receiver is to be remunerated. This is obviously of keen interest to me as a matter of self-interest, but receivers are commercial animals and we will generally tend to be more proactive if there is a reasonable prospect that we shall eventually be paid.
(5) Last but by no means least, just because the course of a receivership tends to be uncertain, it is vital to include the power for the receiver to be able apply to the court for directions if they see fit.

I have touched upon the issue of the receivership's costs above, but it is important to provide more clarity on this issue which is always, quite understandably, a matter of keen interest to the person on whose behalf the receiver is to be appointed. As I have said above, the court has huge discretion in receivership matters generally, and if it has been persuaded that the behaviour of the defaulting party is so egregious that appointing a receiver is a proportionate remedy, then it is typically relatively easy to obtain an order that provides for the defaulting party to bear the costs of the receivership in full. The court will normally expect the receivership application to set out the anticipated costs of the appointment in order to ensure that they are not

disproportionate. Needless to say, the issue of costs and who is to be responsible for them should be made explicit in the court order as well.

As I hope the foregoing comments have demonstrated, the appointment of a receiver can be a hugely powerful remedy where the progress of the implementation of a family financial order has stagnated. However, in my experience often its true potential comes not from selling off assets, but from the power of persuasion and incentivisation.

Clearly, having a third-party appointed over one's assets is not something that anyone would relish and the stark prospect of an imminent loss of control tends to encourage serial defaulters to reappraise their decisions. This is not least because those who ride roughshod over the court process tend to be those who most need to feel in control.

In my experience, this is often crucial. For example, in a recent case, while I was appointed over all of the former husband's assets, I never actually needed to sell any of them. The mere fact of my appointment and the effect that it would have on his life and business was sufficient to cause him to make payment to the former wife in full settlement of all the outstanding awards, including those for costs and interest.

Another fringe benefit is that the receiver is an officer of the court and therefore has a position of impartiality, which can be tremendously helpful in unlocking even the most intransigent situations of deadlock.

I have mentioned a few times in the paragraphs above the issue of an appointment of a receiver over shares in businesses. In many proceedings in which I am involved these are the most significant asset by value, but they are also the hardest to realise. If a receiver is appointed over the shares, clearly they have the power (assuming a correctly worded order) to sell them. The problem is the pool of people brave enough to buy them, for anything like market value, is naturally limited by the circumstances. Few buyers rush for the chance to acquire a business in the face of opposition from the person who was, until recently, at the helm and who will be hell-bent on doing all they can to sabotage it if they are ousted from it. Matters are typically made worse because few business owners are subject to any sort of restrictive covenant and are therefore free to compete immediately with any buyer without restriction.

In most of these cases the defaulting party is also the managing director of the company over whose shares the receiver has been appointed, if not the sole director. A single joint accountancy expert may well have valued the company at a significant sum, but that valuation will always have been predicated on there having been a willing buyer and a willing seller. In a receivership the seller is typically far from willing and will be very unlikely to assist in the smooth transfer of trade that is assumed in any open market valuation. However, this does not mean that the shares cannot be sold. If necessary, shareholders can exert huge influence over the company and the defaulting party. For example, they can reduce or refuse to approve directors' remuneration and they can remove directors from office or appoint new ones. All of this can pave the way for taking control of the business ahead of sale should no other outcome be possible.

Lastly, having explained what a powerful remedy receivership is in the family lawyer's toolbox, it is important to end on a note of caution. Often, when I am dealing with complex high value estates there are assets located outside the United Kingdom. This is not necessarily a problem and often applications can be made for the receivership to be recognised by local courts in the foreign jurisdiction so that they can deal with the overseas assets. However, in some jurisdictions this can be less than straightforward, especially where local courts place significant emphasis on the distinction between a process that is intended to recover funds for one specific creditor and collective recovery actions, such as bankruptcy, which are processes intended to recover funds for a wide class of creditors.

This is yet another reason why the planning stage is vitally important to ensure that receivership is appropriate and can be implemented to best effect.

Mltpl: A New Business Valuation Tool

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Business valuation expert
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Ben McGeoch
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and Director, Mltpl

Introduction

Business valuations are often associated with high costs, long delays and, in many instances, subjective analysis and unsupported conclusions. Inevitably, questions arise as to their utility, given their inherent fragility.

It does not have to be this way. Mltpl is a new automated business valuation software that uses cutting edge and market leading technology to produce accurate and reliable valuation reports at the click of a button. Reports that are generated in minutes, not months.

In this article, we provide an overview of Mltpl: how it works, its demonstrated ability to outperform other valuation methods and the exciting potential for its use in family law cases. Specifically, we discuss:

(1) the market approach, a common valuation method adopted in financial remedy proceedings, and the necessary steps that should be taken, but are all too often overlooked, when performing reliable analysis;
(2) the approach that Mltpl adopts when performing its valuation analysis, including a description of the machine learning methods that it employs to analyse upwards of 30,000 pieces of relevant financial information;
(3) the extensive testing that the Mltpl team has performed, consistently providing the assurance that Mltpl performs in line with the views of other experts, and often outperforms the methods they commonly adopt; and
(4) the exciting possibilities that Mltpl creates for valuations performed in family law cases, from providing an accurate indication of the value of a business asset at the very beginning of the disclosure process, to cross-checking representations made during proceedings, allowing for efficient and effective historical valuations to be performed instantaneously.

Business valuation: what good looks like

The most common valuation method adopted in financial remedy proceedings is the market approach. As summarised in the *International Valuation Standards* (IVS), an authoritative text published by the International Valuation Standards Council (IVSC),[1] the market approach relies upon a comparison being made between the subject company that is being valued to other sufficiently comparable businesses for which price information is available.

Using this approach, valuations are performed by reference to valuation multiples such as Enterprise Value (EV) to Earnings before interest, tax, depreciation and amortisation (EBITDA),[2] where the EV/EBITDA multiple is assessed by reference to the observable EV/EBITDA multiples of other listed companies. They key issue here, however, is ensuring that the EV/EBITDA multiples of the other 'comparables' upon which the calculation is performed are for companies which are sufficiently similar to the subject company being valued. Such analysis can be performed in a variety of ways, but the starting point should always be a clear and objective set of criteria to identify a group of potential peer comparables, by reference to, say, geography, industry and size.

Despite the clear guidance provided in the IVS (and other valuation texts), many valuers give scant evidence or analysis for their choice of multiple. Unsubstantiated comments such as 'in my experience' and 'multiples typically trade at between X and Y' are commonplace, and frequently lack any underlying analysis. Indeed, it is rare to see a discussion of the factors which valuation theory states are critical to the assessment and calculation of a valuation multiple, such as profitability, size and growth.

This is particularly surprising given the effect that the valuation multiple has on any market approach valuation. By way of example, a valuation multiple of, say, 5x, assessed by reference to the expert's 'experience', as compared to a valuation multiple of, say, 7.5x, estimated by reference to peer comparables and comparisons of growth, profitability and size, leads to a difference of 50% in the assessed EV.

The next step in performing a market approach valuation is the application of the valuation multiple to a corresponding earnings figure. In the case of an EV/EBITDA multiple, one would multiply the EV/EBITDA multiple by an assessment of the subject company's EBITDA to calculate an EV. However, unlike with the calculation of a reliable valuation multiple, many of the adjustments required when assessing a business' maintainable EBITDA are subjective and easy to adjust for. Indeed, it is common for arguments to arise over whether a percentage adjustment should be

made to a company's earnings figure to reflect issues of past performance or expected future performance.

Fortunately, the mathematical mechanics of such adjustments are straightforward, and, armed with the relevant starting figures, legal teams and counsel are well placed to make any required adjustments when performing a valuation calculation. And that is exactly the position that Mltpl places its users in, by providing a robust and accurate assessment of a contemporaneous valuation multiple, as at the relevant valuation date, and an initial estimate of maintainable EBITDA, based on recent historical financial performance.

Algorithmic consistency, assured objectivity

In contrast to the vague and noisy approaches that are sometimes adopted by valuation experts, Mltpl ensures algorithmic consistency, time and time again. In fact, when an Mltpl report is requested, Mltpl's technology actually runs nine separate valuations. These include valuations based upon the factors outlined above in respect of the key determinants of an accurate valuation multiple by reference to valuation theory, but also the valuation multiples of other comparable businesses by reference to the subject company's industry.

Then, in addition, to these methods, Mltpl employs cutting edge artificial intelligence and machine learning methods to analyse vast quantities of relevant financial data to fit otherwise unspotted patterns to the observed valuation multiples of listed businesses. In other words, Mltpl allows for empirical observations to be made in a robust and repeatable manner to the data of thousands of listed companies and then applies these to the subject company being valued, based on its own specific circumstances and financial performance. This novel approach allows for Mltpl to gain insights far beyond the conventional approach to valuation analysis.

The next step in Mltpl's analytical journey is the application of continually refined weightings to the nine separate valuations it performs, allowing for an accurate overall prediction to be made of an appropriate valuation multiple for the subject company, consistent with valuation theory and large amounts of data analysis. As we discuss in further detail below, this approach allows for the Mltpl team, via its continuous and extensive testing of Mltpl's technology, to refine gradually the weightings it adopts to ensure that Mltpl's predictive power is always optimised.

Perhaps best of all, not only is Mltpl's valuation approach both reliable and accurate, but it also offers guaranteed objectivity. There is no switch to tell Mltpl to perform a valuation for either husband or wife. The valuation is performed in exactly the same way, with the same assumptions being made, regardless of which party requests the report. This factor cannot be overlooked, as many of you will have first-hand experience of valuations performed solely for the purpose of litigation, prepared either by the business owner's accountant or internal management team with questionable assumptions. Mltpl cuts through all of this. It is completely impartial.

Testing like never before

It should be emphasised that the valuation of private companies is a difficult and challenging task, in part because the aim is to estimate an unobservable quantity. While the valuation of shares in a publicly listed company is elementary, one simply observes the share price and that is the answer, no such index exists for private companies and suitable valuation approaches, such as those as summarised above, are therefore required.

However, and as a consequence, it is also difficult to assess the reliability of valuations performed by business valuers. Indeed, the 'acid test', as referred to by Lewison LJ in *Versteegh v Versteegh* [2018] EWCA Civ 1050, [185], is for the subject company to be exposed to the 'real' (i.e. open) market and sold. Yet such an approach is, for obvious reasons, impractical and rarely seen. This is not the case for Mltpl, as its technology allows for it to be tested extensively against thousands of listed companies on a regular basis and for its performance to be assessed.

To put this in context, Mltpl is tested monthly against two valuation methods commonly adopted by other valuation experts. Mltpl has, for a period of over 2 years, consistently outperformed these approaches, often to a large degree. The accuracy improvement over these other methods is shown in Figure 1.

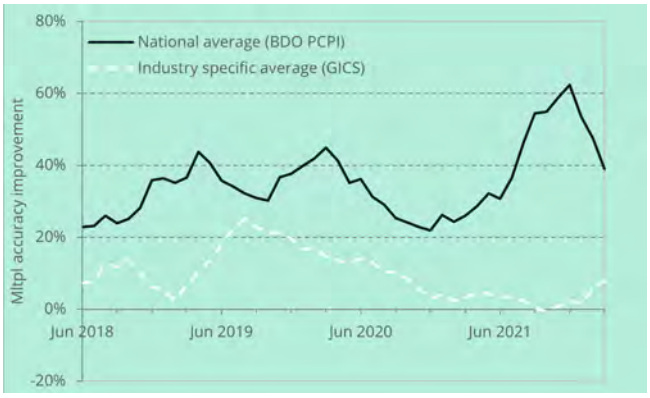

Figure 1: Mltpl accuracy improvement, compared to other valuation approaches

In addition to this comprehensive testing against observable, empirical data, Mtlpl has also been demonstrated to perform in line with valuations performed by other valuers. This is summarised in Figure 2, which shows the valuation multiple range predicted by Mltpl (the white bars) and the valuation multiple adopted by the valuer (the blue line) in 13 (anonymised) cases.

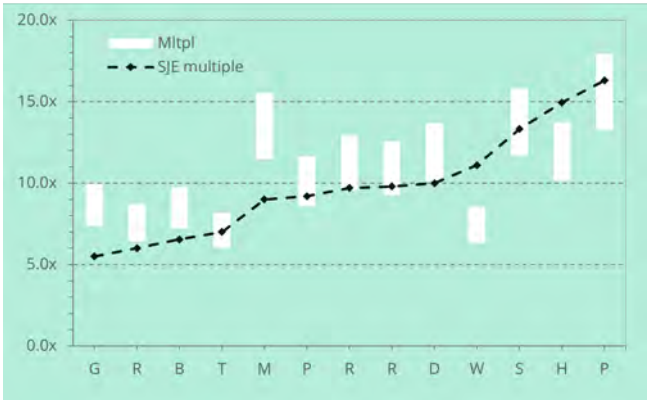

Figure 2: Comparison of Mltpl to anonymised expert valuation reports

As Figure 2 shows, Mltpl regularly performs in line with the valuation conclusions reached by the human valuer. The difference being that Mltpl does so instantaneously and at a fraction of the price, as compared to the 3 months and multi-thousand pound fee for the human valuation. However, Figure 2 also highlights that Mltpl does not always agree with human valuers. We do not consider this to be a deterrent to its use, but rather a reflection of the myriad purposes for which valuations are performed, as well as their associated quality.

By way of example, in case 'M' in Figure 2, the valuation disclosed by the business owning party was prepared by their own accountant, and contained material flaws in the valuation method adopted. It is, therefore, perhaps unsurprising that the resulting valuation was lower than what would otherwise have been assessed, as illustrated by the prediction made by Mltpl of a significantly higher valuation multiple.

Likewise, when comparing the associated costs of the 13 valuations analysed in Figure 2 with the conclusions reached, we observe that, in many instances, the reports for which the costs are the lowest (i.e. less than £5,000) diverge most greatly from the predictions made by Mltpl. As we note above, we consider Mltpl's consistent application of an objective methodology to be a huge source of assurance for the benefits offered by Mltpl.

Mltpl, a significant step towards efficient and cost-effective litigation

The benefits of rapid and reliable business valuations in financial remedy proceedings are obvious and apparent. You do not have to cast your mind back far to remember a time when expensive accountants were instructed to perform maintenance capitalisation calculations using *Duxbury* tables. Whereas now, automated Capitalise calculations are universally accepted when estimating a lump sum referable to a given level of income and a set period of time. Mltpl offers a similar advancement for family law cases, where a business valuation is required.

Its application to financial remedy cases need not stop there, however. Mltpl's ability to instantaneously deliver accurate and reliable estimates of a business value opens a number of new avenues for how its output can be used, for example:

(1) providing robust support for an estimate given in a Form E;
(2) as a cross check of representations made by the other side in respect of their views on a business value; or
(3) as an initial estimate with which the parties can begin negotiations and progress the case, without any of the delay previously associated with directions at first appointment, including instructing a single joint expert, the time taken for them to request information, arguments about what information can be shared, and the costs attaching to all associated correspondence.

Mltpl also provides a helpful hand to many of the pragmatic approaches adopted by the Family Court to assess a value that is fair for a company at some time in the past. Specifically, Mltpl's technology allows for a historical valuation to be performed at any point in the past, subject to the availability of data, thus allowing for an efficient and cost effective estimate to be made that avoids any valuation theory 'heresy' (see *E v L* [2021] EWFC 60 (Fam), [56]) which can be added to the cannon of available evidence when assessing how to divide up any matrimonial accrual over the course of a relationship.

Fundamentally, Mltpl allows for all parties throughout the process, and right from day one, to be empowered with the knowledge that an accurate and reliable valuation estimate provides. The days of delay and unnecessary costs are over.

Conclusion

In short, Mltpl provides high quality and reliable business valuation reports instantaneously and it is our hope that Mltpl can, finally, see an end to 'arid, abstruse and expensive black-letter accountancy valuations' in financial remedy proceedings (*WM v HM* [2017] EWFC 25, [16]).

Notes

1 *International Valuation Standards*, Effective 31 January 2020 (International Valuation Standards Council, 2019).
2 There are a large number of other, alternative valuation multiples that can be adopted, but EV/EBITDA multiples have the advantage of being unaffected by individual company decisions in respect of funding and subjective accounting policy decisions.

Dodgy Digital Documents: Where Are We Now? Where Are We Going?

Helen Brander

Pump Court Chambers

In the sun-kissed, halcyon days of late 2019 when Brexit had not yet taken effect and a corona was a halo of gas seen around the sun during an eclipse, a fevered discussion was taking place on Twitter between family lawyers regarding the increasing frequency with which we were seeing manipulated digital documents and recordings in family proceedings. In 2019 and 2020 this discussion prompted articles,[1] a podcast with me, Byron James of Expatriate Law, and Ben Fearnley of 29 Bedford Row,[2] and a seminar with District Judge Devlin of Oxford Family Court.[3] The issue was also discussed by me and Byron James with Joshua Rozenberg on BBC Radio 4's Law in Action.[4] Those of us interested in the issue thought we had shouted loud enough for all to hear and for lay clients, lawyers and judges alike to be aware of the issue and what to look out for. It appears that we were wrong.

