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Chair's Column

HHJ Edward Hess

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

After a successful opening year in 2022, the *Financial Remedies Journal* (FRJ) now enters its second year and continues to provide a wealth of information and debate on the big subjects topical in the financial remedies world and I commend this edition of the journal to you, as well as encouraging the practitioner reader to make full use of the comprehensive and immediately accessible resources available on the FRJ website.

Access to Justice

In my last Chair's Column, I talked about the troublingly high level of legal costs involved in so many financial remedies cases. This is bad enough for those who have some wealth and find that all too much of it ends up being lost to their lawyers; but for those with little wealth the reality is that the failure of either the market or the government to ensure the provision of legal services to this group will mean that they will almost certainly have no chance of employing a lawyer and will probably have to chart the sometimes difficult seas of the Financial Remedies Court without any legal representation. This edition of the FRJ includes an '*Access to Justice Supplement*' which targets some of the issues involved. This includes Beth Kirkland's insightful article 'The Impact of LASPO on Access to Justice – A View from Law for Life' which highlights the failure of the policy of that Act in the last decade and the ineffectiveness of the MIAMs system really to help at all. The article does, however, draw attention to the helpful range of materials which have been generated towards litigants-in-person to assist with the problem. Also included is the article by Debbie Stringer and Ian Besford, a really informative 'An Overview of the Benefits System', which is a must-read for anybody – litigant-in-person or practitioner – handling a case in which state benefits play a significant role in supporting the family's finances.

30 years of *Duxbury* calculations

For those involved in the debate about the appropriate status of the recently produced Galbraith Tables in the context of pension offsetting, it is intriguing to read the informative article by Michael Allum, Megan Jenkins and Amy Gilbert, 'Looking Back at *Duxbury* 30 Years On' which charts the birth and development of the Tables. Some people have over the years queried the mathematical assumptions involved in creating the *Duxbury* tables, which prominently appear in their most straightforward form in *At a Glance*, but (as is analysed by this article) they have their strong and powerful defenders, not least Mostyn J (*JL v SL* [2015] EWHC 555 (Fam)) and Peel J (*ND v GD* [2021] EWFC 53), and judicial approval of their use remains at a high level.

The Football Black List for 2022

Football fans may already be familiar with the annual '*Football Black List*', designed and published each year to highlight the most influential black figures in English football. There are many names one would expect to find on this list – Bukayo Saka, Marcus Rashford, Raheem Sterling, Patrick Vieira, Vincent Kompany, Les Ferninand for example – but the FRJ is delighted and proud to draw attention to the inclusion of our very own Editorial Board Member Sofia Thomas, who gives tax advice to many footballers through her organisation Juno Sports Tax. Many congratulations to her.

Omissions, Ambiguities and Deficiencies – Seeking Clarification of a Judge's Reasoning

Nicholas Allen KC

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'All judgments are capable of improvement' observed Peter Jackson LJ in *Re O (A Child: Judgment: Adequacy of Reasons)* [2021] EWCA Civ 149 at [70]. As a consequence, the appropriate scope of seeking 'clarification' of a draft judgment – as opposed to suggesting corrections of a typographical or numerical nature or obvious mistakes of fact – is something that continues to vex advocates and judges alike.

The leading civil case on the practice to be adopted by advocates and judges in relation to requests relating to adequacy of reasons is *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605 in which Lord Phillips MR stated:

> '[25] Accordingly, we recommend the following course. If an application for permission to appeal on the ground of lack of reasons is made to the trial judge, the judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings.'

In the subsequent case of *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002, [2008] 1 FLR 1346, the Court of Appeal identified the parameters for such requests. Smith LJ stated:

> '[50] The purpose of the judge providing a draft of the judgment before hand down is to enable the parties to spot typographical, spelling and minor factual errors which have escaped the judge's eye … Circulation of the draft is not intended to provide counsel with an opportunity to re-argue the issues in the case.
>
> [51] Only in the most exceptional circumstances is it appropriate to ask the judge to reconsider a point of substance. Those circumstances might be, for example, where counsel feels that the judge had not given adequate reasons for some aspect of his/her decision. Then it may be appropriate to send a courteous note to the judge asking him/her to explain the reasons more fully. By way of further example, if the judge has decided the case on a point which was not properly argued or has relied on an authority which was not considered, the appropriate course will be to ask him/her either to reconvene for further argument or to receive written submissions from both sides. Letters such as the one sent in this case, which sought to reopen the argument on a wide variety of points, should not be sent.'

In *Re B (Appeal: Lack of Reasons)* [2003] EWCA Civ 881, [2003] 2 FLR 1035 Thorpe LJ confirmed (at [5]) that the *English v Emery* practice 'is of equal application in family cases'.

In the family law sphere, the two leading authorities are *Re A and L (Children) (Appeal: Fact-Finding)* [2011] EWCA Civ 1205, [2012] 1 FLR 134 and *Re I (Children: Fact Finding: Clarification of Judgment)* [2019] EWCA Civ 898, [2019] 2 FLR 887.

In *Re A and L*, having referred at [13] to the practice in *English v Emery*, Munby LJ (as he then was) stated at [14] that 'this practice applies as much in family cases as in ordinary civil appeals'. He drew attention in particular to the observations of Wall LJ (as he then was) in *Re M (Fact-Finding Hearing: Burden of Proof)* [2008] EWCA Civ 1261, [2009] 1 FLR 1177 where he said at [38] that '[i]t is high time the Family Bar woke up to [*English v Emery Reimbold*] and the fact that it applies to family cases'.

Munby LJ then emphasised two points:

> '[16] First, it is the responsibility of the advocate,

> whether or not invited to do so by the judge, to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process.
>
> [17] Second, and whether or not the advocates have raised the point with the judge, where permission is sought from the trial judge to appeal on the ground of lack of reasons, the judge should consider whether his judgment is defective for lack of reasons and, if he concludes that it is, he should set out to remedy the defect by the provision of additional reasons.'

In *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, [2011] QB 218 Lord Judge CJ stated:

> '[5] The primary purpose of this practice is to enable any typographical or similar errors in the judgments to be notified to the court. The circulation of the draft judgment in this way is not intended to provide an opportunity to any party (and in particular the unsuccessful party) to reopen or reargue the case, or to repeat submissions made at the hearing, or to deploy fresh ones. However on rare occasions, and in exceptional circumstances, the court may properly be invited to reconsider part of the terms of its draft … As we emphasise, an invitation to go beyond the correction of typographical errors and the like, is always exceptional, and when such a course is proposed it is a fundamental requirement that the other party or parties should immediately be informed, so as to enable them to make objections to the proposal if there are any.'

The procedure to be adopted is set out in FPR PD 30A, paras 4.6–4.10. Paragraph 4.6 deals with 'material omissions' from a judgment of the lower court:

> 'Where a party's advocate considers that there is a material omission from a judgment of the lower court or, where the decision is made by a lay justice or justices, the written reasons for the decision of the lower court (including inadequate reasoning for the lower court's decision), the advocate should before the drawing of the order give the lower court which made the decision the opportunity of considering whether there is an omission and should not immediately use the omissions as grounds for an application to appeal.'

Paragraphs 4.7–4.9 inclusive then deal with the duty of the decision-making court and the appellate court each to consider whether there is a material omission which can be dealt with by way of additions to the judgment.

In the second of the leading family authorities, *Re I (Children: Fact Finding: Clarification of Judgment)*, King LJ under the heading of 'Clarification' considered the use of the process between paragraphs [25] and [41]. Having cited from the cases set out above she stated:

> '[33] In my view, the exhortations as to the limitations on counsel in seeking amplification of a draft judgment over and above correction of typographical and factual errors, is a principle which applies equally to all areas of civil procedure, including family cases. … *Re A and L (Appeal: Fact-Finding)* … saying in terms at para [16] that it is the responsibility of the advocate to raise with the judge "any material omission in the judgment, any genuine query or ambiguity which arises on the judgment and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process" is not, in my view, inconsistent with Lord Judge's observations in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* …
>
> [34] The question, rather, is as to where one draws the line between a reasonable and appropriate request for amplification of the type identified by Munby LJ in [*Re A and L (Appeal: Fact-Finding)*], which request will properly be an example of the rare occasions where it is appropriate to go beyond typographical and factual errors in order to clarify issues in a judgment, as against a request which goes beyond [*Re A and L (Appeal: Fact-Finding)*] and seeks to reargue the case. Unhappily, to my knowledge, such requests can, on occasion, be frankly confrontational and disrespectful in tone.
>
> [35] Judgments in care cases are often given by a judge under immense time pressure whether extemporary or reserved. It is right that issues of the type identified in [*Re A and L (Appeal: Fact-Finding)*] should be raised with the judge if appropriate and, in so doing, avoid the necessity of an appeal and therefore further delay for the child the subject of care proceedings.
>
> [36] … requests for extensive clarification, going well beyond the perimeters identified in the authorities, have become commonplace in both children and financial remedy cases in the Family Court. It has become, as we understand it, almost routine for a draft judgment to be followed up with extensive requests for "clarification" which in many cases can be regarded as nothing other than an attempt to reargue the case or, as here, water down the judge's judgment …
>
> [38] The Family Court is overwhelmed with care cases. Judges at all levels often move seamlessly from one trial to the next without judgment writing time between them. Routine requests for clarification running to a number of pages are not only ordinarily inappropriate, but hugely burdensome on the judges who have, weeks later, to revisit the evidence and their judgment when their thoughts and concerns have long since moved onto other cases. This is not conducive to the interests of justice.
>
> [39] That excessive demands for clarification are not limited to care cases is evidenced by the observation by Mostyn J in *WM v HM (Financial Remedies: Sharing Principle: Special Contribution)* [2018] 1 FLR 313, when he said:
>
> > "[39] Finally, I would observe that the demands by [counsel] for correction and amplification of the draft judgment went far beyond what is permissible, and amounted to blatant attempts to reargue points which I had already rejected. This practice is becoming commonplace and should be stopped in its tracks in the interests of efficiency and the conservation of the resources of the court. Suggested corrections should be confined to typographical or plain numerical errors, or to obvious mistakes of fact. Requests for amplification should be strictly confined to claimed 'material omissions' within the terms of FPR 2010, PD 30A, para 4.6."
>
> [40] Provided that the term "material omission" found in para 4.6 is taken to embrace the totality of the matters included in para [16] of ... *Re A and L (Appeal: Fact-Finding)* …, I would agree and endorse the observations of Mostyn J.
>
> [41] It is neither necessary nor appropriate for this

> court to seek to identify any bright line or to provide guidelines as to the limits of the appropriate nature or extent of clarification which may properly be sought in either children or financial remedy cases. I would merely remind practitioners that receiving a judge's draft judgment is not an "invitation to treat", nor is it an opportunity to critique the judgment or to enter into negotiations with the judge as to the outcome or to reargue the case in an attempt to water down unpalatable findings. Requests for clarification should not be routine and should only be made in accordance with [*Re A and L (Appeal: Fact-Finding)*] which I repeat is: "to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process".'

In *FS v RS and JS* [2020] EWFC 63, [2021] 2 FLR 641 Sir James Munby stated (at [152] (iii)) that '[t]he sending out of a judgment in draft is *not* an invitation to enter into an ongoing Socratic dialogue'.

More recently in the family context in *Re F and Another (Children) (Sexual Abuse Allegations)* [2022] EWCA Civ 1002 (25 July 2022), having referred to or cited from *English v Emery, Re A and L (Appeal: Fact-Finding)* and *Re I (Children: Fact Finding: Clarification of Judgment)*, Baker LJ stated:

> '[57] In the three years since the judgment in *Re I* was handed down, there has been little if any discernible restraint in the practice of seeking clarification of judgments. Meanwhile the pressures on the family justice system have grown ever greater and King LJ's observations about the burdens imposed on judges having to deal with such requests are of even greater relevance than they were in 2019. …
>
> [59] When giving judgment in a complex children's case, no judge will deal with every point of evidence or every argument advanced on behalf of every party. The purpose of permitting requests for clarification to be submitted is not to require the judge to cover every point but rather, as [*Re A and L (Appeal: Fact-Finding)*] emphasised, "to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process." It is therefore rarely if ever appropriate for counsel to enquire as to the weight which the judge has given to a particular piece of evidence. If, as frequently happens, a judge draws together various strands of the evidence in giving reasons, it is neither necessary nor appropriate for counsel to separate out each strand and enquire what weight the judge has or has not attached to each piece, unless it can be said that in giving his reasons in a general way the judge has failed to address material parts of the evidence, or has created an ambiguity, or failed to provide sufficient reasons for his decision.'

In *Re M (Fact-finding Hearing: Burden of Proof)* Wall LJ (as he then was) stated (at [38]) that '[j]udges should welcome' the process of counsel raising 'not just any alleged deficiency in the judge's reasoning process but any genuine query or ambiguity which arises on the judgment' and 'any who resent it are likely to find themselves the subject of criticism in this court'.

The above principles have been confirmed in the very recent civil case of *Shepherd & Co Solicitors v Peter Brealey* [2022] EWHC 3229 (KB) (19 December 2022). Cavanagh J (sitting with Costs Judge Brown as Costs Assessor) stated:

> '[7] … as the Court of Appeal made clear in *Egan v Motor Services (Bath) Ltd* [2008] 1 All ER 1156, attempts to reargue the issues in the case once the judgment has been circulated in draft were appropriate only in the most exceptional circumstances, for example, where counsel feels that the judge (i) had not given adequate reasons for some aspect of his decision, or (ii) had decided the case on a point which was not properly argued or has relied on an authority which was not considered. …
>
> [9] I respectfully wholeheartedly endorse the sentiments expressed by the Court of Appeal in *Egan*, and by the Court of Appeal in the earlier case of *Robinson v Fernsby* [2003] EWCA Civ 1820, in which the Court deprecated the practice of counsel taking the opportunity afforded by the invitation to draw the court's attention to typographical and similar errors to make submissions on further arguments of substance. The very helpful and sensible practice of circulating the judgment in draft is not designed to give the losing side a chance to change the judge's mind. If there are errors or weaknesses in the judge's judgment, the remedy is to apply for permission to appeal.'

Mostyn J is a particular critic of the practice of raising omissions which cannot objectively be said to be 'material'. His comments in *WM v HM (Financial Remedies: Sharing Principle: Special Contribution*) at [39] are cited by King LJ in *Re I (Children: Fact Finding: Clarification of Judgment)* above. More recently in *Olga Cazalet v Walid Abu-Zalaf* [2022] EWFC 119 (17 October 2022) Mostyn J stated (at [62]) that after providing his judgment to counsel in draft he received 'a list of claimed "material omissions" within the meaning of FPR PD30A para 4.6, and an implicit invitation to reconsider my decision in the light of them'. He refused the application and stated as follows:

> '[63] … In my judgment the omissions (if they were indeed omissions) were of no materiality in the legal and factual analysis which I had to undertake. It has taken me some time, at the expense of other work, to deal with complaints which I regard as flimsy and meritless. In my judgment, advocates must consider very carefully, dispassionately and disinterestedly whether there are, on objective analysis, *material* omissions from the judgment. The omissions would only satisfy the criterion of materiality where it can be plausibly and convincingly argued that a completely different decision would likely have been reached had they been bought into account.' (original emphasis)

Mostyn J has also been critical of the *timing* of requests for 'clarification'. In *JL v SL (No 3) (Post-Judgment Amplification)* [2015] EWHC 555 (Fam), [2015] 2 FLR 1220 the judge was critical of a 9-day delay between circulation of a draft judgment (finalised and handed-down 2 days later) and a request for amplification of his calculations and reasons. He described (at [2]) the 7-day delay after hand-down as 'totally unacceptable' as he 'had left to sit on circuit and had dealt with much other work. Inevitably the details of this case had faded from my mind'. He further stated that '[t]he system depends on requests for clarification of the draft to be submitted promptly and in any event before the judgment is finalised and handed down'.

The line (which is clearly not a bright line) between 'material omissions' which justify seeking 'clarification' of a judgment and those which are 'flimsy and meritless' can be a difficult one to discern. Likewise, the line between 'additions' and 'foundations' of the judgment (as it was described in *Re O (A Child: Judgment: Adequacy of Reasons)* by Peter Jackson LJ at [70]) where it is not appropriate to return to the trial judge but is likely to justify an application for permission to appeal (which Baker LJ described at [61] as 'where the omissions [in the judgment] are on a scale that makes it impossible to discern the basis for the judge's decision, or where, in addition to omissions, the analysis in the judgment is perceived as being deficient in other respects' and which Cavanagh J described in *Shepherd & Co Solicitors v Peter Brealey* at [9] as 'errors or weaknesses in the judge's judgment'). The latter distinction is outside the scope of this article but knowing in both situations where to draw the line in seeking further reasons is an imprecise exercise that will vary according to the circumstances of each case.

An Unwelcome Guest and a 'lively controversy' – *Guest v Guest* on the Essential Aim of Proprietary Estoppel

Charlotte John

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> '1. "One day my son, all this will be yours". Spoken by a farmer to his son when in his teens, and repeated for many years thereafter. Relying on that promise of inheritance from his father, the son spends the best part of his working life on the farm, working at very low wages, accommodated in a farm cottage, in the expectation that he will succeed his father as owner of the farm, to be able to continue farming there, and in due course to pass on the farm to his own children.
>
> 2. Many years later, father and son fall out. It does not matter who is to blame for the falling out, but they can no longer work together or even live in close proximity. The son has no alternative but to leave, to find alternative work and rented accommodation for himself and his family elsewhere. Meanwhile the father cuts him out of his will. The facts of this case differ from the above common example only because the father David Guest has two sons, Andrew and Ross as well as a daughter Jan. Andrew was not promised the whole of the farm ("Tump Farm") as an inheritance, but only a sufficient (but undefined) part of it to enable him to operate a viable farming business on it after the death of his parents.'

The opening paragraphs of Lord Briggs' judgment in *Guest v Guest* [2022] UKSC 27 (above) sketch the basic facts of the dispute between Andrew Guest and his parents, David and Josephine Guest, as well as what has become the most pervasive theme of the proprietary estoppel case-law, namely succession disputes over family-run farms.

Claimants in the position of Andrew find themselves caught, as Lord Briggs goes on to note,[1] between two foundational principles of English law: absent the intervention of equity, promises are not enforceable unless the ingredients for a binding contract are present (which they are usually not in the context of informally expressed promises between family members and relating to land), and wills are 'ambulatory' until the point of death and can be revoked or changed at any prior time.

The doctrine of proprietary estoppel has developed to fashion a solution for claimants such as Andrew. The doctrine is certainly not confined to the family farm. Nonetheless, farms, often asset-rich but cash-poor and typically reliant upon the collective efforts of successive generations of the family to keep running, offer particularly fertile territory for proprietary estoppel disputes.

Although Andrew Guest certainly found himself unwelcome on the family farm, and consequently disinherited by his parents, the Supreme Court decision in *Guest v Guest* is a welcome one that has settled the hotly debated issue of the correct approach to remedying a proprietary estoppel-based claim.

Detriment vs expectation – the controversy

This controversy stems from a divergence in the case-law and academic analysis concerning as the essential aim of the doctrine: where an equity is found to have arisen in favour of the claimant, is the object of the doctrine to fashion a remedy that gives effect to the promises made to the claimant, or, alternatively, to make an award focused on compensating the detriment they have suffered?

The controversy was summarised as follows by Lewison LJ in *Davies v Davies* [2016] EWCA Civ 463 at [39]:

> 'There is a lively controversy about the essential aim of the exercise of this broad judgmental discretion. One line of authority takes the view that the essential aim of the discretion is to give effect to the claimant's expectation unless it would be disproportionate to do so. The other takes the view that essential aim of the discretion is to ensure that the claimant's reliance interest is protected, so that she is compensated for such detriment as she has suffered. The two approaches, in their starkest form, are fundamentally different … Much scholarly opinion favours the second approach … Others argue that the outcome will reflect both the expectation and the reliance interest and that it will normally be somewhere between the two … Logically, there is much to be said for the second approach. Since the essence of proprietary estoppel is the combination of expectation and detriment, if either is absent the claim must fail. If, therefore, the detriment can be fairly quantified and a claimant receives full compensation

> for that detriment, that compensation ought, in principle, to remove the foundation of the claim …'

Both approaches have their merits and their shortcomings. It is not an uncommon feature of these sorts of disputes that the quantifiable aspects of the detriment suffered by the claimant, usually in terms of many years of labour at less than the market rate, in so far as a figure can be attributed to them, are much less valuable than the land that has been promised to them. Viewed from this perspective, giving effect to the promise made to the claimant (the 'expectation'-based approach) might be considered to overcompensate the claimant.

The alternative 'detriment' focused approach seeks to compensate the claimant, in so far as it is possible to do so, with a monetary award equivalent to the value of that detriment. The chief difficulty with this approach is that claimants in the position of Andrew often suffer detriment which is difficult if not impossible to quantify. How does one account for the largely unquantifiable detrimental consequences of a claimant positioning their whole life around the promises made to them, such as the missed opportunity to establish a different life for themselves?

Establishing the equity – the decision at first instance

The principles applicable to establishing that a proprietary estoppel has arisen are well established and were not the focus of the appeal. As set out by Lord Walker in *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at [29], in order to establish that an equity has arisen in their favour, the following must be proven by the claimant:

- a representation or assurance made by the promisor to the claimant;
- reliance on the representations by the claimant; and
- that the claimant has suffered detriment in consequence of their (reasonable) reliance.

At first instance in *Guest*, the trial judge, Judge Rosen QC, found those necessary elements to be made out in Andrew's case.[2] He concluded, in terms of the assurances made to Andrew, that, until the parties had fallen out in 2014, Andrew had been consistently led to believe by his father, with the tacit support of his mother, that he would succeed to the farming business, until about the late 1990s as the sole successor but thereafter on the basis (which was accepted by Andrew) that he would farm side-by-side with his brother, and that he would inherit a 'substantial' share of Tump Farm. The exact extent of Andrew's promised inheritance was not specified, however, Judge Rosen concluded that, provided a long-standing promise or assurance existed, it did not matter that the expectation had changed over time or that there was uncertainty over the share to be given.[3] The statements made to Andrew were considered to clear enough to amount to an assurance that he would inherit a sufficient stake in Tump Farm to enable him to carry on farming after his parents' deaths.[4]

Andrew was found by the trial judge to have reasonably relied on this assurance. His detrimental reliance consisted of working on Tump Farm full time over a period of over 30 years for little financial reward, even taking into account the provision of accommodation, which he would not have done if his father had not encouraged the idea of an inheritance. Whilst it was difficult to say exactly what would have happened if Andrew had gone to work elsewhere, he was a hard-working, accomplished and forward-thinking farmer, and his current situation, as a herdsman starting afresh in his 50s, provided no indication of his true worth in his 20s, 30s and 40s.[5]

Remedy – the decision at first instance

The judge ordered David and Josephine Guest to make an immediate lump sum payment to Andrew, consisting of:

(1) 50% after tax of either the market value of the dairy farming business (as valued in an expert's report) or the value realised by a sale of the business in consequence of the judgment; plus
(2) 40% after tax of either the market value of the freehold land and buildings at Tump Farm (again as valued in an expert's report) or of the proceeds of sale in consequence of the judgment. In either case the farmhouse was to be treated as being subject to a life interest in favour of the parents;
(3) the amount payable to Andrew was to be net of any taxes payable (or which would have been payable) by the parents on the sale of the dairy business and/or Tump Farm.

Based upon the available expert evidence at trial, before the impact of taxation and the notional life interest, this would amount to a lump sum of c. £1.7m.

Leaving to one side the judge's analysis of the preceding case-law, the following factual matters influenced his approach to remedy:

- This was not a case where the assurance could have been described as being of 'quasi-contractual' character. The promised extent of Andrew's inheritance was too uncertain for that.[6] Further, Andrew had recognised his siblings' expectations on their parents' estate.
- The relevant assurance was as to an inheritance on the second death of his parents, who may be expected to live for many more years yet at Tump Farmhouse. Although Andrew expected to take on the business at Tump Farm after his father's retirement, he did not expect to acquire any interest in the land or buildings before his father's death and Andrew had understood that the Farmhouse would remain their home for as long as his parents, or the survivor of them, wished.
- Whilst the exercise of determining Andrew's entitlement would involve an acceleration of his entitlement, that did not mean that the inchoate aspect of his expectation was immaterial. However, whilst the parents had dealt with the land, including leasing part of it so as to reduce the extent of the farm, the evidence supported the conclusion that it was the wish of the parents to retain the freehold, including leased parts, within their ownership and therefore the equity was to be measured against the current extent of the farm including the leased parts.
- The falling out between the family favoured a clean break and it was not realistic to think that Andrew could continue farming at Tump Farm alongside his

father or brother or return to the cottage he had previously occupied.
- Since a clean break was required and it was likely to necessitate selling the farm or a substantial part of it to satisfy a financial award to Andrew, the opportunity for the mitigation of tax upon the death of the parents would be lost. In the circumstances of the case, Andrew should be treated as bearing his share of the taxes that would be incurred.

The decision on appeal

David and Josephine appealed to the Court of Appeal, which granted permission only in relation to the question of the correct approach to remedy and dismissed the appeal on all grounds. Largely sidestepping the controversy around the essential aim of the doctrine, the Court of Appeal noted that in cases where there is a large but unquantifiable element attributable to loss of opportunity it will, in many cases, be just to make an award that is greater than the quantifiable aspect of the claimant's detriment.[7] On the facts, the Court of Appeal concluded that the trial judge had been entitled to treat this case one where, in circumstances where Andrew had largely performed his side of the bargain, it was fair to take what he had been promised 'as a rough proxy for what he has lost' and fashion a remedy based on his expectation.[8] The submission that the judge had wrongly accelerated Andrew's expectation and should not have devised a clean break solution, was also rejected.[9]

The principal lines of attack upon the trial judge's decision in the Supreme Court focused on the fundamental issue of whether or not the judge ought to have adopted a detriment-based remedy; the parents inviting the court to resolve the 'lively debate' between expectation and detriment as the aim of the remedy in favour of the latter. Secondly, the parents argued that the trial judge had in any event erred in the approach to the issue of the acceleration of Andrew's expectation.

In a decision that speaks to the strength of that controversy, the Supreme Court by a majority (3:2 split) rejected the theory that the essential aim of the remedy for proprietary estoppel was detriment-based.

The following points of particular doctrinal importance can be distilled from the judgment of Lord Briggs (Lady Arden and Lady Rose concurring):[10]

- The true purpose of the remedy in proprietary estoppel cases is the prevention or undoing of unconscionable conduct. It is wrong to regard the issue of unconscionability as relevant only to the question of whether or not an equity arises, and then to leave it out of account when framing the equity.[11]
- The suggestion that the court should separately value the expectation and the detriment and then choose whichever is the cheaper remedy, referred to as the 'minimum equity' approach, following Scarman LJ's famous observation about the 'minimum equity to do justice' in *Crabb v Arun District Council* [1975] EWCA Civ 7, [1976] Ch 179, is incorrect and Scarman's *dictum* has been misunderstood. What Scarman LJ was concerned with in that case was how best to fulfil, but not exceed, the plaintiff's expectation. The *dictum* had nothing at all to do with compensating detriment over expectation, still less choosing in any case the cheaper alternative between the two. What is meant by awarding the minimum equity to do justice, is awarding a remedy which would be sufficient to negate the unconscionability in the promisor's repudiation of his promise.[12]
- The logic of the detriment-based approach was faulty and fails to recognise that whilst detriment is necessary to engage the equitable relief in the first instance, and forms part of its moral justification, it is the repudiation of the promised expectation which constitutes the unconscionable wrong. The detriment approach to relief mistakenly treats the detriment, rather than the loss of expectation as the relevant harm. On analysis of the authorities, the notion that the aim of the doctrine is detriment-based had not taken root in the English case-law and, having concluded that it is wrong in principle, court should firmly reject the theory that the aim of the remedy for proprietary estoppel is detriment-based forms any part of the law of England.[13]
- In contrast, the concept of a proportionality test, whereby the court looks at whether the proposed remedy is proportionate to the detriment suffered, has taken root as part of the assessment of whether a proposed remedy based on satisfying the claimant's expectation works substantial justice. However, the proportionality test is no more nor less than a useful cross-check for potential injustice and is not to be applied by reference to detailed mathematical examination of, for example, wage rates or interest rates. The best summary of the test is that the remedy should not, without some good reason, be out of all proportion to the detriment, if that can be readily identified. If it cannot, as will be the case wherever the relevant detriment has had lifelong consequences, the proportionality test is unlikely to be of much use. Moreover, proportionality is not to be carried out on the basis of a purely financial comparison. Where, for example, a claimant has worked on the family farm for their whole life, working at low wages, in the promised expectation that they will inherit it, the question of proportionality is not to be answered simply by comparing the value of the farm with the value of the wage differential. Fulfilment of the expected inheritance will be proportionate in such a case where the claimant has fulfilled their side of the understanding, because it will be fair and proportionate that the parents should perform theirs.[14]

Pulling these strands together into helpful guidance for the courts and practitioners advising in this area, Lord Briggs posits a staged approach to assessing the remedy to be awarded:[15]

- First, the court should determine whether the promisor's repudiation of his promise was, in the light of the promisee's detrimental reliance, unconscionable. Whilst it normally would be, there might be circumstances such as a promisor falling on hard times and needing to sell the property which would not make it unconscionable. A partial repudiation may or may not be unconscionable, depending on the circumstances.
- The second (remedy) stage will normally start with the

assumption (but not a presumption) that the simplest way to remedy the unconscionability of the repudiation will be to hold the promisor to the promise.

- If the promisor asserts and proves (the burden being upon them) that specific enforcement of the full promise, or monetary equivalent, would be out of all proportion to the cost of the detriment then the court may be constrained to limit the extent of the remedy. This does not mean that the court will be seeking to precisely compensate the detriment, but simply to put right a disproportionality that is so large as to stand in the way of full specific enforcement. It will be a rare case where the detriment is equivalent in value to the expectation, and there is nothing in principle unjust in full enforcement of the promise being worth more than the cost of the detriment. The court is not constrained between a binary choice between giving effect to the promise or compensation based on an attempt to value the detriment.
- Finally, the court must consider its provisional remedy in the round, against all the relevant circumstances, and ask itself whether it would do justice between the parties, and whether it would cause injustice to third parties. The yardstick for that assessment would always be whether, if the promisor was to confer that proposed remedy upon the promisee, the promisor would be acting unconscionably.