I was recently asked to speak again on the topic to a collection of judges, and the reactions of horror and incredulity from the audience that met my talk prompted the Chair of the Editorial Board of the *Financial Remedies Journal*, who was also in attendance, to ask me to write an article updating the position. So, where are we now?

The increased use of digital documents during and post the COVID-19 pandemic and their exploitation

Prior to March 2020, only a select few family and private client barristers and solicitors used and were familiar with digital documents and bundles to conduct their practice. It remained the norm to use paper copies and originals of documents and bundles. The need to work from home and the belief that the novel coronavirus was transmitted through droplets which would fall on documents and remain contagious meant that all institutions made far more use of modern technology, first scanning hard copy documents, so converting them into portable document formats (PDFs), then moving to downloading documents directly from websites as PDFs and saving them or otherwise 'printing' them as PDF documents. Coincidentally, at the same time in the Family Division of the High Court and in the Family Court, Mostyn J was pursuing compliance with the *Financial Remedies Court Good Practice Protocol* of 7 November 2019 and, on 3 March 2020, sent out an e-bundles protocol permitting the use of e-bundles with the court's permission and directing how those bundles should be prepared.[5] I believed that, as practitioners became increasingly familiar with digital documents and how commonly available software could be used to manipulate them (since that is what we do when we create e-bundles), practitioners would be less surprised with the ease by which an opportunist would be willing to amend documents to suit their case in court, but it appears that there are many of us who remain unaware of the problem.

The COVID-19 pandemic and remote working has given rise to another issue, namely that where all documents are now digitised in solicitors' files, there is a temptation, frequently indulged, to transfer to counsel and/or to the court all the papers available in any one case. In that way, the solicitor can be sure that nothing that needed to be passed on has been missed. The effect can be that in the limited preparation time available for any one case, when trying to read all the documents provided (sometimes many thousands of pages), some may be skim read (in a bundle of up to 500 pages they would be properly considered), and discrepancies can be missed.

In my experience, we remain far too trusting to accept the contents of documents for the truth of what they say. We do not scrutinise for inconsistencies with sufficient rigour. We often do not have the time or facility to be able to do so. As practitioners and judges we are expected to pick out the most important points of an argument or a document and concentrate on them. In doing so, we ignore apparent or supposed peripheral issues, such as the state of, kemptness or wording of any particular document, and it is this ignoring that manipulators of documents exploit.

What can be manipulated and how?

Documents

In my earlier articles I explain how digital documents can be manipulated (including those from institutions such as

pension funds, banks, local and central government, employers, etc). The likely manipulator can do it in a number of ways:

(1) downloading documents from those institutions and, providing they are not protected by significant security (and they often are not), opening them in Microsoft Word, Google Docs or a similar program and re-writing them with the content they want to show;
(2) if they cannot be manipulated due to security settings (more frequent now than 2 or 3 years ago), then they can be printed with a good quality colour printer (inkjet will do) and then scanned into a digital format and manipulated thereafter;
(3) editing those documents in Adobe programs, such as Acrobat Pro, which can be downloaded and used free of charge for a trial period, or otherwise costs only around £15 a month. Adobe programs try hard to replicate the flaws already present in a digital document and will try to match fonts, including proprietary fonts, of documents. NatWest, for example, uses a proprietary font in its communications, and Adobe programs will automatically try to match that font with something so similar that it is unlikely to warrant any scrutiny;
(4) presenting amended spreadsheets of, for example, bank statements or otherwise micro-fiche-style documents of historical bank records, which are easily manipulable in Microsoft Excel or similar spreadsheet program;
(5) taking photographs of documents and editing them on a smart phone or tablet. Litigants in person frequently provide photographs rather than direct downloads of documents, so they are photographs of copies.

If a likely manipulator is not familiar with these tools, but is determined to present false documents, there are companies on the internet that will provide you with 'novelty' documents for a fee, all of which look completely real (see Figures 1 and 2).[6] All of the sites come with disclaimers as to fraudulent usage of these documents, but they are also providing these documents for people to overcome, for example, money laundering checks (relevant for Know your Client protocols) and to provide proof of points in court or other formal proceedings.

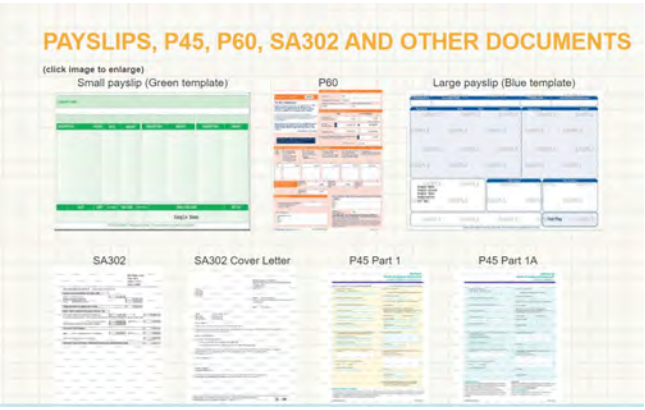

Figure 1: Sample documents

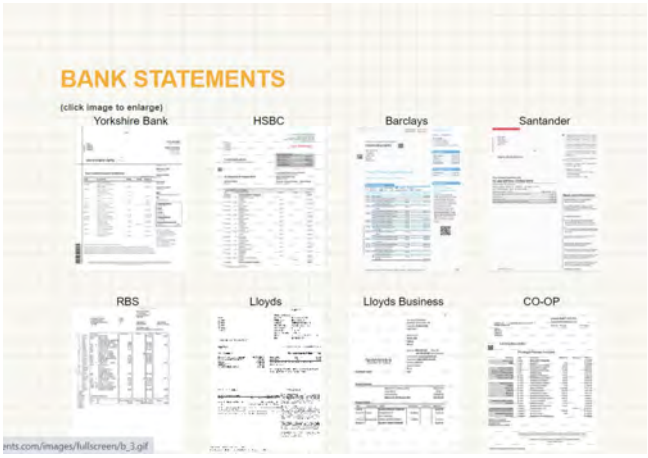

Figure 2: Sample bank statements

Audio and video recordings

It is not just documents that can be easily manipulated. Byron James has had a case in which a mother had manipulated the contents of telephone calls and audio recordings of her former partner taken over a number of years, so that a telephone call shown to have taken place at a particular date and time from both parties' telephone records and supposedly recorded by the mother, included clear and obvious direct threats of violence to her from him.[7] The fraudulent evidence was only ascertained after the father insisted he had never said such things, and the recording of the telephone call was analysed. It transpired that the mother had used easily available smart-phone editing software and online tutorials to create that recording.

Again, if one is not sufficiently competent to make use of that software, then one can send out recordings to online companies with a brief to create a realistic 'deepfake'.

The availability of powerful and complicated computer technology in smartphones and dash cams has made it possible for everyone to record everyone else all the time. How many of us have video and audio recordings of our friends, family and strangers? All of these electronic files can be manipulated and edited by easily available means and a little bit of time, so that one has an apparently original file.

In short, false representations can be very easily made. Courts and representatives need to be alive to the problem. It is surely more frequent than it was when one only had Tipp-Ex or scissors and Sellotape to edit documents.

How does one identify a fake document?

First, one needs to listen to one's clients. Lawyers and judges should be prepared to listen to complaints when one party insists that what the other says cannot be true, or that their document or recording should not say what the representor says it does.

Secondly, always ask for the original version or download of a document. Electronic documents will have, in the information/properties tab of each document, details of who created it and when. If the document is a direct download from a banking institution, for example, the institution should show in the properties as the creator of the document (see Figure 3). The metadata under properties of a downloaded NatWest bank statement shows that the

creator is NatWest. The additional metadata tab will take the scrutiniser to data that provides details of what the actual document is and when and how it was amended (see Figure 4).

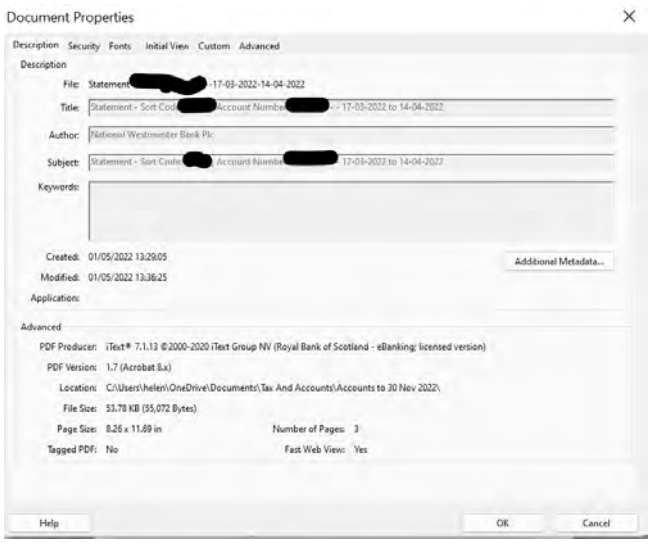

Figure 3: NatWest document properties – description

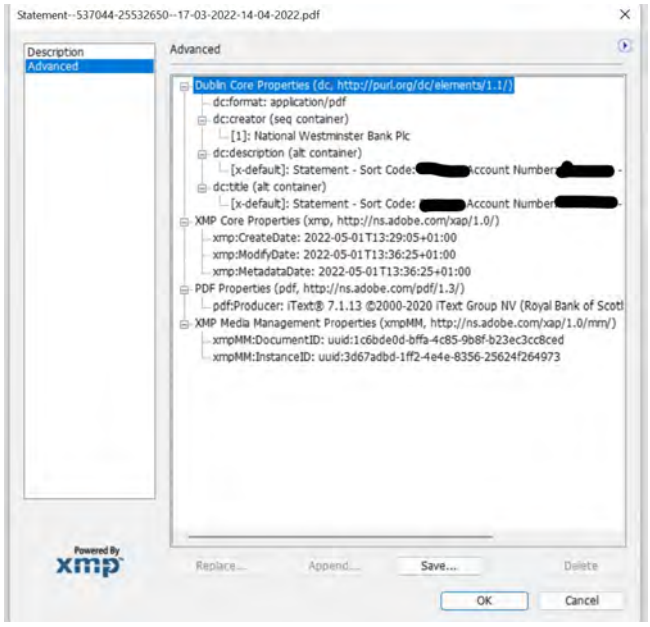

Figure 4: NatWest document properties – additional metadata

If the document allows me to edit it, then I can do so, but the metadata will then show that the document has been edited by me/the person who has the software registered to them. If, however, I print it out, photocopy it, scan to PDF and email it to myself, the metadata will show the document as being created by me (or by whomever the software being used is registered). Frequently, documents are provided by clients to solicitors in just this manner. They might download those documents, print them, then scan and email them on, or otherwise download and print out the documents, before taking them into the solicitor, who then scans and saves them for later forwarding to others.

The direction in the good practice e-bundle guidance for a single, searchable PDF bundle has the potential to exacerbate the problem of manipulated documents to be provided to the court and to the other party. Historically, there would be a direction providing that original documents should be produced to the court at any hearing where they would be relevant. No more. Solicitors and parties have to provide a single e-bundle which, even if it is made up of multiple original documents, creates an entirely new document/file with its own metadata. Quite often, those bundles are made by creating a physical bundle of copy documents, which are then together scanned to PDF and subject to optical character recognition (OCR), before being indexed. Again this creates entirely new documents and the potential for investigating fakery is diminished.

Thirdly, where suspicion arises, scrutinise documents carefully for discrepancies. Look for anomalies such as slightly different fonts in documents, or page numbering/continuation that does not match. The fact remains that the better the fake, the more likely it is to be successful in its deployment. Examples of discrepancies arising are as follows:

(1) Manipulation of bank statements to show that a high-earning husband appeared to be earning very little, and so was unable to satisfy a maintenance order was discovered because 'astute counsel'[8] Ben Fearnley noted in cross-examination that one of the bank statements provided by the husband showed a transaction date of 31 September. When the husband was challenged about this, he said it must be the bank's error. He was ordered by the judge to obtain a year's run from the (offshore) bank overnight, and the husband purported to do so, producing those documents, plus a letter from the bank recording the apparent error. On the way to court that morning, Ben checked the metadata of the documents provided, and they all stated that they had been created by the husband. In cross-examination that day the husband had nowhere to go, having been caught. The court found against him and awarded the wife indemnity costs. He was also reported to the Director of Public Prosecutions, and was prosecuted for attempting to pervert the course of justice. He pleaded guilty. This middle-aged businessman of previous good character who did not want to pay his wife the maintenance to which she was entitled ended up with a 9-month sentence of imprisonment.[9]

(2) Council tax bills addressed to both parties and disclosed by one party to provide evidence that both parties were living in a property belonging to one of them on particular dates (relevant to contributions said to have been made) and when the other party denied that the discloser was living there should not include, on the face of them, the single person discount, as was the case in a matter in which I was involved.

(3) Where an email is produced by one party which is said to evidence an agreement to share interests in a particular property, the manipulator should ensure that all versions of that email are altered if they want to convince the court that what they say is correct. In the case in question, the email having derived from a company's servers and back-up records to which the manipulator did not have access, the original was able to be retrieved showing the true wording of that email.

(4) If, however, the documents are produced by a company director or owner and are said to have been made on software belonging to that company, alarm bells should wail when that same director says the documents are no longer available as the computers have been wiped and destroyed and the electronic records no longer exist.

What to do?

Where suspicion arises in relation to the integrity of a digital document, a party or the court needs to grasp the nettle and deal with the problem. I have previously discussed the draft practice guidelines proposed by District Judge Peter Devlin and Byron James, which were considered by the Judicial Digital Steering Committee, but nothing has yet come of them. I reproduce them here, as they are excellent guidance for all practitioners and judges:

'1. That the starting point is not to trust the content of any hard copy document which has not been subject to verification from the original third party source and/or the underlying metadata of the document.

2. In the normal course of disclosure the original electronic file of any document should be disclosed to the other parties and to the court, together with the electronic communication with which it was provided from the purported creator of the document. Those documents should be sent to a designated secure professional email address that the parties and the court can access.

3. PDF files should be the preferred file for documents (as the metadata can be easily verified). Screenshots and image files are inappropriate and should be rejected.

4. Where a question is raised regarding the veracity of a hard copy document or electronic file, the party producing the file should be required to answer a questionnaire detailing who was responsible for creating the document, their relationship to the person producing it, how the person producing came to be in possession of it, to confirm that they retain the original (hard copy or electronic original), and setting out how the electronic document has been held, saved and changed, if at all, by the person producing it.

5. Where the questionnaire is not answered, the court shall not assume the content of the document is accurate without independent third party verification.

6. Where there are inaccuracies/inconsistencies, then there should be verification by the third-party source, either by way of a third party disclosure order or a joint request from the parties.

7. If questions still exist, then forensic expert evidence should be sought and contempt/fraud warnings should be given.

8. If only hard copy documents are produced, without the original file or original document being available for scrutiny, then the court should consider making a specific finding about whether the producing party is able to rely upon that document in evidence.'

These proposals were met with a lukewarm reception in early 2020, but perhaps, given the realistic prevalence of document manipulation, they will be reconsidered.

I, too, have proposed a remedy that has met with an utterly cold reception (which I cannot understand), namely the use of an independent disclosure officer in private client and financial remedy cases. The parties should meet with that officer and download all their relevant disclosure in that officer's presence, who can then verify its veracity and circulate to the solicitors/other parties and file electronically with the court. This would, in my view, completely minimise the opportunity for document manipulation. It would also minimise the desire to exercise 'self-help' methods of obtaining disclosure, now effectively outlawed by *Imerman v Tchenguiz* [2010] EWCA Civ 908, [2010] 2 FLR 814. It could be made a mandatory standard direction on Form C in advance of exchange of Forms E. Any other disclosure to be provided subsequently should be provided in the same way.

Conclusion

Document and digital file manipulation is a real and present problem in all litigation in which documents are deployed to support arguments or to prove facts. Judges and practitioners need to be aware and alert to it. The problem for any judge dealing with private individuals is, of course, the impact on them, their families and children, both of ignoring the manipulation and of referring the manipulator for consideration for prosecution or committal for a contempt of court. The consequences can mean that the breadwinner and/or parent receives a sentence of imprisonment and an inability to work in future, negatively affecting the welfare of the other members of the family. Despite this, the courts and practitioners must not and cannot ignore or acquiesce in this behaviour, which strikes at the heart of justice. Manipulation is easy to do and easy (if careful enough) to conceal. Fraudulent behaviour and attempting to pervert the course of justice should never be disregarded or brushed aside in the interest of reaching a practical and swift conclusion to litigation between private persons.