Lord Briggs acknowledged the force in the suggestion that cases consisting of a well-defined quasi-contractual promise are likely to generate the strongest case for full enforcement of the promise if the reliant detriment has been undertaken in full.[16]

Cases involving future expectations, such as a promise of inheritance repudiated during the lifetime of the promisor were recognised to pose particular difficulties, particularly where a clean break is desired.[17] Where the remedy involves accelerated receipt, a discount may be required. This is required because a claimant can never be awarded more than their promised expectation, whether that is in terms of a simple amount or accelerated receipt. This remains the case even if the value of the detriment exceeds the value of the promised benefit, for the simple reason that it is not unconscionable for the promisor to give all that they promised but no more.[18]

On this latter point, the Supreme Court found that the trial judge had made an error. Whilst he had built in to his award an appropriate discount to reflect early receipt in relation to the valuation of the farmhouse, he had not done so in respect of the rest of the land and the business.

Therefore, the Supreme Court resolved that the parents would be given a choice between two alternative forms of relief. The could either settle upon Andrew a reversionary interest under a trust of the farm, with a life interest in favour of the parents, or make an immediate payment of compensation along the lines that the judge had ordered but with sufficient discount for early relief which should reflect a continuing notional life interest of the whole of the farm, not only the farmhouse. The judgment offered limited comment as to how the early discount should be calculated, but suggested that this could be undertaken on the same basis that the trial judge had considered in relation to the farmhouse. If the parties could not agree the figures or the terms of the alternative settlement, the matter would be remitted to the Chancery Division.[19]

It is a striking aspect of the judgment that the choice of how to remedy the estoppel is effectively placed in the hands of the defendants. The right to elect between alternative remedies in most other areas of law is a matter for a claimant. Given that the Supreme Court considered that a reversionary interest under a trust would have satisfied Andrew's equity equally as well as a clean break capital award, an approach which has the merit of avoiding the difficulties of discounting for accelerated receipt or the need for an immediate sale (subject to the issue of needing to raise funds to meet costs and any taxation potentially arising upon the settlement), it may be anticipated that such a solution is more likely to be adopted in subsequent cases involving the repudiation of a future expectation.

The dissent itself is interesting reading. Lord Leggatt (with whom Lord Stephens agreed) emphatically disagreed with the majority, being of the view that the fundamental purpose of the doctrine (which he suggested should be rebranded 'property expectation claim' on the basis that estoppels can only be a defence) was to avoid the detriment which would otherwise occur to the promisee based on their reasonable reliance on the promise.[20] He regarded the alternative approach, whereby the court must decided whether or not to enforce the promise and if not what alternative remedy to grant as arbitrary, and as replacing legal principle with 'the portable palm tree'.[21]

Of likely greater interest to the practitioner, however, is the appendix in which Lord Leggatt sets out his assessment of what he would have considered to have been a just award of compensation in this case; a sum of £610,000. The analysis focuses on the value of Andrew's lost earnings and also the correct approach to interest, which Lord Leggatt considered ought to be compounded to compensate Andrew's lost opportunity to do something with those earnings.

Notwithstanding the Supreme Court's emphatic rejection of detriment as the fundamental aim of remedying proprietary estoppel, in most cases, both sides of the dispute will still need to estimate the value of the quantifiable aspects of the claimant's detrimental reliance. From the claimant's perspective, establishing that there has been some sort of substantial detrimental reliance is an essential element of the doctrine.[22] An attempt to assess the value of the detriment is also required when it comes to consideration of the question of proportionality, although now with the understanding that this is not merely a financial comparison, and there will be claims where it will not be appropriate to award the claimant's expectation and where the value of the detriment will be likely to be the focus (but not necessarily the ceiling) in fashioning a remedy. Lord Leggatt's methodology in the appendix provides a useful insight into how this might be approached.

There is no doubt that the decision in *Guest v Guest* represents the most important development in the law since the House of Lords considered the doctrine in *Thorner v Major*. *Thorner* did much to clarify the essential elements required to raise a proprietary estoppel-based claim but offered slim pickings in terms of understanding the correct approach to relief. Whilst there remain areas of uncertainty and difficulty, *Guest v Guest* goes a long way to providing practitioners and the courts with a much clearer roadmap

to assessing the correct approach to remedying proprietary estoppel claims.

Notes

1 [2022] UKSC 27 at [4].
2 [2020] EWCA Civ 387.
3 [2020] EWCA Civ 387 at [139] and [143].
4 [2020] EWCA Civ 387 at [242].
5 [2020] EWCA Civ 387 at [270] and [271].
6 [2020] EWCA Civ 387 at [283].
7 [2020] EWCA Civ 387 at [82].
8 [2020] EWCA Civ 387 [81].
9 [2020] EWCA Civ 387 [88] and [89].
10 [2022] UKSC 27.
11 [2022] UKSC 27 at [13].
12 [2022] UKSC 27 at [13], [25], [30], [33], [43] and [80].
13 [2022] UKSC 27 at [53] and [71].
14 [2022] UKSC 27 at [72] and [73].
15 [2022] UKSC 27 at [74]–[79].
16 [2022] UKSC 27 at [77].
17 [2022] UKSC 27 at [78].
18 [2022] UKSC 27 at [98].
19 [2022] UKSC 27 at [100]–[105].
20 [2022] UKSC 27 at [189]–[190].
21 [2022] UKSC 27 at [181].
22 Although it should be noted that it is settled law that detriment need not in fact be pecuniary as long as it is substantial: *Gillet v Holt* [2001] Ch 201.

Looking Back at *Duxbury* 30 Years On

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Overview

The *Duxbury* formula seeks to ascertain a capital amount which if invested to achieve **capital growth** and **income yield** (both at assumed rates and after tax on the yield and required gains) could be drawn down in equal **inflation-proofed** instalments over a period of time (often the recipient's life expectancy) but would be completely exhausted at the end of the period.

The *Duxbury* concept originated from the case of *Duxbury v Duxbury* [1990] 2 All ER 77, CA, in which the wife – aided by an accountancy firm[1] she had instructed – put forward a projection of the capital sum she required to meet her future needs based on various assumptions. For the best part of a decade it ruled supreme in all co-called bigger money cases on the then law based on the reasonable requirements of the applicant. Many predicted the seminal decision of the House of Lords in *White v White* [2000] UKHL 54 in 2000 would signal an end to *Duxbury* but it has withstood the changing landscape and remains an important tool which is often used by family lawyers and judges.

Duxbury is now most frequently used to assist the court in quantifying a clean break in a non-sharing case and as a guide to capitalising existing periodical payments in variation proceedings. It can also be used as a cross-check on whether the application of the sharing principle is likely to meet the recipient's needs.

The courts have acknowledged that *Duxbury* has been subjected to criticism, particularly in relation to the returns that it assumes will be made. It does, however, remain the tool most often used by family lawyers and judges when quantifying a clean break in a non-sharing case and capitalising a periodical payments order in variation proceedings.

This article explains some of the terminology in layperson's terms, summarises the leading case-law then speculates (see the Appendix) as to how the *Duxbury* funds in previous reported cases may have performed if invested in more cautious risk portfolios than *Duxbury* assumes, based on a set of assumptions prepared by a financial planner modelled on historic market performance. Michael Allum is the primary author of the text as a financial remedies practitioner. Megan Jenkins and Amy Gilbert have undertaken the calculations based on the alternate set of assumptions as specialist financial advisers.

Jargon busting

Capital Growth is the increase in the value of an asset or investment over time. It is measured by the difference between the current value, and its purchase price. *Duxbury* presently assumes **3.75%** per annum.

Income yield is earnings generated by an investment over a particular period of time. It is expressed as a percentage based on the value of the investment. *Duxbury* presently assumes **3%** per annum (1.5% in the first year).

Inflation is the rise in prices, which relates to the decline in the purchasing power over time. Inflation means that a unit of currency effectively buys less than it did in prior periods. *Duxbury* presently assumes **3%** per annum.

The key assumption is therefore that over a long period of time a fund will perform in actual gross terms by 6.75% annually but the owner will suffer inflation of 3% giving a real rate of return of 3.75% per annum.

Post-*White* case-law

The 2003 case of *Pearce v Pearce* [2003] EWCA Civ 1054 at [37]–[38] concerned an application by the husband to discharge/capitalise a joint lives periodical payments order together with a cross application by the wife to increase the quantum of the periodical payments order. Thorpe LJ held that a trial judge should not be put in a 'straight jacket' but that the discretion afforded to the court in departing from the *Duxbury* formula when deciding what capital sum should replace a periodical payments order was a 'narrower one'.

In 2010 in *Vaughan v Vaughan* [2010] EWCA Civ 349, Wilson LJ (as he then was) endorsed the principles set out in *Pearce*. The learned judge commented that the decision in *Pearce* had 'rightly received wide approbation' because it identified what Thorpe LJ had described as 'a relatively simple, certain and predictable method for the calculation of the capital sum'. Wilson LJ concluded by holding that:

'The court has, thank goodness, only a narrow discre-

> tion to arrive at a capital sum otherwise than by application of *Duxbury* formula and it should exercise it in order only to reflect special factors.'

In 2014 in *H v H* [2014] EWCA Civ 1523 at [31] Ryder LJ held as follows:

> 'In summary, it is not wise to assume that because the Duxbury Committee are of the opinion that in the context of their calculations 3.75% gross is achievable over the long term with a cautious investment strategy that the parties will agree that that rate is applicable to capital funds that are not to be amortised on the facts of a particular case. However, if they do agree or if the judge decides that assumption is valid on the facts of a case, I cannot for my part see how objection can be taken. If they do not, then the rate chosen by the court should be reasoned.'

The following year in *JL v SL (No 3)* [2015] EWHC 555 (Fam), in a supplemental judgment arising out of a request for amplification from the wife's counsel, Mostyn J held (at [13]–[15]):

> 'It is important to remember that a *Duxbury* fund is usually calculated over a long period. In this case from the start of phase 1 to the end of phase 3 over 30 years are covered. Generally speaking in most human fields the best prophet of the future is the past. The key assumption is that over a longish period it can be reasonably predicted that a fund will perform in actual gross terms by **6.75%** annually (i.e. 3% income yield plus 3.75% capital growth) but the owner of the fund will suffer inflation of **3%** thus giving a **real rate of return of 3.75%.** The key datum is however the predicted actual gross performance of 6.75%. Is that a reasonable guess?
>
> Between January 1985 and January 2015 the FTSE 100 index rose from 1277 to 6810. This corresponds to capital growth in that 30 year period of 5.74% annually. Over the same period the broader based FTSE-250 has grown by almost 8.8%, while a portfolio based on the US Dow Jones Industrial index (after allowing for the variance in the exchange rate) over the same period would have grown by over 6.9%. Thus it can be seen that the rate of capital return assumed in the *Duxbury* algorithm of just 3.75% is somewhat cautious, recognising that the recipient of an award is unlikely to be advised to invest the whole of her fund in equities, and that other kinds of investment are likely to achieve lower capital returns. Dividends (i.e. income yield) would also have been paid, perhaps at 3% a year. An alternative perspective is to look at P/E ratios over a long period. From 1990 to 2014 they have averaged for the UK 12.6, which translates to annual growth of 7.9%. So on the basis of history 6.75% per annum is a very reasonable guess.
>
> Over the same period the RPI index has moved from 91.2 to 255.4. This corresponds to inflation of 3.49% annually. Again, 3% is a reasonable guess, even if there is actually no inflation right now.' (original emphasis)

Mostyn J went on later in the judgment to say:

> 'Of course there is no "standard" rate in the sense that the economic assumptions underpinning the formula are written in marble from which there can be no deviation. But the *Duxbury* tables are used in countless cases. Their underlying methodology and assumptions are widely accepted as the usual starting point, and where there is no countervailing evidence, the usual finishing point. In that sense they do represent an "industry standard".'[2]
>
> 'As I have explained, the central datum underpinning the *Duxbury* algorithm is a gross actual rate of return of 6.75%. And I have further explained that, irrespective of income yield, in terms of capital growth alone the FTSE 100 has grown annually over the last 30 years by 5.74% and better than that by reference to the FTSE-250 and the Dow Jones Industrial Index.'[3]

In 2017 in *HC v FW* [2017] EWHC 3162 (Fam), Cobb J was invited to consider whether the future income requirement should be computed by reference to the Ogden tables (the actuarial tables used for assessing the sum to be awarded as general damages for future pecuniary loss) or by a *Duxbury* calculation. The choice of tables was of particular relevance given the quasi-personal injury character of the wife's claim, but at trial the wife's case was presented on the basis she was content to proceed on *Duxbury* assumptions (producing a lower capital sum) which the court subsequently adopted.

The court was also asked to consider the Ogden tables the following year in *Tattersall v Tattersall* [2018] EWCA Civ 1978. The court at first instance had decided to adopt the Ogden tables in favour of *Duxbury*. The question for the court on appeal was whether the use of the Ogden tables was an error of law or an error which meant the judge's award was wrong. Although the appeal court expressed a view that it would expect judges typically to use *Duxbury*, it held that a judge could decide to use a different method of calculation and to do so was not an error of law.

In the same year in *WG v HG* [2018] EWFC 84 the court was asked to select a term during which maintenance should be payable (not referable to the wife's life expectancy) and then capitalise that term into a lump sum. The court held that this would be unfair on the wife who had income needs which needed to be met and no earning capacity with which to meet them. The court therefore concluded that if there was to be a clean break it could only be on the basis of a *Duxbury* calculation, commenting as follows:

> '*Duxbury* is no more than a tool; it is not in any way a rule that has to be followed. It has been subjected to considerable criticism not least in the return that it assumes will be made. However, it is still the tool used by judges and family lawyers alike in these cases and nobody has sought to argue in this case that there is a better way of assessing the way to capitalise lifetime maintenance. Accordingly, I will use the *Duxbury* tables on a normal full-life basis.'[4]

2018 also saw the well-known decision of *Waggott v Waggott* [2018] EWCA Civ 727. At first instance the wife received assets worth £9.76m and a periodical payments order of £115,000 per annum (based on an income need of £175,000 per annum less an income she could generate from her free capital of £60,000 per annum on an assumed net return of 1.75%). On appeal, when discussing the scope for different rates of return which could be attributed to 'free capital', Moylan LJ held:

> 'There are, however, clearly advantages – both in terms of providing clarity and of consistency – if the *Duxbury* model and the assumptions within it were to be used at least as a starting point.'[5]

Shortly after *Waggott* came *O'Dwyer v O'Dwyer* [2019] EWHC 1838 (Fam). Mr and Mrs O'Dwyer married in 1988 and separated in 2016. For many years the husband had run a McDonalds' franchise which had an agreed net value of just over £2.4m. The total assets were just over £5.8m which on a sharing basis meant each should leave the marriage with just over £2.9m. This part of the decision was not challenged.

The appeal related to the approach the court at first instance took to maintenance (£150,000 per annum for a term of 5 years) insofar as it amounted to the sharing of the future income stream the husband would receive through the McDonalds' franchise which he retained in the settlement and which exceeded the wife's needs.

When considering the appeal Francis J deducted the sum of £1.2m (being the figure the trial judge had allowed the wife to meet housing and other capital costs) which left the wife was left with £1,732,739 of free capital. Francis J held that it was then necessary to attribute an income to this sum which he did as follows:

> 'One can argue endlessly about the appropriate rate of return but it seems to me that time and again the [*Duxbury*] assumptions in *At A Glance* are used and I use them for the purposes of this case. At paragraph 136 in *Waggott*, Moylan LJ saw clear advantages in adopting the *Duxbury* assumptions, and whilst of course I have a discretion to depart from them it seems to me that I should follow the lead so clearly given by him.'[6]

On that basis Francis J found the wife could secure a return of 3.75% on her free capital which equated to an income of £64,978 per annum. This figure would be taxable in the wife's hands in the United States (where she had returned to live) which reduced the net receipt to the wife to £52,000. On the basis that a fairer figure for the wife's income needs was £120,000 (rather than £150,000) per annum, Francis J held that the periodical payments should be reduced to a rate of £68,000 per annum for the same term as ordered by the trial judge.

Lastly in this review, in 2021 Peel J considered a number of bespoke calculations that had been carried out by a financial adviser in *ND v GD* [2021] EWFC 53. He commented that the range of outcomes was enormous because he had been invited to consider life expectancy from 5 to 30 years as well as numerous options regarding the cost of care and other income and living costs. The financial adviser had also assumed combined income and capital growth of 3.62% (whereas *Duxbury* assumes 6.75%) and inflation of 2% (whereas *Duxbury* assumes 3%). After considering the calculations Peel J held (at [22]):

> 'I have to say, with due respect to all who requested and sanctioned this exercise, that it has been of negligible value to me in resolving this case. In my view the parties could very easily have used the Capitalise programme to generate bespoke calculations. What matters is the figures which are put into the programme by each party to calculate the outcome contended for. Often during a hearing, as issues crystallise, the judge will ask for specific calculations to be carried out; indeed, I did just that in this case. The underlying assumptions can be adjusted on the Capitalise programme if required. I do not see that the SJE was asked to do any more than create his own *Duxbury* style calculations, but, perhaps inevitably, he adopted different underlying assumptions. The result is a quasi-*Duxbury* calculation, inconsistent with the specific *Duxbury* model which has stood the test of time for decades in financial remedy cases. This is not to criticise Mr Hutton-Attenborough [the expert]; he did exactly what he was asked to do, conscientiously and fairly. In my view, it was never "necessary" (to apply the Part 25 test) for him to have been instructed. Indeed, as things have transpired, and perhaps unsurprisingly, neither party really sought to rely on his figures which are so wide ranging as to be of minimal value.
>
> Although I acknowledge that there may be the odd case where an expert is required to carry out a very clearly defined and tailored *Duxbury* calculation, in the vast run of cases it is inappropriate to reach beyond the *Duxbury* tables in *At A Glance*, or the Capitalise programme for a more advanced formula. For my own part, I strongly caution against the sort of exercise which was carried out here which has been a largely futile and costly exercise. There should rarely, if ever, be a need for an IFA to carry out a *Duxbury* style exercise which adds cost, delay, and confusion.'[7]
>
> 'During the hearing, as I have observed, I was presented with a number of capitalisation calculations by an IFA who used underlying assumptions which differ from the *Duxbury* model. In *JL v SL (No 3)* Mostyn J reviewed the *Duxbury* assumptions and concluded that they remain sound. The *Duxbury* model has stood the test of time since the eponymous case of *Duxbury v Duxbury* some 30 years ago. As has been often stated, it is a tool and not a rule. The court has the flexibility to depart from it to the extent necessary in any given case, as, for example, in *A v A*. There, an elderly applicant was, by reason of her age and length of the marriage, entitled to less under the *Duxbury* model than would have been the case had she been younger and/or the marriage shorter; the so-called *Duxbury* paradox. Singer J departed from the strict *Duxbury* application to meet this unfairness. True, the court is not barred from considering capitalisation calculations other than by the *Duxbury* methodology (e.g. *Tattersall v Tattersall*) but I am firmly of the view that there would have to be a very good reason to go down a different route.'[8]

Drawing these cases together it can be seen that although the family court retains its notoriously wide discretion to do justice on a case-by-case basis and, despite some of the potential shortcomings of the *Duxbury* formula and the regular reminder that *Duxbury* is 'a tool rather than a rule', in practice the *Duxbury* assumptions are likely to be adopted by the court in the vast majority of cases as the net value of a right to receive periodical payments at a target annual rate for (often) the remainder of a payee's life. Any attempt to challenge them would require the court's permission to adduce evidence in the form of a different set of instructions which absent very good reasons would be unlikely to succeed.

Against that backdrop this article now considers (with the glorious benefit of hindsight and financial analysis) the potential net impact on recipients of *Duxbury* awards in previous reported decisions. In some instances assumptions have been made where the exact information was not ascertainable from the judgment. In some cases it was not possible from the information contained within the judgment to undertake this exercise but we have endeavoured

to provide at least a short narrative summary of those decisions in the hope of collating a decent sized catalogue of previous reported cases involving a *Duxbury* award.

Although we have endeavoured to capture as many cases as possible, this article does not, for the reasons above, claim to have recorded every single *Duxbury* case. For a comprehensive categorisation of recent cases, see the excellent academic work of Emma Hitchings, 'Reconsidering the *Duxbury* default'.[9] The article does, however, seek to pick up on the theme mooted as early 1998 by Jeremy Posnansky when he asked whether it was time to find out what happened to the *Duxbury* wives and whether they had lived their lives 'like the computer models on which their awards were based'[10] – based on a set of calculations which may be more akin to those adopted by some of those recipients.

Assumptions

In contrasting how the model should perform compared to how often it has in practice, it is important to bear in mind the profile of a likely recipient of a *Duxbury* award. *Duxbury* recipients are often not commercially experienced individuals with a strong understanding of or appetite for risky investments.[11] They are more often likely to favour the safety of less risky financial dealings with which they may be familiar.[12] The assumptions we have used in the Appendix to this article are therefore based on how a typical cautious risk portfolio might have performed based on historic data because, in our experience, that tends to be the approach to risk favoured by the majority of recipients of *Duxbury* awards.

The assumptions we have used are also based on how the portfolios under the management of Saltus Partners LLP have performed historically over the last 12 years (as that is the period for which this data is available). For those cases which were decided more than 12 years ago the same data has been used. Moreover, for those cases, which are the majority, where the receiving party has not yet reached their actuarial life expectancy age, the same 12-year data has been extrapolated to project whether there will be a shortfall or surplus when they reach their actuarial life expectancy age. We have assumed inflation is the consumer prices index (CPI) measure at 2.5% per annum as the Bank of England's target rate of inflation is 2% and the average inflation rate in the United Kingdom between 1991 and 2021 is 2.31%. This has been used for income/withdrawals and expenditure.

The *Duxbury* formula does not take account of how different recipients approach investing, particularly their tolerance and appetite for taking risk. We have assumed the capital sum awarded will be invested in line with a Saltus Cautious portfolio using their full Discretionary Fund Management proposition. We have also included the usual ongoing management fees that would be charged to manage an investment portfolio on a recipient's behalf, which average around 2% per annum and include ongoing investment management, financial planning and underlying investment costs.

Ordinarily, Saltus Partners LLP would build in a variety of tax wrappers depending on the client's individual circumstances. For the assumptions used in this article we have, however, opted for the use of an ISA which would be fully subscribed to each tax year using the General Investment Account as, without knowing an individual's circumstances, it would be remiss to factor in other tax wrappers, such as pensions, whereas every individual (as long as they are UK tax resident) has an annual ISA allowance. We have assumed the cashflow and life expectancy of the client is in line with the ONS statistics, which in most cases is 87. The State Pension is projected at the full amount and payable from the appropriate age (usually between 66 and 68 based upon the client's age/date of birth).

Discussion

The calculations based on how a cautious risk portfolio may have performed during the economic climate over the last 12 years indicate that every capital fund apart from two (*Vaughan* and *S v AG* [2011] EWHC 2637 (Fam), both of which involved low levels of annual income need) would have been exhausted before the end of the recipient's actuarial life expectancy. This might not come as a surprise to the vast majority of financial remedy practitioners doing so-called bigger money work who will have probably tried (and failed) at least once to persuade the court to adopt a bespoke model rather than the *Duxbury* formula when capitalising a maintenance payment. That lack of surprise may, however, be scant consolation to the recipients of *Duxbury* awards who run out of money to meet their needs before they pass away.

It is important, however, to remember that the purpose of the *Duxbury* calculations is not to provide a guaranteed income for life. It is also worth bearing in mind that if the recipient had received an open-ended periodical payments order instead of a capitalised lump sum, they would have been subject to various risks including early variation or termination of the order by virtue of the death of the paying party, remarriage of the receiving party or court order following a significant change of circumstances. These were some of the very well-made points by Lewis Marks KC in 'An Alternative View of *Duxbury*: A Reply' in 2010.[13]

In addition to the (perhaps unsurprising) illustration as to the likely performance of a *Duxbury* fund, the analysis also suggests that there may be a difference in trends between cases involving modest *Duxbury* awards and larger ones. The former seem to perform less badly than the latter and one reason might be the ability of those with lower target rates of income to make greater use of tax-free allowances. Another reason may be that in cases involving lower levels of income needs a larger portion is covered by state pension, which means the recipient is not required to draw as heavily on their capital fund.

Another trend seems to be that *Duxbury* sums given to recipients with a longer period of life expectancy appear to perform less well, which may (despite the *Duxbury* adjustment to income yield in the first year) be attributable to the impact of compounding based on artificially high rates of return and/or the increased risk that a maintenance award would come to an end the longer the term. Another important factor to consider (again despite the first-year adjustment to income yield) is 'sequencing risk', which is the risk that investment will be subject to the worst returns at the worst time, for example the returns during the COVID-19 pandemic in March 2020. In the early years of drawing from capital when it is at its 'peak', weak returns could increase

the risk of the recipient's capital running out at a faster rate. Investing and immediately starting to draw from capital in periods of high volatility may not be wise. Therefore, it is often advisable to build in an emergency fund and potentially hold back the first year of income need in cash which will act as a buffer in volatile times. Whilst for the purpose of these scenarios it has been assumed that the entire sum is invested, in practice, creating this buffer will be a key consideration.

Whilst the significant benefits associated with having a universal formula which can be used to project what capital fund a party may require in lieu of a periodical payments order (including increased certainty, improved prospects of settlement and reduced cost – financial and otherwise – of prolonged litigation) should not be underestimated, it is submitted that the process by which the calculations are determined could be improved. At the moment it is a small group and little is known externally as to how often the assumptions are reviewed. It is suggested that group might, instead, be expanded into a statutory multi-disciplinary committee akin to those used to determine the band of awards in personal injury cases to recommend and review the assumptions in a transparent manner. This would retain all the benefits of a *Duxbury* yardstick whilst ensuring the assumptions are both appropriate and kept under review by a more independent body that is democratically mandated.

Note as a standard warning: Investments do not guarantee a return, the value and the income from them can fall as well as rise. You may not get back the amount originally invested. Past performance is no guarantee of future returns.

Notes

1 Tim Lawrence of what was then Coopers and Lybrand.
2 [2015] EWHC 555 (Fam) at [17].
3 [2015] EWHC 555 (Fam) at [18].
4 [2018] EWFC 84 at [85].
5 [2018] EWCA Civ 727 at [136].
6 [2019] EWHC 1838 (Fam) at [39].
7 [2021] EWFC 53 at [28] and [29].
8 [2021] EWFC 53 at [53].
9 [2021] CFLQ 275.
10 J Posnansky, 'Whatever Happened to the Duxbury Wives' [1998] Fam Law 447.
11 Sometimes in contrast to the paying party.
12 Moreover, often unlike the paying party who may have continuing income from other sources, the *Duxbury* payment may be the only significant funds for the recipient for the rest of their life so a cautious approach as distinct from the assumptions of the model is perhaps understandable.
13 [2010] Fam Law 614.

Appendix

AR v AR [2011] EWHC 2717 (Fam): The court noted that a *Duxbury* sum for an annual income of £115,000 was £2.5m. To enable the wife to spend additional sums and to give an additional measure of security the court increased that sum to £3.2m.

N v F [2011] EWHC 586 (Fam): The court held that the wife would have a *Duxbury* fund which ignoring state pension (not available to her in the United States) would produce an annual income of £104,000. The court also held that the husband would in effect have a *Duxbury* fund of £3.487m which would supply an annual income of £184,000.

BJ v MJ [2011] EWHC 2708 (Fam): The court held that a *Duxbury* calculation on an income need of £65,000 per annum assuming gross income from private pension of £26,300 per annum and a full state pension produces a capital requirement of £626,759.

B v s (Rev 2) [2012] EWHC 265 (Fam): The court held that two lump sums of £1m in 2 and 3 years' time would each provide the wife (aged 43) with an income of £3,200 per month on a *Duxbury* basis. Once these two lump sums had been paid the wife's maintenance should therefore reduce from £7,500 per month to £1,100 per month but the court capitalised at £344,000.

Y v Y [2012] EWHC 2063 (Fam): The court found the wife's income need to be £150,000 per annum reducing by 20% to £120,000 per annum after 8 years at age 60 which required a *Duxbury* fund of £3m. As a cross-check the court held the wife could alternatively use it to provide a flat income of £125,000 per annum with no reduction at age 60.

Z v A [2012] EWHC 1434 (Fam): The court had given a bracket of between £2m and £2.5m for housing. For income the wife had a shortfall of £50,000 per annum which would require a *Duxbury* fund of £1m. The court held this was very generous after a short marriage and said another option was to use a multiplier of 10 which would give £500,000. The total bracket (for housing and income shortfall) was therefore between £2.5m and £3.5m and the court ordered £3m.

AH v PH [2013] EWHC 2063 (Fam): In light of the wife's young age (33) and the short length of the marriage, the court (the *Duxbury* paradox) held it would be inappropriate to capitalise her income need of £200,000 per annum for life and instead capitalised it for just under 14 years which was £2,237,000 rounded to £2.25m.

SJ v RA [2014] EWHC 4054 (Fam): Judgment where the court used the *Duxbury* formula to attribute a capital value (£1.6m) to an income stream (£139,000 net per annum for life from age 73) received by the husband.

P v P [2015] EWFC B59: Judgment where the 62-year-old husband received capital which could be deployed as to £736,000 to produce £50,000 net per annum for life or £399,000 to produce £35,000 per annum for life.

JL v SL (No 3) [2015] EWHC 555 (Fam): The wife's needs were split into three phases (years 1–3 at £75,329 per annum; years 4–10 at £55,964 per annum after deduction of earnings of £13,007 net to age 60; and year 11 onwards at £68,981 per annum) which the court capitalised in the sum of £98,947 for stages 1 and 2 non-amortised and £1,191,357 for stage 3 amortised.

Juffali v Juffali [2016] EWHC 1684 (Fam): The court found an income need for the 54-year-old wife of £2.5m per annum reducing by 33% to £1.675m per annum in 2026 and then by a further 25% to £1,256,250 per annum on her 75th birthday. The *Duxbury* calculation was £44,313,355 which was rounded to £44.3m.

Z v Z & Ors [2016] EWHC 1720 (Fam): 45-year-old female found to have an income need of £140,000 per annum and a rental income of £78,000 per annum for the next 6 years awarded a *Duxbury* fund of £3,333,480.

Case	Age of receiving party	Gender of receiving party	Life expectancy	Annual income need	Capital sum	Surplus/shortfall (cautious)	Projected depletion/ deficit age	Age of receiving party today
Duxbury v Duxbury [1990] 2 All ER 77	45	Female	80	£28,000	£540,000	Minus £202,881	74	75
M v L [2003] EWHC 328 (Fam)	57	Female	83	£12,000	£150,000	Minus £27,565	73	76
GW v RW [2003] EWHC 611 (Fam)	43	Female	83	£71,500	£1.676m	Minus £659,004	68	62
W v W [2003] EWHC 2254 (Fam)	61	Female	83	£34,000	£560,000	Minus £122,925	82	80
Pearce v Pearce [2003] EWCA Civ 1054	66	Female	84	£45,698	£620,000	Minus £126,417	84	85
M v M [2004] EWHC 688 (Fam)	42	Female	82	£125,000	£3.25m	Minus £1,710,964	68	60
P v P [2004] EWHC 1364 (Fam)	46	Female	82	£10,000	£176,000	Minus £25,673	64	64
FS v JS (aka S v S) [2006] EWHC 2793 (Fam)	41	Female	82	£50,000	£700,000	Minus £934,086	56	57
Lauder v Lauder [2007] EWHC 1227 (Fam)	70	Female	86	£60,000	£725,000	Minus £159,543	85	85
P v P [2007] EWHC 2877 (Fam)	52	Female	83	£120,000–£150,000	£3.5m	Minus £1,323,811	76	67
CR v CR [2007] EWHC 3334 (Fam)	51	Female	83	£140,000–£170,000	£5m	Minus £747,017	82	66
McCartney v McCartney [2008] EWHC 401 (Fam)	40	Female	82	£600,000	£14m	Minus £10,261,715	64	54
NG v KR (first instance Radmacher v Granatino) [2008] EWHC 1532 (Fam)	37	Male	79	£100,000	£2.335m	Minus £1,764,262	61	51
SR v CR [2008] EWHC 2329 (Fam)	'mid-forties'	Female	83	£133,000	£3.25m	Minus £1,709,166	70	59
B v B [2009] EWHC 3422 (Fam)	37	Female	85	£135,000	£2.25m	Minus £2,832,813	54	50
R v R [2009] EWHC 1267 (Fam)	53	Female	83	£135,000	£3m	Minus £1,175,088	77	66
Vaughan v Vaughan [2010] EWCA Civ 349	66	Female	87	£14,000	£215,000	Plus £17,856	n/a	78
N v N [2010] EWHC 717 (Fam)	54	Female	84	£110,000–£125,000	£2.4m	Minus £1,467,038	72	66
Gallagher v Lawrence (Rev 1) [2011] EWHC 1375 (Fam)	54	Male	81	£28,000	£500,000	Minus £202,745	78	65
S v AG [2011] EWHC 2637 (Fam)	55 at time (draw fund at age 65)	Male	81	£11,250	£82,000	Plus £36,035	n/a	66

Case	Age of receiving party	Gender of receiving party	Life expectancy	Annual income need	Capital sum	Surplus/shortfall (cautious)	Projected depletion/ deficit age	Age of receiving party today
Z v Z [2011] EWHC 2878 (Fam)	50	Male	80	£100,000	£2,283,126	Minus £373,313	80	61
B v B [2012] EWHC 314 (Fam)	40	Female	80	£44,400	£1.04m	Minus £625,049	64	50
Kremen v Agrest [2012] EWHC 45 (Fam)	44	Female	83	£200,000	£5.481m	Minus £2,319,193	71	54
DR v GR & Ors [2013] EWHC 1196 (Fam)	68	Female	86	£54,428	£725,000	Minus £13,429	86	77
SA v PA [2014] EWHC 392 (Fam)	54	Female	84	£65,000	£1.281m	Minus £124,329	84	56
H v H [2014] EWHC 760 (Fam)	55	Female	84	£25,000	£400,000	Minus £173,877	76	63
S v S [2014] EWHC 4732	47	Female	84	£100,000	£2.5m	Minus £514,333	76	55
MCJ v MAJ [2016] EWHC 1672 (Fam)	'Nearly 51'	Female	84	£90,000	£1.289m	Minus £1,316,306	66	57
BD v FD (No 2) [2016] EWHC 594 (Fam)	41	Female	87	£175,000	£5m	Minus £2,180,257	71	47
X v X [2016] EWHC 1995 (Fam)	45	Female	83	£150,000	£3.8m	Minus £1,242,589	75	51
AAZ v BBZ & Ors [2016] EWFC 3234 (Fam)	44	Female	87	£5,359,354	£157,101,606	Minus £53,093,023	74	50
R v B & Ors [2017] EWFC 33	56	Male	82	£50,000	£839,000	Minus £431,592	75	61
HC v FW [2017] EWHC 3162 (Fam)	64	Female	85	£298,648	£3,474,607	Minus £2,917,891	76	69
WG v HG [2018] EWFC 84	50	Female	87	£90,000	£2m	Minus £899,057	74	54
W v W [2018] EWFC B99	49	Female	87	£100,000	£2.188m	Minus £1,106,527	73	53
C v C [2018] EWHC 3186 (Fam)	Mid-40s	Female	84	£200,000	£5m	Minus £2,581,984	71	49
AF v SF [2019] EWHC 1224 (Fam)	49	Female	84	£175,000	£4.1m	Minus £1,500,093	76	52
RC v JC [2020] EWHC 466 (Fam)	45	Female	83	£100,000	£2.35m	Minus £1,301,131	69	47
AG v VD [2021] EWFC 9	51	Female	86	£100,000	£2.060m	Minus £1,086,056	73	52
E v L [2021] EWFC 60	61	Female	87	£90,047	£1.540m	Minus £496,716	81	62

Case	Age of receiving party	Gender of receiving party	Life expectancy	Annual income need	Capital sum	Surplus/shortfall (cautious)	Projected depletion/ deficit age	Age of receiving party today
A v M [2021] EWFC 89	58	Female	87	£325,000	£6,483,623	Minus £2,186,861	80	59
WC v HC [2022] 4 WLR 65	52	Female	86	£150,000	£3.319m	Minus £1,440,195	75	52
Pierburg v Pierburg [2022] EWHC 701	72	Female	88	£400,000	£4.750m	Minus £1,736,995	84	72
YC v ZC [2022] EWFC 137	59	Female	87	£30,000	£421,000	Minus £186,672	77	59
TM v KM [2022] EWFC 155	50	Female	87	£175,000	£4m	Minus £1,801,070	74	50

KA v MA [2018] EWHC 499 (Fam): 54-year-old female found to have an income need of 100,000 per annum dropping by 25% to £75,000 per annum when the child turned 21 years old but an earning capacity of £20,000 per annum for 10 years awarded a *Duxbury* fund of £1.6m (with private pension of £123,000 ignored).

IX v IY [2018] EWHC 3053 (Fam): 51-year-old wife found to have an income need of £300,000 per annum until age 60 thereafter reducing to £100,000 per annum awarded a *Duxbury* fund of £4.44m.

Hammoud v Zawawi [2019] EWHC 839 (Fam): 36-year-old wife found to have an income need of £600,000 per annum until her 50th birthday thereafter reducing to £400,000 per annum for the rest of her life awarded a *Duxbury* fund of £14.6m.

Ipekçi v McConnell [2019] EWFC 19: 45-year-old husband with a net income need of £50,000 per annum reducing by 40% to £30,000 at age 67 with an earning capacity of £35,000 per annum until retirement awarded a *Duxbury* fund of £445,500.

CB v KB [2019] EWFC 78: 47-year-old wife found to have an earning capacity of £25,000 gross per annum from age 49 to age 60 and the ability to release equity of £1.5m at age 60 awarded a *Duxbury* fund of £2,151,579 to provide, taking into account the preceding points, an initial spendable income of £175,126 per annum reducing to £115,324 at age 60.

Haskell v Haskell [2020] EWFC 9: A case where given the relatively young age of the wife (42) and the medium length of the marriage the judge held it was not reasonable for there to be a full *Duxbury* award and the court instead proceeded on the basis of an income need of £140,000 per annum reducing by 50% at age 60 which required a capital fund of £2.7m.

Her Royal Highness Haya Bint Al Hussein v His Highness Mohammed Bin Rashid Al Maktoum [2021] EWFC 94: Capital fund of £210m to give a 47-year-old female a capitalised income of £11m per annum until the end of 2030 thereafter reducing to £8.25m per annum until the end of 2034 and thereafter reducing to £5.5m per annum.

Clarke v Clarke [2022] EWHC 2698: Appeal where the judge at first instance gave a *Duxbury* fund of £339,400 which gave a 60-year-old female an income of a little over £25,000 net per annum for life which the appeal court increased to £586,7500 which together with private pensions worth £120,379 gave an income of £48,000 per annum for life.

CMX v EJX (French Marriage Contract) [2022] EWFC 136: Capital fund of £2,092,579 to provide a 54-year-old female with an income need of £200,000 per annum reducing to £160,000 per annum at age 60 and then to £120,000 per annum at age 68 but an earning capacity of £48,000 from age 55 to age 58 and then self-employed income at the rate of £80,000 from age 59 to age 67 and then pension receipts of £40,500 per annum.

Collardeau-Fuchs v Fuchs [2022] EWFC 135: Capital fund of £21,720,767 to provide a 47-year-old female with income of £1,110,316 per annum over a 40-year period, but: (1) without state pension; (2) with a cash injection of £4m in 2039; and (3) with a 40% reduction in income in 2042.

Pensions on Divorce – Lifetime Allowance Tax Issues

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A favourite film of one of the authors is *Apollo 13*. At one point, whilst trying to work out what had to happen to get the ill-fated space craft home, Commander Jim Lovell said: 'All right, there's a thousand things that have to happen in order. We are on number eight. You're talking about number 692.' The same must be the view of so many family lawyers regarding worrying about lifetime allowance (LTA) tax issues in the midst of financial remedy proceedings. In many cases, however, it is important that consideration of this subject is not relegated to the end – to do so may cost your clients many tens or hundreds of thousands of pounds in unnecessary tax.

In this article, we:

- briefly discuss the tax and how it is applied differently to defined benefit (DB) and defined contribution (DC) pension schemes;
- look at a number of case studies;
- look at how some of the HMRC-granted protection certificates may be affected by pension sharing orders (PSOs); and
- consider how LTA tax can be mitigated in some cases.

Background

The LTA is a limit to the total amount of tax-efficient pension benefits that an individual can accrue over their lifetime. It was introduced on 6 April 2006 (what was then known as 'A-Day'). The LTA threshold – the amount of pension fund one could have before paying tax – started at £1.5m, rose to £1.8m in 2010, and then gradually fell back to £1.0m in 2016, before slowly climbing back to the current £1.073m.

Pension benefits are tested against the LTA as follows:

- DC arrangements with reference to their fund value when benefits are taken; and
- DB pension amounts are multiplied by 20 upon being put into payment to place a value on these (with any automatic lump sums been taken at face value).

Any excess over the LTA gives rise to a tax charge that is calculated depending on how these excess benefits are taken:

- if taken as a cash lump sum, the excess is subject to a 55% tax rate;
- if taken as an income, it is taxed at 25% in addition to the normal income tax regime.

These two approaches are often neutral to each other from a tax perspective.

HMRC provides several protections against the LTA, some of which are no longer available to new applications. Details of these can be found at www.gov.uk/guidance/pension-schemes-protect-your-lifetime-allowance. The impact of a PSO on the pension debit member (i.e. the one whose benefits are being reduced) can be affected where some such protections are held. It is also the case that the LTA position of the pension credit member (the one who is to receive the benefit of a PSO) can also be affected depending on certain specific factors that are outside the remit of this (relatively) brief note.

Between 2018/19 and 2020/21, the LTA was increased in line with inflation, as measured by the consumer prices index (CPI). In the 2021 spring budget, however, it was announced that the LTA would be frozen at the 2020/21 level of £1,073,100 until the end of tax year 2025/26. Thereafter, who knows what may happen, but in the current climate, expecting any relaxation of this limit which by definition will benefit only 'millionaire pensioners' is perhaps being unrealistic.

Case study 1

Let us start off with a straightforward case. H is looking to retire imminently and has a self-invested personal pension (SIPP) worth £2,000,000; this is a DC fund. DC funds are easy to value for LTA purposes; it is simply the value of the fund that is tested against the LTA. Unless any action is taken, H will have a tax bill of c. £250,000 when he retires, due to being c. £1,000,000 over the LTA threshold of £1,073,100.[1]

H and W are getting divorced, and a PSO of 50% is made in favour of W, who prior to the PSO, has no pension funds of her own, and the order is made prior to H's retirement. H and W now each have £1m of pension funds, with their own individual LTA limit of £1.073m, and thus neither party has an LTA tax liability.

Case study 2

We are now going to take a simple DB case and develop the case with the addition each time of new features. This will hopefully bring out the differences between DB and DC pensions for LTA purposes and identify how the tax may be mitigated or unwittingly exacerbated.

Let us take the case of Mr Smith, aged 55, who is a member of a DB scheme. He has a deferred pension of £80,000 pa, payable ordinarily at age 60, and the cash equivalent value (CEV) is £2.2m. Mrs Smith is 5 years younger at age 50. We are asked to look at equality of income by means of pension sharing. The best way to look at the LTA issues is to consider the calculation for equality of pension income, which requires a PSO of 46.0%, but first totally ignoring the LTA issues:

Pension sharing for equality of pension income, assuming retirement at age 55, no LTA adjustment			
Mr Smith			
	Pre-PSO	PSO	Post-PSO
Pension at age 55	£62,000 pa	46.0%	**£33,461 pa**
Mrs Smith			
Pension credit received		£1,012,669	
Value of credit at age 55		£1,230,843	
Annuity bought at age 55			£36,925 pa
Annuity at age 55 in today's money			**£33,461 pa**

So, what do we note from this calculation?

- First of all, we have ignored the instruction – we have assumed retirement at age 55, not age 60. And thus, if Mr Smith draws his pension at age 55, it is reduced from £80,000 pa at age 60 to £62,000 pa from age 55. The reason for this is that even at age 55, we have LTA issues. If we had assumed retirement at age 60, unless we are to assume that the LTA limit will increase each year by a rate greater than the anticipated investment return, deferral of the retirement until age 60 will simply exacerbate the LTA issues. Please bear in mind that the LTA limit is frozen until 2025/26 and in the current climate we are not sure it is realistic to assume tax regimes will become less onerous. Jonathan Galbraith (he of the Galbraith Tables) made just such a call in the case of *W v H (Divorce Financial Remedies)* [2020] EWFC B10, where, for practical considerations of LTA issues, he advised we should consider retirement at age 55, notwithstanding the letter of instruction.

  In the (anonymised) written judgment (available at www.bailii.org/ew/cases/EWFC/OJ/2020/B10.pdf) HHJ Hess made explicit reference to Mr Galbraith's report and acknowledged that it was appropriate therein for the expert to depart from the specifics of the letter of instruction with reference to assumed retirement ages in light of the facts of the case. The relevant section of the judgment is [63] (ii):

  > 'It has been suggested by Mr Galbraith from Mathieson Consulting Limited, the PODE instructed in this case, in his report of 3rd July 2019 … that (for reasons convincingly explained in detail by him which have been accepted by both parties, and which include a proper consideration of the Lifetime Allowance and Fixed Protection issues arising here) the appropriate equalisation age on the facts of this case is 60 (rather than the normal 65 or 67). I propose to adopt this recommendation.'

- Secondly, Mr Smith no longer has an LTA issue. Prior to the PSO, he had a pension of £80,000 pa if taken at age 60 or £62,000 pa if taken at age 55. DB pensions such as this one are valued for LTA purposes on a very simple multiple of 20 times the pension (plus a lump sum if there is an automatic one) and thus his pension would have been valued at £1.6m if taken at age 60 (20 × £80,000 pa) or £1.24m if taken at age 55 (20 × £62,000 pa). Thus prior to the PSO he would have breached the LTA of £1.073m, unless he had any protection. However, he has not crystallised his pension (by retiring) and thus the pre-PSO LTA issue is a hypothetical future liability. Once a PSO of 46.0% is made, reducing the pension to £33,461 pa at age 55, Mr Smith no longer has an LTA issue when he retires, with £669,000 (20 × £33,461) being well below the current threshold.
- Mrs Smith, however, does have an LTA issue. For DC funds, it is the CEV at the point of crystallisation which is used to value the pension for LTA purposes. With a pension credit now of £1,012,669, which is forecast to be worth £1,230,843 at age 55 (when she is assumed to retire), unless there is an increase on the current LTA limit of £1.073m, Mrs Smith will be £158,000 over the LTA limit, and thus face a tax charge of c. £40,000. We have ignored this tax liability in this calculation.
- This calculation highlights very clearly the lack of fairness in the way LTA rules are applied against DB and DC pensions. Both Mr and Mrs Smith are forecast to have the same guaranteed level of pension income, but Mr Smith is assessed as having funds below the LTA and Mrs Smith will require DC funds in excess of the LTA threshold. This is because using a factor of 20 to convert DB income into a notional value for a DB pension massively understates the true value of the pension, at least where an annuity purchase solution is used with DC funds for the purpose of matching incomes in retirement.

Case study 3

We now develop the previous case study and adjust the calculation such that the LTA liability faced by Mrs Smith is taken into account:

Pension sharing for equality of pension income, assuming retirement at age 55, LTA adjusted			
Mr Smith			
	Pre-PSO	PSO	Post-PSO
Pension at age 55	£62,000 pa	47.0%	**£32,891 pa**
Mrs Smith			
Pension credit received		£1,032,911	
Value of credit at age 55		£1,255,446	
Annuity bought at age 55			£36,296 pa
Annuity at age 55 in today's money			**£32,891 pa**

Here we can see:

- On Mrs Smith's side of the equation, we have considered the tax she must pay, and deducted this from her fund, prior to the purchase of an annuity.
- As we have now considered Mrs Smith's tax liability (unlike the previous calculation) the PSO must increase to compensate her, from 46.0% to 47.0%, and the pension credit increases from £1,012,000 to £1,032,911.
- But here we enter a vicious circle. To compensate Mrs Smith, via the PSO, for her tax liability, she needs to receive more pension monies which means the tax liability is increased, and thus she needs more pension credit to compensate her – and the only winner is the Exchequer. This is to the detriment of both parties, with incomes being equalised at a level that is c. £600 pa less each than what was shown in Case Study 2.

Case study 4

An alternative here is to recognise there is a sweet spot at which a PSO: (1) brings Mr Smith's pension within LTA limits (must be below £53,655 pa, such that 20 times the residual pension does not exceed £1,073,100); but also (2) Mrs Smith at age 55 has no more than £1,073,100 of funds, and thus herself does not have an LTA liability. This can be achieved by a PSO of 40.1%:

Restricting PSO such that both parties remain within LTA			
Mr Smith			
	Pre-PSO	PSO	Post-PSO
Pension at age 55	£62,000 pa	40.1%	**£37,119 pa**
Mrs Smith			
Pension credit received		£882,886	
Value of credit at age 55		£1,073,100	
Annuity bought at age 55			£32,193 pa
Annuity at age 55 in today's money			**£29,173 pa**
Income differential to be offset			£7,946 pa

But given a PSO of 46% is required to achieve equality of pension income (ignoring LTA liabilities), it follows that a PSO of 40.1%, which: (1) keeps Mr Smith's pension within LTA limits; but also (2) gives Mrs Smith projected funds at age 55 of £1,073,100 will inevitably lead to an outcome where Mr Smith's income is greater than Mrs Smith's (£37,119 pa vs £29,173 pa).

So the proposal is that this settlement, which avoids losing £45,000 in tax from the joint pension pot, should be undertaken in conjunction with some offsetting for the income imbalance of £7,946 pa. It follows that there are various ways in which one might place a value upon the non-pension capital required by Mrs Smith to make up the difference here, and it is also widely accepted that adjustments in respect of tax and/or utility might be required in respect of any figure derived. The Pension Advisory Group (PAG) report[2] can help with this.

Protection

At various stages in the life cycle of LTA (and it has only been with us since 2006), various protections have been made available – both transitional ones when the regime commenced, and thereafter primarily when the threshold has been reduced – to soften the blow for those who had funds that were within limits when thresholds were higher but would be in excess of a newly reduced threshold.

In case study 2 above, which evolved through case studies 3 and 4, what would have been the case had Mr Smith had Fixed Protection 2014, for example? Such protection would mean that Mr Smith could have pensions valued at £1.5m before LTA tax would become due. (It is worth noting that just because your client can produce a Fixed Protection certificate, this does not mean it is necessarily valid. If Mr Smith successfully obtained such protection in 2014, but had subsequently made pension contributions, such protection would have been lost.)

Assuming Mr Smith's Fixed Protection 2014 of £1.5m was still valid, then he could draw a pension of up to £75,000 pa (20 × £75,000 = £1.5m) without incurring a tax charge. Thus:

- Ignoring any PSO, if Mr Smith were to retire at age 60 with the full pension of £80,000 pa, he would have a pension valued at £1.6m for LTA purposes, which is £100,000 more than his protection limit of £1.5m, thus giving rise to a tax bill.
- But if he were to retire at age 55, with a reduced pension of £62,000 pa, he would have no tax liability – a further reason why the PODE was right to have the temerity to suggest he should use age 55 instead of age 60 as instructed.

If the usual sequence of events were to be changed, such that before any PSO is made, Mr Smith were first to put his pension into payment, what then would be the outcome?

- First, Mr Smith would then be in receipt of a pension of £62,000 pa (assuming he took no tax-free cash) and he would have no LTA tax to pay on this, as he remains within the limits of Fixed Protection 2014.
- If following Mr Smith's drawing of the pension a PSO is made, Mrs Smith will then receive a pension credit from funds which have already been tested, and even HMRC does not think it is right to test pension funds twice. Thus, Mrs Smith could apply for a 'pension credit factor' (note it has to be applied for and not assumed and can only be applied for if the pension

being shared came into payment post-2006), which in effect means her own LTA limit will be increased to the extent of the pension credit she receives. The Pensions Tax Manual at PTM095200 refers (available at www.gov.uk/hmrc-internal-manuals/pensions-tax-manual/ptm095200).

- We can reconsider the calculation in case study 2 as an efficient solution if the PSO of 46% is made after Mr Smith has retired and tested his benefits, as in effect, Mrs Smith will find her LTA threshold increased from £1,073,100 by a further £1,012,669 – the extent of her pension credit, and thus no LTA tax is paid.

An alternative way in which protections may help would be if Mrs Smith had her own DC pension, to which she has not contributed post-2016, and thus Mrs Smith could retrospectively apply for Fixed Protection 2016, which would give her an automatic allowance of £1.25m. There are quite specific circumstances around the application for such protection, and to ensure that such protection is not then lost through receipt of a pension credit. Thus, if Mrs Smith had, say, a personal pension of £5,000, and she has not contributed to any pension post-2016, she could apply for Fixed Protection 2016, prior to receiving a PSO, and thus be allowed to have total pension funds of £1.25m without creating a liability to LTA tax. Again, if we refer to case study 2, if Mrs Smith could successfully apply for Fixed Protection 2016, then irrespective of whether Mr Smith retired prior to a PSO or not, Mrs Smith's own funds would be within her newly created limit of £1.25m. Such are the subtleties of how the LTA tax regime and the pension sharing regime interact with each other: it is important for potentially affected individuals to tread carefully here and ensure that they are seeking the proper advice that they require to understand these issues.

Summary

- PSOs can be complex.
- LTA tax issues are complex.
- Where PSOs meet LTA issues, it is like the meeting of two great oceans. If there are issues regarding existing protections, it is like the meeting of two great oceans, with a violent storm overhead – all but the most competent of sailors should refuse to venture there.

There are only a handful of financial planners I know who are competent in this field – they must first and foremost be pension experts, but they must also be fully aware of the additional skills, knowledge and competencies of working within financial remedy proceedings. None of the information above is intended as formal advice and should not be used as such. It is also not intended that the above furnishes the reader with the skills to navigate these seas alone. It is intended to inform the legal practitioner of some of the issues, some of the pitfalls, and some of the very expensive errors that can be made if pensions are not handled correctly, so that they recognise when the appointment of a specialist financial planner is essential.

Risk warnings

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

Notes

1 Throughout this article we approximate the LTA threshold to £1m unless stated otherwise, and assume that the member takes the excess as income, in which case tax of 25% will be paid (in addition to income tax).

2 *A Guide to the Treatment of Pensions on Divorce* (PAG, July 2019), available at www.nuffieldfoundation.org/sites/default/files/files/Guide_To_The_Treatment_of_Pensions_on_Divorce-Digital(1).pdf

Cryptocurrency and the Family Courts – Some International Experiences

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Executive summary

Millions of people around the globe have funds in cryptocurrencies, with billions of dollars now invested. The nature of these funds is invariably secretive and non-national based. They present distinctive challenges for family courts around the world in ascertaining what are the overall assets in order to produce a fair outcome. These challenges should be addressed globally, by lawyers and judges, because it is an international resource which requires international collaboration to ensure full disclosure and proper understanding. Approaches and judicial devices successfully adopted in some countries can usefully be borrowed elsewhere. Distinctive orders made, and wording successfully used to enforce or implement, can be translated to other courts. This article sets out some global experiences with the intention of leading to a wider debate and sharing. It presumes a reasonable understanding of digital currency and related aspects.

The extent of the issue and the consequential need for information

In June 2022 it was estimated that more than US$900 billion was held in digital currencies and more than US$300 billion was traded daily. Such is the volatility of these currencies that their worth was much less in January 2023 due to a significant fall in prices in late 2022. But its short history has shown a remarkable resilience and multiple recoveries, not least because of the enthusiasm of those involved and the advantages of a resource which is not often found in any documentation or represented by bank savings or gold or other traditional assets. This article presumes digital currencies will not just remain but will increase in usage, acceptability in general commerce and personal retail and be an increasingly higher proportion of personal wealth.

Accordingly, the family court and family lawyers have a vital interest. Whether equal division of marital community resources or ascertaining a fair outcome to provide for needs, how much is held in a digital currency is crucial and must be known. Yet here comes the primary challenge. There is invariably a limited paper trail, perhaps only funds realised to make the digital investment. Whilst some crypto records can be obtained by a third party, this requires significant expertise and associated costs. This is easier if the cryptocurrencies are held in a regulated centralised exchange that requires KYC compliance, but this is not always the case as it is possible to hold cryptocurrencies in self custody (i.e. in 'non-custodial wallets', where the private key is known only to the user). Insofar as it could be said there is any organisation with control or responsibility, it is unclear how responsive it would be to requests or demands by family courts. Finding out is the biggest task. The next is enforcement against the digital assets. Sometimes enforcement follows a freezing order to ensure the asset remains available for the family court order. Both are immensely difficult. It is little wonder that there has been limited reference in family courts.

It has to be acknowledged at the outset that the reason cryptocurrency is attractive to many people is a desire to keep financial interests confidential and to avoid regulatory and other oversight; the essence therefore of cryptocurrency is to be secretive. This of course can impact significantly on the efficacy of 'full and frank disclosure' requirements of family law systems.

In mid-2022, specialist family court judges in England

dealing with complex financial cases had the considerable benefit of training by crypto specialists. It was obvious to me that in England we could learn from what was happening in family courts around the world and in similar fashion we would be happy to share what we had discovered might work. With the encouragement of senior judges, I resolved to find out and share, hence this article.

I approached a dozen specialist international family lawyers, each in leading jurisdictions, with a fairly comprehensive questionnaire (see the Annex, set out in the online version of this article, available on the *Financial Remedies Journal* website). I was surprised by how many said they had no experience of the involvement of digital currencies, that they featured rarely or not at all in their country's family judicial system, and moreover that they knew of no one in their jurisdiction identified as a digital currency expert in family cases and, unfortunately, they could not contribute. These were countries with populations known for having high proportionate holdings of cryptoassets, yet there were no known references to digital currencies in family court proceedings, no judicial pronouncements, and no apparent expertise. It seemed to suggest family justice systems were not keeping pace with the financial circumstances of their citizens. In one leading country, a lawyer had written for a leading law publication about cryptoassets in the family courts but despite three emails including a generic one to his firm, there was no response. In some countries I was promised a response, but nothing was received, and I appreciate the complexity of this issue. Perhaps in these circumstances when the topic was discussed at the LawAsia conference in Sydney in November 2022, speakers from a number of the countries present felt little could be done to discover or enforce against digital currencies. I myself do not consider that is an option for us in the international family law community.

I received comprehensive responses from Australia, China and Switzerland, coupled with an awareness of the position in England. It was a good mix of common law, civil law and other systems across countries with leading digital holdings. I am grateful to the lawyers who prepared extensive answers to my questions. They are named in the 'Schedule of contributors', below. This article can only be a summary and I know they are happy to hear from lawyers around the world wanting to know more.

My hope therefore is that this can start an international conversation between international family lawyers and judges about how we can best deal with this resource in our cases. I am pleased to see it is on the agenda of the IAFL European conference in Venice in February 2023. I set out some recommendations at the end of the article on future progress.

What is the frequency of digital currencies arising in family court proceedings?

The quick answer would seemingly be not often. Australia had no statistical evidence of frequency. In Switzerland it was thought that it might appear in as many as 30% of all cases, perhaps showing the sophistication of the financial holdings there. In England it would be still relatively rare even in complex finance cases. As to the size of the digital holding proportional to the overall finances, it was again perceived to be relatively small, with the expectation this would increase with confidence in the stability of cryptocurrencies and their value. In other words, it is likely to arise more often and to a bigger proportion of the overall finances in the case.

There are relatively few reported family court decisions, and it would be hugely helpful if any could be shared with the international family law community. An important Australian decision is referred to below. A Chinese decision as far back as 2019, Gui 0109 Min Chu No 735 had Bitcoin worth about £15,000 at that time, a small percentage of the overall assets in the case. China may have had more family law cases concerning digital currencies, which was reflected at more length in the paper from Claudia Zhao Ningning referred to in the 'Schedule of contributors', below.

Although digital currencies are international, it is of interest that in China the central bank digital currency is legal tender on the basis that it is issued by the People's Bank of China. This gives the opportunity for it to be divided as marital property. Nevertheless, it is a virtual commodity. In Jing (2018) 01 Min Zhong No 9579, the Beijing First Intermediate People's Court ruled Bitcoin was a civil interest protected by law. International lawyers will follow closely what happens in China.

How to find out about the existence of a digital currency

Here is immediately one crucial issue. Present experience is that in many cases the applicant spouse is already aware that the other has or had at least talked about having a digital currency investment (e.g. Jing (2018) Min Chu No 58471). The latter may be unwilling to disclose but it allows an entrée to the courts and lawyers to ask questions or make enquiries. Discovering one spouse has a digital investment, without any prior knowledge or intimation, is presently immensely difficult and unlikely.

Many family justice systems have requirements of duties of full and frank disclosure. However, because awareness of this issue is still so limited amongst family lawyers, there is a suspicion that lawyers simply do not ask clients if they have these holdings. Clearly, there must be better training and awareness amongst family lawyers and as a minimum a form of good practice obligation to ask clients about these resources in the disclosure process.