Notes

1 Byron James, Expatriate Law, 'We trust PDF files too much – and why we shouldn't', www.familylawweek.co.uk/site.aspx?i=ed200534; Helen Brander, 'Digital Documents: Use in Proceedings and Issues of Manipulation – how to spot it, how to deal with it', [2020] Fam Law 611; Helen Brander, 'Fake or fact? (1) Digital docs manipulation and how to spot it', www.counselmagazine.co.uk/articles/fake-or-fact-digital-docs-manipulation-how-to-spot-it-(1); Helen Brander, 'Fake or fact? (2) Digital docs manipulation and how to deal with it', www.counselmagazine.co.uk/articles/fake-or-fact-(2)-digital-docs-manipulation-how-to-deal-with-it

2 www.youtu.be/TtbouUll4UI

3 www.youtube.com/watch?v=tp5D88OAI5A

4 www.bbc.co.uk/sounds/play/m000p10c

5 www.judiciary.uk/announcements/financial-remedies-courts-e-bundles-protocol/

6 www.replaceyourdoc.com/samples.html; www.replaceyourdocuments.com/; https://onlinenoveltydoc.com/samples.html

7 www.thenationalnews.com/uae/courts/deepfake-audio-evidence-used-in-uk-court-to-discredit-dubai-dad-1.975764
8 As described in the judicial sentencing remarks.
9 www.worcesternews.co.uk/news/business/19383639.husband-jailed-lied-get-making-payments-ex-wife/

Security for Costs in Family Proceedings

Elissa Da Costa-Waldman

New Court Chambers

In *MG v AR* [2021] EWHC 3063 (Fam), Mostyn J made an order providing security for costs. Such orders are more frequently made in civil proceedings, where 'costs follow the event' and costs orders are made in favour of the successful party. An application for security for costs is an unusual application within the family jurisdiction where costs orders are rarely made, the usual order being 'no order as to costs'. Indeed, this is the first reported case on the subject since the Family Procedure Rules 2010 (SI 2010/2955) (FPR) came into force.

The facts

The case concerned M, aged 8, whose Lebanese mother, having later acquired Canadian citizenship, had moved to London in 2007 where she met M's father, a dual Saudi/British national. M had dual British–Canadian citizenship. The parties separated shortly after M's birth, since when they had been embroiled in litigation.

A final child arrangements order was made in November 2015 providing that M remain in the primary care of the mother with weekly contact with the father. The order also recorded that M was habitually resident in England and Wales. The mother then applied for child maintenance under Schedule 1 to the Children Act 1989. The final hearing took place in December 2016, at which the father was ordered to pay an outstanding interim lump sum and costs orders. Those fell into arrears such that by the hearing of the security for costs application, the father was indebted to the mother in the sum of £127,000.

In October 2017, the mother and child went to Dubai for a holiday for M to visit her father. The trip was repeated in April 2018. The father claimed that the mother wished to relocate to Dubai and resume cohabitation with him. The mother disputed this, asserting that on the second visit the father had seized her passport and the child's, leaving them stranded them in Dubai.

In May 2019, the mother managed to obtain the child's passport and travel documentation for herself and subsequently fled to Lebanon. From there, mother and child returned to Canada, in June 2019, and have been living there ever since.

Further litigation ensued in the Superior Court of Ontario where the father sought the return of M to Dubai. The father's application was granted with a finding that M was habitually resident in Dubai prior to her removal to Ontario.

The mother successfully appealed that order. On appeal, it was held that the judge had erred in treating the father's application as if it were governed by the 1980 Hague Convention;[1] that there was a dispute as to whether the United Arab Emirates (UAE) would apply a best interests approach if M were returned there; and that substantial weight should have been given to the consent order made in London in November 2015. The Ontario Court of Appeal concluded that the case should have been returned to the Central Family Court in London for determination. Mostyn J found this surprising, given the child had not been in London since April 2018, 2 years prior to the Ontario Court of Appeal decision and in circumstances in which the child had been living in Dubai until the end of May 2019, and then in Canada for nearly a year, such that 'her prior historic habitual residence in England had surely long evaporated' ([62]).

The Ontario Court of Appeal concluded not only that the order returning M to Dubai could not stand, but also that an order would be made staying the father's return application on condition that he promptly commence a similar set of proceedings in the Central Family Court with the following provisos:

(1) if the English court declined to accept jurisdiction, the father could apply to the Ontario Court to lift the stay and seek a rehearing of his original application; and
(2) in the event the father brought further proceedings in the Ontario Court, the mother would not be prevented from bringing her own application in respect of M.

In addition, the father was ordered to pay the mother's costs, which he had not paid at the date of the security for costs application. The father subsequently applied for permission to appeal to the Supreme Court of Canada but was unsuccessful, his application being dismissed with costs, which also remained unpaid.

In April 2021, the mother applied in Ontario for orders in respect of M including an order for the Ontario Court to

assume jurisdiction and to make an order superseding the original child arrangements order giving her sole decision-making responsibility and primary residence for M. A matter of weeks after this application, the father made the substantive application before Mostyn J seeking 'an order pursuant to the inherent jurisdiction of the High Court that the child is forthwith returned from Toronto, Canada to Dubai, UAE'.

In response, the mother sought a *Hadkinson*[2] order debarring the father from proceeding with his application until he had discharged the outstanding costs and lump sum orders, and the arrears of periodical payments. The mother's application was dismissed and on 25 October 2021 she made her application for security for costs, relying on the father being in resident in Dubai.

Mostyn J referred to a 'gaping deficiency in both the application for security for costs and its defence' ([70]) as neither party had provided evidence regarding their current means, or of costs already incurred and paid. The matter was adjourned for those points to be addressed and supplemental written submissions to be made. That evidence is dealt with at [71] to [77] of the judgment.

Security for costs in the FPR

The rules regarding security for costs are at FPR 20.6 and 20.7.

'**Security for costs**

20.6

(1) A respondent to any application may apply under this Chapter of this Part for security for costs of the proceedings.

(Part 4 provides for the court to order payment of sums into court in other circumstances.)

(2) An application for security for costs must be supported by written evidence.

(3) Where the court makes an order for security for costs, it will—

(a) determine the amount of security; and

(b) direct—

(i) the manner in which; and

(ii) the time within which,

the security must be given.

Conditions to be satisfied

20.7

(1) The court may make an order for security for costs under rule 20.6 if—

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b) either—

(i) one or more of the conditions in paragraph (2) applies; or

(ii) an enactment permits the court to require security for costs.

(2) The conditions are—

(a) the applicant is—

(i) resident out of the jurisdiction; …

(b) the applicant has changed address since the application was started with a view to evading the consequences of the litigation;

(c) the applicant failed to give an address in the application form, or gave an incorrect address in that form;

(d) the applicant has taken steps in relation to the applicant's assets that would make it difficult to enforce an order for costs against the applicant.

(3) The court may not make an order for security for costs under rule 20.6 in relation to the costs of proceedings under the 1980 Hague Convention.

(Rule 4.4 allows the court to strike out a statement of case.)'

At [6] of the judgment, Mostyn J compared the FPR on security for costs with the counterpart provisions of the Civil Procedure Rules 1998 (SI 1998/3132) (CPR) at 25.12 and 25.13 noting that there are some differences which recognise that the CPR deal with commercial matters and the geographical scope of the FPR is wider. Mostyn J considered the history of the power to award security for costs. He noted that the reason for its development was to prevent an abuse of process, based on the fact that a claimant has a choice whether to litigate but the defendant to a claim does not as 'in order to avoid default judgment, [a defendant] is compelled to litigate or settle, whether or not the plaintiff has available assets sufficient to pay the costs of a successful defence' ([7]).

Given the fundamental differences between the costs regimes in civil and family cases, Mostyn J expressed surprise that there was no practice direction linked to FPR Part 20 to explain how the power should be exercised in the family jurisdiction ([9]). The judgment analyses the several matters to be considered in the exercise of this power, namely:

- the gateway conditions that need to be satisfied;
- how the exercise of the discretion to award security for costs should be exercised;
- the procedural requirements for making the application;
- if the application is granted, how security should be given; and
- how to deal with non-compliance with an order for security of costs.

The gateway conditions

These are set out in FPR 20.7(2) and are matters of fact not discretion. However, in respect of 2(a)(i), residence beyond England and Wales is clearly out of the jurisdiction although post-Brexit residence in Scotland and Northern Ireland 'literally satisfies the condition', leaving Mostyn J to *opine* that 'an authoritative decision must be awaited' ([13]).

As to the other three conditions, the court is required to make findings of fact. With respect to condition 2(b), the court must find that the applicant has not only changed address but that he/she did so 'with a view to evading the

consequences of the litigation'. Condition (c) simply requires a finding of fact that the applicant failed to give an address or gave an incorrect one, and condition (d) requires that the court consider the steps taken and whether those steps would render it difficult to enforce an order for costs against the applicant. The type of steps taken would include the 'dissipation of assets, their transfer overseas or into the names of third parties, or their removal to unknown destinations' ([18]). Clearly, if such findings are made, it follows that it would be difficult to enforce an order for costs against a claimant.

Discretion

If one or more of the gateway conditions have been met, the court must then decide whether it should exercise its discretion and order security for costs. Such an order may be made if the court is satisfied that it is just so to do 'having regard to all the circumstances of the case' (FPR 20.7(1)(a)).

In the civil jurisdiction, the court is not generally required to consider the merits of the case because 'the purpose of an order for security for costs is to protect a party in whose favour it is made against the risk of being unable to enforce any costs order they may later obtain' (White Book, 2022, Vol 1, 863, para 25.12.2). The Court of Appeal confirmed this in *Chernukhin v Danilina* [2018] EWCA Civ 1802, [69] holding that in respect of security for costs the parties should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure.

On the contrary, and because the family jurisdiction does not contain the presumption that costs follow the event, Mostyn J in *MG v AR* ([25]) is clear that in family cases:

> 'the merits of the application and the strength of the defence necessarily have to be carefully considered. It is only by considering the merits that a view can be taken of the likelihood of an award of costs in favour of the respondent. This is because the default regime in family cases is no order as to costs. This is so whether the claim is about children or financial remedies …'

Having reviewed both private and public law children cases as well as financial remedies cases where costs orders have been considered, the point is made that a respondent in a family case will, unlike the successful defendant in a civil case, get an order for costs only if they can both demonstrate that their opponent has conducted the case unreasonably and that they have the means to satisfy such an order. The Family Court must therefore consider whether, if a respondent successfully defended the application, they would obtain an order for costs. It was held in *MG v AR* ([34]) that:

> 'the court should only, in the exercise of its discretion, consider ordering security for costs if it is satisfied that there is a good chance (but not necessarily a probability of more than 50%) of the respondent obtaining an order for costs at the final hearing.'

As well as considering the merits of the application and the strength of the defence, the court will also consider the means of both parties. An order for security for costs will not be made where it is clear that the applicant, against whom it was intended to be made, is without means to satisfy it. In assessing the ability to pay an order for costs – and, it follows, an order for security of costs – the court should apply the principles in *TL v ML* [2005] EWHC 2860 (Fam), [124], as set out by Mostyn J in *MC v AR*, [36]:

> 'Where the disclosure of the applicant is obviously deficient, the court should make robust assumptions about his ability to pay. Similarly, where it is asserted that an external source of support has been cut off but where there is no clear evidence to that effect from the provider of that support, the court should assume that the source of support will be maintained at least until final trial.'

Having considered a number of other matters related to an application for security of costs, Mostyn J *opined* at [53] that the following steps must be taken and applied:

> 'i) The court must find as a fact which gateway condition applies.
>
> ii) The court must have regard to all the circumstances in order to determine whether to make the order for security would be just. In making that determination the court will form a value judgment until it reaches the stage of quantification of the amount of security, where it will exercise a true discretion.
>
> iii) If the applicant has a meritorious case and is of limited means so that the imposition of an order for security would hinder or stifle his substantive application then it would not normally be just to make an order for security.
>
> iv) Subject to para (iii) above, the court must have regard to the merits of the substantive application and to the strength of the defence, as well as to the means of the parties, in order to determine if the respondent has a good chance of being awarded an order for costs at the final hearing of the substantive application. If the court concludes that the respondent does not have that good chance, then it would not normally be just to make an order for security.
>
> v) When assessing the ability of the applicant to pay an order for costs and, *ex hypothesi* security for those costs, the court should apply the principles in *TL v ML* at [124] and make robust assumptions about his ability to pay where his disclosure had been deficient or where he maintains that a source of support has been cut off.
>
> vi) If the court determines that the respondent has that good chance, it must then be satisfied by evidence adduced by her that there is a real risk (albeit not as high as a 50% probability) that she will not be in a position to enforce an order for costs against the applicant. Findings as to gateway condition (b) or (d) are likely to be highly relevant to the assessment of this risk.
>
> vii) In determining whether it would be just to make an order for security the court will pay particular attention to whether the application for security was made promptly. It may not allow historic costs if the application for security was made unduly late.
>
> viii) If the court decides to make an order for security it will fix the amount in a robust, broad-brush manner, deploying a wide discretion. Historic costs are fully claimable. The evidence of the

respondent seeking security must provide full detail of claimed historic costs and a detailed estimate of future costs.

ix) The court may reflect future litigation uncertainties, as well as potential reductions on a detailed assessment, in a percentage discount from the sum claimed.

x) In the first instance, security should only be provided in a financial remedy case up to the FDR; in a children's case it should be provided up to the pre-trial review (or equivalent). Security should be payable in monthly instalments rather than in a single lump sum.

xi) Before making an order for security, the court must finally stand back and satisfy itself that what it is going to do is just. In a children's case the court must be satisfied that what it is proposing to do is consistent with the best interests of the children, or at least not contrary to their interests.

xii) In the event of default in the provision of security there should not be an automatic strikeout of the claim. Rather, the respondent should be entitled to apply urgently for a hearing at which the court will consider what measures should be taken in the light of the default. Such measures will include a summary dismissal of the substantive application, but in children's proceedings the court must be satisfied that such an order is in the best interests of the children, or at least not contrary to their interests.'

Conclusion

In *MG v AR*, notwithstanding the guidance that security for costs should be payable in instalments, the court ordered the father to pay a single lump sum to the mother of £50,000 given the following:

- the father's case was unmeritorious;
- the mother case was strong on her chance of obtaining a costs order;
- the father had the means to satisfy any costs order; and
- the mother would have difficulty in enforcing a costs order.

It remains to be seen whether applications for security for costs in the family jurisdiction become more frequent following this judgment. However, in the absence of a practice direction accompanying FPR Part 20 in respect of security for costs, this judgment is enormously helpful.

Notes

1 Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980).
2 *Hadkinson v Hadkinson* [1952] P 285.

Menopause – Turning the Clock Back for Women?

Farhana Shahzady

Director, Family Law Partners

Earlier this year, with the help of Family Law Partners, I launched the Family Law Menopause Project. It had the straightforward aim of encouraging family lawyers to consider the impact of menopause on clients.

I was prepared for curiosity and healthy scepticism about the Project. However, I was unprepared for some of the prominent female criticism it elicited. In particular, I have in mind Baroness Deech, who wrote a letter to the *Law Society Gazette* on 11 March 2022 in response to my article of a week earlier:

> 'It is hard to think of anything more damaging to the prospects of women at work than the menopause pretext put forward by Farhana Shahzady (Divorce settlements and the menopause, *Gazette*, 4 March).
>
> It reminds me of the beliefs that were advanced to prevent women succeeding in any career in the 19th century and earlier – they were too fragile, too emotional, their voices too weak, their smaller brains addled by reproduction.
>
> Most women do not suffer from menopause to the extent that they have to stop work. Women judges seem to cope with it just fine! The provisions of my bill to reform financial provision were misstated. It would put a far greater emphasis on child maintenance up to the age of 21, and bring English law into line with the law of Scotland and most western countries, reducing litigation and exorbitant legal costs. It would accord with no-fault divorce, soon to be introduced.'

The last thing I wanted to do as a lawyer interested in safeguarding and championing rights was to turn the clock back. But Baroness Deech raises an interesting point: Does factoring in menopause and recognising that women are biologically different, in financial remedy proceedings, set women back? Or in truth, are women set back by *ignoring* the biological differences between them and men and failing to challenge the clamour for a clean break?

The menopause problem

I hope I am right in assuming that most informed people recognise the serious impact of menopause on some women. But menopause concealment, which is the desire not to be outed and not to openly discuss the menopause, remains an issue. Menopause denial or relegating it to a discussion about an occasional hot flush is trite. There is increasing and growing awareness of the extent of the problem which can include, *inter alia*, debilitating symptoms such as serious anxiety and low mood, sleep problems, claustrophobia, brain fog, depression, worsening migraines, heart palpitations, joint aches and profound fatigue. It is an endocrine problem which affects 100% of women who reach a certain age. One of the leading UK experts in the field, Dr Louise Newson, speaks forcefully about the symptoms and health impact[1] and the number of women affected by menopause. It is estimated that there are over 13 million women of menopausal age, with one in four experiencing severe symptoms. That is a very high number of women who are suffering and, in turn, having their livelihoods affected in a variety of ways, including job loss. The Parliamentary Women and Equalities Committee was sufficiently concerned to conduct a large-scale enquiry into this because of the concern that nearly 1 million women are leaving unemployment prematurely due to lack of menopause support. The feedback given to the committee from the many women who participated is compelling.