It might be that inquisitorial jurisdictions, in which the responsibility for investigation lies with the court rather than the burden of proof being on the applicant, may make greater progress if suitable court powers are available. In China, the People's Court will check bank statements and other documentation for evidence and perhaps produce an Investigation Letter to third parties. Civil law countries may have a distinctive contribution to make on this topic on what can be undertaken by the courts in their inquisitorial role.

Some countries have documents for financial disclosure but then rarely refer to digital currencies, for example in the description of investments and savings. Most were drafted before Bitcoin existed! Therefore, these disclosure documents should be urgently reviewed and amended across the world to make it clear that digital currencies must be disclosed, as with all other resources. In China, the conse-

quences of failure to give full disclosure is specifically spelt out on the Property Disclosure Form including compulsory measures against other assets. In England on the equivalent Form E there is reference to perjury and committal, although in practice this almost never happens.

Investment in digital currencies often comes from existing, traditional/fiat currencies as investments. Analysis of bank accounts and similar records, by the court or the applicant or an expert, may well show withdrawals or transfers without any other obvious explanation, hence investment in a digital currency may be reasonably presumed. This is one of the primary means of finding out if there are digital resources hitherto undisclosed. However, if after the initial investment, a person continues to use an exchange platform to continue trading, only the initial investment will be visible on bank statements, which in some cases might go unnoticed or unmonitored. Similarly, claims for capital gains or losses in tax returns (where cryptoassets have been exchanged at gain/loss on exchange platforms) may not be fully explained by conventional shares and stock and again may highlight the existence of digital holdings. Of course, this will not prove the present value of the digital holding, simply because of the huge volatility of digital currencies. But it would certainly show how much was originally invested or was held at any one time, and many family justice systems will then put the significant burden on the holding party to give a good explanation. See below on how China and Australia have dealt with this exercise of proving value.

Countries such as Australia have moved ahead significantly in the disclosure process on the enquiries made of third parties, such as subpoenas. The primary problem is whom to subpoena! Blockchains are international and multinational. Invariably, expert help will be needed.

It also depends on the exact nature of the holding. As was pointed out from Switzerland, if the spouse holds the assets in the custodial wallet (i.e. often on an exchange platform), the crypto exchange that holds it might be made subject to an order for disclosure, subject to the usual national rules on disclosure obligations. However, if a non-custodial wallet is involved, it is far more difficult. This means no third party, such as a centralised crypto exchange, has access to a person's crypto. As all cryptocurrencies are stored on public block chains, they are accessed through private keys. If the cryptoassets are held in a centralised exchange, it is the exchange that holds the private key required to access it. In the case of a non-custodial wallet, the owner is the sole entry point, unless sharing the private key with a third party.

In some jurisdictions, if it is unclear how much a respondent has by way of resources because of their failure to disclose but there is a good confidence of undisclosed assets, judicial inferences can be made and consequently orders made (the Australian case of Weir (1992)). It may be particularly valuable where there is a real impasse when it comes to the respondent disclosing reliable evidence. This may be coupled with offsetting, a device in which a judge will direct an applicant to have more of the known, disclosed assets with the respondent having the inferred, undisclosed assets such as a digital currency. These devices of inference and offsetting may be far more frequently used in this context.

In most jurisdictions there is a huge benefit in finality, the conclusion and dismissal of all claims so the parties can move on with their lives. However, where it is uncertain how much is held in a digital currency and if it may be a significant amount so that the family court cannot produce a just outcome without better knowledge, one device might be to adjourn the proceedings. If assets subsequently come to light, for example real property purchased with a digital currency, the case could be restored, and a now fairer outcome imposed. This lack of finality is not a preferred solution but might be appropriate and has been distinctly raised by judges in some countries. China goes one stage further. By Article 1092 of the PRC Civil Code, it is explicitly stated that if a party conceals, destroys or disposes of marital property they should be granted less or no property and moreover if discovered after the divorce a new action can be brought for fresh redistribution of marital property.

Sometimes the family court will simply be frustrated. For example, the Haidian District Primary People's Court of Beijing Municipality in (2020) Jing 0108 Zhi Hui No 1202, ruled that the virtual currency that should be returned in that case had been lost and the enforcement was unable to execute. Nothing against which to enforce could be found. The Fangshan District People's Court of Beijing in the case of (2021) Jing 0111 Zhi No 305 ruled that even though orders against Bitcoins had not been enforced, further enforcement had to be terminated because no more property nor the legal representative or shareholders could be found.

Transfer orders

Family courts transfer assets from one spouse to another to produce a fair outcome according to national law. This might be real property or money in a bank account. There are however limited examples of transfers of digital currencies. A case is running in Switzerland for the transfer of the respondent's wallet together with provision of unrestricted ownership and power of disposal. However, an order for sale would be far more problematic. Again, there will be a huge benefit in sharing experience globally.

In one Australian case (unreported as resolved without judgment), one party asserted that her investment in crytptocurrency was lost as she was unable to 'find' the key to the account. By its very nature that claim was unable to be proved or disproved. An agreement was reached, and order made, that if the key was found, the cryptocurrency account would be closed and the proceeds of the account divided. Of course, although the order exists, there is little possibility it being enforced.

Service via blockchain

In both the United States and England in civil cases (rather than family law cases), service has occurred through a blockchain when the location of the respondent has otherwise been unknown. This is likely to be adopted elsewhere. By extension, in England in a child abduction case where the abducting parent could not be located but was using digital currency, orders were made to trace him through these means.

Awareness of digital currencies within family justice

All reports are of a significant lack of awareness on this topic by family law professionals and judges. This is understandable given the complexity of the digital technology. it is not understandable where there are now significant family resources held in this fashion. In England there has been a concerted attempt, led by digitally aware judges and lawyers, to educate and discuss how to deal with such cases. Some family lawyers now hold out as having a distinctive expertise in cases with digital currencies, such as my colleague, Agata Osinska. But very little is happening around the world. It is essential there is early awareness and understanding. If necessary, in these early days, judges in jurisdictions should be earmarked and ticketed with a docket, to deal with these cases. Lawyers should transfer cases to those lawyers aware of these issues. Anything else will fail the parties needing justice.

It was also evident from the responses, including experience in England, that in these early days the involvement of digital currency experts is invaluable. They may provide merely a better understanding of what is involved. Certainly, assistance is necessary in knowing what to look for in the disclosure process and then what orders are appropriate. In each jurisdiction, as with any other area of specialist valuations, a list of experts who can assist in family justice is needed. However, given this is an international currency, and with a relative shortage of experts familiar with family law aspects, lawyers may find themselves instructing an expert from abroad. It would be ideal if a list of global experts in digital currencies familiar with family court requirements was available.

Freezing injunctions

Because of the real difficulties of identification including of relevant parties with any control over the digital currencies, there are no reports of successful freezing orders from family courts, to ensure the digital currency remains available for the final settlement. It will be invaluable for this to be shared globally if any are successfully obtained. Some have been obtained in the criminal courts (see examples from China below), and family lawyers will want to observe and borrow.

Sometimes freezing orders are made regarding worldwide assets but this has distinctive issues of enforceability. This is again an issue for digital currencies where injunctions or other orders require involvement of institutions outside national borders. For example, in the case of Bitcoin Refund executed by the Baoshan District People's Court of Shanghai, PRC, the court judicial assistance notice for enforcement was proposed to be issued to the Bitcoin trading platform. Unfortunately, the notice was not able to be issued because the platform is outside the PRC without a valid postal address to receive the notice. For this reason, as well, jurisdictions have to be particularly creative regarding matters of service, as set out below. Freezing injunctions in respect of worldwide crypto holdings have been made by the civil courts in England and Wales.

Alongside freezing injunctions, some jurisdictions have the power physically to enter properties and take possessions in furtherance of disclosure, sometimes known as Anton Piller orders. These were useful until data on computers was stored in the cloud at which point passwords were necessary. It might sometimes be successful if the private keys to a wallet can be found on the computer of the respondent as a consequence of the implementation of this sort of order.

The operating entity of the digital currency registered within China can be used for freezing or preservation, although it is not feasible for the offshore entity. In (2019) Su 0681 Enforcement 3099 in the context of the crime of raising funds by means of fraud, the court successfully froze all the properties in the account in okcoin.cn belonging to two persons subject to enforcement. Even though the court was not instructed on how to deal with the Bitcoins, the freezing measures were successfully taken.

Like many countries, Chinese courts are not able to issue the enforcement decree and judicial assistance notice to trading platforms located outside national borders. In (2020) Hu 0113 Min Chu 23704, the court ruled that within 10 days, the defendant return Bitcoin to the plaintiff. Due to the defendant's failure to fulfil the obligation, the court was going to issue the enforcement decree and the judicial assistance notice to the concerning Bitcoin trading platform requesting the assistance for the enforcement. However, the Court could not find anything about the platform's effective postal address and contact information in China. This sums up the frustration globally of the family courts in dealing with these forms of assets.

Volatility of value

An order by a family court to transfer real property or money in a bank account has relative certainty of the value to be received. It is the opposite with digital currencies. Late 2022 saw an amazing 65% decrease in value of Bitcoin at the time of any transfer from 2021 values. How will the applicant know what they are getting? They won't! A response is that if they are receiving a share, the share of the respondent could have equally fallen in value. The real problem is where the digital currency being transferred in the settlement represents needs or other provision, which will therefore be inadequate.

This specifically arose in the Australian case of *Powell v Christensen* [2020] Fam CA 944 where one party had purchased cryptocurrency in contravention of an order that restricted them from dealing with or disposing of property, as well as with their own funds. The other party sought that the cryptocurrency be reckoned at its original purchase value, arguing that it be notionally 'added back' to the property pool. The party who purchased the cryptocurrency argued the value of it had decreased significantly since the time of purchase but did not disclose any documentation to support his case. The court found there had been a deliberate non-disclosure as to the apparent decrease in value and so the purchase value should be found to represent the current value. It was said the court should not be unduly cautious in inferring best evidence of value was the purchase price. The court also noted the cryptocurrency purchased from the restricted funds should be subject of an add back to restore to its original purchase value and protect the pool. If documents are offered to provide value of the cryptocurrency, this order would obviously change

(either to the point at which the cryptocurrency is sold or to the date of the order).

It is important to affirm the benefit this brings to the power of courts to deal with in any way, perhaps creatively or laterally, digital assets in financial proceedings. This decision shows that where a party does not make full and frank disclosure in relation to digital assets, the court should not be unduly cautious in what they estimate to be the value of the assets, for example if a court is confident the digital assets exist, but the party is refusing to disclose evidence as to value, the court can simply use best available information to guess its value when adding it to the property pool, and if appropriate be generous in its estimation. This should act as a strong deterrent to any party attempting to hide assets, digital or otherwise.

In determining a digital currency's price, the following circumstances from Chinese cases are worth taking into consideration:

- Referring to the transaction price of BTC on Huobi and ZB on the date of the dispute, as well as the price mutually confirmed by the parties to the case: (2020) Yu 13 Min Zhong No 3607.
- Determining the price of virtual currency based on the mutual agreement of both parties but not the exchange: (2019) Hu 01 Min Zhong No 13689.
- Determining the value of virtual currency based on the price agreed in the Agreement previously concluded by both parties: (2021) Liao 13 Min Zhong No 3736.
- Determining the value of the virtual currency based on the price of purchase as in the Australian case above, and see also (2021) E 0582 Min Chu No 983.
- Determining the value of digital currency based on the result of judicial expertise.

Taxation

Reports indicate that fiscal authorities are, on paper at least, fairly ahead of the game. In Switzerland, England, China and Australia, gains and income from cryptoassets are taxable and should be declared on tax returns including specific coins. Non-disclosure to fiscal authorities may be viewed by the family courts as evidence of non-disclosure in respect of the financial settlement. In Switzerland, a cryptocurrency must be declared as an asset on tax returns. Perhaps unsurprisingly, experience is that they are not declared, by mistake or purpose.

Conclusion

From these reports internationally and from the experience in England, some tentative and provisional recommendations can be made:

- Lawyers should make it clear to clients, including as part of any good practice obligation, that the duty of disclosure of financial circumstances specifically includes any form of digital resource and asset.
- Pro forma disclosure documents used in many countries should be redrafted specifically to set out the requirement to include any form of digital asset.
- There must be greater awareness by specialist family lawyers and family court judges of digital currencies; this will start with basic education about the nature of digital assets and then how family lawyers and family courts should deal with them.
- In these early days of reference to digital currencies, there may be benefits in such cases being heard before specialist, ticketed judges.
- Lawyers should consider transferring cases with either any digital currency or issues of disclosure or enforcement of digital currency to a specialist lawyer experienced in this work.
- It would be useful to have a list of experts in digital currencies able and familiar to assist family courts and family lawyers including investigation of disclosure; in these early days this is likely to be an international list given the initial lack of any number of national experts in most countries.
- The judicial power to draw inferences as to the likely level of assets when there is non-disclosure is particularly important in the context of digital assets and should be explored as to availability in jurisdictions where not presently used.
- In jurisdictions where there is a choice of applicable law, there needs to be additional collaborative international work to consider what and which law would be applied to digital assets if not national law.
- Family justice can usefully learn from the experience of the criminal courts and civil courts in dealing with digital currencies, including any freezing orders, discovery and enforcement.
- It would be valuable to create an ad hoc group of international family lawyers with a knowledge of these matters to pool and share developments around the world.
- In any event, family lawyers are invited to share with the global family law community what is happening in their jurisdiction on the basis that approaches, orders, knowledge and similar can be usefully borrowed as a collaborative process.

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Clarke v Clarke – A Brave New (Valuation) World

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Introduction

Business valuers are often asked to estimate the value of interests in companies that do not represent the entirety of the company's share capital.[1] In those cases, the application of an appropriate valuation discount, which accurately reflects the attributes of a subject shareholding can be both a contentious and material issue, with the size (and application) of the assessed discount potentially having a large effect on the overall valuation of an individual's interest.

Mostyn J's recent judgment in *Clarke v Clarke* [2022] EWHC 2698 (Fam) represents, from a valuation perspective, an interesting departure from the strict reading of the assumptions that would normally underpin a Market Value estimate (and the valuation discounts that are typically involved). In this article, we explore the implications of the judgment and what it may mean for business valuations performed in the context of financial remedy proceedings going forward.

FZ v SZ, Market Value and a demonstratable injustice

Valuers sometimes refer to the assumptions that underpin the basis on which they perform a valuation as the 'basis of value' (or 'standard of value'). One such common basis of value is Market Value, which, according to the definition provided by the International Valuation Standards (IVS) represents the estimated amount that would be exchanged between a willing buyer and willing seller in an arm's length transaction, after proper marketing, where both parties have acted knowledgably, prudently and without compulsion.[2]

Importantly, Market Value does not reflect any attributes that might be valuable to a specific owner or purchaser. That is to say, the characteristics of the actual owner should be disregarded when performing a Market Valuation. It is exactly this issue that raises interesting questions when valuing interests in financial remedy proceedings.

As business valuers, the basis of value is often a point of instruction, although my understanding is that Mostyn J's views, as set out in *FZ v SZ* [2010] EWHC 1630 (Fam), are instructive in this regard. In that case, he said (at [118]):

> 'My view is therefore that present market value should be the usual measurement of value and that fair/hope/economic values should only be used in the exceptional case. I think that serious injustice would have to be demonstrated before departure from the usual rule was justified.'

Whilst departures from Market Value are explicitly acknowledged as being possible, it follows that, in most cases, the assumption for the purposes of a valuation in financial remedy proceedings is that the business interest is: (1) to be sold; (2) imminently (e.g. 'after proper marketing'); and (3) to an unconnected third party. As a consequence of these factors, and from the perspective of valuation theory, it follows that a valuation discount should be applied to reflect these assumptions.

However, valuation discounts are difficult to estimate reliably as there is limited data on the sale of minority interests in private companies. This is because it happens so infrequently. It is more common for owners of small stakes in private businesses to realise the value of those interests either: (1) by retaining their interest and benefiting from the receipt of future dividends; or (2) for the whole company to be sold. If the whole company is to be sold, then no valuation discount would be applied, and the shareholder would receive their *pro rata* share of the proceeds of the sale.

Leaving aside for now any issue of a '*demonstratable* injustice', this aspect raises an important question: is it appropriate (or fair), when assessing the value of a minority interest in financial remedy proceedings, to apply discounts, which can be material, in the scenario where either: (1) the interest is unlikely to be sold; or (2) it has been explicitly agreed that it will not be sold.

Clarke v Clark – a probabilistic departure?

In *Clarke v Clarke* [2022] EWHC 2698 (Fam), one of the issues that Mostyn J addressed was the applicability (and quantum) of valuation discounts. At first instance, HHJ Farquhar had applied a 15% discount (5% less than the discount suggested by the SJE) to the value of the husband's 50% minority interest and consequently reducing its estimated value by approximately £140,000, whilst at the same time questioning whether Mr Clarke would, in fact, leave the business and realise his shareholding for at least 2–3 years.[3]

When dealing with this point, Mostyn J commented (at [17]) that:

> 'Of course, it is perfectly true that were the respondent to seek to sell his 50% shareholdings … he would struggle to do so, and if he were able to find a buyer would have to sell at considerably less than the par value … So in that sense the 20% discount is logical. But it is also completely unreal because, in my judgment, on the evidence it was not possible for the judge to find that there were any likely circumstances in which the respondent would sell his shares other than in conjunction with his fellow 50% shareholder.'

Going on, Mostyn J stated (at [17]):

> 'It is my opinion that the judge should have looked into the future, and asked himself whether it was more likely than not that a discount would be suffered. The answer to that question would, on the balance of probability, be no … It seems to me that the question is a binary one. Either the discount applies or it doesn't. There is no room for a third way.'

Ultimately, Mostyn J concluded that the valuation discount, on the facts of the case, should be rejected as 'highly artificial and highly improbable'.[4] As a result, the effect on the estimated value of the husband's 50% interest was considerable, increasing the value by approximately £140,000.[5] Or, put another way, the valuation was increased by 15%.

In making its decision, the court specifically took into account the characteristics of the actual owner, Mr Clarke (and his relationship with his co-shareholder), when considering the question of how he might go about crystalising the value of his interest. This, from a valuation perspective, is a step away from Market Value, and might be said to reflect an alternative basis of value, such as 'Equitable Value', where the specific characteristics of the seller are considered and reflected in the valuation.

Also interesting is Mostyn J's reference (at [17]) to both: (1) the likelihood of the business owning party actually suffering a discount (i.e. by way of a sale of their minority interest in isolation without the other shareholders as part of a wider sale of the whole company); and (2) being 'satisfied the business was run as if it were a partnership'. Both those conditions being present, he concluded that no valuation discount should apply.

A matter of expert judgement?

So where does that leave valuations performed in financial remedy cases? Is it still the case that valuations should be performed on a Market Value basis? Or have we entered a brave new valuation world whereby, without either party first proving a 'serious injustice', the valuer can be instructed to value a business on alternate bases?

Whilst it will remain a factual and legal matter for the judge to be satisfied whether the business is 'run as if it were a partnership', following Mostyn J's judgment in *Clarke v Clarke*, it may now be the case that it is helpful to instruct the business valuation expert to perform their valuation on both a Market Value basis, as well as any other basis of value that they consider relevant, reflecting their understanding of the facts of the case and the way in which the business has been managed to date.

This will, hopefully, allow the expertise and experience of the forensic accountant to be brought to bear so that you, the legal team, are able to express the arguments you consider necessary to accurately reflect the value of the interest.

Notes

1 Parts of this article are adapted from a talk given by the author at the 2022 At A Glance conference, titled: 'Is the Goose still golden if it never goes to market? A business valuer's ponderings on Market Value'.
2 See, for example, IVS 104: Bases of Value. Other bases of value under the IVS include 'Equitable Value', 'Investment Value', and 'Synergistic Value'. For financial reporting purposes, 'Fair Value', under the International Financial Reporting Standards (IFRS), is often adopted.
3 A full review of Mostyn J's judgment is beyond the scope of this article. However, a helpful summary, by Stephanie Coker, can be found on the Financial Remedies Journal blog, available at https://financialremediesjournal.com/content/clarke-v-clarke-2022-ewhc-2698-fam.d316bb3767954d5c8bea033d91e08bc7.htm
4 *Clarke v Clarke* [2022] EWHC 2698 (Fam) at [19].
5 £941,759 – £800,000 = £141,759. £141,759 / £941,759 = 15.1%. *Clarke v Clarke* [2022] EWHC 2698 (Fam) at [18] and [19].

Letter to the Editors from Roger Isaacs, Partner, Milstead Langdon and member of the Financial Remedies Journal Editorial Board

The Editorial Board of the Financial Remedies Journal *is keen to foster debate. During the editorial process a point of divergence from the view expressed by Thomas Rodwell in his article above was noted by Roger Isaacs and he sets out his differing view in this short reply.*

The foregoing article quite rightly raises the issue as to the importance of furnishing the court with as much information as possible so that it can understand the circumstances in which parties to family proceedings are likely, in practice, to realise their shareholdings.

Such considerations, for the reasons set out in the article, ought to be disregarded if a strict Market Value approach is taken. The real-world circumstances of the party to the proceedings and the interests of other shareholders, who may even be relatives, can only be taken into account if a valuation is undertaken using an Equitable Value approach. The reason for this is that the International Valuation Standards Council (IVSC) defines equitable value

as 'the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties *that reflects the respective interests of those parties*' (emphasis added).

The lesson here is that family practitioners who instruct experts to opine *only* on Market Value should not be surprised if a strict approach is taken, resulting in a valuation that is, to quote Mostyn J in *Clarke v Clarke* 'completely unreal'.

Such 'unreality' is an accepted and indeed a requisite feature of fiscal valuations prepared for tax purposes, but it is far less common in the context of financial remedies proceedings for the reasons that are so clearly and succinctly set out in the *Clarke v Clarke* judgment.

Depletion of Business Profits and Assets During Separation and Divorce Proceedings – Would it Have Happened Anyway?

Hollie Edwards-Davies

Director of Forensic Accounting & Specialist Services, Watts Gregory LLP Accountants

Introduction

This article is written from the perspective of the business valuation expert. We often see business profits and assets deplete over the period of separation and during divorce proceedings. The question is to what extent this can/could have been controlled by the business owner (and usually shareholder/director in owner-managed businesses) and what was due to circumstances outside their control. Would the depletion of assets and profits have happened anyway if not for the divorce?

While it is not the role of the business valuation expert in divorce proceedings to investigate business finances, unless instructed to do, is it their role to gather sufficient information to form as accurate an estimate of value as possible, in their expert opinion, at the specific valuation date.

Attributing reasons for depletion of profits and assets

How easy it is to attribute reasons for depletion in profits and assets? Usually it is not easy, but often more could be done to attribute reasons and understand the changes in the business.

We may also ask the question, does it matter what the reasons were for the depletion of profits and assets, other than where there have been deliberate actions by a business owner? Well, the answer is yes, it does matter because those reasons could have significant implications for the value of the business. If the valuer does not sufficiently understand how the business operates and how it generates value, its critical success factors and specific reasons for changes in performance, any valuation may be flawed. There may also be consequences for the financial remedy.

Practical examples and questions to consider

Let's consider the following questions with a view to refining how we may attribute reasons for the deterioration in the financial performance and position of the business:

(1) Was the director and business owner acting in the best interests of the company at all times (Companies Act 2006) and are they acting/have they acted in good faith in litigation, providing appropriate disclosure?
(2) Which other financial decisions have been or could have been controlled by the business owner during that period?

Was the director/business owner acting in the best interests of the company at all times (Companies Act 2006) and are they acting/have they acted in good faith in litigation, providing appropriate disclosure?

Where a director has not acted in the best interests of the company, the most common examples valuers may see is diversion of income and profits to another entity or additional cost charged to the business to benefit the business owner or a related party.

We saw the diversion of income/funds in *OG v AG (Financial Remedies: Conduct)* [2020] EWFC 52, [2021] 1 FLR 1105. In this case, both parties worked in the business. During separation and divorce proceedings, the director/shareholder of the business being valued turned out to be unquestionably involved in the establishment of another entity which was a direct competitor, thereby diverting funds and reducing the prospects of the business being valued. It became clear that he was beneficiary of the new entity and had also channelled funds through it to enable him to purchase property abroad.

In this case, Mostyn J indicated that conduct was consid-

ered relevant in financial remedy cases in four distinct situations.

(1) Where there is 'gross and obvious' personal or economic misconduct against another party, which is taken into account in rare circumstances and only where there is a financial consequence.
(2) Where 'one party has wantonly and recklessly dissipated assets which would otherwise have formed part of the divisible matrimonial property'.
(3) Litigation misconduct which may not affect assets to be divided but could be penalised in costs.
(4) Failure to give 'full and frank' disclosure. The lack of assets disclosed needs to be assessable by the court.

In *FRB v DCA (No 2)* [2020] EWHC 754 (Fam), disclosure by the director/shareholder had been wholly inadequate to enable a business valuation of one company which had a valuation range which differed by more than £50m at between £54m and £108m. The court took the lower figure as the one it could be confident as being available to the husband in that case.

Where parties have not acted in the best interests of the company and where there has not been appropriate disclosure, it can clearly have a significant impact on decisions on division of assets and allocation of costs. Deliberate deprival of the company of income and profits and labouring it with excessive/inappropriate costs may also be a breach of directors' duties under the Companies Act 2006, if they are or have been a director of the company being valued.

One question that any business valuer would be expected to ask is whether any offers have been received for the business or whether there have been any approaches or potential sale discussions/negotiations. If such discussions relating to a potential purchase are at an early stage and highly confidential, while these ought to be disclosed to the business valuer, however (informal as they may be relevant to the business valuation), the business owner may not disclose such information and the result of such discussions may only be revealed if there is actually a deal done and the transaction later executed, more likely than not at a different figure to that placed on it by the valuer.

Which other financial decisions have been or could have been controlled by the business owner during that period?

In the lead up to and during separation and divorce, it is inevitable that this question has an impact on most owner-managed businesses. This is particularly the case where businesses are owned 50/50 by both parties and/or where both parties have established or are working in the business. Not only might it affect the parties, but it is also likely to affect other family members who may be involved in the business and employees whose loyalties may be divided. Depending on the role the parties play in the business, sometimes the effect can be catastrophic, particularly if the period of separation and divorce proceedings is long and drawn out and when children are involved. Other businesses may have robust management teams and systems in place allowing the business to continue largely unaffected.

What should we look for in the accounts to determine where the figures may be more subjective and even open to manipulation? This is a particular risk in smaller owner-managed businesses which are not audited. It can be more difficult and more time-consuming to undertake a valuation of such businesses than larger entities which have to be audited because the audit should in theory, provide a high standard of verification and assurance on the figures reported.

Looking at trends across all income and expense lines is important. Even where revenue and expenses are comparable year on year, it cannot be assumed that there are no one-off or non-trading items buried in those lines and that they will continue along the same trajectory. The right questions must be asked.

Some of the areas below may be worth taking a closer look at and drilling down for further detail and supporting accounting policies and assumptions. The basic principles of double entry in accounting mean that both the balance sheet and profit and loss account can be affected by changing one figure, thereby suppressing or enhancing business value. This is considered further under the accounting areas highlighted below.

Sales

If one party is the main source of lead generation and sales and holds the main contractual relationships, they can exert a degree of control over the income and pipeline. It may, in some cases, be helpful to gain an understanding of the profile of sales in these types of businesses, including for example number of customers, turnover by customer and the contractual cycle, if there is one. How can we know if there is a promise of a significant contract where pen has not been put to paper to formalise the deal? We cannot know but depending on the business to be valued it may be appropriate and relevant to ask whether they are in discussions over any new contracts which have not yet been signed. On the other hand, businesses may have relied on revenue streams from contracts which have ended and will not be renewed.

Repairs and renewals

Repairs and renewals costs may vary significantly year on year. Determining a 'normal' level of expenditure and understanding what is one-off or not recurring on an annual basis is helpful. There are choices that the business owners can make about how this expenditure is reflected in the accounts and if such expenditure is significant, then this can consequently have a significant impact on the business value. There may be a formal accounting policy in place which provides the framework for the choice made, but often in owner-managed businesses there is not. If the choice is made to include this in expenses in the profit and loss account, this could significantly lower a business valuation. However, if the choice were made to include this figure instead in the balance sheet, which means capitalising it as an asset which depreciates over say 5–10 years (or whatever is deemed the appropriate period for the item(s) of expenditure), this latter approach would both increase the profits and the net asset value of the business.

There are of course depreciation and tax consequences but these can be dealt with appropriately by using the right valuation method(s) for the business. The same principle for decisions made on how to treat repairs and renewals in the accounts and the consequential impact on business

value may also apply to software and IT expenditure for some businesses.

Rent

Are we confident that rent is being paid at market rate for the premises actually used by the business? Is there spare capacity? If rent has increased as further capacity is required, is there a corresponding increase seen in revenue and if not, when will this be seen?

Often, when properties are valued, the property valuers are not instructed to include the value of the market rental (at the dates relevant to the case) in addition to the freehold/leasehold. Instructing property values to include the market rate rental in these reports may be done at small extra cost and may help to produce a more accurate valuation and mitigate any uncertainties or disputes about the level of rent charged after the business valuation report is completed.

Legal, professional and consultancy fees and management charges

It should go without saying that legal fees which relate to the parties' costs in divorce proceedings should not be expensed to the business. However, legal fees may be worthy of further examination.

In relation to professional and consultancy fees and management charges, depending on the level of these and the nature of the business, it may be worth seeking clarification whether any such fees are being paid to directors and shareholders or related parties and, if they are, what services are provided. It may be the case that such fees are being paid in lieu of directors' remuneration and adjustments should be made here by the business valuer alongside any adjustments required for directors' remuneration.

Provisions

Provisions may be included under liabilities/creditors in the balance sheet, thereby appearing to reduce the business value. With reference to their size and nature, it might be appropriate to consider whether these could have a significant impact on the business value.

Such provisions might relate to bad debts, warranties, impairment of assets, obsolete stock or taxes for example. For provisions relating to any one-off non-recurring events or items, it may be appropriate to make adjustments to these in the business valuation.

Stock can be particularly subjective in owner-managed businesses and, often, the stock figure is provided to the accountant by the business owner and for unaudited businesses, no verification work is undertaken on this figure. This needs to be looked at in conjunction with expenses in cost of sales, and the impact on turnover. It may be the case that stock is understated or that cost of sales has increased disproportionately to sales. Looking at trends over several accounting periods such as levels of gross profit margin, stock levels in proportion to turnover and stock as a proportion of total assets may help to determine anomalies. Some of these issues should be flushed out in the financial statements over time, if the party who does not have any control over the business has time to play with.

Regarding impairment of assets, ideally any property values will be supported by an independent valuation of the freehold/leasehold (including, as noted above, the market rate rental). Any significant provision made for impairment of other assets should be supported by documentary evidence. The same principle should be applied to any significant losses on disposal of assets, and it should be determined whether those disposals have taken place on normal commercial terms. This will assist the business valuer in their work and the court in deciding how to deal with these, should the parties be in dispute on these items.

Understanding the decisions made and the impact on business value

It may be difficult if not impossible to determine whether the director/shareholder, if they are a party to the divorce and/or others they are closely affiliated with in the business, would have made the same decisions had the separation and divorce proceedings not taken place. However, understanding what changes have been attributable to decisions controlled by the director/shareholder, and the impact of those decisions on the financial performance and position of the business, may influence the business valuation.

Challenges for the business valuation expert

When initially appointed as a business valuation expert, we may have little more than statutory accounts available to us when we commence work. On the other hand, we may have disclosure bundles running into thousands of pages. In either case, to achieve a reasonable valuation estimate, it is necessary to understand the business, how it operates, how it generates its sales, what its critical success factors and major risks and opportunities are and who are the people that drive the business. The numbers tell a story but by no means provide the full picture, and a true understanding and reasonable valuation of the business cannot be achieved without substantive qualitative information to support the numbers, both for the business in question and for similar businesses in the industry. Therefore, the context in which the business is operating at any one time is critical to the valuation, as well as attributing specific reasons for changes in financial performance and position. This is essential for building the most accurate estimate of value possible in the absence of a real purchaser, providing full disclosure has indeed been given of any offers, approaches and negotiations relating to any potential sale.

Conclusions and matters to consider for instructing lawyers

In order to unpick some of the issues considered in this article, it is necessary to ask appropriate questions of the parties at the very earliest opportunity.

Why is building an understanding of the business and the reasons for depletion in profits and assets important? This is about undertaking a valuation which is robust, systematic and based on the real life experience of the business valuation expert. This cannot be done without building the best understanding reasonably possible of opportunities, risks, how a business operates and other relevant factors and identifying specific reasons for any depletion in profits and assets over the period. There may be many and those

reasons may be complex. The right questions need to be asked and the business valuer undoubtedly needs to have the right skills and experience.

Lawyers may wish to consider in more detail those accounting areas identified above and specify in instructions to business valuers that they should give specific reasons for changes in the financial performance and position of the company when undertaking the valuation. While most good valuers will do so anyway, this helps to ensure that the valuer gives proper consideration to the reasons in their estimate of business value and that they explain these reasons in their report.

Business valuation experts should ensure that their information requests enable them to build a strong understanding of the business and the context in which it operates. Often, more could be done to attribute reasons for depletion in profits and assets by asking the right questions and undertaking appropriate analysis and, in doing so, perhaps reach a more robust valuation estimate and better assist with resolution of the case.

Reflections on Being a LASPO Reviewer for Advocate

Justin Warshaw KC

1 Hare Court

I became a reviewer for Advocate, then the Bar Pro Bono Unit, within days of the advent of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Earlier in my career in 2002, Martin Pointer KC and I had launched a full-scale assault on Holman J's ground-breaking decision in *A v A (Maintenance Pending Suit: Provision for Legal Fees)* [2001] 1 FLR 377, which had introduced an early iteration of LASPO through the back door of section 22 of the Matrimonial Causes Act 1973 (MCA 1973). The assault failed. We were rebuffed on the beachhead by Charles J in *G v G (Maintenance Pending Suit: Costs)* [2002] EWHC 306 (Fam), [2003] 2 FLR 71, who dismissed our erudite expedition into the history of alimentary provision and the common law agency of necessity with one sweep of the Matrimonial Proceedings and Property Act 1970's new broom. From then on, or so it seemed to me, provision for legal fees within maintenance pending suit applications became ten a penny. The advent of LASPO appeared only to herald, with the sweeping changes to MCA 1973, s 24A, a new era of interim capital provision through orders for sale of real property, albeit limited to legal fees.

Since 2013, the Bar Pro Bono Unit has undergone change, including, of course, to its name. In 2018, the unit became Advocate (to rhyme with 'donate'), followed by an explanatory 'The pro bono charity of the Bar'. But that cosmetic change is nothing in comparison to the explosion in size and work. In 2013, there were four caseworkers. There are now 24. There were fewer than a hundred barrister reviewers. There are now 199 and, if their experience reflects mine, the 199 are all dealing with many more files. Like all organisations, Advocate had to face the challenges of the COVID-19 pandemic – until 2020, old-fashioned buff files would be sent down to the reviewers' chambers. The way in which the digital changes were orchestrated on a shoe-string budget has been frankly miraculous.

In the field of financial remedies, records are relatively sparse but they show what one would expect. In 2016, there were 180 applications. In 2022, there were 325. Advocate has removed the requirement to apply by a referral agency (Citizens Advice Bureau, law centre or solicitor). This means Advocate has become more like a front-line agency and with that the caseworker role has evolved, incorporating collation of documents from third parties, providing courts with dates to avoid and often arranging mental health services for applicants.

The applicants who seek help from Advocate are usually vulnerable and impoverished. On no more than two occasions, I have been able to advise applicants that they should seek legal help in unlocking resources either though LASPO or by accessing other illiquid resources. Those who seek help from Advocate are usually in impossible situations with few or no resources. The world of LASPO is a very far cry from Advocate's doors.

Ten Years on from LASPO – An On-the-Ground Perspective from Support Through Court

Esther Elshen

Communications Manager, Support Through Court

We empower litigants in person

Every year, thousands of people in the United Kingdom face court alone. Often through no choice of their own, they must represent themselves at a moment that could determine the rest of their life. They may face divorce, eviction from their home or the loss of their children. In an unfamiliar courtroom, up against a party with legal representation, the process can be stressful and confusing.

Support Through Court stand with those who have nowhere else to turn. We provide a free service across England and Wales, offering support and guidance before, during and after court. We make sure people facing court are not alone, and help them to navigate a complex legal system with dignity and self-assurance. Our 500+ volunteers help clients to put their papers in order, help them to prepare what they need to say in court and empower them to represent themselves.

The challenges of accessing justice

We are no strangers to the many barriers to accessing justice – from financial and language barriers through to barriers imposed by society and as a result of legislation. Since the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) was implemented in April 2013, putting most social welfare and private children and family cases out of the scope for legal aid, we are continuing to see increasing numbers of clients seeking support. In the last financial year, despite periods of closure due to lockdowns, we helped clients on 49,346 occasions, with our National Helpline covering 13,701 of these contacts.

The consequences of missing out on legal advice can be far reaching. For a significant proportion of litigants in person, the burden of having to represent themselves can lead to relationship breakdown, mental health problems, financial difficulty and even job loss. It can be a downward spiral, leaving people in a worse place than it should. Family breakdown has a serious impact on children, magnified by extended periods of conflict and unsatisfactory outcomes. We regularly see clients who are affected by secondary problems, and we keep close relationships with mental health charities, domestic abuse organisations and debt agencies, referring clients to these groups on a regular basis.

Some of the most disadvantaged and marginalised members of our society have been hardest hit by the changes. Legal troubles are often compounded by additional disadvantages such as unemployment, language barriers and mental or physical disability. In the last financial year, 77% of the clients we saw told us English was their first language; 49% told us they were in employment (with the remainder either unemployed or self-employed); and 26% reported serious health problems, with 10% registered as disabled. LASPO is having an impact across all parts of society, but it is often those facing multiple disadvantages who are most severely affected.

Taking steps to support litigants in person

We ensure that those facing court alone feel prepared and supported in accessing justice. In an ideal world, our client numbers would be declining as litigants in person get the help and support they need. We step in to fill the gap, assisting people such as Elly.

Elly's story

When Elly[1] first came to visit us, she was very anxious. After years in an abusive marriage, she had finally got divorced some time before. She had given her husband multiple chances to redeem himself, even after going into a refuge. Every time he appeared to have changed, but would eventually show his dark, true colours. Elly and her children have all been affected by the abuse, which is why she eventually decided she would not accept his behaviour any more.

When they divorced, she thought she and her children were finally able to continue their lives without him.

But now he has brought her to court, claiming he is entitled to a share of her properties. When she was informed by the court that her ex-husband had applied for a financial settlement, she 'didn't have a clue what to do'.

As a lay person, she found it very difficult to understand documents from the court, and didn't know what to do next. Our volunteers helped her to make sense of the documents, by putting words into basic English. We also helped her to express her thoughts in a clear, organised way – Elly stresses how important this was for her, as she is dyslexic.

At times it was all very overwhelming. For a while, she struggled with suicidal feelings, and found it hard to get out of bed because she was so depressed. She found the strength to come to Support Through Court many times over, and says 'Support Through Court gave me a lot of guidance and hope'.

As the court date came closer, one of our volunteers referred her for legal advice, which she found very helpful: '[The Solicitor] was very detailed over the phone, she understood my situation very well, and she put everything in writing'. The solicitor, she adds, used very simple language when giving her legal advice, which helped her to understand what to do next.

Since then, Elly has come back to us for more support: she believes that Support Through Court's volunteers save lives, just by listening, offering a drink and showing kindness.

We also referred her to Advocate to get legal representation and she now has a barrister for her case, whom she is working with to get justice for herself and her children. She also managed to arrange counselling for herself. Sometimes it still gets too much, but thanks to the help she received she says she 'came out very positive and stronger'.

Towards a fairer future

Where do we go from here? Until changes are made, we will continue to develop our capacity to support more people who cannot access legal aid or afford a solicitor. In fact, over the next 5 years we are looking to make some big changes in the way that we work, so that we can double the number of unrepresented people we are working alongside. We will use technology to connect with more people, in more places, more cost effectively. We wll invest in recruiting and training more volunteers to empower people dealing with the stressful navigation of the court process. And we will continue to ensure that clients are at the heart of all we do, so they know they are not alone.

Note

1 Names and some details have been changed to protect anonymity.

The Impact of LASPO on Access to Justice – A View from Law for Life

Beth Kirkland

Head of Legal Information and Pro Bono, Law for Life

This year will see the 10th anniversary of the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

In 2017, the Law Society reviewed the impact of the changes introduced in 2013 and found:

- legal aid is no longer available for many who need it;
- those eligible for legal aid find it hard to access;
- wide gaps in provision are not being addressed;
- LASPO has had a negative impact on the state and society.[1]

The reduction in funding for civil legal aid has resulted in 'legal aid deserts' where providers have left the legal aid market, leaving ever increasing numbers of people in need with fewer options to get legal aid.[2]

Within the family law sphere, the aim of the changes introduced by LASPO were to discourage people from making private family law applications at all, and instead encourage them to 'take responsibility for resolving such issues themselves'[3] with mediation promoted as the primary alternative. However, publicly funded MIAM figures have fallen by 60% since LASPO was implemented, while case starts have continued to rise to an all-time high of 54,920 in 2019.[4] In its recent report, on access to justice within the private family court, JUSTICE observes that:

> 'The policy therefore appears to have achieved the opposite of its intention: it reduced legally-aided mediation and increased court use.'[5]

As a consequence, the decade since LASPO has seen the numbers of litigants in person (LiPs) rise in courts and tribunals across England and Wales.[6] In terms of efficiency and the delivery of justice, this of course has had wide ranging implications.[7] It is easy to overlook, when considering the data (or lack of),[8] that in every case that involves a LiP there is at least one person's life that has been significantly impacted by legal problems. That person then has to navigate a court system which is designed for experts, with no or very little help.

JUSTICE has identified that there are numerous 'unknowns' for LiPs:

> 'the law, and how to legally translate the case in court documentation; what to expect in the building and the courtroom; how to prepare for a hearing; the conduct of the hearing itself and the roles of different actors within proceedings ...'[9]

Here at Law for Life,[10] we hear from LiPs regularly via our website Advicenow about the 'unknowns' they have to cope with. Our users' feedback often makes for harrowing reading. The legacy of the COVID-19 pandemic and the cost of living crisis are only serving to exacerbate the difficulties our users face day in, day out.

For those who are cognitively and digitally capable we have a range of online legal information resources to support LiPs. Our community training courses aim to reach those who cannot manage to use our online help unsupported.

Based on Legal Capability research carried out with the University of Bristol,[11] all our resources aim to help the reader to:

- recognise the legal dimensions of their problem;
- find out more about the legal dimensions of their situation; and
- deal with the law-related issues they are facing.

Our guides and other resources focus on the early resolution of legal problems, wherever possible. They not only set out what law applies in any given situation, but they also empower the reader to take action to sort out their legal problem – by setting out the steps to be taken, and by encouraging the reader to develop the skills and attitudes they need to succeed. We try to ensure that all our resources as helpful as possible by testing them with members of the target audience and those who support them prior to publication.

Our materials are accessible to all who need them. We charge for the extended versions of five guides, but we provide them free of charge to those on a low income (they

just have to ask). Our guides are reliable and up to date – all of our materials are peer reviewed by practising lawyers before publication and updated regularly.

Our family law resources are extensive and range from short introductory pieces, for example, on where to start if someone has just separated, to detailed step-by-step guides that take the reader through an application for a financial remedy order.

The guides give readers guidance on how to resolve their family law problem with a focus on avoiding court and using mediation and/or solicitors where people can afford to. These include:

- 'A survival guide to divorce or dissolution of a civil partnership'.[12]
- 'A survival guide to sorting out your finances when you get divorced'.[13]
- 'A survival guide to pensions on divorce'.[14]

Where readers are not able to resolve their problems without the input of the court, we have a range of guides that help them to apply for the most common orders. Whilst these guides focus on the steps required to obtain a particular court-based outcome, they continue to remind the reader of the benefits of mediation and negotiation, and aim to manage the reader's expectations of the court's remit. These include:

- 'How to get a divorce or end a civil partnership without a lawyer'.[15]
- 'How to apply for a financial order without a lawyer'.[16]
- 'How to fill in your financial statement (Form E) – film'.[17]

From feedback, we have identified that people with no previous experience of court often have many misconceptions about court processes and the role of professionals. In response, we have developed guides on what to expect when the other side is represented and how to prepare for a remote hearing.

In the context of LASPO and endless feedback from our users about their inability to access legal advice, we carried out our own research. When we surveyed our users on why they tend not to get legal advice despite understanding that it would be beneficial, we found that unaffordability is only one issue people face. They also worry about the unpredictability of how much it will cost; how to find a good solicitor, and how to assess whether spending their small amount of funds on a solicitor will be worthwhile. In response to this we developed a project with Resolution to establish a clear pathway for people using our guides to get to Resolution members willing to provide high-quality, low-cost unbundled advice.

This project has now evolved to become the Affordable Advice service, where readers can work through the appropriate Advicenow guide and, at the most important points, choose to access fixed-fee low-cost legal advice from an experienced Resolution member solicitor who is part of our Affordable Advice panel of lawyers.[18] Most appointments are £120 including VAT.

Evaluation of the impact of this service has been extremely encouraging, with clear evidence that it increases the legal capability of those able to use our guides and also access tailored legal advice:

- 93% said advice helped them feel more confident;
- 93% said it reduced the stress;
- 82% said it helped them decide to do something differently; and
- 89% felt it helped them make their case better.

> 'People who have never had to use a solicitor before (like me!) are terrified of the cost and have no idea what is involved. Overall, an amazing service.' Service user

Despite calls from numerous influential bodies and committees for the return to state-funded early legal advice for those in need,[19] it is not clear if or when this will ever happen, or what shape it would take. So, in the meantime we, together with our colleagues in the Access to Justice Sector will continue to support LiPs in the ways we can and help to amplify their voices.

As practising lawyers and judges, please take a moment to consider how our resources might be of help to someone you cross paths with – here are a couple of suggestions:

- recommend Advicenow to any LiP you meet – be that a prospective client who cannot afford your rates, a person on the other side to your case, or someone in your court room;
- tell colleagues who work with or speak to LiPs – clerks, receptionists, court staff – about Advicenow.

And if you have time, do get in touch – we are always in need of an expert!

Notes

1 www.lawsociety.org.uk/topics/research/laspo-4-years-on
2 www.lexisnexis.co.uk/research-and-reports/legal-aid-deserts-report.html
3 Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* (Cm 7967, 2010) paras 4.210– 4.211
4 JUSTICE, *Improving Access to Justice for Separating Families* (2022) paras 2.10 – 2.11.
5 JUSTICE, *Improving Access to Justice for Separating Families* (2022) para 2.12.
6 Justice Select Committee, 'The Future of Legal Aid' (July 2021) para 102.
7 Justice Select Committee, 'The Future of Legal Aid' (July 2021) para 104.
8 Justice Select Committee, 'The Future of Legal Aid' (July 2021) para 105.
9 JUSTICE, *Improving Access to Justice for Separating Families* (2022) para 2.18.
10 Law for Life: the Foundation for Public Legal Education is a national education and information charity that aims to increase access to justice in England and Wales. It is an independent, not-for-profit organisation. We believe everyone should be equipped with the knowledge, confidence, and skills needed to deal with the law-related issues they are likely to encounter in the course of their lives.
11 University of Bristol Public Legal Education Evaluation Framework (November 2021).
12 www.advicenow.org.uk/guides/survival-guide-divorce-or-dissolution-civil-partnership
13 www.advicenow.org.uk/guides/survival-guide-sorting-out-your-finances-when-you-get-divorced
14 www.advicenow.org.uk/pensions
15 www.advicenow.org.uk/guides/how-get-divorce-or-end-civil-partnership-without-lawyer
16 www.advicenow.org.uk/guides/how-apply-financial-order-without-lawyer

17 www.advicenow.org.uk/guides/how-fill-your-financial-statement-form-e-film

18 For more on the service, see 'Getting affordable advice from a family solicitor via Advicenow', available at www.advicenow.org.uk/know-hows/getting-affordable-advice-family-solicitor-advicenow.

19 See the Law Society, 'Early legal advice' (1 November 2022), Resolution, 'Good Divorce Week 2022 – Ending the Family Court Crisis', The Bar Council, 'Civil legal aid review essential but interim measures needed now, says Bar Council' (5 January 2023), and the Justice Select Committee, 'The Future of Legal Aid' (July 2021), Conclusions and recommendations.

The Interplay Between Welfare Benefits and Financial Remedy Orders – A Practitioner's View

Lucy Mead

Partner and Head of Family Department, David Gray

It is now 10 years since the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force. Reflecting back, the obvious impact on my firm's practice has been the reduction in the number of financial remedy cases we deal with where clients have the benefit of public funding. Inevitably, in drastically reducing the availability of legal aid for financial remedy applications, there are fewer clients on lower incomes who instruct us, no doubt because they cannot afford to pay private legal fees. For the bulk of cases where we are advising clients on low incomes and they may be in receipt of benefits, the assets of their marriage or civil partnership are often very modest. For me, these are often the most difficult cases to advise upon as there simply is not enough to split between two households. Whether a client is in receipt of public funding or paying privately, it is very important that practitioners understand the interplay between benefits and financial remedy orders when advising clients on financial settlements. This article aims to assist in flagging up the issues that practitioners need to be aware of to help ensure the best outcome for their client.

What orders can the court make in a financial remedy application?

Under section 23 of the Matrimonial Causes Act 1973 the court has the power to make orders for, *inter alia*:

(1) periodical payments for the benefit of a spouse;
(2) periodical payments for the benefit of a child;
(3) lump sums;
(4) in respect of property including transfer of a jointly owned property or the sale of a property;
(5) in relation to pensions including pension sharing orders.

When dealing with a case where a party is in receipt of benefits, particular consideration needs to be given to the impact of any capital or income payments made to the recipient of any benefits.

Overview of Universal Credit

For those clients we are dealing with who are on benefits, the majority will now be on Universal Credit. The claiming of Universal Credit does not affect any Personal Independence Payment (PIP) or Carer's Allowance.

The aim of the new Universal Credit system was to simplify the benefits system. It is fair to say there have been teething problems in its rollout and a decade later you may still have clients who are still claiming on the old legacy benefits system. It appears that the rollout is planned to continue until at least December 2024 and possibly beyond that. A change of circumstances, for example a claim as a single applicant rather than a previous joint claim, which may well arise on separation, would trigger a move to the new system.

Universal Credit can be claimed by both claimants who work and those who are not currently working. As a result of the COVID-19 pandemic and other economic factors, the economic landscape has changed in the last few years, and you may find you have an increasing number of clients who are in receipt of Universal Credit. Any new claims made for benefits will now be made under the Universal Credit system.

Those making a claim for Universal Credit can claim a standard allowance. On top of that they can claim for other financial needs, such as housing and child care. There are basic rates of monthly standard allowance and additional payments can be made on top of that, such as child care or a work allowance. Where someone is claiming Universal Credit while they are unemployed, they must be able to demonstrate they are actively looking for work. Clients may be eligible for help with housing costs and financial support can cover rent and some service charges. If they are a

homeowner, they may be able to get a loan to help with interest payments on their mortgage.

Unlike the legacy benefit payments which were paid weekly or fortnightly, Universal Credit is paid once a month. It can take 5 weeks or more to get a first payment, but it is possible to apply for an advance payment in some circumstances. I have mentioned applying for help with housing costs but claimants can only apply for this after being on Universal Credit for 39 weeks, so clients could be left vulnerable for that period.

How do financial remedy settlements impact on benefits?

Previously, under the legacy benefit system, any child maintenance or spousal maintenance paid was not taken into account when assessing the level of benefits received. A significant change occurred with the introduction of Universal Credit and practitioners must be aware that spousal maintenance will now be considered as unearned income and will impact on benefits received. Unearned income can also include income from a Trust or annuity, pension income or capital treated as income. There is of course no substitute for specialist advice on benefits, and practitioners should be advising parties to obtain advice on all state benefits that may be available to them and to check with a specialist benefits adviser about the impact of a settlement on their entitlement to benefit.

The other key issue for practitioners to be aware of are the capital limits which impact on eligibility for Universal Credit. Any capital held under £6,000 will not be considered. However, any capital between £6,000 and £16,000 will be treated as generating income. Any capital over £16,000 will make an individual ineligible to claim Universal Credit. In other words, any capital settlement providing a client in receipt of Universal Credit with anything over £6,000 will have an impact on their eligibility for Universal Credit and will either mean they are not eligible at all if they receive over £16,000 or that their income will be reduced.

There is a disregard for money received from the sale of a former home if it is to be used to purchase another home and has been deposited with a housing association as a condition of the person occupying the premises as their home or is a grant made to the person for the sole purpose of purchasing a home. Beware that this disregard only applies where the amount has been received in the last 6 months, although in some circumstances that may be extended. The rules are complicated and clients need specialist benefits advice on the point.

As a matter of public policy, the court will not generally take in to account the fact that a party is in receipt of state benefits and therefore unlikely to derive any real benefit from any financial order made in their favour. One can see the argument that if there are private assets available, then they should be shared fairly and if that helps someone be less reliant on benefits, that can only be a good thing. It also would not sit particularly comfortably for the party not in receipt of benefits to be better off financially both in terms of capital and income as a way of ensuring the party in receipt of benefits continued in their reliance on benefits.

Where you are representing a client where they are going to receive spousal maintenance, then the other thing to bear in mind is that although they may see no difference in their income where their benefits are deducted pound for pound for spousal maintenance received, there may also be some implications which have not been thought of, such as a reduction in other areas where they may have had support, for example a council tax reduction.

Key issues to be aware of

Whilst practitioners are not expected to be specialist benefit advisers, it is important to bear in mind the following when advising clients who either already claim benefits or may need to apply for them due to the financial circumstances they find themselves in after separation:

- Universal Credit is available to those on a low income, out of work or unable to work. If a client may be eligible, they should apply as soon as possible.
- Spousal maintenance is no longer ignored when it comes to benefit claims. As it is now counted as unearned income, it will reduce the Universal Credit received on a pound-for-pound basis.
- Capital payments of over £6,000 will impact Universal Credit and capital over £16,000 will mean that the recipient cannot claim Universal Credit at all.
- Where there is a jointly owned property, it may be the only asset of the marriage. A property occupied as the main family home will not be considered as capital, so a transfer of the property to the recipient or, where that is not possible, a *Mesher*-type order may be the best outcome.
- Child maintenance remains outside the unearned income consideration, so a child maintenance order would not lead to a reduction of Universal Credit.

There may also be ways for the non-claiming party to offer financial assistance in a way which would not reduce the recipient's benefits. The paying party could, for example, pay the recipient's creditors or landlords without the funds first being sent to the claimant. The Department for Work and Pensions would need advising about this to ensure no additional housing funds are being received on top of the basic Universal Credit allowance.

All of these are points to consider when advising clients around settling a financial remedy claim whilst in receipt of benefits. Clients can be signposted to the following online resources for further advice:

- gov.uk, guidance on available benefits – www.gov.uk/browse/benefits
- gov.uk, benefits calculators – www.gov.uk/benefits-calculators
- Citizens Advice Bureau, benefits – www.citizensadvice.org.uk/benefits/
- Age UK, benefits and entitlements – www.ageuk.org.uk/information-advice/money-legal/benefits-entitlements/
- Advice Now, benefits – www.advicenow.org.uk/topics/benefits

An Overview of the Benefits System

DJ Debbie Stringer

DDJ Ian Besford

Lloyd George, determined to 'lift the shadow of the work-house from the homes of the poor', sought to provide a guaranteed income to the old and infirm.

All wage-earners contributed to a health scheme, in return for benefits.

Sounds simple. But what about those who had never worked? Who or what is a worker? Cue 100 years of legislation, adding layers of complication, so in 2023 we have a welfare benefits system that is almost impenetrable.

This article is intended to signpost the reader through the benefits system.

For the year ending April 2022 the government spend on welfare benefits was £225.7 billion. In the United Kingdom over half of families are entitled to benefits. Parties need to consider their entitlement to benefits and the impact any agreement or order will have.

Overview

In general, benefits fall into three main groups: (1) means tested; (2) non-means tested; and (3) contribution-based.

Means-tested benefits

These benefits depend on the income the applicant (or partner) receives and generally the benefit is reduced £1 for £1.

Usually, income received in respect of child support, whether through the Child Maintenance Service (CMS), an informal agreement or a court order is not 'income'. Spousal maintenance is however treated as income for the purposes of Universal Credit. In respect of agreements to pay a mortgage or rent directly to a party, these may be treated as income if the payer has an interest in the property. However, if the payer pays the landlord or mortgagee direct, they are ignored (save for any claim for Housing Benefit (HB), perhaps where payments do not cover the full rent).

Means-tested benefits are also subject to a capital limit. It is likely a lump sum award within family proceedings could count as capital, leading to a reduction in income or even a loss of benefits all together. Regular payments for Personal Injury claims are ignored whether via a court order, annuity or a Trust. Monies from the sale of the former matrimonial home, which are going to be utilised to buy a further property to live in within 6 months (extendible), will not be counted as capital.

Non-means-tested benefits

These benefits intended to help with the extra costs of a disability, such as transport, medical supplies, etc. They are not means tested nor do they require National Insurance contributions. They do not count as income.

Contribution-based benefits

These benefits replace earnings. Their availability depends upon previous National Insurance payments. If enough contributions have been made a person will be entitled to receive contribution-based Employment and Support Allowance (ESA) for 1 year regardless of their household income. In this sense the benefit is not therefore means tested. After a year they transfer to income-based ESA which is means tested unless they are also deemed to be incapable of work-related activity, where they will remain on contribution-based ESA for the life of the award.

Those on contribution-based ESA/Jobseeker's Allowance (JSA) are unable to access passported benefits (free prescriptions/dental care) but those on contribution-based benefits will not be affected by any order the court makes for the payment of a lump sum in financial remedy proceedings and so it is important to identify the benefit received.

(1) Means-tested benefits

Universal Credit (UC)

When introduced in 2010, this was not a new benefit, it brings under one umbrella the following means-tested benefits:

- HB;
- Income-based ESA (ESA-IB);
- Income-based JSA (JSA-IB);
- Child Tax Credit (CTC);
- Working Tax Credit (WTC); and
- Income Support.

UC seeks to simplify the claim process. The claimant receives one payment, usually monthly. It is for the claimant to budget and be responsible for the payment of expenses such as housing costs. Direct payments to landlords are still available where there are arrears. Payments are made to the one individual, even where the claim is as a couple; paid to two accounts with agreement. This causes difficulties for separating couples as well as having scope for financial abuse.

Those unable to work through ill health or loss of employment will be entitled to JSA or ESA (sick pay). This will be either contribution-based (CB) or income-based (IB) and means tested. After a year or if they have not paid

enough qualifying contributions, it will be means tested and will require an application for UC. A party should be able to tell you whether they are in receipt of UC or not. If the answer is 'yes', they are in receipt of a means-tested benefit, and any financial settlement, particularly the payment of maintenance or a lump sum, will impact on their entitlement. If they are in receipt of JSA or ESA but not on UC then this is contribution-based, not means tested and a payment will not have an impact on their benefits until they transfer to UC.

Any claim for UC brings to an end any entitlement to previous means-tested benefits whether the claim is successful or not. This is particularly important in respect of Tax Credits which are far more generous than UC.

The payment is made up of a basic 'standard allowance' and extra payments that might apply depending on circumstances, for example having children.

In addition, receipt of UC is a 'passport' benefit for help with prescription charges, dental care and free school meals.

Income Support (IS)

The claimant must be 16 or over and:

- either pregnant, a carer or a single parent looking after a child aged under 5;
- working less than 16 hours a week (there may possibly be eligibility if doing unpaid voluntary work or on unpaid maternity/paternity leave);
- under Pension Credit (PC) qualifying age (this varies depending on date of birth and is subject to review);
- on a low or no income;
- have less than £16,000 in savings (£6,000 or less has no effect; between £6,000 and £16,000 the amount received is tapered).

If none of the above apply, a claim may still be possible by way of a 'top off' or a 'hardship' payment in some cases if the claimant is:

- unable to work as disabled or a carer;
- off work and getting Statutory Sick Pay (SSP); or
- aged 16–20 and in full-time education or training (excluding university).

Jobseeker's Allowance (Income-based) (JSB-IB)

The claimant must be over 16 and under State Pension age. Where a claimant has a partner, both need to be eligible. The claimant must be:

- not working full time (i.e. less than 16 hours a week);
- available to work full time;
- actively looking for full-time work;
- not in full-time education;
- have less than £16,000 in savings (£6,000 or less has no effect; between £6,000 and £16,000 the amount received is tapered);
- not claiming Income Support.