As well as individuals, a number of organisations participated in the enquiry since it is being increasingly recognised by employers that more needs to be done to safeguard menopausal women because, otherwise, workplaces are haemorrhaging female talent. A 2019 survey by Newson Heath Clinic found that 67% of workplaces were not offering any kind of menopause support despite 90% of women feeling that their symptoms were having a negative impact on work. The latest Fawcett Society Report of May 2022,[2] which is based on a survey of 4,000 women, sets out that:[3]

> '44% of menopausal women in employment say their ability to work has been affected by their symptoms. Despite this, *8 in 10 menopausal women say their workplace has no basic support in place for them – no support networks (79%), no absence policies (81%) and no information sharing with staff (79%).*'

Why should it matter to family lawyers?

Menopausal symptoms can last for around 7 years but some women who have had symptoms for decades. Perimenopausal symptoms can last for several years as well. The hormone deficiency related to the menopause 'lasts for ever'. The average age of the onset of perimenopause is the mid-40s and the average age of menopause itself is at age 51. Onset can vary according to race and ethnicity. When looked at through the prism of divorce, the peak age at which women are divorced is often somewhere between the ages of 45 and 55, therefore invariably coinciding with menopause.

What this means is that many menopausal women will need to engage with family practitioners as part of the divorce and separation. However, I cannot find a single reported or anecdotal case where menopause has been factored in. This is incomprehensible. Is this a failure on the part of family lawyers in taking proper instructions or minimising the issue due to lack of knowledge or embarrassment? Whatever the reason it is regrettable, when the data emerging is that some women are seriously affected by menopause which directly impacts their employment and/or earning capacity and/or income needs following divorce.

History of maintenance

It is worth reflecting that when the Matrimonial Causes Act 1973 (MCA 1973) came into existence, it was considered radical and the idea that a wife could get a transfer of property order, lump sum and maintenance was called a 'meal ticket for life' even back then. Hitherto, women in marriage had little control over their property and, even on divorce, were generally restricted by what was called a 'compassionate allowance' to prevent destitution. Interestingly, the MCA 1973 did not originally provide for a clean break between the parties unless both parties consented, and the clean break under section 25A was only later introduced under the Matrimonial and Family Proceedings Act 1984, which added a new section 25A. Only then was a formal duty of the court to consider clean break between the parties born.[4]

Clean break – the Holy Grail[5]?

While for some there may have been a delay in introducing a formal clean break, there is no doubt that clean breaks are flourishing now as never before, as more and more women have entered the workplace and most often juggle work with raising a family. There are very few joint lives spousal maintenance orders and most financial orders now have an immediate clean break or a deferred clean break after a short term of maintenance. A term order can be made for such term as is sufficient to enable the payee spouse 'to adjust without undue hardship to the termination of his or her financial dependence on the other party'.[6] What has become apparent while considering the issue of menopause and maintenance is that there is an increasingly hawkish clean break culture which is demanding women adjust at a time in their life when fairness surely requires that, amongst other things, their biology should be considered as part of one of the circumstances of the case.

In cases such as *SS v NS* [2014] EWHC 4183 (Fam), Mostyn J insists not only that the court must consider termination of spousal maintenance with the transition to independence as soon as it is just and reasonable, but also that a degree of (not undue) hardship is acceptable in making the transition to independence. This is arguably a stern stance since how fair is it knowingly to impose hardship or even talk in terms of tolerating hardship, when faced with women in menopause who may already be suffering? On joint lives orders, Mostyn J states: 'if the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former' ([44]). The case of *Fleming v Fleming* [2003] EWCA Civ 1841 had, some years earlier, acknowledged the principle that an increase in term could be exceptionally justified, but that now seems to be eclipsed in favour of the demand for self-sufficiency.

Mind the gender gap – *Waggott*

Similarly, when it came to *Waggott v Waggott* [2018] EWCA Civ 727, [2018] 2 FLR 406, which addressed joint lives orders and the sharing of post-separation income, there is legitimate concern at how it is also prejudicial to women, particularly of a certain age who have given up their careers for family which may have otherwise flourished. This was a case where the parties divorced after 21 years of marriage and despite the husband and wife starting off at the same level in their careers in accountancy, they made a joint decision during their marriage that the wife would sacrifice her career path for the family, as indeed many women do.

Unfortunately, the wife's claim for a share in the fruits of the post-separation earnings was rejected by the court. The Court of Appeal, moreover, replaced a joint lives order with a term order of 3 years with a bar under MCA 1973, s 28(1A), on the basis that the wife's relationship-generated needs could be met from her surplus/free capital; and the sharing principle did not apply to earning capacity, despite the wife's claim that she had helped build the husband's earnings. Many believe the Court of Appeal's approach to be discriminatory because, surely, there was relationship-generated *advantage* for the husband, who could continue to develop his career and earnings even if Mrs Waggott could not substantiate a claim for relationship-generated disadvantage and compensation.[7] The husband accepted that Mrs Waggott could only now achieve income of around £30,000 p.a. compared to his £3m.

In *Waggott*, the court placed great emphasis on MCA 1973, s 25A. The case was considered a triumph for the clean break, finally ending the 'meal ticket for life'. But many in practice did not rejoice because, up and down the country, it remains a genuinely challenging part of the job explaining to wives that although they may have not worked for years due to children and although their hormonal health has deteriorated, they can expect a clean break. In real life, most women do not have deep pockets like Mrs Waggott and do not have free capital on which to live. Instead, as Lord Hope stated in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [118]: 'The career break which results from concentrating on motherhood and the family in the middle years of their life comes at a price which in most cases is irrecoverable'. If you add

symptomatic menopause to the mix, the price becomes very high indeed.

The importance of a discretionary system

Despite the prevailing clean break culture, we still have a discretionary legal framework which can be mobilised to help women in menopause. The case of *C v C* [1997] 2 FLR 26 provides welcome relief for some women:

> '(6) The question is, can she [the wife] adjust not should she adjust … it is highly material to consider any difficulties the payee may have entering or re-entering the labour market, resuming a fractured career and making up any lost ground … Facts supported by evidence must therefore justify a reasonable expectation that the payee can and will become self-sufficient. Gazing into the crystal ball does not give rise to such a reasonable expectation. Hope, with or without pious exhortations, to end dependency is not enough'

In the case of *Flavell v Flavell* [1997] 1 FLR 353, the Court of Appeal also offered support and emphasised that clean break amendments to the MCA 1973 proposed no more than an aspiration that the parties should be self-sufficient and the power to determine dependency should be exercised only if the adjustment could be made without undue hardship. Ward LJ underlined the need for an 'evidence-based' approach in this case. The court went on to find that it was not usually appropriate to terminate periodical payments for a wife in her mid-50s unless she had substantial capital or a significant earning capacity. The court found that the risk of ill-health and loss of employment were real factors to be taken into account and carefully considered.

Most do, however, acknowledge that the Flavell wives – while not quite extinct – are fewer and farther between.

Menopause as disability?

I have seen many Forms E where wives have sought to explain at section 1.11 how they are suffering stress and depression and chronic health problems. We should not assume it is the divorce alone making the wife ill. I think we need to take it seriously when the wife tells us she is concerned that she may have to reduce her hours at work due to health difficulties or that she feels she may have to give up completely as she navigates not only a difficult divorce, but also health issues which may or may not have been diagnosed. It is well known that menopause is not often diagnosed in a timely way and most GPs do not have medical training in relation to menopause. This is the point where family lawyers should be considering obtaining a medical expert report and/or urging the client to seek appropriate medical expertise. There are some specialist menopause clinics[8] and some outstanding menopause practitioners, such as Dr Newson and Dr Shahzadi Harper, but waiting lists can be a challenge for women wanting to see a specialist, and the private specialists are often the preserve of more wealthy clients who have the resources to pay.

Many women are also wary of describing menopause as a disability and prefer to see it as a life stage similar to adolescence or pregnancy. But, for some, the symptoms are disabling which means it is highly likely that menopause will be viewed as a disability (MCA 1973, s 25(2)(e)). Employment lawyers are similarly treating menopause as a disability under the Equality Act 2010. As with every disability case, the medical evidence will have to be considered very carefully and the case put together bearing in mind diagnosis, prognosis and the availability of an effective treatment pathway to help ameliorate symptoms. Take-up of hormone replacement therapy (HRT) – despite recent headlines about shortages – is quite modest[9] and availability is also patchy depending on what part of the country you live in. For some, HRT is not an option due to other health issues.

There is still the totemic fear of cancer for many women and years of confusing public health scares and messages about HRT. There needs to be better education and research to help put women's minds at rest. The only realistic thing that family practitioners can do is to take instructions, triage and signpost clients as necessary. We should put together our cases based on the best science and treatments available, including factoring in the cost of these treatments and consultations. While there is insufficient disability case law, the recent case of *ND v GD* [2021] EWFC 53 is useful authority on the importance of expert evidence where the wife has special heath needs (in that case, Alzheimer's) and was diagnosed with a disability after separation. The case is also very useful for establishing the principle that needs do not have to be relationship-generated. The husband sought to argue that the wife's health was not causally linked to the marriage, especially since she was diagnosed after separation. In Peel J's judgment ([50]), he stated: 'this approach cannot be right … The statute does not limit consideration of needs in this way'.[10]

Is the future Deech?

All clients want clarity regarding outcome when seeking legal advice. It is true to say the current discretionary system does not deliver this very well. Baroness Deech rejects the concept of judge-made law, i.e. a discretionary system that (in her view) does not offer certainty to parties regarding outcome and helps to drive up legal cost. She points to the big money cases, but those cases are not representative of the day-to-day cases run by most lawyers.

Baroness Deech advocates dismantling and dispensing with the discretionary system and adopting a formulaic approach as per her latest iteration of the Divorce (Financial Provision) Bill. She speaks about how we should not create a society of dependent wives but does not consider the problem of poverty for many ex-wives, which is exacerbated by the hard-line clean break culture she promotes.

There is growing evidence about how women do not do very well on divorce or indeed more generally when it comes to, for example: pay, promotions, job security, health, pension savings on retirement. A report produced by the Chartered Insurance Institute (CII) titled 'Risk, exposure and resilience to risk in Britain today' concluded that divorce and separation are a significant financial risk to women left 'vulnerable' by joint decisions made while they were in a long-term relationship.[11] Another report titled 'Depreciating assets: the female experience of health in the UK'[12] states:

> 'Unlike men, women live with a constantly changing physiological and physical self during most of their reproductive and economically active life due to menstruation, miscarriage, pregnancy, and the

> menopause. Not only do they have a higher incidence of some of the more significant illnesses, but they also have the challenges of contraceptive and reproductive health. Simultaneously they carry a higher burden of domestic work and caring responsibility.'

This seems to echo Fiona Shackleton's comments that 'Women are like leaseholds, we're depreciating assets, and men are like freeholds and appreciate'.[13] Yet Baroness Shackleton supports the Deech formula that not only severely limits maintenance, but also limits the court's discretionary powers to make orders in relation to non-matrimonial property (i.e. property or assets or pension that parties bring to a marriage or which they inherit or receive by way of a gift during it). This means orders can only relate to matrimonial property, which is arguably another blow to women who are usually the financially weaker party and need to invade non-matrimonial property to help meet reasonable needs.

Baroness Deech states that 'Current maintenance laws encourage the message that "getting married to a well-off man is an alternative career to the one in the workforce"'.[14] This is one of the most reductive views of women I have come across. A marriage with children followed by subsequent divorce is a financial shock for many, many women with or without menopause. Maybe the answer to Baroness Deech is that women should avoid having children at all, which will give them the best chance of a thriving and uninterrupted career. That should circumvent the need for maintenance if the marriage fails. Arguably, childbirth in this country, along with exorbitant childcare costs, is what most damages women's ability to work. Menopause is just another reminder of the cost women end up paying for their fertility.

Notes

1 Dr Louise Newson, *Preparing for the Perimenopause and Menopause* (Penguin, 2021).

2 Available online, at www.fawcettsociety.org.uk/news/landmark-study-menopausal-women-let-down-by-employers-and-healthcare-providers

3 Original emphasis.

4 Section 25A states: 'it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers so that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court thinks just and reasonable'.

5 Mostyn J in *SS v NS* [2014] EWHC 4183 (Fam), [39]: 'As for "how long" the Holy Grail should be, where it is just and reasonable, an eventual termination and clean break'.

6 MCA 1973, s 25A(2).

7 Moylan LJ in *Waggott* made it very clear that the principle of compensation applied only to those who had been *disadvantaged*, i.e. someone had given up a career.

8 In 2021, there were 95 NHS menopause clinics in the United Kingdom serving 13 million women of menopausal age and older – Kate Muir, *Everything you Need to know about the Menopause (but were too afraid to ask)* (Gallery UK, 2022), 189.

9 79% of menopausal women have not taken HRT and lots of GPs refuse treatment until periods have stopped.

10 Quoting *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186, [11]: 'Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.'

11 'Risk, exposure and resilience to risk in Britain today' (Chartered Insurance Institute, 2016). There is a perception that women in England do well out of divorce. However, for most women, the reality is that they have often created homes, raised children and supported their partners while their own careers have stood still, or progressed at a considerably slower rate. As a result of these life decisions, they have significantly compromised their own future long-term needs, including retirement, and it is for this reason, through no fault of their own, that they are often considered to be the financially weaker party. Information contained within the CII report suggests that the average divorced woman has less than a third of the pension wealth of the average divorced man, while 10% more divorced women expect to rely on the state pension than men, 41% of whom have an occupational pension. To compound this, following divorce, the difficulties the financially weaker party faces in terms of the employment market leads to ever-reducing earning potential and greater reliance on their state pension whilst, on the contrary, the financially stronger party can continue to earn at their full earning potential and top up their pension pot within a job industry they have been given the opportunity and time to thrive within.

12 Judith Dawson, [2021] 71 (704) *British Journal of General Practice* 123.

13 J. Gapper, 'Fiona Shackleton: "Divorce is either quick torture or slow torture"', *Financial Times*, 6 November 2020.

14 'Stop Giving ex wives these undeserved millions, says Baroness Deech', *The Times*, 14 September 2009.

Mediation in the Wake of *WL v HL* – Low-Hanging Fruit or Golden Opportunity?

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Traditional perceptions of mediation

> '[M]ediated cases are self-evidently the easiest to settle; the low fruit of the dispute resolution world. Quite rightly this will always remain so. But my nagging concern about the mediation process remains; that one side often has the upper negotiating hand either psychologically or practically. Without independent, well trained and experienced, proactive intervention, the playing field can look and feel anything but level.'[1]

Sir Paul Coleridge's analysis of mediation in the first issue of this journal perhaps reflects the views of many in the profession as to the merits and limitations of family mediation. But is this critique fair? This article responds to Sir Paul's observations and seeks to address whether mediation is really only suitable for the easiest cases or is, in fact, a much under-used and more sophisticated process which, with an increasingly strained family justice system, we should all be seeking to embrace for the benefit of our clients.

2011 and all that – one decade on

The introduction of the pre-action protocol (PD 3A) under the Family Procedure Rules 2010 (SI 2010/2955) (FPR) in April 2011 was supposed to herald a sea-change in the approach to family mediation with the requirement that an applicant in a financial remedy application should, in default of meeting one of the defined exemptions, attend a Mediation Information and Assessment Meeting (MIAM).

While there is little doubt that many more separating couples have become aware of family mediation since 2011, the graph in Figure 1 from the latest *Family Court Quarterly Statistics* (extending to the end of 2021) suggests that the number of contested financial remedy applications has remained at a very similar level (save for a dip at the start of the COVID-19 pandemic) over the decade from 2011 to 2020. The figures for 2021 do, however, suggest a slight reduction in contested financial remedy applications. Is this a sign that non-court resolution methods may be gaining traction, and that, going forward, we may see a reduction in the numbers of contested financial remedy cases coming before the courts? Alternatively, is this just a quirk of COVID-19?

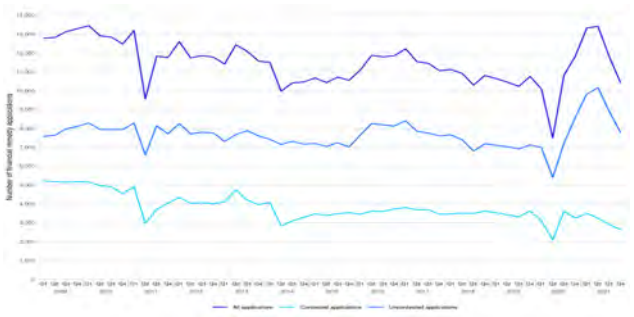

Figure 1: Ministry of Justice, Family Court Statistics Quarterly*, October to December 2021*

Quite why mediation has not taken off over the last decade as many had hoped is not entirely clear. There is little doubt that some cases are patently not suitable for mediation and do require court intervention. Where there is recalcitrant non-disclosure, an unbending unwillingness on the part of one party to engage realistically with legal advice or substantial coercive control, mediation is unlikely to be suitable.

There are, however, still plenty of financial remedy cases coming before the courts where mediation is not being considered when it could be. Whether this is due to reluctance on the part of some solicitors to positively endorse the benefits of mediation, or failure by some tribunals to properly exercise their responsibility under FPR 3.3(2) to consider whether a MIAM has even taken place, the introduction of MIAMs has not led to a surge in mediation, or to pressure on the court system being relieved as had been hoped. The report of the Farquhar Committee of September

2021[2] reported that the average case length for financial remedy cases in 2019 up to financial dispute resolution (FDR) hearing was 55 weeks, while it took 84 weeks to reach final hearing – the delays were longer still in 2020. This plainly demonstrates a system that is working under enormous strain.