Employment and Support Allowance (Income-based) (ESA-IB)

The claimant needs to meet the 'Work Capability Assessment' rules (i.e. limited work capacity due to a medical condition). It is possible to undertake paid 'Permitted work' providing earnings do not exceed £153 per week (January 2023) or 16 hours per week.

Household income is taken into account including pension, and savings/capital are treated the same as JSA-IB.

Tax Credits (TCs)

This benefit is for individuals/families who work in excess of 16 hours, and in receipt of a low income. Child maintenance is excluded when determining income. For those currently in receipt of WTC (not UC) there is no capital limit. Whilst an element for 'WTC' is included in UC the capital limit applies to all elements of UC regardless of income or child care costs, thus effectively removing those families with savings from being eligible for TCs. This means there will be some families who have savings and are not therefore eligible for TCs but others with the same savings who are in receipt of TCs as they still have not migrated to UC.

Receipt of TCs is a 'passport' to other benefits such as childcare vouchers, prescription costs, maternity costs, school costs, court fees and heating/energy grants.

Eligibility may be determined by an online calculator and once assessed runs until the end of the financial year, after which the application needs to be renewed. Eligibility is based upon income not capital, although any income from capital in excess of £300 per annum is taken into account. A capital award within family proceedings will therefore not affect entitlement unless the recipient is in receipt of UC. Any change of income greater than £2,500 per annum (either way) or a migration to UC needs to be notified.

State Pension

This benefit is presently for those who reached State Pension age before 6 April 2016.

The full new State Pension is dependent on contributions and is in addition to any other income. It is not affected by capital.

Pension Credit (PC)

This is a means-tested benefit for people on a low income of qualifying age.

PC has two parts – Guarantee Credit and Savings Credit. Both may be payable:

- Guarantee Credit tops up weekly (low) income. It is not dependent on contributions.
- Savings Credit rewards people who have prepared for their retirement by having some savings or income.

Guarantee Credit is a passport benefit to maximum HB and Council Tax Reduction, the exact amount depends on the area.

To qualify, the claimant must live in the United Kingdom and the claimant or partner must have reached State Pension age. Claimants do not pay tax on any PC received.

Entitlement to PC is income-based. Capital and investments over £10,000 can reduce entitlement by attracting a tariff income. This reduces benefit by £1 per week for every £500 capital over the £10,000 lower limit. There is no upper limit.

Housing Benefit (HB)

This benefit is to help pay rent if on a low income. HB can pay all or part of the rent. It is available whether the claimant is unemployed or working. The eligibility and amount can be calculated through the benefits calculator.

Discretionary assistance is available from the council for

those whose full rent is not met via HB by way of an award of a 'discretionary housing payment'.

There is a capital limit for eligibility of £16,000. Capital below £6,000 is excluded and between £6,001 and £16,000 there is a sliding scale. For every £250 over £6,000, £1 per week is deducted from benefit.

'Bedroom Tax' – Under-Occupancy Charge

The rules and exemptions are complicated, and if applicable the claimant may be able to seek 'top-up' benefit from the council by way of a 'discretionary housing payment'. The Under-Occupancy Charge does not apply if the claimant or partner are of PC age and claiming HB. It only applies to social housing. It does not apply for the first 13 weeks of any claim where no HB claim has been paid within the last 52 weeks.

The reductions to be applied are 14% (one unused bedroom) or 25% (two or more).

The Benefit Cap

This limits the total amount of HB or UC paid to claimants of working age. It does not apply if PC is payable.

(2) Non-means-tested benefits

Disability Living Allowance (DLA)

A legacy benefit for adults aged between 16 and 64. It is non-means tested and has been replaced by Personal Independence Payment (PIP) for all those over 16 years of age though many adults are yet to be migrated across.

DLA remains for all those under 16. There are no plans to migrate children to PIP.

DLA has two eligibility criteria: if the claimant needs help to look after themselves (the 'care component') or has walking difficulties (the 'mobility component')

It is available whether living alone or with someone else; it is about the need for care rather than actually receiving it.

Personal Independence Payment (PIP)

This is a non-means tested payment to assist with the extra costs of disability or long-term health conditions for people aged 16–64. A minimum of 8 points is required to be eligible and the number of points dictates whether it is paid at the standard or enhanced rate. The 'need' must have been for at least 3 months prior to the application with an expectation of at least another 9 months' need (or are terminally ill with less than 6 months to live). It is envisaged that claimants under the age of 65 will migrate across from DLA to PIP in the fullness of time. The pre-claim qualifying period does not apply to those migrating.

PIP is made up of two components:

- the Mobility component if help is needed getting about;
- The Daily Living component if help is needed with carrying out everyday activities, such as washing and dressing.

Each component can be paid at either a standard or an enhanced rate and it is possible to receive either one or both components and at either the standard or the enhanced rate.

Attendance Allowance (AA)

Available for claimants who are over State Pension age and have a disability or illness that affects their ability to care for themselves and are not in receipt of DLA or PIP. The need for care or supervision must have been established for 6 months prior to the application. It is not payable if in hospital or in a local authority care home. It is however available if in a hospice and terminally ill.

It is non-means tested without limit. It does not affect State Pension or earnings if still in work, and it is tax free. It is not subject to the Benefit Cap either.

Receipt of AA, DLA and PIP also are 'passport' benefits by way of eligibility for Council Tax Reduction, Disabled Person's Railcard, 'Blue Badge' and increased PC and HB without being subject to the Benefit Cap. Also, if someone is caring for the recipient, they may also qualify for Carer's Allowance.

Sickness/maternity/paternity/adoption benefits (usually work-related)

Sickness benefits

To qualify for Statutory Sick Pay (SSP) you must:

- be classed as an employee (including agency workers) and have done some work for your employer;
- have been ill for at least 4 days in a row (including non-working days);
- earn at least £120 (before tax) per week;
- tell your employer you are sick before their deadline – or if none within 7 days;
- provide a 'fit note' after 7 days.

Maternity and adoption benefits

These are statutory rights for employees to maternity leave, pay and additional benefits. An 'employee' is someone who has worked and earned an average of £120 gross per week with the particular employer, continuously for at least 26 weeks continuing into the 'qualifying week' – the 15th week before the expected week of childbirth.

- **Statutory Maternity Pay.** This is paid for up to 39 weeks at:
  - 90% of average weekly earnings (before tax) for the first 6 weeks;
  - £156.66 (January 2023) or 90% of average weekly earnings (whichever is lower) for the next 33 weeks.

  It is paid in the same way as the wages were, i.e. monthly or weekly. Tax and National Insurance continues to be deducted. At least 28 days' notice must be given and, if required, proof of pregnancy.
- **Statutory Adoption Pay.** At least 28 days' notice must be given and it is paid for up to 39 weeks. The weekly amount is:
  - 90% of your average weekly earnings for the first 6 weeks;
  - £156.66 (January 2023) or 90% of your average weekly earnings (whichever is lower) for the next 33 weeks.

  The claimant must be an employee (not 'worker'), have worked for a minimum continuous period of 26 weeks and earn a minimum of £120 gross per week.

(3) Contribution-based benefits

Contribution-based benefits are usually time limited and unaffected by a partner's income.

Jobseeker's Allowance (Contribution-based) (JSA-CB)

This is available if the claimant is unemployed and has paid sufficient Class 1 National Insurance contributions. Payments are limited to 6 months.

Eligible National Insurance contributions are if the claimant, in 1 of the last 2 complete tax years, has paid Class 1 (or special Class 2) contributions to the value of 26 times the lower earnings limit, and in both of the last 2 complete tax years, has paid or been credited Class 1 (or special Class 2) contributions to the value of 50 times the lower earnings limit.

The 2 tax years that are relevant are the ones completed before the benefit year in which the job-seeking period began. The tax year runs from 6 April to 5 April. The benefit year runs from the first Sunday in January.

Employment and Support Allowance (Contribution-based) (ESA-CB)

Any time spent within the ESA support group is excluded. If a claimant is within the ESA support group it is possible to receive CB benefits indefinitely. The claimant will not then be entitled to the passported benefits but is not subject to any capital limits.

In order to determine eligibility for benefits, claimants should either use the online calculator at gov.uk or visit a job centre.

If eligible for UC or ESA-CB/JSA-CB a decision should be made quickly. UC should be paid in 5 weeks. Non-means-tested benefits can take much longer, over a year if an appeal is necessary.

Fair Shares? Sorting Out Money and Property on Divorce

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Introduction

For the 100,000 couples who divorce annually in England and Wales, the financial arrangements they make can determine the future standard of living that they and their children will have. Yet, only a third of them use the legal system to reach a financial settlement, with the remaining two-thirds negotiating their own arrangements or, worse, reaching no settlement at all.[1] Despite numerous calls to reform the law on this issue, very little is known about the detail of how couples negotiate settlements, or of how these work out.

The 'Fair shares? Sorting out money and property on divorce' research study is in the process of investigating how divorcing couples in England and Wales negotiate financial arrangements. It involves an online survey of over 2,400 people who have divorced within the previous 5 years, and in-depth interviews with a further 50 divorcees. It will provide the first detailed, fully representative picture in England and Wales of how finances and property are divided on divorce, importantly including information both on couples who do and do not make use of the legal system. It also includes a short online survey with a representative sample of the general public, measuring public understanding of the law in relation to financial remedies.

The purpose of this article is to explain the importance of the research, its aims and methods, and the key contributions we will be making to the evidence base on financial settlements on divorce.

The importance of the research study

There is little detailed information about the kinds of financial arrangements couples currently make when they divorce, or the impact and effects of different arrangements. Whilst existing research provides evidence about the effects of divorce and separation on ex-spouses' income levels, notably the differential negative impact on women and children compared to men[2] and the fact that resultant financial hardship and economic and housing insecurity are associated with poorer child outcomes,[3] we know little about the financial outcomes experienced by the majority of the divorcing population, the kinds of arrangements agreed (or imposed by the stronger party), or the relative effects of different arrangements. This study aims to start to fill this gap, collecting quantitative survey and qualitative interview data from a sample of recent divorcees. It will include both divorced couples who did and did not use the courts, those with and without children and from the full range of socio-economic backgrounds. The goal is to capture the lived complexity of arriving at and experiencing post-separation and divorce financial arrangements and to identify precursors to particular outcomes. This will be achieved by providing robust, nuanced data for professionals and policy-interest groups on the experiences of divorcees. We hope that the research will improve practice through a greater understanding of what happens across the whole divorcing population and provide a benchmark for any future legal changes. We also plan to archive the data to facilitate further analysis by the research community.

As part of the divorce process, couples can decide to have a formal financial settlement, agreed by the parties or court-imposed. However, of the roughly 100,000 couples who divorce in England and Wales each year[4] only around 40,000 seek a financial remedy and only a third leave the marriage with a court order.[5] This is the group we already know a bit (but not a lot) about. Of this cohort, increasing numbers of family litigants in private law cases have no legal representation.[6] Between 12 and 15% of such cases end up as contested hearings in court and around two-thirds come

to court as agreed settlements.[7] Over four-fifths of court-sanctioned arrangements are for 'clean break' settlements with no ongoing financial support payments for a former spouse. Where such payments are made, they are almost always for wives taking care of dependent children.[8] Fewer than 20% of financial remedy cases disclosing relevant pensions include any pension orders.[9] The consequences of this for women are particularly severe, but there is limited quantitative data on processes and outcomes in these cases and nothing at all about how these arrangements are worked out in practice.

Even more importantly, we know very little about the arrangements of the other two-thirds of divorcing couples who do not use the courts. While longitudinal survey data provide information on income levels post-divorce,[10] we do not know how parties' relative incomes might sit within a wider financial settlement, nor the workability of any outcome. Survey data[11] provide information about ongoing child maintenance, including both arrangements formally agreed through court or statutory systems and those agreed between the separated parents outside the legal space. But we know nothing about how assets are divided and the trade-offs between ongoing support, including pension provision, and 'clean break' agreements for this population. Nor do we know how frequently arrangements are reached by default and force of circumstances rather than by design; how they are negotiated; how workable they are; and what leads to varied outcomes.

This lack of evidence – both basic prevalence figures and a nuanced and dynamic understanding – is problematic particularly as there has long been a view that the law governing post-divorce finances needs overhauling.[12] Moreover, there is a very strong policy priority of encouraging private ordering of family legal disputes, coupled with the abolition of legal aid for most family law matters. Without robust evidence regarding how negotiations and arrangements are managed, whether made with or without legal assistance, and what the consequences are for families and children,[13] there is no firm evidence base from which the legal profession and policymakers can discuss and assess what, if any, substantive and/or procedural changes might be required.

Methods

The study addresses three broad research questions: *What* are the financial and property arrangements that have been made? *How* do divorcing couples arrive at their financial and property arrangements? What are the *immediate effects* of those arrangements?

Given our research questions, the study necessarily involves both quantitative and qualitative data collection in two stages. An online survey of a representative sample of recent divorcees provides prevalence figures of different arrangements for different populations and quantitative measures of the routes they took. An in-depth study of a purposively selected interview sample is collecting more nuanced and detailed information on the arrangements, a deeper understanding of individuals' experiences, assumptions and rationales when making these arrangements and the immediate practical and financial effects of these.

The survey

The prevalence of different financial arrangements is being measured via an online survey of a representative sample of over 2,400 divorcees whose decree absolute had been granted in England and Wales within the previous 5 years, carried out by the survey organisation YouGov among eligible online panel members. The survey provides the detail of divorcees' different arrangements and how they have started to work out in practice.

The survey took place over the summer of 2022. The final survey questions were the result of an extensive development process, involving pilot interviews with recent divorcees and consultation with our academic and practitioner Advisory Group. As a result, the questions in the 15-minute survey were closely aligned to our research questions, worded in ways which we knew that divorcees would understand and relate to.

In broad terms the survey covers arrangements concerning any matrimonial home, pensions, savings or investments, any debts, and any ongoing payments to the ex-spouse or children. It also includes questions on the child arrangements, the negotiation process and the involvement of any professionals, how fair the outcome was perceived to be by the participant at the time and currently, and how well any arrangements have worked. With the survey including a range of information about the couple and their family before and since the divorce, our analysis will be able to look at the prevalence of different financial arrangements for different groups. We are particularly interested in differences between those who did or did not use the legal system; between those with different income or asset levels prior to divorce; and those with and without children. We will identify the predictors of reaching a financial settlement, and of different types of arrangement (individually and in combination), exploring in particular the relationship between financial and child arrangements, and the extent to which the arrangements are associated with the involvement of any professionals.

The interview sample

This phase involves 50 semi-structured interviews carried out between late Autumn 2022 and early Spring 2023. Matching the eligibility for the survey, the interviewees were all divorcees whose decree absolute was granted within the previous 5 years. They were purposively selected to include both those who have and have not used the court, a range of ages, both genders and those with and without children. Each interviewee has also been asked to complete the online survey prior to the interview. In light of the experience of the COVID-19 pandemic, all interviews are being conducted virtually and are lasting approximately one hour.

These interviews are essential in gaining a more nuanced understanding of individuals' financial and property arrangements, how they arrive at these and capturing outcomes which flow from their earlier decisions. In-depth interviews complement the survey by providing detailed information on experiences, drivers and trajectories. For example, we are exploring the main driver of decision-making in relationships where there has been domestic abuse and the route taken (if any) to arrive at property and financial settlement; how far a lower or precarious household income affects the ability of parties to re-house,

finance two households going forward and/or pay child support or the willingness of couples to access professional advice or legal services.

What next?

We are currently in the process of analysing the survey data and completing the qualitative interviews. The full research report, integrating the survey and interview findings, is due for publication in Autumn 2023, alongside a range of other publications.

It is hoped that the findings from the research study will enable policymakers and policy-interest groups to design reform proposals based on a better understanding of the range of experience of divorcing couples and their families, and the ongoing economic and emotional impact on them of the arrangements they reach. Further, we hope that the findings from the research will equip advice-providers and support groups to better support divorcees who do not use the family justice system by describing the range of financial arrangements that are reached and identifying particular problems and hardships that divorcing couples may experience. Finally, we plan to archive all quantitative and qualitative data gathered for this project in order to maximise potential impact and usability.

To keep up to date with the research and future publications, please follow us on Twitter at (@shares_fair) or email the research team (fairshares-project@bristol.ac.uk) to be placed on our stakeholder mailing list.

Notes

1 Family Court Statistics Quarterly (Family Court Tables): July to September 2022, Table 13.

2 M Brewer and A Nandi, 'Partnership dissolution: how does it affect income, employment and well-being?', *ISER working paper* 2014-30; H Fisher and H Low, 'Recovery from Divorce: Comparing High and Low Income Couples', (2016) 30(3) *International Journal of Law, Policy and the Family* 338–371.

3 A Mooney, C Oliver and M Smith, *Impact of Family Breakdown on Children's Well-Being* (Department for Children, Schools and Families, 2009).

4 In 2020, there were 103,592 divorces granted in England and Wales. Office for National Statistics, Divorces in England and Wales, 2020 dataset (February 2022), available at www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/datasets/divorcesinenglandandwales

5 Family Court Statistics Quarterly (Family Court Tables): July to September 2022, Table 13.

6 Family Court Statistics Quarterly: July to September 2022, Figure 4; M Maclean and J Eekelaar, *After the Act: Access to Family Justice after LASPO* (Hart Publishing, 2019) 18–20.

7 Family Court Statistics Quarterly (July to September 2022), Table 13. See also, E Hitchings, J Miles and H Woodward, *Assembling the Jigsaw Puzzle: Understanding Financial Settlement on Divorce* (University of Bristol, 2013).

8 E Hitchings and J Miles, *Financial Remedies on Divorce: The Need for Evidence-based Reform* (Nuffield, 2018); H Woodward with M Sefton, *Pensions on Divorce: An Empirical Study* (Cardiff University, 2014).

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

10 H Fisher and H Low, 'Recovery from Divorce: Comparing High and Low Income Couples', (2016) 30(3) *International Journal of Law, Policy and the Family* 338–371.

11 For example, the UK Household Longitudinal Study.

12 See B Fehlberg and J Miles (eds), 'Anglo-Australian financial remedies law: Current challenges, possible solutions', (2018) 32(1) and (2) *Australian Journal of Family Law* 1–220.

13 See C Bryson, s Purdon and A Skipp, *Understanding the Lives of Separating and Separated Families in the UK: What Evidence Do We Need?* (Nuffield Foundation, 2017) for a discussion of the evidence gaps around separating and separated families.

Litigation Funding – A Brief Overview

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Partner, Dexter Montague

Funding family law litigation is a complex process. It should be seen in the context of most family law proceedings operating on the basis of each party paying their own legal costs, with costs orders rarely being available save for litigation misconduct.

The first choice of funding is to use the client's own resources. The second is to borrow from family and friends, often the 'bank of mum and dad'. This is not ideal as the court is likely to regard such borrowing as a soft loan. For a thorough look at the recent case-law on soft loans, in particular, *P v Q* [2022] EWFC B9, see 'The Treatment of Soft Loans in Financial Remedy Proceedings' by Graeme Fraser, for the *Financial Remedies Journal* blog, available at https://financialremediesjournal.com/content/the-treatment-of-soft-loans-in-financial-remedy-proceedings.df8a98f4ad614f8abe091ae8f4ddabef.htm

What about Legal Services Orders? These sorts of orders, available from the court under section 22ZA of the Matrimonial Causes Act 1973, have to be seen as the last resort. This is because there is a requirement to show an inability to pay by any other means. This includes that the firm will not offer a *Sears Tooth* agreement providing for a deferral of payment and also includes the client being refused credit by two commercial lenders (whether specialist litigation funders or mainstream lenders). Mostyn J's guidance in *Rubin v Rubin* [2014] EWHC 611 (Fam) sets out that evidence of refusals by two commercial lenders of repute will normally dispose of any issue under section 22ZA(4)(a) as to whether a litigation loan is or is not available.

An example of this criterion in practice is *BN v MA* [2013] EWHC 4250 (Fam) where Mostyn J held that the fact the wife had received offers from two litigation loan suppliers meant that she could not satisfy the section 22ZA(4) requirement.

However, this is not necessarily the end of the issue if the party with assets could (and arguably should) have voluntarily made assets available to the other party to fund the litigation but chose not to do so – perhaps for tactical reasons. As Mostyn J observed at [37] of *BN v MA*, 'if the wife has as a result incurred unnecessary interest on these litigation loans, then the husband will have to discharge that interest. I mention that in order, really, to do no more than state the obvious'. If solicitors find themselves in this situation they should always put the other party on notice that they will seek to recover this interest regardless of outcome or what costs orders may (or may not) be made.

Litigation funding, also known as third party finance, is where a third party, without any prior connection to the litigation, agrees to finance some or all of the legal costs of the litigation in return for interest and fees payable from the proceeds which may be recovered by the litigant/applicant for funding.

Litigation loans are a growing area. However, there are no statistics to establish how many such arrangements are made each year. Moreover, you would not expect any single lender to state how many they had in operation or what figure they had lent, due to commercial sensitivity.

The decline of public funding and legal aid is part of the backdrop to this growth, as is the significant cost of some family law litigation.

One could be forgiven for thinking that litigation loans are a relatively new development, but that overlooks a scheme that at least one High Street lender used to run a couple of decades ago. In that scheme, the loan was underwritten by the solicitor so if the client defaulted then the lender looked to the firm to recover its losses.

There are a number of commercial lenders in the current cohort of litigation loan providers. What is different about the majority of these lenders is that they do not require the litigant's solicitor to underwrite the loan.

For a time the most notable lender in this field was Novitas. However, this company withdrew from providing litigation loans in 2021 subsequent to its acquisition by Close Brothers.

Any decision to lend is based on the individual circumstances of the case. Part of the application involves the solicitor for the party seeking the loan, the applicant, submitting key information to the lender about their case. This means that the applicant has to give permission to the solicitor to release such details to the third party lender. The information extends to an assessment of the likely value of the case, the asset pot and the amount of the loan required to conclude the case. The results of any application will be specific to the applicant.

Solicitors are not qualified to give independent financial

advice. With interest rates typically in the order of 18% or more, caution must be taken if asked by your client to recommend a litigation loan provider. It is a good idea for the applicant to have independent financial advice to ascertain a full overview of the market and a comparison of relevant terms. For example, can the loan be drawn down in tranches? When is interest payable? When does repayment fall due? The applicant should ask for an illustration of the overall cost of borrowing. This will assist making comparisons between lenders.

As well as the input of an independent financial adviser, independent legal advice for the applicant is a prerequisite. Typically, this is required by the litigation loan provider anyway.

Lately, litigation loans have featured in the media for the wrong reasons. 'Divorce action funder failed to carry out checks before lending £232,000' read one recent headline in the Law Society *Gazette*. The article continued that former litigation lender, Novitas, failed to carry out any checks on a borrower's income before lending her £232,000 to pay divorce costs, according to financial watchdog, the Financial Ombudsman Service (FOS). The *Gazette* stated that, the FOS investigation, the outcome of which had been seen by the *Gazette*, found that Novitas acted unfairly in the matter and should repay all interest and charges. Interestingly, the report stated that the litigant had her loan arranged by solicitors handling her divorce and had initially complained to the legal ombudsman, as opposed to the FOS, about the way she was treated.

In the last few weeks Close Brothers has confirmed that it will set aside an additional £90 million in its 2023 financial statements against bad loans from Novitas. When taken with the figures previously announced, the total net provision for Novitas could reach £183 million.

Simon v Simon & Level (Joinder) (Rev 1) [2022] EWFC 29 raised a significant question. Could a party, in receipt of litigation funding, surrender a lump sum claim thus preventing the lender from clawing back the sums due under the litigation loan agreement? Here, a wife agreed a consent order that prevented her from repaying loans of £1 million owed to litigation loan funder, Level, and the funder was joined to the proceedings. The litigation is ongoing and hence the question has yet to be answered, but for more detail about this case, see *Financial Remedies Journal* case summary by Polly Morgan, available at https://financialremediesjournal.com/content/simon-v-simon-level-joinder-rev1-2022-ewfc-29.964c44224ad0446dbb6be85f9ee87682.htm

In response to *Gazette* coverage of an investigation by the Solicitors Regulation Authority (SRA) into complaints about the funding of family law cases by Novitas, Nigel Shepherd (twice former chair of Resolution and now himself a consultant with litigation funder Ampla Finance) wrote a blog for the Law Society website. This, sponsored by Ampla Finance, noted that Novitas had stopped funding at the end of 2021 but stated that the issues highlighted in the *Gazette* had triggered a nervousness in the market. Shepherd said that a responsible lender would carry out background checks on every solicitor's firm they engaged with and would only carry out work when they were satisfied that the firm was reputable.

So where does this leave us? Hopefully, we have a more mature and regulated financial sector with which we have to deal for the benefit of our clients. However, it is crucial that we remember the regulatory obligations we have as solicitors. These stretch from confidentiality to advising properly on costs. The SRA has warned that law firms risk breaking conduct rules if clients were not fully informed of their rights before taking out loans to finance litigation, reported the *Gazette*.

Assuming that you have complied with all your regulatory requirements, typically, when can your client get litigation funding? Whilst the scope of litigation funders is wide, there has to be an asset on which they can 'bite'. Accordingly, they are not available for standalone child arrangements applications, pre-nuptial agreements or applications to vary maintenance. At least one litigation loan provider currently offers living expenses as well as legal funding to individuals in family law proceedings, which it defines as 'financial remedy, Children Act, enforcement, Part III, ToLATA and Schedule 1'.

In this present climate, where other methods of finance are not available, many family law matters which, for whatever reason cannot be kept out of court or arbitration, simply cannot occur without litigation funding. It is our responsibility as solicitors to make sure that the client is the number one priority and that we act in our client's best interests throughout.

DR Corner: The Drive for Gender Diversity in Private FDRs

Sarah Green

Senior Associate, Michelmores

Pressures on court time and the increasing use of remote courts over the COVID-19 pandemic have led to the increasing popularity and success of Private FDRs within (and instead of) financial remedy proceedings within the last 5 years.

A Private FDR is a 'without prejudice' hearing which can be used for financial remedy cases on divorce, and Schedule 1 to the Children Act 1989 cases, where a privately appointed 'judge' (evaluator) indicates the likely outcome of a case and order that a judge will make at final hearing within the court system.

Private FDRs have received judicial encouragement nationwide, and there is an increasing emphasis on their use where possible and case-law has confirmed that attending a Private FDR is an 'exceptional reason'[1] for dispensing with a court FDR.

As we become accustomed to another way of practising, which is not regulated or subject to the same scrutiny, as say, appointment to the judiciary, are we, as a legal profession doing enough to make sure that the way that we approach Private FDRs is balanced and unbiased?

What is the issue?

There is a significant problem with Private FDRs at present. Research suggests that the majority of Private FDRs are conducted by a minority of chosen evaluators, the vast majority of whom are white, male barristers over a particular number of years' call, either at senior, junior or KC level.

Approximately half of the junior family finance bar is female[2] (42% of top set family finance barristers overall[3]). Just 16% of family finance silks are female. Whilst law firms are under pressure to address the gender pay gap, data published by the Bar Council shows that women barristers in family law earn around 43% less than men, and that the gap has widened in recent years.[4]

In the *Financial Remedies Journal* Private FDR directory,[5] 41% of the 183 practitioners listed as offering services as Private FDR evaluators are female.

Based on these statistics, somewhere between a third and a half of Private FDRs should be conducted by female juniors, and of those Private FDRs before silks, one in five should be before female silks. However, anecdotally, just 1% of Private FDRs in London were conducted by women.

Is this a case of women being put forward (as say one of three options), and then not being selected, or not being put forward at all?

I received a letter last year on a case, from a counterpart, with three proposed names for Private FDR 'judges'. The panel he put forward were all male, all white and all within a certain age bracket. I rejected the proposals and put forward my own, diverse selection. The response was a threat to report me to the Solicitors Regulation Authority for being rude and a robust defence of the original selection, rather than recognition of the issue and a resolve to 'do better' next time.

Solicitors and counsel need to take responsibility for 'sleepwalking' into this (as Katherine Landells, Partner at Withers, puts it). Katherine has spearheaded a group of 40+ lawyers who are committed to taking positive action to raise awareness of gender equality and unconscious bias within the process of selecting a Private FDR evaluator.

Why is this happening?

There is not one standalone cause for this, but rather several issues which are endemic within the legal system we operate in, and society as a whole.

Unconscious bias

'All human beings – women and men – are biased; we are hardwired to make implicit associations which force us to automatically characterise people and make judgments about them based on those characteristics. But whilst this enables quick decision making, it is also the foundation of stereotypes, prejudice and discrimination.'[6]

According to the Law Society, unconscious bias was perceived to be the main barrier to career progression in 2018,[7] although concerningly, only 11% reported any visible steps being taken to address this.

Perceived judicial leaning

One line of thought is that there is a perception that a wife who is a home-maker, claiming a high level of spousal maintenance, would not want a female evaluator. The fear is that the female evaluator would not be able to relate to their

situation as a working woman, leading in turn to a panel of male evaluators being put forward for selection by instructing solicitors wanting to avoid this risk (a point made by Joanne Edwards of Forsters in March 2022[8]).

It's who you know

There is also the question of what or who you know. Most experienced practitioners are likely to select evaluators that they have experience of, and probably instructed on cases in the past, probably someone of over 15 years' call – and as 65% are male (BSB source) and 83% are white, the chances are that the person selected is a white male.

This issue is self-perpetuating, though. How does a solicitor learn who they like to instruct as counsel? Most likely, in my experience, from recommendations from established senior colleagues and from our contemporaries. It is easy to forget just how influential we can be towards how our junior lawyers' practice is shaped – they learn by example.

What can we do?

In the court system, there is no element of self-selection – we do not choose the judge who hears our client's case. There are targets and quotas regarding appointments of women within the judiciary, and promoting diverse groups. The unregulated space that the Private FDR falls within is the Wild West of the family justice system, in contrast. It is a self-selecting space and, as a result, unconscious bias comes to the fore in the selections that are put forward. In the public space, because it is accountable, work is being done to strive to close the gender gap and address issues of inequality – we are not there yet, but at least there is awareness and something is happening. In the private legal world, though, in areas such as Private FDRs, we still see women facing huge inequality and injustice. How do we change what happens in that space?

Without regulation, we as professionals with a conscience should make it our duty and responsibility to ensure that we are actively taking steps to tackle this bias. As a matter of course, we should be actively presenting a diverse panel of options to clients and to counterparts when considering who we appoint, whether as chosen counsel for a case, an evaluator for a Private FDR, or choosing an arbitrator.