Sir Paul's observation that private alternative dispute resolution as a whole is a much under-used process is undoubtedly true (although there has been a notable growth in the number of private FDRs), but is his suggestion that mediation is 'the low fruit of the dispute resolution world' a fair one?

Lawyer inclusive and hybrid mediation

In lower value cases there is little doubt that mediation is often the low fruit, or indeed the only viable fruit available to the parties. However, the categorisation of mediation as the preserve of only lower- to medium-value cases, or those which are easiest to settle, does not take on board significant progress in the development of the mediation model over the last decade.

Sir Paul identifies as a 'nagging concern' the issue of power imbalance, be it psychological or practical, that pertains to many cases. In the vast majority of cases that we see as family practitioners, there is indeed a degree of power imbalance; however, this does not render all of these cases unsuitable for mediation.

Mediators have extensive training in handling power imbalance, practiced and polished over many years. There are, of course, many excellent mediators who combine their mediation practice with varied and extensive financial remedy practice, as solicitors or barristers.

Significantly, the last 2 years have seen a substantial increase in the number of family mediators trained by Resolution to undertake hybrid mediation. Only 33 hybrid mediators were trained prior to the COVID-19 pandemic. However, over the last 2 years, a further 50 mediators have trained in this process and, taking on board those scheduled to train in the next few months, the total number of hybrid mediators will reach 100 later this year. Although in the past some mediators have, on occasion, involved lawyers in the mediation process, by inviting them to meetings, the hybrid mediation model has the involvement of lawyers at its very heart.

Hybrid mediation sees clients attending meetings with their lawyers present, often throughout the mediation process. It is a flexible model, where clients and lawyers can attend either in person or virtually. In both instances, meetings can take place with all parties together in the same room, or with part or all of the process conducted with the parties in separate rooms with their respective lawyers (with the mediator 'shuttling').

The major distinction between hybrid and traditional family mediation is that in hybrid mediation, the mediator is able (with the consent of the parties) to hold private meetings with each party and their lawyer and, in this setting, to 'hold confidences'. These separate meetings can help the mediator to clarify issues and understand where synergies may arise and where it may be possible to break an impasse in negotiations.

A greater range of cases

Where there is a concern that the power imbalance may be too great for traditional mediation, hybrid mediation provides a real and attractive alternative for all parties. Some clients who might be nervous or overwhelmed by the prospect of meeting their spouse alone may feel safe to enter into the solicitor-inclusive model, in the knowledge that they will be supported throughout.

The flexibility of the model and the involvement of supportive solicitors throughout the process means that hybrid mediation can also be a realistic option for high conflict couples or situations where either or both parties may have autistic traits or personality disorders. These cases may not, on some occasions, be suitable for the traditional mediation model, but hybrid mediation opens up a viable non-court avenue.

As such, hybrid mediation can be used for a far greater range of more complex financial remedy cases than many often consider suitable for mediation. In addition to embedding the role of supportive solicitors at the heart of the process, the hybrid model enables the parties to agree to involve other professionals to advise within the mediation, including financial neutrals, single joint valuers and tax specialists. In short, it is a bespoke model, highly adaptive to the parties' needs and circumstances. It can also be used successfully to deal with other family issues, such as inheritance or family business disputes.

The end of silos?

One criticism of many dispute resolution models (including the court process) has been that couples have not been able seamlessly to navigate the right approach for their case, instead being driven by professionals into an approach that is 'siloed'.

Developments in the mediation arena, including the rise of the hybrid model, suggest we may be entering a 'silo-free' era. The hybrid mediation model is similar to the collaborative law model, in that it is an interdisciplinary approach, with the couple supported by a range of professionals in finding the right outcome for their situation.

In addition to family solicitors, financial professionals and family consultants, hybrid mediation allows for the involvement of counsel. Both as a solicitor and as a mediator, I have conducted a number of mediations where counsel has been involved in supporting the process by giving advice to individual parties between sessions. Counsel can, of course, also be involved in giving an early neutral evaluation to both parties on one or more issues.

In addition, couples can move seamlessly from hybrid mediation into arbitration if they have reached an impasse on one or more issues. What is more, there is nothing to prevent a couple who have reached an impasse from choosing to have a private FDR.

In short, hybrid mediation is a highly flexible, interdisciplinary, de-siloed model which enables parties to reach agreement in the optimum way, utilising whatever professional support they need in whatever is the right setting to achieve this (and, if necessary, moving seamlessly to another setting).

WL v HL – looking forward

Another factor which suggests a much more positive outlook for mediation is policy activity on the ground.

The November 2020 report by the Family Solutions Group[3] featured, among other elements, the Surrey Initiative, developed by mediator Karen Barham. This set out a roadmap requiring far greater engagement in non-court resolution by professionals, including a requirement that both parties consider non-court dispute resolution options and if the respondent refuses, a requirement to explain why.

This work has since been built on by Karen Barham, Martin Kingerley QC and Rhys Taylor through the Family Solutions Initiative, which emphasises a shift away from 'dispute resolution' to 'solution-focused' processes. The suggestion that costs sanctions may be imposed (even on lawyers) in some circumstances where parties refuse to engage in non-court dispute resolution is perhaps controversial for some; however, this influential group's work suggests further change and that greater incentivisation of mediation and non-court dispute resolution is likely going forward.

The movement towards a more proactive approach to non-court dispute resolution and mediation was borne out in the decision of Mr Recorder Allen QC in *WL v HL* [2021] EWFC B10 (5 March 2021). In that case, the judge used his case management powers under FPR Part 3 to stay proceedings to enable the parties to engage in non-court dispute resolution. He did so on the basis that the costs incurred by the parties and the estimated future costs were disproportionate to the issues he had to determine.

To add bite to his decision, when adjourning the matter Mr Recorder Allen QC ordered the parties' solicitors to write to him setting out the parties' engagement in non-court dispute resolution, together with a schedule of any offers made and replies to offers made. Further adjournments were subsequently granted, as the solicitors reported by way of joint letters that the parties were engaging in mediation and were hopeful of coming to an agreement. A substantial agreement was then reached, save on a discreet issue that was determined by Mr Recorder Allen QC on paper.

Mr Recorder Allen QC stated in his judgment that he was 'confident that adopting the approach I did led to a better, quicker and less expensive outcome than would otherwise have been the case' ([26]). He referred to his duties to further the overriding objective at FPR 1.4(2)(f) to include 'encouraging the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure' ([27]).

The encouragement at the highest levels of the judiciary of a more proactive case management approach is underlined by the fact that Mostyn J, as then lead judge of the Financial Remedies Court, asked the judge to record his use of FPR Part 3 powers in a written judgment published on BAILII (on 5 March 2021).[4] This case may come to be seen as a pivotal moment in terms of judges being encouraged to be much more proactive and constructive in the exploration of non-court resolution options and use of their powers under FPR Part 3 in future.

Online solutions

> 'I have found mediation via Zoom far from satisfactory or easy. The process is inevitably very drawn out and ease of communication, a vital key to smooth and successful mediation, is severely hampered.'[5]

Sir Paul's comments on the merits of online mediation will not be shared by many mediators. Before the COVID-19 pandemic, the vast majority of mediators had done little, if any, online mediation. Throughout the subsequent 18 or so months, however, the status quo was transformed and almost all mediation work went online.

While the reopening of society will, no doubt, lead to the resumption of face-to-face mediation for some couples, contrary to many mediators' expectations prior to the COVID-19 pandemic, online mediation has been a revelation in its effectiveness. In some respects, it even has distinct advantages over its face-to-face cousin.

Sir Paul's critique of the process as 'drawn out' is, I believe, misplaced. To the contrary, meetings are much easier to arrange. Parties are able to dial-in (within reason) from anywhere, from an office meeting room, a hospital consulting suite or the comfort of their own home, and at much shorter notice if required.

Online mediation can also lead to much quicker turnaround times, given there is no need to travel – with the consequent removal of geographical boundaries. Like many other mediators, I have successfully mediated a large number of cases across the United Kingdom and even abroad via Zoom, which did not happen on anything approaching this scale prior to the COVID-19 pandemic.

The suggestion that Zoom is only for straightforward cases is not borne out by the mediators I speak to. Hybrid mediation, in particular, is highly effective via Zoom. I have successfully conducted a number of hybrid mediations, including cases with substantial assets and complex financial issues.

Mediating on Zoom (or other online platforms) has many distinct advantages, not least the ability to share complex financial data in real time via 'screen share'. The parties can work on figures collaboratively and the mediator can show multiple resources at the click of button, rather than having to struggle with bundles of papers.

In addition, online mediation benefits those parties who might otherwise feel uncomfortable or unable to cope with face-to-face mediation (even where shuttling is involved, as they may not want to be in the same building). It enables participants to take part from the safety of their own home or another venue. And, when one party is behaving inappropriately, the mediator is able to mute participants or separate them into the private space of a 'breakout room' at the click of a button.

'Fairness' can be subjective

Sir Paul writes that 'mediation is ... limited in its usefulness unless the case is straightforward, and all parties are in an a very fair and balanced frame of mind'.[6]

As any mediator will attest, 'fairness' is a highly subjective term (particularly when, for example, considering needs), which parties invariably perceive differently. As such, this suggestion does not ring true.

Parties invariably view fairness through different prisms; there are, moreover, some power imbalance issues in almost every setting where relationships end and mediation begins. The skill of the mediator is, of course, to provide impartial support, help the parties to reality-test options and look for synergies, so that practical solutions can be found which parties can settle on (regardless of how they may have initially viewed the question of 'fairness').

Final thoughts

Mediation provides a golden opportunity to alleviate the burden on the overburdened court system, if only more practitioners and judges embrace it. What can be done to ensure that this opportunity is taken?

(1) Compliance with the MIAM protocol should, a decade on, be properly followed, not just by solicitors but also by mediators and judges. As a matter of good practice, a mediator should always invite not just the applicant but also the respondent to a MIAM. Sadly, some mediators have been too willing to sign off forms where only the applicant has been invited to a MIAM. There is no compulsion on the parties to proceed with mediation, but all mediators will attest to the fact that plenty of mediations referred as a 'tick-box exercise' by the applicant's solicitors have turned into successful mediations when the respondent is also invited.

(2) In light of the decision in *WL v HL*, there should be no further excuse for judges to fail to follow FPR 3.3, which requires them to ask about mediation/non-court dispute resolution at every court hearing (all too often, this does not happen). The example of *WL v HL* suggests that mediation could and should be the subject of a far greater level of judicial encouragement and intervention. In the same way that a proper policing of the MIAM protocol would likely lead to a significant reduction in the numbers of financial remedy cases coming before the courts, a roll-out of the approach adopted by Mr Recorder Allen QC in *WL v HL* may lead to a significant number of cases being adjourned while parties explore mediation or other forms of non-court dispute resolution, thereby reducing pressure on the court system.

(3) Training in the benefits of mediation (and the importance of complying with the FPR) should not stop with judges. The Family Solutions Group report recommended that all family law professionals undertake awareness training in non-court resolution options. Over time, such training could lead to many more cases being diverted away from an overburdened court system into non-court dispute resolution routes, such as the hybrid mediation model.

It will be interesting to see how the evolution of a two-client, one-lawyer model (should it obtain broader regulatory approval) may further stimulate the development of private non-court dispute resolution. Could such a brave new world see the rise of evaluative mediation, where mediators adopt a directive approach to mediation, rather than the current facilitative model adopted by most?

Alternatively, given that a core strength of the facilitative mediation process is the calm impartiality of the mediator, who helps the parties 'reality test' a range of outcomes, might any shift to a more evaluative approach in family mediation be less likely than many may think?

As the number of cases awaiting resolution in court grows even more unwieldy, creative developments in mediation mean that there is a route to resolution even in the most complex of cases.

Notes

1 Sir Paul Coleridge, 'Private Alternative Dispute Resolution (pADR) – a Still Much Under-Used Process' [2022] 1 FRJ 63.
2 HHJ Farquhar, *The Financial Remedies Court – The Way Forward. A paper to consider changes to the practices and procedures in the Financial Remedies Court* (September 2021).
3 'What about me? Reframing support for Families following Parental Separation' (12 November 2020).
4 *WL v HL* [2021] EWFC B10.
5 Sir Paul Coleridge, 'Private Alternative Dispute Resolution (pADR) – a Still Much Under-Used Process' [2022] 1 FRJ 63, 64.
6 Sir Paul Coleridge, 'Private Alternative Dispute Resolution (pADR) – a Still Much Under-Used Process' [2022] 1 FRJ 63, 64.

Tech Corner: iPad Pro (2021) Review, Or, as a Solicitor, How I Learned to Stop Worrying and Love a Tablet

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For as long as I can remember, an in-person attendance with family finance practitioners at the Bar has always been the first place for me to see the latest Apple releases in the wild. With apologies to younger readers who may not get the reference, I still recall my wide-eyed wonder at watching counsel navigate a 3-day final hearing like a scene from *Minority Report* as she used a makeshift biro as a stylus. On another occasion, I watched a client recoil in horror when our barrister declared that all their papers were on their iPad Mini (which is scarcely bigger than a Kindle). This is because I knew the client would make a direct correlation between the number of lever arch files on counsel's desk with the quality of the advice she was going to receive.

Digital working has been in the offing for years. Once upon a time, enquiries to chambers as to whether counsel would accept a PDF were (in my experience) always met with an insistence on hard copies. Just as I almost gave up trying, the Bar (and the courts) raced ahead, hastened by the COVID-19 pandemic. The rest of us were left scrambling for multiple Adobe accounts. Please understand: during the last 2 years, we were trying.

I have long coveted an iPad but, hearing bundles aside, I have never felt there was enough of a reason to sanction even the most basic tablet as a solicitor. Detachable 'convertibles' often lack power, as the trade-off for being able to lift the screen (where all the processing power is housed). Since there is still a lot of Microsoft in my professional life, it felt like an extravagance – until 2021 when Apple overhauled its iPad line *and* the iPadOS and, finally, I could see a use-case beyond a £1,200 bundle reader.

Now the iPadOS has finally come of age, it is sufficiently useful to warrant taking the plunge. Key to that understanding for lawyers is that the iPad is not there to replace a desktop/laptop, but to *support* it. It is a pure quality of life upgrade in the age of wellbeing that makes things just that little bit easier and/or quicker. Who does not want that?

It is often said of Apple's design logic that it focuses on what it thinks the consumer needs, rather than what the consumer wants (recalling an early announcement for an iOS update when the introduction of 'copy and paste' was proudly trumpeted). Often, that leads to early frustration, and for years the iPadOS could hardly be described as a professional grade operating system. Basic features such as true multi-tasking have been absent, and users have had to find their own shortcuts and clumsy solutions. Literally no one I know works in the way that Apple PR thinks we do (try crashing a box-set of *The Thick of It* into the daily lives of those shiny, happy people and it is closer to the terrifying abyss of the working day).

That being said, although the iPadOS has now been significantly updated under the hood, it still looks and feels a lot like your iPhone. This is pretty useful at first, while you acclimatise and shift your workflow, but there is still an underlying inflexibility crying out from an operating system still crying out for a major refresh. The ultimate outcome is that the iPad Pro in all its forms is hopelessly over-powered and thus, basically, future-proofed[1] for several years so you can amortise the investment to yourself. You can spec the iPad Pro up to 2Tb of hard drive space and it is only at 1Tb that 16Gb of RAM is included, but this is excessive.[2] The only major change you are likely to see will be hardware-specific upgrades (such as better cameras) and these are typically incremental enough not to be worth entering into the old 2-year cycle that early iPhone users may recall.

It is also worth noting that since a lot of practitioners now operate in an entirely security-compliant cloud, both the RAM and hard disc space are much less important, but if you are going to keep lots of massive files on your iPad (or you have a number of instructing solicitors determined to send you an email full of nested PDFs whose true file size only assumes its horrific final form by the time you open the last attachment), then it is nice to have. Still, nearly one year on I have barely scratched 100Gb of space (mostly personal photos I edit in the built-in Photos app).

In terms of other relevant features, conferences, hearings and those discussions that would (and should) have taken place over the telephone but for which *every* client now expects a Zoom link are here for the foreseeable

future. The front-facing camera of the iPad Pro is not the best in class, but is a significant improvement. 'Centre Stage', meanwhile, is a disconcerting iPadOS feature that means the camera (placed at the vertical north end of the unit) tracks your position and moves the focus accordingly. It is incredibly disconcerting for anyone not in an Apple advert and thankfully you can turn it off.

Look and feel

The iPad itself has been refined a great deal over the years. In its current iteration it is a handsome slab of industrial grey, with a premium finish. It is best used away from any cover. The Retina Display LED screen on the iPad Pro is the biggest selling point – it is simply gorgeous and worth the upgrade for anyone on an older version. Anything in colour on this display simply pops. Pin-sharp with an amazing range, it is a joy to use. Too much in fact, at a time when we are all supposed to be focusing on our wellbeing. If you are going to be staring at a small screen for a long time it may as well be this one. It is probably the closest Apple has ever come to the 'magical sheet of glass' the iPad first promised. There is some slight 'blooming' with bright white text set against a pure black background, but you would have to be looking to spot it (with thanks to the internet, which did so early in the Pro's lifecycle). I note it in the interests of giving a complete view, but it has never bothered me at all and is highly unlikely to do so for the user either.

Accessories

Ah, the further price of admission. Out of the box, the iPad Pro is brilliant, but let's face it, you will need a keyboard and a stylus to go with it. The iPad Pro is best paired with both the Magic Keyboard (black; the white picks up dirt far too easily) and the Apple Pencil 2. There are plenty of third-party efforts on the market, but trust Apple to have nailed the issues with its previous keyboards in favour of finally making a satisfying typing experience. There is, as ever, an Apple tax and you are bound to be able to find a good *but not better* substitute, but it is worth the outlay.

However, the Magic Keyboard will suddenly add considerable heft to the iPad (well in excess of your nearest laptop) and it does *not* fold around the rear as a case, so do not buy it if you want something to double up as a cover (this trade-off was worth the improved workflow in my mind). The Smart Folio Keyboard does wrap around the unit and is considerably cheaper, so visit a store (or your nearest chambers) and try them both. On balance, I did not *need* the Magic version – the Smart Folio would have easily met my needs – but, oh, *that keyboard*. The modern parlance is 'chef's kiss'.

The Apple Pencil 2 is a standard issue stylus with no bells and whistles. It feels good to hold, but it is worth exploring a screen protector to protect the glass from too many scratches. Some companies offer a paper-like equivalent, but your mileage may vary as to whether the stylus still interacts as comprehensively as it does normally.[3] I have a tempered glass protector from *JETech* and I scarcely notice it (although still nothing beats the tactile feedback of good paper stock, you do not have to give up on the Leuchtturm 1917[4] notebooks just yet). GoodNotes5 tries to replicate the variety of your local stationer with an array of styles (squared, dotted, lined, etc) so you will find something that works for you.

Conclusion

There is no doubt that, for some users, the granular nature of a full-blown desktop or laptop will be something hard to relinquish. For practitioners on the fence, however, it is the perfect remote tool and well worth the upgrade. The laser-like focus it can provide to a project has been remarkable and has made weekend or remote working much easier (when I have to do them).

As a friend in tech remarked to me recently, the big problem in the industry is that, in the last few years, no one has really noticed that computing capacity now vastly outstrips our ideas for what to do with it. Virtually all of Apple's incredibly well-produced launch videos only show you people writing emails, albeit that little bit quicker. Save for all but the heaviest lifting,[5] it means that you could blind order most Apple tablets and still find them capable of doing everything this profession needs. There are only marginal gains the higher up the ladder you go – still, quality of life makes the difference. In summary, for a barrister, an iPad Pro is essential if you still have not yet upgraded; for a solicitor, consider taking the plunge now.

Post-script

Although the deadline for this issue of the FRJ is June, as I sit writing to you in March, Apple has just unveiled a new M1 iPad Air 5, which serves as an entry level device. There has been some concerning online chatter in relation to build quality and, while the spec is more than capable of meeting the legal profession's needs, if you are spending any kind of money on an Apple product it had better be brilliant, so my vote is still with the iPad Pro.

For anyone still worried about making sure they get the latest and greatest, keep an eye on the Buyer's Guide at www.macrumors.com. A good rule of thumb with Apple is to always buy when you need, but this website is indispensable if you want to maximise the lifecycle of your purchase.

Top 5 productivity apps

Several of the recommendations below have a subscriber (and/or freemium) model. For years, developers have been pushed hard by the costs of improving their product against a plateauing level of audience growth. I get it. It feels like you don't own the app and that is because you don't. If you cancel your subscription, all that functionality often disappears and, of course, you cannot have a sub for *everything*. I was a hold-out, too, but it respects the developer and means apps are supported even longer.

(1) *1Password* (subscription). Almost as essential as breathing. If you are still relying on pen and paper and/or the name of your first cat when you were 6 for all your passwords, this needs to be in your life. Years of accumulated logins will take a while to reset, but the app is so powerful (and shared across all your devices), it is barely one step away from doing everything for you. Watchtower warns you about compromised or repeated passwords, amongst other things.

(2) *GoodNotes5*. A powerful, elegant note-taker. I find it difficult to type as I talk, so I scribble attendance notes into the app; plan instructions and statement outlines or just do some colourful case planning. I can then export those as a PDF and save to our case management software (or send to a colleague, sorry). You can also import documents for annotation (e.g. time statements when compiling your Form H/N260). Inexplicably, you cannot see *when* you created your notes, so do not forget to date them, but the ability to maintain separate 'notebooks' is incredibly useful.

(3) *PDF Expert* (subscription). Lawyers generally fall into two categories – those who prefer the granular approach of Adobe Acrobat Pro and others who use PDF Expert.[6] I fall into the latter. It aims for user-friendly simplicity with a few power features and an elegant interface. When you absolutely, positively need to produce a bundle for leading counsel at midnight on the Sunday before your final hearing: accept no substitutes.

(4) *Microsoft Office* (subscription). Well, of course. You know it and you probably hate it for its wilful formatting decisions but wait. The iPad version of Word and Excel have seen vast improvements in recent years and while they still lack a lot of the wider functionality of their bigger desktop brothers, they are standard issue for getting work done. I am including the iPad version of Outlook here, too, because while the design language will not win any beauty awards, it plays well with attachments and is easy enough on the eyes. It strips out a lot of the bells and whistles, but for brief emails this is a great shortcut.

(5) *Spark*. Half the battle is dealing with *personal* emails as well as the *professional* ones. A good wellbeing hack is to use two separate apps and then there is no danger of crossing the streams. Email apps are as distinct as personality types, everyone has one. I have used *a lot* and while the default Mail app is fine, it is nowhere near as fast and efficient as Readdle's Spark. An elegant interface, this is a caramel-smooth client that epitomises why so many professionals choose a Mac: get in, get done, get out.

Lastly, if your case management software has an accompanying app, that will make the iPad even easier to integrate into your workflow, so check the App Store.

Pricing

Recommended spec: iPad Pro, 12.9 inch, 512Gb with 8Gb RAM and Wi-Fi costs £1,299. The Smart Keyboard Folio costs £199 and the Apple Pencil 2 costs £119.

Notes

1 Creative professionals may very well need to store huge files of 100Gb+, but know your audience.

2 The M1 iPad Pro could conceivably run the latest MacOS, but it does not, for the time being anyway. You will be glad of the extra RAM on that day, but it is a big ask for a consumer to speculate on Apple's own development cycle given the cost of buying in.

3 With the limitations of the Magic Keyboard as a cover, I use the iPad much more as Apple would like us to in its keynotes (only without the smugness), which is lovely, but definitely buy a screen protector.

4 Look for the spin-off *Analogue Corner* coming to the FRJ soon.

5 There is no reason to think that, as you deliver another set of diamond-cut submissions, you don't have call to run a particle physics simulation or edit the dailies on your next major studio blockbuster.

6 A third category uses Casedo. I have seen the latter at use in conference and the level of control there is absurd.

Pension Taxation – a Tax on Ambition Is Never Wise

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Pension classification

Most pension arrangements will be either one, or a hybrid, of the following arrangements:

- *Defined contribution (DC) (also known as 'money purchase')*: the retirement benefits (or income) are defined by the contributions you make. These are usually invested in stocks and shares, commercial property, and may also include direct shareholdings.
  At retirement, you will have accrued a fund (a pot of money) from which you may either draw an income directly from the fund or buy an annuity. Whichever option you choose, you will need to ensure that this is an amount which can provide or maintain a lifestyle to which you are accustomed; otherwise, there is a risk of significant financial hardship or shortfall.
- *Defined benefit (DB)*: the benefits can be defined at the outset because they are based upon a pre-set formula (known as an accrual rate, e.g. 1/60th, 1/80th, 1/54th) linked to pensionable earnings and length of service. They can operate as a final salary, of which an example would be the 'best of the last 3 years' ('best of three'), a system originally used by public sector pension schemes; more recently we have seen the introduction of the Career Average Revalued Earnings (CARE) scheme, which currently appears to be the more popular choice of DB pensions.

While both 'best of three' and CARE schemes will accrue pension rights, the accumulation and calculations are significantly different and thus worthy of further consideration. This is notable for both Whole Time Equivalent (WTE) and Less Than Full Time (LTFT) working; however, the disparities are often more exaggerated for those working LTFT, as in the following examples.

Examples of the effect of LTFT working in 'best of three' and CARE schemes

The same accrual rate is used in both examples for simplification (see Table 1).

In the next example (see Table 2), we assume pay has fallen by £10,000 because this person is working fewer hours (20% less). We will assume the member does not meet 'protected pay' criteria for the final salary section and the consumer price index is nil.

Total pension after 6 calendar years:

- Best of three – £6,075 p.a.
- CARE – £12,063 p.a.

What does this tell us?

In the 'best of three' example, the pensionable pay would still be based on WTE, however, service is scaled down to account for LTFT working. When the earliest pensionable year is the best, then this pay figure is given an uplift to account for inflation, so that the pension does not lose value. Unless this member can opt to protect the unreduced pay, then the pension will not be able to protect the higher pay.

This problem is further complicated by the McCloud remedy as, with effect from 1 April 2022, all future service in the legacy schemes will be frozen as members transition into the 2015 scheme (for more detail, see 'McCloud

Table 1

Final salary 'best of three' (1/54th)			**CARE (1/54th)**				
Total pensionable pay (WTE)	*Service (days)*	*Pension*	*TPP*	*Pension*	*Previous year's account balance*	*Revalued pension*	*Revaluation factor*
£100,000	365	£1,851	£100,000	£1,851	nil	£1,878	1.4
£100,000	730	£3,703	£100,000	£1,851	£1,878	£3,823	2.5
£100,000	1,095	£5,556	£100,000	£1,851	£3,823	£5,930	4.5

Table 2

Final salary 'best of three' (1/54th)			CARE (1/54th)				
Total pensionable pay (WTE)	*Service (days)*	*Pension*	*TPP*	*Pension*	*Previous year's account balance*	*Revalued pension*	*Revaluation factor*
£100,000	1,387	£4,750	£90,000	£1,667	£5,930	£7,893	3.9
£100,000	1,679	£5,750	£90,000	£1,667	£7,893	£9,866	3.2
£90,000	1,971	£6,075	£90,000	£1,667	£9,866	£12,063	4.6

remedy' below). Unless there is a pre-existing Added Years contract, the member will retain the final salary link, but will not accrue any further service. If this had applied in the Table 2 example, the service in year 6 would have been frozen at £1,679, not £1,971, resulting in a total pension of £5,175 and not £6,075.

The CARE pension is less sensitive to changes due to the accrual mechanism, as each year is banked and revalued on an annual basis; pay figures are based on actual earnings and are not notional. However, this system provides a faster rate of accrual than its predecessor.

What taxes do you pay on a pension?

There are two main taxes of which you need be aware of due to the potential effect upon the value of future member pensions: Annual Allowance (AA) and Lifetime Allowance (LTA).

AA

This tax falls within the remit of Self-Assessment and should therefore be reviewed on an annual basis.

Fast facts

- The AA is £40,000 and subject to tapering.
- Tapering will currently apply to those with a taxable income in excess of £200,000.
- If your income exceeds this limit, you will need to complete an 'Adjusted Income' calculation.
- If your 'Adjusted Income' exceeds £240,000, the standard AA reduces at a rate of £1 for every £2, to a minimum of £4,000.
- By contrast, within the tax years 2016/17 – 2019/20, the Tapered AA applied to those with earnings in excess of £110,000; adjusted income was set at £150,000 and the minimum AA was £10,000.
- If you believe you have exceeded the AA, you can 'carry forward' any unused amounts (from the last 3 tax years) to reduce or mitigate your charge.
- Even if you have had a period of time outside of a pension scheme, as long as you have been a contributing member within the last 5 tax years, you are still able to carry forward any unused amounts, although tapering still applies to those with higher incomes and the pension input amounts for the deferred years will be £0 – in such cases, specialist advice should be sought.

There are two different methods of valuation depending on whether you are in a DC or DB scheme. The application of tax reliefs may differ too, depending on whether this is an employer or employee's pension contribution.

How AA is calculated

- *DC schemes*: the value of all pension contributions – not the fund value.
- *DB schemes*: a multiple of the growth in pension rights, from one year to the next, with an allowance for inflation. The measure used is referred to as a 'Pension Input Amount' and all schemes must provide members with this information. You do not take into account employer or employee's contributions.

Tapered AA and NHS services

The Tapered AA has been problematic for those working within the public sector, especially the NHS, as even though the thresholds increase, most higher earning staff have exhausted their carry forward allowances in the prior years when thresholds were much lower.

Due to the existence of anti-avoidance measures, to avoid falling foul of these rules members have necessarily resorted to working less to avoid punitive tax bills; in one case, a doctor providing £5,000 of non-pensionable cover for an understaffed ward received an additional AA charge of £13,000 due to tapering – an effective tax rate of 260%!

As carry forward allowances work on a 'use it or lose it' basis, this can cause severe issues for those looking to 'act up' (the temporary assignment to a more senior grade or role), as the spike in pensionable pay can create a tax charge, for which they may never see a return; this happens if they step down and fail to ever secure and protect the same level of pensionable pay again.

If a member had used Scheme Pays as a method of payment, they cannot write off the AA charges relating to those higher years, nor would they be able to seek refund had they used Self-Assessment.

Over the last 3 years, we have noticed a significant change in the career objectives of our medical clientele, most not actively seeking promotions, but instead wanting more free time, being prepared to accept less income, and aiming for earlier retirement.

LTA

This a tax which is usually assessed when you either draw your pension, take a lump sum, die, or reach the age of 75. LTA charges may become payable when a 'Benefit Crystalisation Event' (BCE) occurs. There are 13 BCEs, and each has its own approach to the valuation, but generally the method used is:

- DB – 20 times the pension plus any retirement lump sums.
- DC – the value of the fund.

The fact that LTA charges are not calculated and recovered in the same way leads to a disparity between the amount of

pension payable at retirement. The following example attempts to highlight this problem.

Case study

The objective is to re-create Jack's pension rights on the open market, assuming Kamila is aged 60, in good health (so does not qualify for enhanced rates) and married with two children.

- Jack has a 1995 NHS pension with a capitalised value of £1,173,100:
  - standard annual pension: £51,004;
  - standard retirement lump sum: £153,013;
  - after LTA charges:
    - £49,850.14 p.a.;
    - £153,013 retirement lump sum.
- Kamila has a DC pension with a capitalised value of £1,173,100.
  - retail price index (RPI) linked annuity with 50% widow's pension, before LTA charges:
    - £22,195.92 p.a.;
    - £293,275 retirement lump sum.
- After LTA charges, Kamila has £854,825 left to purchase an annuity (assuming she opts for the full pension commencement lump sum):
  - RPI linked annuity with 50% widow's pension, after LTA charges:
    - £17,323.32 p.a.;
    - £279,525 retirement lump sum.

Trying to re-create these benefits on the open market is impossible, if only from the viewpoint that public sector schemes are underwritten by the Treasury, unlike the annuities provided by insurance companies. Of course, there are other flexibilities and retirement options Kamila could adopt to help reduce her LTA charges, which are not included in the above case study. For example, delaying annuity purchase and phasing withdrawals via flexible drawdown over a period of time; however, she will be exposed to investment risk, unlike the NHS scheme pension. This example serves only to demonstrate how the benefits of public sector pension schemes generally outweigh those provided by DC schemes, especially when taking into account LTA recovery factors.

LTA mitigation strategies

There are strategies that can be used to reduce or mitigate LTA charges:

- *'Small pots' or small lump sums*: a maximum of three small, non-occupational pension schemes and an unlimited number of occupational schemes can be taken without being tested against the LTA.

  Each pot or payment must not exceed £10,000. The member must have reached minimum pension age, protected pension age or satisfy the definition for ill health retirement.

  As an example, it is worthwhile exploring whether it is advisable to split a small pension fund of £30,000 into three amounts, by transferring to different providers, simply for the LTA tax savings.
- *Trivial commutation lump sum*: the payment of a trivial commutation lump sum is not a BCE and does not trigger an LTA test. Although the rules do state that when the lump sum is paid to the member, they must have some LTA available, and the value of all member pension rights must not exceed £30,000. The member must have reached minimum pension age, their protected pension age, or qualify for an ill health pension. All payments must be made within a 12-month commutation period.
- *State pensions*: the state pension is not subject to AA or LTA taxes. The amount you will receive will depend on your national insurance record and it is possible to add 1/35th of the full amount to make up for any shortfalls so you can qualify for the full state pension, currently £185.15 per week (2022/23 rates).

Enhancing your LTA

The standard LTA can be increased in a number of circumstances, as follows:

- *Pension credit*: as a result of a pension sharing order, from either before 6 April 2006 or from when a pension in payment after 5 April 2006 is shared.
- *Qualified recognised overseas pension scheme transfer (QROPS)*: there is a transfer-in from a QROPS.
- If the member holds any of the following transitional protection certificates:
  - primary protection;
  - enhanced protection;
  - underpinned LTA;
  - fixed protection (2012, 2014, 2016);
  - individual protection (2014, 2016).