Resolution, the membership organisation for family justice professionals, has formed a working group which is looking into the principles and standards for early neutral evaluations and Private FDRs, involving representatives from the International Family Law Association and the Family Law Bar Association, and how as a profession we can ensure that there are adequate learning and development resources available to the professionals undertaking this work, and those that are operating within this system.

Unconscious bias awareness

Unconscious bias might be defined as 'learned behaviour around social stereotypes that are automatic and unintentional … sometimes we are even unaware how they shape our decision-making as they are not consciously thought through'.[9]

If you are a team leader, look into options for how to raise awareness of unconscious bias within your team, for example, inspirational reading on the issue and inspiring training sessions. Built-in stereotypes that we are not aware of on a conscious, daily basis are not going to be fixed overnight, or by just attending one course, and so having regular cross-checks with yourself is essential to ensure you are actively questioning and keeping an open mind, rather than slipping back into old ways.

The ICCA Gender Diversity Task Force Report

There is much that can be learned from other organisations undertaking similar work. The International Council for Commercial Arbitration produced a report last year,[10] aimed at addressing ways to increase diversity within arbitration, worldwide. Perhaps unsurprisingly, very few arbitrations take place before women.

Some of the key messages from its report, which are just as applicable to the appointment of Private FDR evaluators and which particularly resonated, include:

- Address unconscious bias.
- Be conscious of how women candidates are described to clients.
- Engage with and sponsor junior women in the field.
- Promote proactivity by candidates to promote themselves and invest in relationships with appointors, seek out leadership opportunities, be visible, demonstrate required qualities, network, find mentors.
- Promote positive work culture, offer flexible hours, mentorship, sponsorship, training, consider gender neutral terminology, and champion and promote women.

Stepping up

Following a series of meetings with around 40 family law professionals in October 2021, Katherine Landells produced a *Best Practice Guidance for Private FDRs* document, which is essential reading for all family law practitioners.

Solicitors are often responsible for making Private FDR proposals and so it is vital to ensure that the shortlisting is inclusive and non-discriminatory. Being conscious about the choices that are made and be aware of the potential for bias will assist us all to put forward more inclusive panels. Many firms now offer unconscious bias training which is an excellent starting point, but this goes beyond ticking a box by attending one course.

Chambers also have a role to play in ensuring that a diverse range of individuals within their set are being put forward and that they are shaping a culture which encourages all members who wish to do so to develop their Private FDR practice (and are of course developing their practice in a way that suits them, which goes beyond the Private FDR point). Gathering data around the appointment of Private FDR evaluators and being transparent around diversity and inclusion, to ensure there is accountability, will also help to promote and monitor improvements. Positively, some progress is already being made. Data from 29 Bedford Row suggests that Private FDRs before a female evaluator from their chambers have increased from 16.44% in 2021 to 28.85% by September 2022.

Improving how we communicate and our language around Private FDRs

The Private FDR Best Practice Guidance highlights the importance of being aware of how we communicate about Private FDRs with clients, colleagues, and our counterparts:

(1) Be conscious about the language used when

describing the hypothetical judge or evaluator – use gender neutral or alternative references (the judge, the evaluator, they).

(2) Explain to clients that that the job of a Private FDR evaluator is to try to eliminate all personal subjectivity, to establish what are the range of likely outcomes, and to indicate where the judge would be most likely to fall, within that bracket, at a final hearing.

(3) Be objective about what qualities you want your evaluator to have and resist making assumptions about an evaluator's personal views. No evaluator should allow their personal views to cloud their judgment when it comes to giving their indication.

(4) Share knowledge and experience of Private FDR evaluators with peers so you can be confident when recommending someone to a client.

Changing the way we approach Private FDR selection

It should be standard practice that any list that is put forward is diverse. As Matthew Richardson put it, the Resolution National YRes Committee has a simple requirement for no one-gender panels[11] – something that can easily be mirrored when it comes to Private FDR selection.

Paragraph 15 of the 2022 FRC Efficiency Statement[12] states that, where there is to be a Private FDR, the nominated evaluator will be identified in the order made at first appointment. If the evaluator has not been agreed in advance, details of the proposed evaluator, including fees, should be brought to the first appointment. If the identity of the evaluator cannot be agreed, the court will resolve the issue.

When put on the spot at court, it is easy to put forward the first name that comes to mind, someone perhaps both counsel will have experience of. It is therefore important for solicitors and counsel to be prepared – to do some homework, carefully look at a selection of names and prepare a balanced list of options.

In cases where judges need to resolve the identity of the evaluator and are presented with a list that is not balanced, and perhaps contains three of the 'usual suspects', it is imperative that they challenge the legal representatives on the choice put forward. This will impact in two ways – first, it sends the message that presenting anything other than a balanced selection is not accepted practice, and secondly, no lawyer will want to be pulled up by a judge for failing to consider diversity within their panel in front of their client!

There is passing reference to Private FDRs in the Family Justice Council, 'Financial Dispute Resolution Appointments: Best Practice Guidance'.[13] A paragraph within the guidance drawing attention to the importance of presenting a diverse panel of evaluators is another route of encouraging change.

It should be a rule (spoken, until it can become unspoken) that we should all be presenting a diverse panel of options to clients and to counterparts when considering who we appoint as Private FDR evaluator.

The *Best Practice Guidance for Private FDRs*[14] sets out an approach which is recommended for application nationally:

(1) Both 'sides' to reflect and agree on the appropriate level of seniority for the Private FDR evaluator (be that senior solicitors or counsel of all levels).

(2) Identify a window within which the Private FDR should take place.

(3) Obtain client, solicitor and representing counsel's availability for that window.

(4) Agree which party is to be responsible for drawing up the shortlist.

(5) The shortlisting party to obtain a non-exclusive list of potential Private FDR evaluators at the agreed level of seniority available on that date.

(6) The shortlisting party to propose at least two potential evaluators from that list, which shortlist it is expected should contain at least one individual of each gender.

(7) The selecting party to choose an evaluator from that list. If the list does not contain at least one individual of each gender and no compelling reason has been given, the selecting party may propose an alternative shortlist which does contain at least one individual of each gender from which new list the evaluator may then be selected.

Male champions

Male leaders have a significant role to play in achieving gender balance across all areas of our professional practice:

> 'The obstacles and barriers faced by women are not always known, consequently gender diversity measures can be seen as unfair. Men who build awareness of these issues can, for example, ensure that women can be more systematically and actively included'[15]

In the Private FDR sphere, male barristers can play a positive role by championing their female counterparts to achieve their potential, to put themselves forward as Private FDR evaluators. Male clerks can advocate for a choice made from their female barristers, ensuring that women are given as options in response to enquiries about available Private FDR judges (even if the enquiring solicitor has not suggested this). Male solicitors can ensure that they are putting forward balanced panels for selection, and not just selecting names of male barristers who they know, get on well with, or have instructed historically.

Supporting our female practitioners to maximise their potential

'Is this Private FDR "judging" something that you could be doing?' my other half asked me when I was mulling ideas over for this article. 'Oh well, yes, I'd love to, maybe say in another 20 years when I'm more experienced…' I answered, without thinking (by which point, I would be nudging 60).

Why did I still not feel that such a role was in my reach sooner? Probably the same reason why I would not put myself forward to become a Deputy District Judge – I'm not 'good enough', I don't have 'enough' experience, 'enough' confidence. I'm a female, state-school educated first-generation lawyer and a part-time working mum of a pre-schooler.

We all have a role to play in enabling our junior female colleagues to maximise their potential, and to be positive female role models, to ensure that they feel ambitious, engaged and inspired on their chosen career path, and to see that the variety of roles available within our profession are just as open and achievable to them as their male counterparts. To quote Billie Jean King, 'If you can see it, you can be it'.

Final word

The issue is of course not limited just to gender equality within the realm of Private FDRs. Indeed, this article only just touches the surface of the issues with diversity which are so endemic within the system we operate. The problem runs deeper still.

It is easy to put your head down and plough on with work in the same way we always have done and never really stop to question how we approach our practice and how our practice area operates. If we do not all take time to stop, challenge ourselves, our own unconscious biases, and the approach of others, then change will never happen.

We should be applying the same thought process in our choice of counsel for our case, selection of an evaluator for early neutral evaluations, arbitrators, mediators, divorce coaches, financial advisers – in fact, any appointment where we have discretion and who we use is a matter of choice.

On a wider note, family lawyers are withdrawing from the Bar and from private practice at an alarming rate. Family law has the potential to offer a multitude of different practitioners a diverse and bespoke career. If we are to ensure that our future generations of clients have access to evaluators, adjudicators and representatives who represent our diverse society, we all need to be playing our part in ensuring that support is provided at all stages of the profession. This is particularly so regarding the junior lawyers, to ensure our promising stars of the future are not overworked, underpaid and burnt out by the system and the failures of those who have gone before.

Notes

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4 Barrister earnings data by sex & practice area 20-year trends report, Appendix 1, September 2021, available at www.barcouncil.org.uk/uploads/assets/814f8208-6eab-4564-b6da9f85d49a1ce9/c39f111a-0a40-4781-a3bea6a8ac961241/earnings-data-report-2021-appendix.pdf
5 https://financialremediesjournal.com/directory.htm
6 'Practical Toolkit for Women in Law', The Law Society, March 2021, available at www.lawsociety.org.uk
7 'Male Champions for Change: Toolkit', The Law Society, 2018, available at www.lawsociety.org.uk/campaigns/women-in-leadership-in-law/tools/male-champions-for-change-toolkit
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11 Talking Family Law – The Resolution Podcast, 'Private FDRs', 14 December 2022, available at https://resolution.org.uk/podcast/season-2/
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13 Family Justice Council, 'Financial Dispute Resolution Appointments: Best Practice Guidance', November 2021, available at www.judiciary.uk/wp-content/uploads/2021/11/FJC-Financial-Dispute-Resolution.pdf
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Tech Corner: Choosing Tech that Will Transform the Way You Work

Non-essential office tech that can transform your work. How to sort the tech needs from the tech thneeds.[1]

Jim Hitch

Co-Founder and CEO at Casedo (casedo.com), Secretary Trustee at The Pixel Fund (pixelfund.org.uk)

Using the right tools can completely transform the way you work or bog you down with a solution that is more cumbersome than what you had before. How do you tack the fine line between improving your workflow or capsizing under a solution that leaves you floundering?

Understand how you work

Before you do anything, understand *how* you work. If you work in a relentlessly reactive way in which you are constantly overwhelmed, that is beyond the scope of this article, I suggest you stop right now (*everything* you are doing) and read Cal Newport's *A World Without Email*,[2] then come back when you're done.

I should instead perhaps have said, *understand how you should be working*. In other words, without all the excess admin of opening and reopening documents, or the copying of hand-written notes to a computer, or, as in my case (as was), the time-consuming typing up of the plan-for-the-day that only I'm going to read. All these things don't only take time, they take cognitive energy, leaving less for the stuff that really counts.

You should be focusing on the brain work that you are paid for, so you need tools that help to minimise the admin and make the brain stuff as efficient as possible.

The problem for many of us is that we can't see another way of working, we still think that the vertical inbox is the only communication game in town, or that a PDF *editor* is the only way to *read* PDFs (when you possibly never edit PDFs). A simple suggestion for trying to get some perspective on where improvements can be made in your workflow is identifying what things constantly drive you nuts and see if there's a way to stop them happening, both by you not having to deal with this anymore and others not having to deal with the same issues *from you*.

Being a Luddite is a bad choice, being a tech over-adopter can be worse

Whilst it's great to feel that you only need an ink pot and vellum, they don't really cut it in the modern workplace, and at some point you'll have to move on. Equally, at the other end of the scale is tech-for-tech's sake, something I can be quite partial to. I think my experience with the reMarkable 2 (see below) sits in this camp. In this space I'm still unsure of the benefits of using our mobiles to pay for stuff, especially when it comes to transport, as anyone who's always getting caught at ticket barriers behind someone who's Apple/Google Pay isn't playing ball will understand.

Try stuff and move on (if necessary)

Like desks and chairs, there are certain bits of software that we all have to have, an Office-like package, a Zoom-ish thing, but beyond those we need to find and try tools that suit not just what we do, but the *way* we do what we do.

Don't be too precious, much legal work comes in distinct cases, so you could try something for a case or two and then ditch it if it doesn't work. Due diligence can only get you so far in terms of how something actually works for you. Equally, don't be afraid to ditch what isn't working and move on (and so, top tip, keep the box of anything physical that you buy, so you can maximise the resale value).

A case in point for me is the reMarkable 2,[3] a high-end piece of digital paper that works excellently as a replacement for a messy desk and syncs wonderfully with computers as well having great OCR abilities. It even has a whole community dedicated to hacking it to install a far better and more feature-rich Operating System than comes as standard. I was a complete sucker for it, and it cleared my

desk and became the go-to place for my notes for around a year. In fact, the device sits well with a growing trend amongst certain tech users in that *it doesn't do much*, it's a focus-thing, that won't let you get distracted by the internet, for example, because it doesn't have a browser.

But I'm not a lawyer, I don't take serious notes, and my handwriting is so awful that the OCR didn't work well enough for me. So I had a very neat digital writing pad (also excellent for reading), that failed in one crucial aspect for me: I couldn't flick through it at speed as I could with paper. So I replaced it with a B5 notebook, and am currently re-loving the anarchy of paper.

What goes for hardware, also for software. Just because you've been using something for years (I'm looking at you, barristers still wedded to WordPerfect[4]) doesn't make it the best solution (it *might be*, but prove it still is). The years roll by fast, new software solutions pop up here and there. Give them a go.

Hardware, software and analogware – what tools do I use?

Casedo uses a whole suite of tools to run a tech business which are irrelevant to this article, but I will say that for Office products we moved from Google to Zoho and then to Microsoft Office. It's what most people use, if you create a Word Doc from the off, you'll not need to convert it to something else.

For workflow for both organisations we use *Airtable*,[5] an online relational database, which allows use to easily set up forms and automated responses, saving huge time in manual inbox labour. At both Casedo and the Pixel Fund, Airtable does the work of at least one full-time employee.

For both of the organisations I work for, the main needs not covered by existing software are:

- brainstorming, planning, strategising;
- making sense of documents;
- easily taking and sharing screenshots.

Brainstorming, planning, strategising

The reMarkable 2 was meant to cover this, but in the end didn't work for me. I have now split this between paper and a completely freeform spider map program called Scapple.[6] In the past, I have found mind-mapping software far too prescriptive, Scapple lets you do exactly what you want. Whilst my B5 lined notebook lets me plan the day using my own spin on Cal Newport's excellent Time Block Planner.[7] With my notebook I can be as messy and free form as I like and write on the fly. It's liberatingly physical. On my 35-inch monitor, a full Scapple gives me a handle on what I'm trying to achieve.

Making sense of documents

I'm not a lawyer, but I do need to make sense of lots of documents, and I need to come back to them and pick up where I left off. This is a naked plug, but I do use Casedo[8] to do this. We've raised money seven times now and the process is complicated and tiresome. I have all the steps and previous documents marked up and annotated in a Casedo casefile, ready for me when the next raise comes. I use it all the time for the odd collection of documents. At The Pixel Fund I put together meeting packs in Casedo that run to 800 or more pages.

Easily taking and sharing screenshots

This might sound like an odd one, but I'm *forever* needing to capture images on my monitor, whether they are for support articles on our website, an *aide mémoire*, sharing a good idea, explaining myself and so on (I've just checked and it's running at over a thousand screenshots a year). I use Snagit[9] which allows me to annotate and add graphics to all the screenshots I take. It can take a screenshot of an entire webpage by scrolling and does video screenshots too.

And finally – don't confuse with productivity with efficiency

If you put 'productivity' into Amazon, you'll get 80,000 results. Productivity means doing more 'stuff' in a given unit of time, whereas efficiency, though similar, means doing that 'stuff' in a more streamlined way. Productivity doesn't give you more time, you just have to do more in the same amount of time. Efficiency gives you more time.

Why is this important in terms of tools? It's a rule of thumb – don't choose tools that keep you on the hamster wheel. Task list software can be notoriously awful at this, your to-dos will never end.

Define what you do and don't want to be spending your time on and find tools that help you to achieve that goal, it'll transform the way you work.

Notes

1 If you've read Dr Seuss' *The Lorax*, you'll know exactly what I mean, if not: 'A thing that is not required yet is purchased in great amounts anyways' (www.urbandictionary.com/define.php?term=thneed).
2 www.calnewport.com/books/a-world-without-email/
3 https://remarkable.com/store/remarkable-2
4 www.wordperfect.com
5 https://airtable.com
6 www.literatureandlatte.com/scapple/overview
7 www.timeblockplanner.com/
8 https://casedo.com
9 www.techsmith.com/screen-capture.html

Money Corner: Did the 2022 Permacrisis Reduce Your Client's Pension Credit?

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2022, a year that we all hoped would usher in a return to normal following the COVID-19 pandemic, turned out to be full of seismic shifts, and it was certainly a stark reminder that the value of investments can go down as well as up. Investors had to face the dual threat of inflation and interest rates rising sharply and both bonds and equities fell sharply in response. To give these historic moves some context, a typical 60:40 stock:bond portfolio fell 17.7% in US dollar terms (Global Developed Markets/10-year Treasuries), which was the worst outcome since 1931. In the United Kingdom, the 10-year gilt total return was –20.1%, the worst since 1974, whilst the US 10-year Treasury fell by 16.4%, the worst (in US dollar terms) since 1788 when the US Constitution was ratified. At its nadir on 27 September, the 30-year gilt in total return terms was down by 52.4%.[1]

These huge falls were in response to an enormous change in the interest rate environment over the past 12 months (in which the Fed target interest rate (upper end) rose by 4.25%, its fastest rate since 1977–80). To a degree this change was overdue and to be expected following a period since the Global Financial Crisis in 2009 in which money had been virtually free (in September 2021 more than a fifth of the debt issued by governments and companies around the world was trading with negative yields,[2] i.e. investors were paying for the privilege of lending to these governments and companies).

We have witnessed a painful re-set of investment assets (including equities) which has wider and longer-term implications for valuing personal investments such as pensions on divorce and also the capitalisation of maintenance payments and cashflow forecasting to inform and advise on post-settlement choices.

It is also worth noting that at the time of writing in January 2023, although 2022 has been a bad year for investors, there is now a higher sustainable level of income on offer from selected fixed income and equity investments now that the re-set is behind us.

As we look ahead to 2023, the overriding fear dominating the investment world is inflation not recession (another departure from the recent past). At 9.1% US inflation for June 2022 was the highest since 1981 and November UK inflation of 11.1% was the highest since 1982. This is another large shift compared to our experience of the past 20 years and it is the primary driver of Central Bank behaviour, which means that further interest rate rises are likely even though inflation now looks to be peaking in the major developed economies. As labour markets weaken further and supply chain pressures ease we expect further moderation in inflation, which investment markets would view as good news. Markets are currently more worried about inflation becoming entrenched, resulting in higher wage demands and ever higher inflation, than they are about growth falling. This is partly because inflation has not been a threat for such a long time and also due to the very real impact that it is now having on all household budgets and our day-to-day lives. This market slowdown therefore has the potential to do longer lasting damage to investor confidence and behaviour.

A good investment partner will not just focus on the investments that we might hold inside an investment 'wrapper' (such as a pension) but would also advise on the broader picture. It is impossible not to have been impacted by the current investment environment (even if clients do not consider themselves to be investors) and our experience in the past few years has had a huge and unavoidable impact on the value of assets accumulated during a marriage as well as on sentiment and the way clients feel about investing going forwards.

The cash value of a pension is referred to as the CETV, or Cash Equivalent Transfer Value (aka CETV, CE or CEB), for pension sharing purposes. Pension sharing orders must be expressed as a percentage of the CETV. If pensions are shared on divorce, one party will receive, as a cash payment into a pension of their choice, a percentage of the CETV (except for unfunded public sector schemes, where the spouse of the member may become entitled to a defined benefit pension in their own right). The CETV is recalculated at the point of implementation, so the cash amount is never known in advance.

There are numerous permutations of types of pensions but, in broad terms, there are only two main categories of pensions: money purchase pensions, also known as defined

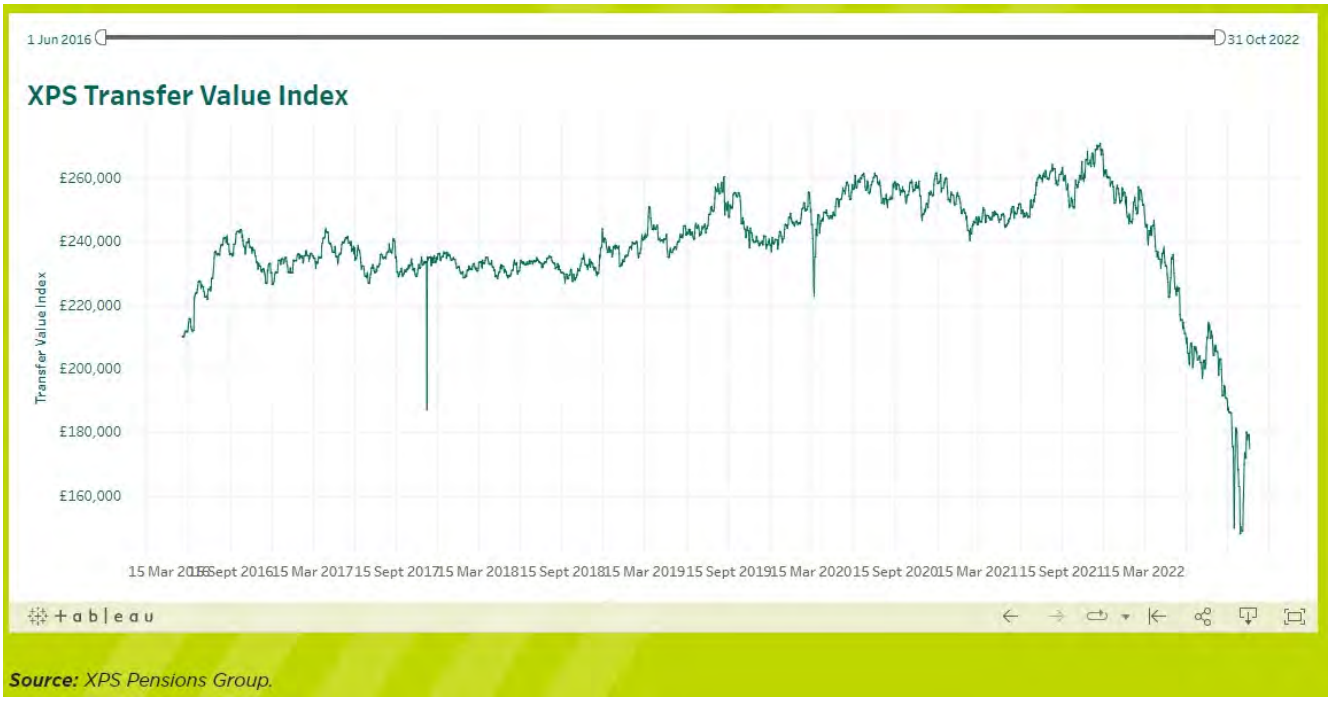

Figure 1: XPS Transfer Value Index. Source: XPS Pensions Group.

contribution pensions, and defined benefit pensions (e.g. final salary schemes and CARE schemes).

Money purchase pensions are simply investment wrappers, so the CETVs are the value of the underlying assets, less any relevant charges or penalties. The CETVs fluctuate in line with the investments selected, and therefore investment markets more generally.

However, the situation is markedly different for defined benefit pension schemes.

Defined benefit pension schemes CETVs (DB CETVs) represent the cash amount that the scheme trustees are prepared to pay in exchange for members giving up their entitlement to guaranteed benefits. The assumptions underlying the CETVs are set by the trustees of each scheme. There are numerous, scheme-specific factors that affect DB CETVs. However, in broad terms, as the cost of securing a guaranteed return or income rises, as occurs when gilt yields fall, CETVs in general tend to rise. Conversely, when interest rates and gilt yields rise, as has happened recently, the cost of providing a guaranteed income also falls, as do defined benefit CETVs.

This can have a dramatic impact on finances in divorce cases, especially when there are significant changes to interest rates in a relatively short period of time.

There has been a prolonged period of historically high CETVs, starting with a spike immediately after the surprise results of the Brexit vote, which prompted market expectations of falling interest rates and, as a result, falls in medium-term gilt yields and rises in CETVs.

However, the situation has changed rapidly over the last year and since Liz Truss' 'mini budget' in September 2022 in particular.

We have seen one case where a DB CETV fell from £2.1m to £1.1m over the period of a year, during which divorce negotiations were continuing and another where the CETV fell from £1.6m to £1m. Not all cases are so extreme, but falls of around 30% over a few months have become quite common.

Until recently, we were seeing CETVs which in some cases were 40 times the gross annual income. In other words, for giving up a guaranteed income of £10,000 gross per annum, some schemes offered to pay £400,000, or even more, as cash into a money purchase pension. The highest multiple we saw was 72 times the gross annual income, although that was an exceptional case. We have recently seen a scheme offer a CETV of only 13.4 times the gross annual income, which is lower than we have seen for many years.

The CETV calculation basis varies from scheme to scheme, so it can be misleading to assume anything about any specific case, but it can be helpful to be mindful of the general trends.

XPS provide an index which represents the average transfer values for schemes it administers for a member at age 64 with a retirement age of 65. This is not necessarily indicative of the entire market, and every scheme is different, but it does provide a stark visual representation of the potential movement in CETVs over a short period (see Figure 1).

In the context of sharing a pension on divorce, falls in CETVs between the date the value is obtained for any pension sharing calculations and the date of implementation can lead to the recipient of the pension credit receiving a significantly smaller cash payment than expected. The experience of 2022 when gilt yields and expectations changed so rapidly is a useful reminder that in many cases it is prudent to update any pension sharing calculations shortly before going to court to get a pension sharing order.

As already outlined, the last two decades have delivered consistently high returns for passive holders of 60% equity/40% bond portfolios, driven largely by the nature of the macro-economic environment.

After an extended period of quantitative easing and 'over earning' from investments, it was reasonable to expect lower real returns ahead, but the re-set in 2022 proved to be more dramatic and rapid than anticipated. The good news is that a considerable adjustment in both interest rates and interest rate expectations is most likely behind us

and in selected bond and equity investments investors can now be 'paid to wait' for the macroeconomic mists to clear without taking on huge levels of risk.

Attempting to time when to get in and out of investments is tricky, and impossible to do consistently, but catching the rebound helps. Staying invested in the S&P 500 for the past two decades would have delivered annualised returns of 9.76%. Assuming that the 10 best days were missed from that 20-year period, the annualised return falls to 5.6% and missing the 30 best days cuts it further, as shown in Figure 2.

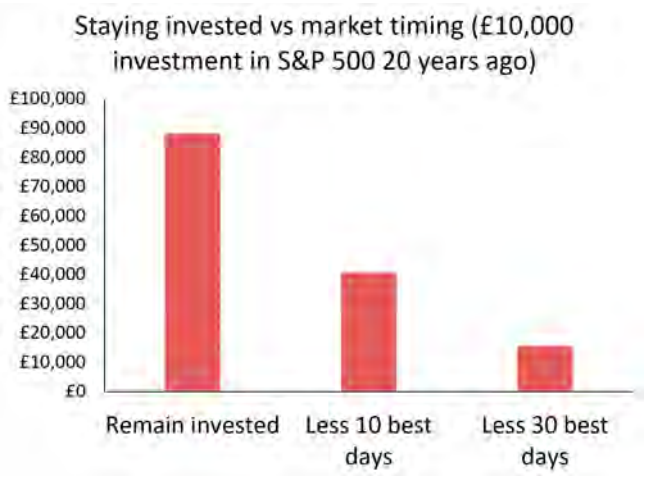

Figure 2: Staying invested vs market timing (£10,000 investment in S&P 500 20 years ago)
Source: Refinitiv/Evelyn Partners. Data as at May 2022.

In the context of divorce negotiations, the question many solicitors will be asking is whether to obtain updated pension valuations and request revised pension sharing calculations before implementing a settlement. When advising the party receiving a Pension Credit, it might seem at first that it is fundamental to do so, as they may well receive a far lower cash amount than expected.

However, there isn't a simple answer to this question that is true for all cases. This is because, whilst valuations have fallen, the cost of generating a guaranteed income has also fallen, and in some cases revised calculations will result in a relatively modest change to the pension sharing percentage, or even the percentage share for the recipient falling rather than rising (as might be expected).

If solicitors do request updated calculations without guidance from a pension and divorce specialist, we would suggest that they manage their client's expectations by explaining that the pension sharing percentage could fall, depending on the actuarial assumptions, and the purpose of the update is to reduce the risk of an unfair settlement, rather than to improve upon the existing percentage.

Like with most pension considerations in divorce, there are various exceptions and caveats, and we would always advise proceeding with caution.

Important information

This article is solely for professional advisers and should not be construed as investment advice. Whilst considerable care has been taken to ensure the information contained within this commentary is accurate and up to date, no warranty is given as to the accuracy or completeness of any information and no liability is accepted for any errors or omissions in such information or any action taken on the basis of this information. Investments carry risk – you may get back less than the amount invested. Past performance is not a guide to future performance.

Notes

1 All sources, except where indicated in the article, are Refinitiv, Evelyn Partners.
2 Chris Flood, 'In charts: bonds with negative yields around the world', *Financial Times*, 27 September 2021.

Book Review: *Quiet Revolutionaries*

The Married Women's Association and Family Law, Sharon Thompson (Hart Publishing, 2022)

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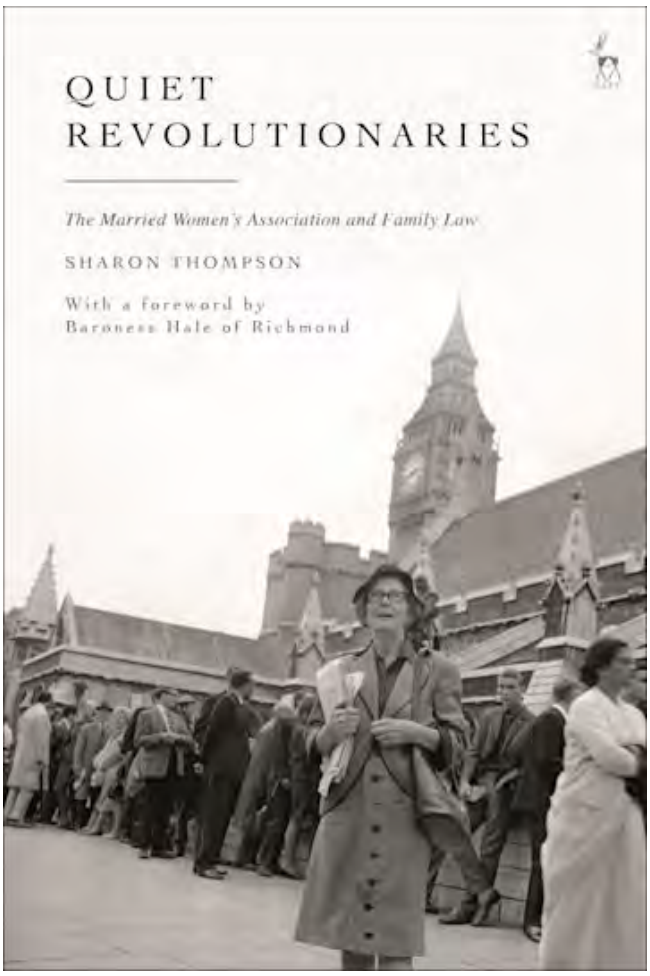


Family lawyers today often talk of reform. In a relatively short period of time, we have seen fundamental changes to the landscape of family law including comprehensive no-fault divorce and mixed-sex civil partnerships. We are likely to welcome new reforms in the future too, such as changes to weddings law. With any luck, we might even get increased protections for cohabitants. In many ways these reforms are all about progression, modernisation and tailoring the law to the needs of a changing society. They are forward-looking, pioneering and seeking to break new ground.