While most of the above protection certificates are no longer available, it is still possible to apply for individual protection 2016. This certificate provides holder with the ability to continue making pension contributions and protect the capitalised value of their pension rights as at 5 April 2016 up to a maximum of £1.25m. To qualify, their pension rights must have exceeded £1m as at 5 April 2016.

McCloud remedy

Further to the most recent consultation, updated 3 March 2022, the government has confirmed that previous holders of fixed and enhanced protection should give further consideration as to whether they move into the 2015 public sector schemes. As the McCloud remedy will effectively return members to the legacy schemes, then it is possible that they can reactivate these protections via HM Revenue & Customs, as long as they do not transition into the reformed (2015) scheme; joining a new scheme is in breach of the terms of these protections, which provide significant LTA savings.

Whilst these certificates may reduce or mitigate an LTA charge, they also prevent future accrual, as the member would have to opt out of the public sector pension scheme before 1 April 2022. The members will need to decide whether a deferred pension with no LTA charge provides a higher level of benefit, than future pension accrual with an LTA charge. There is no default position, as this is dependent on future earnings and service.

Enhanced protection is a particularly complex certificate, which is subject to two 'relevant percentage' tests based upon future growth, which very few members ever pass – usually only 1995 practitioner members of the NHS pension scheme. As this path can be fraught with many dangers, it is

therefore advisable to seek professional advice from a suitably qualified expert before taking any further action.

Conclusions

The above summary sets out the considerable complexities of pension calculations that need to take account of the differing schemes, changes to regulations, taxation and projections regarding future pay and similar remuneration (and these are just some of the relevant factors). As an example, should we apply these principles to the application of pension sharing orders (PSOs) in public sector schemes, we know that the pensions on divorce debit is a fixed amount of the pension now, which will increase each year with inflation; however, it continues to be deducted from the member's gross pension – it is a common misconception that a 'best of three' public sector pension will only ever grow in value. Also, future pension growth can also attract AA charges and, therefore, Scheme Pays deductions can only serve to exacerbate this problem.

In summary, it is possible that superficial calculations may wildly undervalue the eventual pension rights at retirement, whereas conversely an indexed debit can represent a higher share of the pension in the future than it was originally valued at the time of implementation. It could, therefore, be argued that the application of PSOs in public sector pension schemes are never really a clean break (especially when factoring in future AA liabilities for Scheme Pays), and therefore it is time that the pension system be reviewed.

Financial Remedies Case Round-Up

February to April 2022

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

Henry Pritchard
One Hare Court

From the Chair of the Editorial Board

'*The Mostyn*' award for this issue: *WC v HC (Financial Remedies Agreements) (Rev 1)* [2022] EWFC 22.

In our first issue, I indicated that the main aim of this *Case Round-Up* would be to feature a concise summary of judgments from all levels of the judiciary which have emerged since the previous issue, but that in each issue I would identify one outstanding judgment in this category considered to be a *must read* for all financial remedies practitioners. In deference to the then imminent retirement of Mostyn J from the position of national lead judge of the Financial Remedies Court (FRC), and in genuine admiration of his phenomenal contribution to the FRC and the wider field of financial remedies in general, I announced that henceforth we would call the judgment receiving this award '*The Mostyn*'.

The first award went to Mostyn J himself for his judgment in *BT v CU* [2021] EWFC 87, and his judgment in *Xanthopoulos v Rakshina* [2022] EWFC 30 (discussed at length in other parts of this issue) is a strong candidate for a second eponymous award, but it is fitting that for this second issue of the FRJ, the award of *The Mostyn* is to Mostyn J's successor as national lead judge of the FRC, Peel J, for his judgment in *WC v HC (Financial Remedies Agreements) (Rev 1)* [2022] EWFC 22.

The judgment may be most remembered for Peel J's strong deprecation of the conduct of the wife's legal team in simply ignoring provisions in court orders, practice directions and statements of efficient conduct as to the length of statements and other documents. Reducing the font size of text to gain token compliance was:

> 'completely unacceptable … Why is it fair for one party to follow the rules, but the other party to ignore them? Why is it fair for the complying party to be left with the feeling that the non-complying party has been able to adduce more evidence to his/her apparent advantage?'

He also strongly deprecated the tone of many of the lawyer-produced documents:

> '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 … as a "rummage through the attic" of the marriage.'

The judgment is also, however, remarkable for the breadth of issues of law it summarises with an admirable and unusual level of concision. An overview of the general law of financial remedies in 16 crisp and concise sub-paragraphs is given in [21]. The law on agreements is summarised in five crisp propositions in [22]. The same task is performed for the law on *inter vivos* subventions from third parties and potential inheritances in [23] and [24]. It might be said that, for many cases, the court will need to go no further than to master these paragraphs to identify the governing principles for any decision it needs to make.

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

Bailey v Bailey & Ors [2022] EWFC 5 (Peel J)

Peel J made committal orders against the respondent husband and two of his associates. H had fled the jurisdiction shortly after being served with a passport order, having failed to comply with a financial remedy order. H's counsel argued that the rule in *Hollington v Hewthorn* [1943] KB 587, that previous findings of fact were not admissible in subsequent civil proceedings as they were opinion evidence, prevented the judgment below from being admitted into the committal proceedings. The judge rejected this, noting that the rule applied only to distinct sets of proceedings or those with different parties, and that he could take it into account. It would be an absurdity if the order being enforced was not admissible in a subsequent application for committal. The judge found that H and his associates had committed breaches and sentenced H to 12 months and the others for 4 months each, the latter suspended for 28 days.

Xanthopoulos v Rakshina [2022] EWFC 30 (Mostyn J)

Mostyn J strongly criticised the level of legal costs incurred by the parties, regarding them as 'apocalyptic'. He urged the Lord Chancellor to 'consider whether statutory measures could be introduced which limit the scale and rate of costs run up in these cases … steps must be taken'. The judgment

also features a majestic analysis of the history of anonymisation of judgments in financial remedies cases, at the end of which ([140]) Mostyn J reaches the:

> 'fundamental conclusion … that, irrespective of the terms of the standard rubric, section 12(1) of the 1960 Act, following long established principles, permits a financial remedy judgment (which is not mainly about child maintenance) to be fully reported without anonymity unless the court has made a reporting restriction order following a *Re S* balancing exercise. In my opinion this freedom can only be restricted by primary legislation and not by rules of court … The power of the Family Procedure Rule Committee to make rules under this subsection is strictly confined to making something presently punishable as contempt not so punishable. It cannot make rules the other way round to make punishable as contempt something that is not presently so punishable. Therefore, any change to make financial remedy judgments systematically anonymous has to be done by primary legislation.'

The consequences of this decision are fully discussed in the articles in this issue of the FRJ by Sir James Munby[1] and Christopher Wagstaffe QC.[2]

Lockwood v Greenbaum [2022] EWHC 845 (Fam) (Moor J)

Moor J allowed an appeal against the judgment of a Recorder in which W had been refused permission to pursue a Part III claim in England pursuant to section 15(1)(c) of the Matrimonial and Family Proceedings Act 1984. H had an interest in a property in England which had at one point been used as a family home. There had been extensive proceedings in New Zealand in which the courts there had declined to make orders in respect of this property, despite W having been ordered court to pay substantial 'relationship debts' to H, some of which being referable to this property. Moor J found that the judgment below had applied the law incorrectly in dismissing W's application on that basis that she had failed demonstrate a 'substantial connection' to the jurisdiction. The judge found that this was not the correct test as set out in *Agbaje v Agbaje* [2010] UKSC 13, [33] and decided to re-exercise the discretion to grant permission. H was ordered to pay W's costs of her application for permission on the basis that he ought to have conceded this.

Re A (Schedule 1: Overspend: Costs Clawback) [2022] EWFC 21 (Recorder Chandler QC)

Recorder Chandler QC, in the context of an application under Schedule 1 to the Children Act 1989, considered whether F should be liable to clear M's debts and whether he should also have to make provision for a nanny. The judge found that M, an influencer, had made no attempt to moderate her spending and should not have her debts to her family discharged, but just her hard debts to banks. The judge subjected these payments to claw-back provisions for the sums he found W to have overspent and the sums she had spent on an unsuccessful appeal. The judge also did not allow costs of a nanny on the basis that M's stated justification that it would allow her to build up her earning capacity was not truly for the benefit of the child.

DX v JX [2022] EWFC 19 (Moor J)

Moor J heard a variation application concerning a spousal periodical payments order which had been made by consent and calculated payments so that W shared a percentage of H's very considerable income. H attempted unsuccessfully to vary this order in W's domicile of Luxembourg, as then required by the Maintenance Regulation.[3] W challenged jurisdiction on H's latest application in England, contending that H still needed to apply in Luxembourg. Moor J did not accept this, the Maintenance Regulation having been replaced by the Hague Convention 2007,[4] which required an application in the 'contracting state', England. The judge also rejected W's submission that the issue was *res judicata*. Moor J held that he would not have acceded to H's application to terminate the spousal periodical payments had H not taken a very large pay-cut by moving back from the United Arab Emirates to the United Kingdom. Moor J was not convinced that the element of sharing of income in the original order was impermissible, since the parties had consented to it. The judge found that the parties now had equivalent incomes and assets and so determined that the order would be discharged.

J & K v L (Schedule 1: Older Children) (Rev 1) [2021] EWFC B104 (HHJ Hess)

The judgment by HHJ Hess deals with the latest round of litigation under Schedule 1 to the Children Act 1989 between parents who had been engaged in court proceedings for most of the past 20 years, 'a ghastly disaster for all the individuals involved'. The judgment engages in a detailed analysis of the complex 'baton-passing' provisions in Schedule 1 as to when an application for a financial remedy should be made by a child rather than by a parent. The narrow point decided is that Schedule 1, paragraph 1(5)(a) does not prevent the court varying an existing child periodical payments order after the child is 18. In any event, an application made before the child is 18 (as was the case here) can still be determined after the child is 18 and is not extinguished by the effluxion of time. The wider points in the judgment are the comments made about the decision of those drafting Schedule 1 for producing such a complex sequence of 'baton-passing' provisions and concludes '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)'. The judgment makes decisions on what financial provision can reasonably be expected by a child likely to be moving into tertiary education in due course.

ND v LD [2022] EWFC B15 (DDJ Arshad)

DDJ Arshad's judgment (in a financial remedies case which is unremarkable for its financial facts) is notable for the way in which the court dealt with a litigant-in-person husband who evinced some challenging behaviours and was on the borderline of not having capacity, but whose engagement in the hearing had to be properly secured to ensure procedural fairness. The judgment highlights the need in such cases for careful case management, including the use of a separate ground rules hearing, in relation to the appointment of a suitable McKenzie friend, the selection of special

participation measures tailored to the particular aspects of the behaviour of the unrepresented husband and the consequences of such behaviour on the wife and other participants.

MG v GM [2022] EWFC 8 (Peel J)

Peel J heard an application for Maintenance Pending Suit and a Legal Services Payment Order. The judge considered the impact of the underlying jurisdiction dispute, concluding that it was not so strong that he should reflect any pessimism in the interim award as to the underlying jurisdiction for W's application, since W had been found to be habitually resident in previous Hague Convention[5] proceedings. The judge had to draw inferences as to H's resources given his lack of disclosure and held that H would have to unlock liquidity in his funds to meet an award, particularly in circumstances where he had done so in the last year of the marriage in 2021 in order to invest in his business. The judge granted W's applications, although he declined to make costs orders in respect of the Hague Convention proceedings, which he found to have been entirely distinct and historic. He stayed the payment of sums in respect of the Children Act 1989 proceedings pending the outcome of the mediation process.

Collardeau-Fuchs v Fuchs [2022] EWFC 6 (Mostyn J)

Mostyn J heard an application for Maintenance Pending Suit (MPS) in a case where H had net assets of some £1.2b and where he had made an application for Notice to Show Cause as to why W should not be held to the terms of a pre-nuptial agreement. The judge had given directions for limited financial disclosure, including for H to provide a schedule of the parties' annual expenditure in the last 2 years of their marriage. W then worked backwards from that schedule to provide her claimed income needs. Mostyn J held that, although MPS could be calculated with a broad-brush approach, that he would in this case 'paint this decision in a fine sable', given the time and information he had available to him. H was ordered to pay £855,600 p.a. to W, on top of his undertaking to pay for all staff and overheads associated with W's property.

P v Q (Financial Remedies) [2022] EWFC B9 (HHJ Hess)

The judgment of HHJ Hess identifies the guiding principle of equal division in sharing cases ([27]):

> 'I want to say something at this stage about the sharing principle. As a starting point in the division of capital after a long marriage it is useful to observe that fairness and equality usually ride hand in hand and that (save when an asset can properly be regarded as non-matrimonial property) the court should be slow to go down the road of identifying and analysing and weighing different contributions made to the marriage.'

The judgment also suggests some principles to be followed on how a court should distinguish between hard and soft debts for the purposes of computation ([19]):

> '[T]he inclusion or exclusion of a technically enforceable debt in an asset schedule can depend on its softness/hardness … Once a judge has decided that a contractually binding obligation by a party to the marriage towards a third party exists, the court may properly wish to go on to consider whether the obligation is in the category of a hard obligation or loan, in which case it should appear on the judges' computation table, or it is in the category of a soft obligation or loan, in which case the judge may decide as an exercise of discretion to leave it out of the computation table.'

The judgment identifies certain features which may place a debt on one side of the line and certain other features which may place it on the other side of the line and concludes ([19]):

> 'It may be that there are some factors in a particular case which fall on one side of the line and other factors which fall on the other side of the line, and it is for the judge to determine, looking at all of these factors, and maybe other matters, what the appropriate determinations to make in a particular case in the promotion of a fair outcome.'

The court should take care not to allow one party to 'repay' a debt which would not otherwise have been repaid to manipulate the computation exercise.

Baker v Harthill Baker [2022] EWFC 15 (Mostyn J)

Mostyn J heard an application for Maintenance Pending Suit in a case where he noted that the respondent husband's disclosure had been so contradictory that the judge required that his replies to questionnaire be exhibited to an affidavit and sworn to be true in order that H should know that any untruths would make him vulnerable to a sanction for perjury, rather than just a false statement of truth. Mostyn J rejected a submission by W that reliance should be placed on a pre-nuptial agreement (PNA) in circumstances where he considered that this might amount to an inappropriate pre-recognition of the PNA on an interim basis. Although the award fell far short of what W had sought, H had not provided a *Calderbank* offer and so H was liable to pay W's costs, albeit after the judge had pruned them back.

Traharne v Limb [2022] EWFC 27 (Sir Jonathan Cohen)

Sir Jonathan Cohen heard a case in which W argued that she had been subject to coercive and controlling behaviour and that, as a consequence, she had not entered freely into a pre-nuptial agreement (PNA). H argued that this PNA should be a 'magnetic factor' in the outcome of the proceedings. A single joint expert (SJE) psychologist was appointed at the first directions appointment to assess whether W had been subjected to such behaviour and whether this might have affected W's ability to freely enter into the PNA. The judge found that coercive and controlling behaviour could be an *Edgar*[6] vitiating factor within the pre-existing categories of undue pressure or exploitation of a dominant position, or as conduct. However, with the benefit of the SJE evidence, he did not find that H's behaviour was of the sort complained of. The judge concluded that W's sharing claim was also entirely misconceived and made a needs award. As to costs, the judge

criticised W's insistence on litigating H's conduct and her misconceived sharing claim. H was ordered to pay some of W's costs, but these were scaled back to leave W with her own debts, including a costs award against her in H's favour.

Simon v Simon & Level (Joinder) (Rev 1) [2022] EWFC 29 (Nicholas Cusworth QC)

Nicholas Cusworth QC heard an application to discharge the joinder of a litigation lender who had been joined to the proceedings without notice when the lender had come to suspect that the parties had reached an agreement with the intention of preventing it from recouping its loan (made to W). This agreement involved W being granted a life tenancy of a property owned by a trust of which H was a beneficiary. This appeared to have been calibrated so as to leave nothing for the lender to recover. The parties had sought to have this agreement turned into a sealed order in the teeth of the lender's protests. The lender sought joinder to try to prevent any such sealing. It appeared that Mr Cusworth, who had approved the order, was not at that time informed of the lender's application for joinder. H argued, in W's absence, that the parties had resolved their proceedings and should not be forced to continue to litigate simply for the lender's benefit. H eventually conceded the set aside application, and the judge concluded that joinder was appropriate so that the proceedings could be fairly and expeditiously resolved.

Goddard-Watts v Goddard-Watts [2022] EWHC 711 (Fam) (Sir Jonathan Cohen)

Sir Jonathan Cohen heard the second re-hearing of W's application for financial remedies following two successful set aside applications and a previous rehearing in 2016. H had been found to have not disclosed significant trust interests in the original proceedings, and then not to have disclosed circumstances (including an offer to purchase H's shares in his business) in 2016 which suggested those shares had been worth far more than the judge in 2016 had been led to believe. This had been found in 2018 to have been a deliberate failure to disclose on H's part. W then argued that there should be a complete rehearing (rather than a bespoke *Kingdon v Kingdon* [2010] EWCA Civ 1251, [2011] 1 FLR 1409 approach) and that she had an outstanding sharing claim to H's business. The judge found that W did not have an extant sharing claim against the business, that having been settled in the original proceedings where the value of the business as asserted by H turned out to have been largely accurate as at that time. Instead, the judge adopted the *Kindgon* approach and made a needs-based award, providing W with a sum of £1.1m to constitute a *Duxbury* fund. This was based on W's continuing contributions to raising the children. Notably, W was not criticised for having alienated significant funds by buying her children flats in London, although as a consequence she was not permitted to ringfence her award from amortisation.

Notes

1 'Some Sunlight Seeps In' [2022] 2 FRJ 79.
2 'Privacy and Transparency in the Financial Remedies Court' [2022] 2 FRJ 96.
3 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7/1.
4 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (23 November 2007).
5 Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980).
6 *Edgar v Edgar* [1981] 2 FLR 19.

Interview with Lord Sumption

Alexander Chandler QC

1KBW

In 'Family law at a distance',[1] you spoke about the benefits of cross-fertilisation. As a practitioner, were you ever interested in family law? Did you ever come across family law practice?

No, I was a commercial practitioner. I had two exposures to family law before I went to the Supreme Court. One of them I am not in a position to talk about. The other was a case when I was fairly new to practice, which rather illustrates the problem that arose in *Prest v Petrodel*.[2] A deserted wife who had married a Greek ship owner and then divorced him, wished to obtain a *Mareva*[3] injunction to stop him salting away his assets before the financial remedies were obtained. She knew that he owned and ran ships, and she knew that they were all owned by one-ship companies which, as with all Greek ships, were registered in Panama. All she knew about them was that they ended with the name 'Naviera'. She obtained from Heilbron J a worldwide *Mareva* order blocking every ship belonging to a company with a name including the word 'Naviera' – this was about 4,000 ships of the Greek merchant marine distributed across the world. I was instructed to apply to Heilbron J to have it lifted because 3,997 were unlikely to have anything to do with the husband. The judge thought this was an extraordinary application and threw it out. It was only at the door of the Court of Appeal that the wife's lawyers recognised that this was not going to be easy to sustain before a Court of Appeal comprising people such as Eustice Roskill. The case underlines the tendency for family courts to move in a different world, in which one stopped at absolutely nothing to ensure that financial remedies were effective.

That was really the problem in *Prest v Petrodel*. We got to what I would agree was the right answer but not by ignoring the corporate veil. It was actually a case about company law rather than family law.

There is a problem about all specialisations. The problem is the degree of specialisation which is professionally possible at the Bar. It is higher than in almost any other legal profession in the world. This encourages the development of legal silos. I was constantly struck by the number of practitioners who came into the Supreme Court in family cases, in planning cases, in social security cases who were entirely enclosed by their speciality. They had a grab bag of useful authorities, all derived from their own area of law. There was no conception that behind these authorities there might lie some general legal principle, common to quite a number of other legal silos. But because nobody looks over the fence into the garden next door, they were completely unconscious of this. By far the best advocates are those who can relate what they are submitting to some general principle of law which is not confined to that particular speciality. It is surprising how few practitioners do that

Do you think family lawyers were particularly bad at that (being siloed)?

As I said in the lecture that you quote,[4] family lawyers were particularly inclined to feel that their field was governed by certain imperatives which made other legal principles irrelevant. Family law is different in quite a few ways. It was not originally a common law jurisdiction. It originates in the ecclesiastical courts and has large elements of civil law in it. So historically it certainly is different. It is also traditionally a much more inquisitorial rather than adversarial system, with the judge very much more in charge than he would be in a case about, for example, charter parties. So, there are differences, but the substance of the law is the same in every division of the High Court. In particular, the law of property is the same.

Do you discern that things are getting better in terms of family lawyers taking this on board?

I have not heard enough cases to be able to say. I am told it is. I also notice that the calibre of people going into the family Bar, not by the accident of where they did that pupillage but by choice, is very high. I am not going to suggest that it was not always high, but looking at the children of friends of my generation who are going into the law, a significant number are going into areas of law where the pay is lousy, such as criminal law and some parts of family law. But it is not a place you go to make your fortune; you go there because you are genuinely interested in it.

When you took your appointment, did you leave the Bar with any regrets?

I did not regret it. I left the Bar at a time when I was very much enjoying it, but it was not going to get any better or any different for me. It would have been more of the same. The same was great, but the opportunity rarely arises to do something important, interesting and different when one is 63, and it is not to be sneezed at.

How did you find the change, from your role as leading counsel and one of the stars at the Bar, to the more collaborative environment of the Supreme Court?

It is not very different. The sort of cases that I was doing quite often involved large teams of barristers and solicitors – they were collaborative as well. Solicitors have changed out at all recognition since I came to the Bar in 1975. At that time, many solicitors particularly the more senior ones did not regard it as their function to think seriously about law. That was what they went to counsel. For a generation or more now, solicitors have been extremely good lawyers, or they do not survive. They have an important contribution to make which you have to respect, so there is a large measure of collaboration anyway.

The Supreme Court has not always been as collaborative with as it is now. In Tom Bingham's day, people retired into their igloos after the arguments, and they emerged with draft judgments which involved no real input from any of their colleagues. It was not done to go round to a colleague and say, 'look I could agree with you if you change this or that' or 'don't you think that the following bit of your judgment needs to be toned down'. That is absolutely routine now, but it is really only in the last 10 years that it has become so.

I was looking through the authorities and I think there were probably about a dozen family cases or quasi-family cases

I did not deliver a judgment in many of them.

***Prest* is the obvious one …**

There was also a case where I dissented along with Tony Clark with both the family lawyers, Nick Wilson, and Brenda[5] on the other side.[6] That is actually one of the great advantages of the Supreme Court: the fact that some one new to the subject can end up hearing cases on subjects like this. There are times when a specialisation becomes a bit ingrown. It starts observing unique conventions of its own. An outsider can come into this world and say, 'Blimey what the Hell's been going on here?' That is very healthy because it is a question that somebody who has been doing it all his career is never likely to ask.

Like the House of Lords in *White*, asking where in the statute is there any reference to 'reasonable requirements'.

Yes.

What was your impression of family lawyers having not come across them in practice?

As lawyers? I thought that they were too bound up with their own way of doing things and with a series of principles and practises grown up unique to their area of law, which is always a bad thing. There obviously are immensely significant exceptions to this. James Munby, for example, was a judge with a general view of the law, in my view one of the outstanding lawyers of his generation. There were occasional practitioners who made the same sort of impression. But remember that one is spoilt in the Supreme Court.

You mentioned *Prest v Petrodel* earlier, where you comprehensively disapproved of the special approach which had been applied in the Family Division to piercing the corporate veil. Is *Prest* a decision you look back on or reflect on?

I do not really look back or reflect upon any of the cases that I sat on. I remember that one particularly because it was quite early in my time on the court, because it was not my subject, and because I had to spend a lot of time negotiating with family lawyers who were much more sympathetic to the decisions of the first instance judge than I was.

Who felt that the end justifies the means?

Yes, but that is not a sound principle.

Practitioners who sit part time are often surprised by how much you can gain from observing advocacy. You can see what works and what does not work. What would you say are the hallmarks of a really good advocate?

There is not a single answer to that. One of the worst things you can do is to imitate the mannerisms however effective of another advocate that you have admired. Certainly, at the top level there is an element of quirkiness in all great advocates, which is one of the things that makes them interesting to listen to. The quirkiness guarantees that they are not going to be telling you the same as the last person who argued that point. I think apart from the obvious things like being completely on top of your material both factual and legal, an ability to present facts and law in an interesting way is absolutely vital to retaining the interests of the tribunal.

I have occasionally been asked 'What is the single most important rule you would press on people?' and my answer is that halfway through each sentence it should never be entirely clear how it is going to end.

Avoid clichés?

Avoid cliches, certainly, but if there is some linguistic uncertainty about the way that you are going to put it, people pay attention more closely.

What advice do you have just for a young barrister or solicitor in terms of preparing for court?

The most important thing is that you have got to have a very clear idea of what you are trying to prove if it is fact or establish if it is not. It is surprising how many very experienced advocates flail around looking for a principle that might help them instead of working out exactly in advance what they have got to establish. This applies particularly to cases involving contested witness evidence. The point about cross-examination, for example, is not just to rubbish the other side, but to prove something, which may be better done by not rubbishing them.

Your valedictory is still online and makes entertaining viewing. Lord Grabiner QC joked that as a judge you had to retire just as you reach your intellectual maturity. Had the rules been different would you liked to have sat beyond your 70th birthday?

There would have been a serious crisis in my family had that happened, but I probably would have braved the disapproval of my wife and continued for a couple of years. I would not have continued to 75. I do not think that one

declines as a judge in one's seventies. But from a purely personal point of view, I think that to stop working at 75 is too late to start doing other interesting things instead. There is a big difference that I cannot really explain between retiring at 70 and retiring at 75 to the quality of the rest of your life.

Turning to your life since retiring, you have taken a very public stance against the lockdown measures to the extent of, arguably, approval of a degree of law breaking

I did not approve it. What I said was there is no moral obligation to obey the law. It is a tautology to say there is a legal obligation. I have also said that it is a matter for every individual to decide at what point he says to himself 'I'm not going to comply with this nonsense'. There is such a point in the case of almost every individual. If you take an extreme case, and I am not suggesting there is any analogy with the COVID-19 measures, I think that many people who were basically law abiding would have felt that there was a point beyond which in Germany in the 1930s they were not prepared to comply with some laws. I cite that simply to make the point we all have a breaking point somewhere.

Do you feel that some of the lockdown measures brought you to that point of saying 'I can't comply'?

I have already admitted that I was not a scrupulous observer of the lockdown rules. I thought that they were oppressive. They went well beyond what the state is entitled to do to people. It is not a good enough reason that it might work or will save lives. I do not regard liberty as an absolute value, but I do think that it is a value of very great importance. If we were talking about an outbreak of smallpox cases with fatality rates around 30% or Ebola with 50%, I would see the point. The alternative would be worse than the lockdown. But to apply this to a disease with a case fatality rate somewhere between 0.15% and 1% seems to me to be completely disproportionate.

Are you troubled by the political climate, or do you think we are now taking steps to get back on track?

Well, we are obviously moving out of lockdown, but my concerns about the political climate are a lot wider than that. I think that we are moving to a more authoritarian and less tolerant style of politics. This is not, however, entirely the fault of politicians. It is largely the fault of the public at large. There is a demand that the state intervene in areas where it is either impotent or its actions are just not going to help. The same is true of quite a lot of other countries.

Have we enabled it?

Certainly. We did not behave with the kind of hysteria that we have seen in the COVID-19 pandemic during the epidemics of Hong Kong or Asian flu in 1957 and 1968. They were not as serious in mortality or infection terms as COVID-19, but they were not that far short. What has clearly changed is the public mentality. We are now willing to accept this kind of measure and, indeed, to demand it. We all have a personal responsibility to look after ourselves and our neighbours. If we shuffle this responsibility off to the state, the state will respond in the only way it knows, namely by coercion. That creates a relationship between the citizen and the state which is profoundly unhealthy. It may be what a large majority of citizens want or certainly wanted at one stage, but that does not make it any better.

Turning to your involvement with the media, the Family Court is currently wrestling with this issue. The President has recently published guidance for opening up the family court allowing the press to actually report instead of attend. Given your recent experience with the media and some of the controversies which have arisen, are you a proponent of greater openness?

In principle, yes, but I think special considerations apply to family law. The proceedings of the courts are part of the public business of the state and unless there are compelling considerations of justice or national security I would in general think they should be open. I am the author of at least two judgments to broadly that effect.

There are, however, some rather special considerations in family cases, and I actually think that the family courts are probably too open. There was a time when family proceedings were with minor exceptions closed to the public. Family cases normally deal with intense personal tragedies involving quite ordinary citizens. I think that the public does not have a right to know about the internal distresses in a family relationship. The public does not acquire the right to know simply because the family in question is unable to sort out the problem for itself so that the court becomes involved. So, I would make this an exception to the principle that courts transact the public business of the state. Family courts are concerned with sorting out some of the most intimate and emotional issues that an ordinary human being can experience. I regard them as providing a supporting service rather than an adjudicatory service in the sense in which one might use that word in other kinds of case.

Would that also apply when it is a family against the state, for example in care proceedings?

Yes, for exactly the same reasons. Care proceedings are cases in which the relationship between a parent and child has in some way gone badly awry. I would not distinguish between that kind of issue and an issue between husband and wife.

Are you more wary of the media these days?

No. If you descend into the bear pit as I have done you cannot complain if you get scratched. I deliberately went public on lockdowns but in general I think that this is a bad idea. I have a great deal of sympathy with those ex-colleagues of mine who feel that a retired judge should not take a public stand on controversial issues. But there are some issues which I think are so fundamental not just in themselves but because of what they mean for the way we govern ourselves in the future, that you have to stand up and be counted. I think that lockdown was that kind of issue.

Some judges anonymously engage in social media such as Twitter. Has that ever interested you? Are you a secret Tweeter?

No, I am not a secret Tweeter. I find the social media deeply unpleasant in lots of ways and I think that people who go onto social media often lose the reticence that they would observe in any other medium. It is a tremendous temptation

to say things that one subsequently regrets. That applies to a lot of very cautious people who just become less cautious when they go into Twitter.

Do you ever regret not taking the path of an academic historian?

I have taken the path of an academic historian, side by side with being about a barrister and a judge. So, I have got nothing to regret. You know the irony is that conditions in academic life now are such that it is easier to write a five-volume history of the Hundred Years' War as a barrister and judge than as a full-time academic. It is shameful but that should be so, but it is. Partly because of the burden of administrative work and partly because of the need to keep up the research assessment framework score of your university department by producing regular articles in peer-reviewed journals. This is a tyranny which stops people writing serious works of scholarship. I do not think that I could have written as I have done if I had been a full-time academic. I hasten to say that that came something of a surprise to me. It was not why I ceased to be an academic.

Having now completed that multi-volume project, I think Lord Grabiner QC suggested you might start on something similarly massive, such as the Thirty Years War?

I cannot start on something massive in scope. I am not immortal. I have finished *The Hundred Years War*; it has taken me 42 years. It is important not to embark on the decline and fall of the Roman Empire at the age of 73. I do not quite know what I am going to do now. I cannot imagine a time when I do not have some literary project on hand. I did at one stage think about writing about the Dreyfus case, but after reading Ruth Harris's excellent book in English on the subject I felt that that was a work that could not be bettered and so there was really no point.

I am going to follow the traditions of the Bar by saying I have one final question, meaning at least two final questions: There is precedent for retired judges to appear on *Desert Island Discs*. Would you ever be tempted to do that and, if so, what would be the book and piece of music you take to your desert island?

I would be tempted. The book? For a very special reason it would be Pastor's *The History of the Popes*. The special reason is that if you are on a desert island and only has one book, it needs to be the longest book that you can think of. Pastor's *The History of the Popes* is not a literary masterpiece but it is in in 40 volumes, so by the time I had reached the end I would undoubtedly have forgotten the beginning and could happily start again. As to music, it depends on the last concert that one went to. I think possibly one of Janáček's operas, probably Jenūfa.

Is there one case as a judge or a barrister you look back with the greatest sense of pride and satisfaction?

There is not one; there are a number of them. Some of them are technical cases of no general interest. *Alconbury*,[7] for example, was about the application of human rights to the planning system. It was a case I look back on with pride because most people thought it could not be won in the House of Lords and I did win it. I was not surprised to win it. I just thought that people had missed the critical point up to that stage and it is always a pleasant feeling to win a case like that.

Otherwise, I got a great deal of satisfaction from the last case I did at the Bar, which is the dispute between Abramovich and Berezovsky.[8] It was a case of no legal importance at all – essentially, a swearing match between two people about a series of transactions which occurred in the absence of witnesses and with no documentation. It turned entirely on cross-examination. I have never prepared a cross-examination so intensively or continued one for so long – 9 days – or with a stronger feeling that it was decisive of the outcome. So, I look back on that with some pleasure.

And that would have been cross-examination with an interpreter?

Not in the case of Berezovsky. He would have been wise to use an interpreter because although he spoke and understood English well enough to be cross-examined, he did not understand it quite as well as he thought he did. Abramovich genuinely does not speak much English. He needed, and used, an interpreter.

Lord Sumption, on behalf of the *Financial Remedies Journal*, thank you for agreeing to be interviewed.

Notes

1 'Family law at a distance', At a Glance Conference 2016, Royal College of Surgeons (8 June 2016). Available online, at www.supremecourt.uk/docs/speech-160608.pdf.
2 *Prest v Petrodel Resources Ltd & Ors* [2013] UKSC 34.
3 *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213, CA.
4 'Family law at a distance', At a Glance Conference 2016, Royal College of Surgeons (8 June 2016).
5 Lady Hale.
6 *Re B* [2016] UKSC 4.
7 *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295.
8 *Berezovsky v Abramovich; Berezovsky v Hine & Ors* [2012] EWHC 2463 (Comm).

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