By focusing on the future there is a natural temptation to dismiss the past. It might be asked whether reforms that took place last century offer any insights for campaigns today given the different societal and political contexts. After all, marriage and interpersonal relationships have changed, arguably for the better. But, as Sharon Thompson demonstrates in *Quiet Revolutionaries*, dismissing the past would be a mistake. In this wonderfully crafted book Thompson delves into the familiar past reforms in the field of family property and explores how incremental change is achieved. More importantly, the book provides the untold story of the protagonists and their sculpting of a movement that often is overlooked by conventional histories of family law.

The core focus of the book is on the Married Women's Association, a quaintly-named organisation that Thompson admits brings to mind 'tea parties and charity fundraisers'. But that could not be further from the truth. Formed in 1938, the mission of the organisation was to reform family property. It was borne out of the frustration experienced by wives that their contributions to the home were not valued in the same way as their husband's. While the Married Women's Property Acts of the Victorian era had enabled wives to own their property and keep their earnings, they did little to address the issue of genuine equality of the sexes. A gendered division of labour often resulted in the devaluation of both work in the home and childcare, which in turn created economic vulnerability upon divorce. It was a group of quiet revolutionaries that sought to challenge this position and achieve their ultimate goal of equal partnership in marriage.

This characterisation of the Association as 'quiet but persistent' is carefully unpicked by Thompson and the accounts of its work are juxtaposed against the more headline-grabbing revolutions ushered in by the suffragettes. Although the Association was composed of former suffragettes, the strategies adopted were arguably more subtle and involved 'polite lobbying'. But this in no way denies the shrewd tactics adopted by these women and, as Thompson notes, when needed there were 'dramatic confrontations with politicians, civil servants and Law

Commissioners'. The Association's work was not easy too – Thompson observes that the Association members' commitment, strategizing and long-hours of work were often met with 'derision, ridicule, wilful ignorance and reactionary backlash'. Indeed, the depiction of members of the Association by the press oscillated between calling them 'fragile little women' and 'threatening man-haters'.

By exploring the tireless work of the Association, Thompson skilfully places women back into the historical record. Women are not the afterthought in this book or painted simplistically as the victims of an unjust patriarchal society. Instead, Thompson allows us to see their individual personalities, their strengths and, at the same time, their vulnerabilities. The public and private lives of powerful public figures in the organisation such as Edith Summerskill MP, Vera Brittain, Dora Russell, Helena Normanton and Juanita Frances are exposed and brought to life. For example, the prologue reveals an illuminating exchange between the Association's founder Juanita Frances and her husband as to which political party she should vote for in the 1935 General Election. After rejecting her husband's somewhat blithe and simplistic advice, Frances reads all she could find on the suffragettes and educated herself in politics so that she might exercise her right to vote effectively. She went from a political novice to a leading feminist campaigner of the day. It is these vignettes, sourced through meticulous archival research, that allow Thompson to provide fresh insights into the easily overlooked daily lives of women leading the Association.

Another theme running through this book is that reform is not a singular act or moment of triumph. Rather it is a process and continuing conversation. Progress, as Thompson reminds us, is not always inevitable and for all the successes of the Association, there were crushing failures too. Their equal partnership Bill never came to fruition and throughout the time the Association was active there were 'few major legislative reforms'. But the Association succeeded with a series of small victories in the 1950s and 1960s relating to maintenance, housekeeping allowances and matrimonial home rights. While these have been overshadowed by the Divorce Reform Act 1969 and the Matrimonial Proceedings and Property Act 1970, they nevertheless remain significant milestones in the Association's history. They remind us that effective reform need not always be fundamental, structural change to the law's architecture but can take the form of a gradual erosion or chipping away of the law's foundations. Thompson teases out this theme throughout the book and highlights a perceptive observation by Vice President of the Association, Teresa Billington-Greig in 1958 that:

> 'Reform movements are like builders; they set out to erect structures in which human beings can live better lives but there are few of them which can begin their constructive work at once because of the state of the site on which they have to build.'

Much of this building work requires an appreciation that reform can be measured differently by different people. It does not necessarily mean legislation or a landmark case but can involve shifting societal perspectives, reorientating public debates and injecting a new language into our vocabulary. For example, in 1964 the Association recognised the success of its reform activities by noting that, 'we have created by propaganda and agitation a public opinion that marriage is a partnership'.

The structure of the book is innovative and engaging. It is not a terse chronological recounting of the Association's history from inception to demise. Rather, Thompson intersperses the chapters with interludes or spotlights on specific key protagonists, moments and developments. This provides a vibrancy to the book and opens it up to a wider audience. They ensure that the book will be of interest not only to family lawyers but also to a wide range of scholars, especially those interested in the movement for women's equality. One rather striking example is an interlude exploring Lord Denning's views of the Association, and of women more generally. Thompson highlights his views on equality and his belief that by 1950 the wife had become the 'spoilt darling of the law' and the husband 'the patient pack-horse'. The reaction of the Association, and its refutation of this claim, is then revealed. Interestingly, this exchange exposed some of the fault lines in the Association's membership and it prompted a realisation that maintaining public support for its aims required compromise, regrouping and the repackaging of its central message.

Quiet Revolutionaries is a fantastic book that should be read by legal historians, practitioners and anyone interested in how legal change is achieved. Thompson deserves praise for reanimating the lives of women that in muted, understated and unconventional ways fundamentally changed the public conversation around property holding in marriage. Drawing upon rich insights from archival and empirical research, this book reveals that 'the MWA's story is a microcosm of feminist legal activism'. This observation is important as, despite the House of Lords' decision in *White v White* and the sculpting of the evolved discretion of Part II of the Matrimonial Causes Act 1973 by the courts, it is arguable that genuine equality has not yet been achieved, and that this feminist activism is still needed. *Quiet Revolutionaries* provides a new way of thinking about that activism and how 'success' might be measured for reform projects in family law today.

Financial Remedies Case Round-Up

October to December 2022

Polly Morgan

Case Editor, Associate Professor and Director of UEA Law Clinic, University of East Anglia

A sad tale's best for winter, so we start with October's Supreme Court decision in *Guest v Guest* [2022] UKSC 27. As with other leading estoppel cases, it concerned a farm and a promise of inheritance, in reliance on which the claimant undertook decades of work on the farm. The claimant in *Guest* was the son of the farm owners, and he had worked for decades on what the first instance judge found was the promise of inheritance. Such work was paid, but below the level that the son would have been able to obtain by working at another farm. Sadly, the parents and son could not agree on modernisation of the business, and this led to the son being disinherited. The issue before the Supreme Court was not whether his estoppel claim succeeded, but what the remedy should be. Should the remedy compensate for loss, such as the amount of lost income, or should it otherwise remedy the unconscionability; and, if the latter, what did that look like? The court was split, with the majority finding that the outcome is to remedy the unconscionability. However, the promise in this case was of future inheritance, and no one had yet died. The court therefore held that the parents had a choice: they could place the farm into a trust for the benefit of the son, or they could buy him out now, with a discount for accelerated receipt. The minority would have compensated for loss of income, but as the academic Brian Sloan has noted on Twitter, there is 'effectively zero engagement' between the majority and minority judgments. However, the case is already leaving its mark with two cases referencing it being decided almost immediately.

The first of these was December's *Hudson v Hathaway* [2022] EWCA Civ 1648, a much-needed Court of Appeal decision on whether detriment remained a requirement of a constructive trust. In each issue of the *Financial Remedies Journal*, we identify one case which is a 'must-read' for practitioners. *Hudson* is our Mostyn Award winner for this issue. Enormous litigation risk is involved in Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) cases, both relating to the quality of the evidence and to uncertainties in the law. *Hudson*'s decision on detriment was therefore not before time, as there had been uncertainty post-*Jones v Kernott* [2011] UKSC 53 and *Stack v Dowden* [2007] UKHL 17 as to whether those cases' failure to consider detriment explicitly meant that detriment was not needed; and/or whether the fact those were joint names cases was relevant to this.

The case concerned an unmarried couple who communicated with one another post-separation in writing with an evidentially convenient degree of clarity. They agreed that the respondent would retain the family home (which was in joint names) for herself and their children, and the claimant would retain his shares and pension. In reality, the respondent had no claim to his pension and at its highest her claim in respect of the claimant's shares was a claim that a constructive trust had arisen in respect of them. The parties effected this agreement but some years later the claimant sought sale of the house and an equal share of the proceeds under TOLATA. The court held that detriment had been so obvious in *Stack* and in *Jones* that the Supreme Court had not needed to address it, and that its explicit approval in both cases of *Grant v Edwards* [1986] 3 WLR 114, a case which involved detrimental reliance, implied its continued acceptance of it as a prerequisite. The Court of Appeal also drew on *Guest*, observing that it is the detriment which makes the agreement or promise enforceable.

Hudson is useful for other reasons too. Although not argued at first instance or at first appeal to Kerr J, the Court of Appeal asked for arguments on the effect of section 53 of the Law of Property Act 1925, aka the bane of law students' lives. Section 53 provides that an interest in land can be created or disposed of by a signed document; unlike a legal interest, a deed is not required. In *Hudson*, the applicant's emails to the respondent expressly giving her the house were in writing and signed, the court noting that there was 'a substantial body of authority to the effect that deliberately subscribing one's name to an email amounts to a signature'. This meant that the applicant had unwittingly complied with section 53 and thereby released his interest in the property to the respondent (as section 36(2) says is possible). Two thoughts come to mind on reading this part of the judgment. First, there is the feeling of worry that a client might inadvertently do the same thing with an ill-judged impetuous email. Secondly, there is the feeling that the Court of Appeal has done what *Macleod v Macleod* [2008] UKPC 64 did with section 35 of the Matrimonial Causes Act 1973 and suddenly reminded everyone that

there is a bit of statute law that we overlook more than we should.

Fear not. This is not the cohabitees' remedy journal: if it was, we would not stretch to three issues per year. Before we consider financial remedies, however, we need to divert first to marriage law, and in particular a brief flurry of cases concerning the validity of a purported ceremony. We summarise such cases because they are, ultimately, about the money, as a void marriage, even if void *ab initio*, opens the door to a financial remedies order, whereas a non-qualifying ceremony (formerly called a 'non-marriage') does not. Prior to *Akhter v Khan* [2020] EWCA Civ 122, the law was in a state of some confusion about where the dividing line lay and it is now much clearer. However, there were still issues that needed to be resolved. *Parveen v Hussain and the Queen's Proctor* [2022] EWCA Civ 1434 involved a talaq divorce recognised in Pakistan but not entitled to recognition under the Family Law Act 1986, as it was a transnational divorce (*Re Fatima* [1986] 1 AC 527). W's subsequent marriage in England would therefore be bigamous. Yet formal validity issues, which include capacity to marry, are governed by the country of ante-nuptial domicile and the wife's ante-nuptial domicile was Pakistan. The Court of Appeal decided against a general rule, but held that a court should give weight, and probably significant weight, to the general policy objectives of seeking to uphold the validity of a marriage.

Moving to financial remedies themselves, we have several useful decisions. In *P v P* [2022] EWFC 158, DDJ David Hodson considered the costs position where the court was concerned with the sharing principle yet one party's costs were significantly higher than the other. The effect of no order as to costs in such a situation would be for the more frugal party to indirectly subsidise the costs of the other. He concluded that the costs spent from marital resources could be treated like an advance of partnership funds from a business, and added back, albeit (as there was no wanton dissipation in that case) the add-back was not intended to be punitive. The almost simultaneous decision of HHJ Hess in *YC v ZC* [2022] EWFC 137 led to the adding back of a proportion of the wife's grossly disproportionate expenditure, the judge being more critical of the expenditure levels in that case. (Incidentally, *YC v ZC* also reminds us that there are pensions out there with guaranteed annuities rates near the 10% mark and that it is essential to identify this – the pensions adviser in this case had not done so – and to be aware that an externally transferred pension credit loses the guaranteed annuity rate.)

Readers will be aware of Mostyn J's comments as a deputy High Court judge in *GW v RW* [2003] EWHC 611 (Fam), and later in *CB v KB* [2019] EWFC 78, that the starting point for a top-up of child maintenance above the Child Maintenance Service limits should 'almost inevitably' be based on the percentage applicable to high earners under the child support rules, as though the cap did not exist. In *CMX v EJX (French Marriage Contract)* [2020] EWFC 136, Moor J declined to apply this starting point while acknowledging 'the beauty' of it, referring to its significant disadvantages depending on the number of children and its lack of connection to actual budgetary need.

On the issue of child maintenance budgetary needs, at the latest hearing in the *Collardeau-Fuchs* case, reported at [2022] EWFC 135, Mostyn J drew a distinction between those cases in which child maintenance was front and centre, such as claims under Schedule 1 to the Children Act 1989, and those cases where it was a subsidiary issue to a financial remedy claim for the benefit of a spouse. In the former, the child's budgetary needs, and those of their carer in their capacity as carer, are subject to careful scrutiny and application of the case-law that has arisen in respect of Schedule 1, whereas in the latter they are not. Where an application is brought under the Matrimonial Causes Act 1973 for maintenance for a child in a situation in which the parent with care has no claim for their own benefit that is being adjudicated at the same time (such as where a nuptial agreement excludes it), the court, Mostyn J argues, should take the careful approach found in Schedule 1 cases.

Michael Allum discusses these two cases further in a blog for this journal's website ('Child Maintenance Outside the Child Maintenance Service: Where Are We Now?', 12 December 2022, available at https://financialremediesjournal.com/content/child-maintenance-outside-the-child-maintenance-service-where-are-we-now.79e743f8ed5c4c5894980dcab7a466b3.htm).

AIC Ltd (Respondent) v Federal Airports Authority of Nigeria (Appellant) [2022] UKSC 16 is not a case name one would assume to be relevant to the family field. However, it deals with what a judge should do when, shortly after oral judgment but before a formal written minute of the order has been sealed, one of the parties asks the judge to reconsider the judgment and the order. Distinguishing *Re L (Children) (Preliminary Finding: Power to Reverse)* [2013] UKSC 8, on the grounds that the welfare principle makes children cases different, the Supreme Court held in *AIC* that the strong public interest in litigation finality meant that a judge in this position 'should not start from anything like neutrality or evenly-balanced scales' but should consider whether the application should be entertained at all.

Finally, it would appear that hens have grown teeth and pigs are flying and white leopards are prowling: we have an honest-to-goodness compensation principle case to report, *TM v KM* [2022] EWFC 155. While noting with some understatement that post-*Miller/McFarlane* [2006] UKHL 24 authorities 'at High Court level were discouraging to compensation claims', HHJ Hess saw Moor J's approach in *RC v JC* [2020] EWHC 466 (Fam) as 'resonant and applicable' to the facts of *TM*. The wife was a high earner who had relocated for the husband's job more than once, and given up work to raise their children. This was 'one of those rare and truly exceptional cases where a discrete compensation award is appropriate'. Quantification of the award involved considering the benefit the wife already received under the sharing principle of the capital accrued from the husband's earnings; the *Waggott v Waggott* [2018] EWCA Civ 727 point that future income is not subject to the sharing principle; the wife's voluntary choices; and the statutory steer towards a clean break, which could be achieved notwithstanding a compensation award.

The Summary of the Summaries

Henry Pritchard

1 Hare Court

We have summarised the following cases on the *Financial Remedies Journal* website since the last issue went to press, and now present these as a summary of summaries. Visit the 'Cases' tab on the website to search a compendious back catalogue of financial remedies cases via their keywords.

A v B [2022] EWFC 149 (HHJ Reardon)

Decree of divorce pronounced notwithstanding that marriage was void for bigamy, as no formal application for annulment had been received. *Keywords: nullity; validity of marriage*

A Wife v A Husband [2022] EWFC 154 (HHJ Vincent)

A claim for an upward variation of child periodical payments 8 years after the parties had initially resolved their financial claims was dismissed in the absence of the requisite change in circumstances. *Keywords: cohabitation of the recipient of spousal maintenance; child maintenance; conduct; variation applications*

AB v CD [2022] EWFC 116 (Roberts J)

A second set-aside application was struck out on the basis that the applicant ought to have raised the relevant allegations of material non-disclosure in the first rehearing some years before, at which time the parties had compromised all of their claims. *Keywords: valuation of shares; setting aside orders (including Barder applications); striking out applications*

AIC Ltd (Respondent) v Federal Airports Authority of Nigeria (Appellant) [2022] UKSC 16 (Lords Hodge, Briggs, Sales, Hamblen and Leggatt)

Consideration of the principles to be applied on an application for reconsideration of a judgment after the giving of an oral judgment and before the sealing of the formal order. *Keywords: principle of finality; appeals; judicial discretion*

ARQ v YAQ [2020] EWFC 128 (Moor J)

£80m of assets transferred from the husband to the wife for the purposes of tax minimisation were found to be matrimonial property, but were shared unequally due to their pre-marital origins. *Keywords: matrimonial and non-matrimonial property; sharing; add-backs; trusts; tax; needs*

BK v Secretary of State for Work and Pensions & LB [2022] UKUT 282 (AAC) (HHJ Rowland)

F's appeal of a child maintenance assessment on the basis that the Child Maintenance Service had used too high a figure for his gross income was allowed in part. *Keywords: child support; appeals*

Renée v Galbraith-Marten [2022] EWFC 118 (Mostyn J)

The applicant mother, who was already subject to an extended civil restraint order, received permission to bring a variation application in respect of child maintenance, but not in respect of a Schedule 1 application for capitalised school fees. *Keywords: child maintenance; Children Act 1989 Schedule 1 applications; variation applications; experts; civil restraint orders*

Cazalet v Abu-zalaf [2022] EWFC 119 (Mostyn J)

An application for the set aside of a decree nisi was dismissed in circumstances where the wife argued that there had since been a reconciliation, and where the actual length of the marriage would have a significant bearing on sums payable under a pre-nuptial agreement. *Keywords: agreements; divorce*

CF v Secretary of State for Work and Pensions [2022] UKUT 271 (AAC) (HHJ Wikeley)

Decision set aside by the Upper Tribunal where F's first appeal had wrongly been dealt with on paper without a hearing. *Keywords: child support; child support appeal procedure*

Clarke v Clarke [2022] EWHC 2698 (Fam) (Mostyn J)

Appeal allowed where the respondent's director's loan account had been taken into account incorrectly in valuing a private company, and where a discount had wrongly been applied to the value of said company. *Keywords: valuations; companies; appeals*

CMX v EJX (French Marriage Contract) [2022] EWFC 136 (Moor J)

A needs-based award provided to the wife on the basis that she ought to be held to the terms of a French marriage contract notwithstanding the lack of independent legal advice and formal disclosure of each party's resources. *Keywords: needs; agreements; pensions on divorce*

Collardeau-Fuchs v Fuchs [2022] EWFC 135 (Mostyn J)

A pre-nuptial agreement was found to have created a separate property regime and to have waived spousal maintenance. The judge awarded secured child periodical payments, providing guidance as to the assessment of the same. *Keywords: secured provision; Duxbury capitalisation; agreements; Children Act 1989 Schedule 1 applications; child maintenance*

Dixon v The Crown Estate Commissioners [2022] EWHC 3256 (Ch) (HHJ Hodge KC)

A successful proprietary estoppel claim following the dissolution of a company which still held the legal title to two properties, meaning that the properties had seemingly unintentionally vested in the Crown. *Keywords: proprietary estoppel*

Quashie v Solomon [2022] UKPC 34

Appeal dismissed in circumstances where, a financial order having been made many years previously by former spouses in respect of some property, but not implemented, their daughter had applied successfully to establish an interest in this property via estoppel and constructive trusts. *Keywords: proprietary estoppel*

Guest v Guest [2022] UKSC 27

The Supreme Court gave guidance as to the proper approach to the granting of relief under the doctrine of proprietary estoppel. *Keywords: proprietary estoppel*

HA v WA & Anor [2022] EWFC 110 (Sir Jonathan Cohen)

The court heard a beneficial ownership dispute in which the wife succeeded in establishing that her brother was the beneficial owner of a property held in her name. *Keywords: trusts*

Hudson v Hathaway [2022] EWCA Civ 1648 (Lewison, Andrews and Nugee LLJ)

The Court of Appeal confirmed that detriment remained a requirement of a constructive trust whilst finding that the relevant property had in fact been expressly disposed of through the operation of LPA 1925, s 53 via a signed email. *Keywords: detrimental reliance; TOLATA claims; signature; LPA 1925, s 53*

J v H [2022] EWFC 133 (Peel J)

Application for a freezing injunction dismissed where the procedural prerequisites had not been fulfilled and where there was not sufficient evidence to warrant the order sought. The husband was ordered to pay the wife's costs. *Keywords: costs; freezing injunctions*

Boughajdim v Hayoukane [2022] EWHC 2673 (Fam) (MacDonald J)

The court held in favour of a wife who sought a divorce in the face of a husband who averred that there had been no valid marriage, following a Moroccan court's decision that the parties had satisfied the legal conditions for marriage there. *Keywords: lex loci celebrationis; estoppel per res judicatam; validity of marriage*

Nicolaisen v Nicolaisen [2022] EWFC 70 (Moor J)

In a case involving large assets and a range of competing fora, an applicant wife's petitions in England were dismissed for want of jurisdiction because she was not found to have been habitually resident for the requisite period. *Keywords: forum; jurisdiction; forum disputes*

P v P (Treatment of Costs in Sharing Cases) [2022] EWFC 158 (DDJ David Hodson)

The judge provided for an adjustment to what would otherwise have been an equal sharing award to reflect the large disparity in legal costs expended by the parties. *Keywords: sharing principle; add-backs*

Parveen v Hussain [2022] EWCA Civ 1434 (Moylan, Asplin and Stuart-Smith LLJ)

The Court of Appeal determined that, notwithstanding that a wife's previous divorce was not entitled to recognition under the FLA 1986, it had been nevertheless effective on the proper application of the law on capacity, bearing in mind wider policy objectives. *Keywords: validity of marriage; conflict of law; divorce; nullity*

Pierburg v Pierburg [2022] EWHC 2701 (Fam) (Moor J)

The wife brought a Part III application after withdrawing from proceedings conducted in Germany. Having sought to resile from an agreement to compromise the application, executed shortly before the final hearing, the wife was

nevertheless held to its terms. *Keywords: repudiation; overseas divorce and the 1984 Act; jurisdiction; agreements*

PP v Secretary of State for Work and Pensions & SP [2022] UKUT 286 (AAC) (HHJ Wikeley)

A father successfully appealed a re-assessment of his child maintenance liability on the basis that the variations made in respect of unearned and diverted income had been incorrectly reached. *Keywords: child support; appeals*

Ralph v Given [2022] EWHC 2395 (KB) (Freedman J)

An application for summary judgment in relation to an application to deliver up an Aston Martin DBX and a Range Rover Sport against a former fiancé failed on the basis that the respondent had a real prospect of success in defending the claim. *Keywords: cohabitation; gifts; summary judgment; chattels*

SA v FA [2022] EWFC 115 (HHJ Hess)

A jurisdiction dispute was resolved with the UAE being determined as the appropriate forum for a financial remedies application, bolstered by undertakings offered by the husband. *Keywords: forum; jurisdiction; domicile; divorce*

Stacey v McNicholas [2022] EWHC 278 (Fam) (Moor J)

An unsuccessful appeal from an order that the father, in circumstances where the court lacked jurisdiction to award child periodical payments, should pay a series of lump sums to the mother to cover rental payments. *Keywords: Children Act 1989 Schedule 1 applications*

TM v KM [2022] EWFC 155 (HHJ Hess)

An award made, in part, on the basis of the compensation principle where the wife had sacrificed her status as a higher earner in favour of her family commitments. *Keywords: compensation principle*

W v H (Contested Divorce) [2022] EWFC 150 (HHJ Greensmith)

In contested divorce proceedings the wife was not able to establish that the husband had behaved in such a way that she could not reasonably be expected to live with him. The case had involved the use of a ground rules hearing in order to determine participation directions for the husband, who had Autistic Spectrum Disorder. *Keywords: defended divorce; intermediaries*

WD v MH [2022] EWFC 162 (Recorder Rhys Taylor)

The court gave effect to an agreement made in previous judicial separation proceedings in 2008, uprating the value of a key asset in accordance with its increase in value during the intervening years in order to quantify a needs-based award. *Keywords: costs; agreements; delay*

XO v YO & Anor [2022] EWFC 114 (HHJ Hess)

In a case with international elements and a non-disclosing husband, it was held, *inter alia*, that the court had jurisdiction to determine a claim in relation to a property in Miami, and that adverse inferences could be drawn from the husband's failure to engage in the proceedings. *Keywords: conduct; Hague Convention on the Law Applicable to Trusts and Their Recognition; jurisdiction; disclosure; foreign assets*

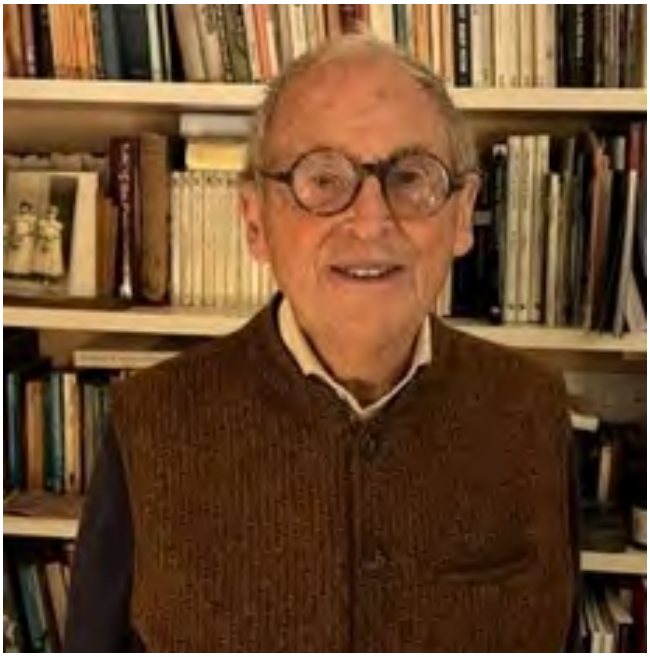
YC v ZC [2022] EWFC 137 (HHJ Hess)

An award based on a needs-based departure from equality after a long marriage, including an adjustment that the wife would have to amortise her *Duxbury* fund because of her excessive spending on legal costs. *Keywords: Duxbury capitalisation; add-backs; pensions on divorce*

Interview with Sir Mathew Thorpe

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

Nicholas Allen KC
29 Bedford Row



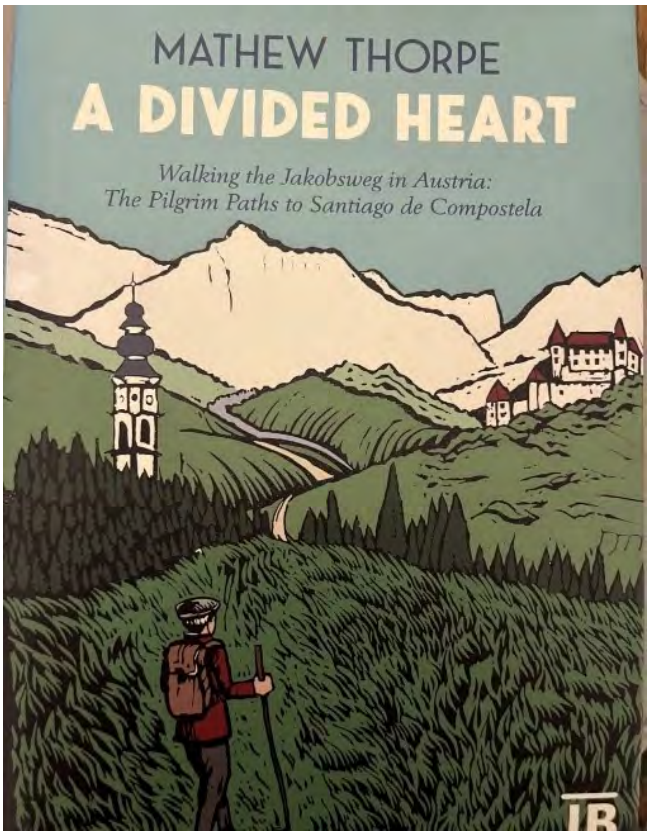
Sir Mathew Thorpe, Barrister from 1961, in silk from 1980, Family Division Judge (1988–95), Lord Justice of Appeal (1995–2013) and Deputy Head of Family Justice and Head of International Family Justice (2005–13). Sir Mathew was interviewed at his Wiltshire home in Autumn 2022.

How have you occupied your time since your retirement in 2013?

I immediately set up a consultancy, particularly as an expert in international work. I got work from the Czech Republic, Romania, Poland and Bulgaria which kept me quite busy because at that stage there was a sort of battle being fought between the accession states in Europe and the United Kingdom. The accession states had so many nationals living here and the nationals were subject to public law care proceedings and very often the local authority would go for adoption, and as far as the accession states at a government level were concerned the loss of these nationals, the children, was dire – losing their citizenship – so they were seeing Czech or Slovak children suddenly becoming UK citizens. They resented that deeply and thought it was quite contrary to all European cooperation. There was a case decided by Sir James Munby sitting in the Court of Appeal, I think called *Re N*,[1] where he stood up for the accession countries and said that adoption should not lightly be ordered in respect of these children, that they belong to another culture, they belong to another country, and we should respect that, and particularly we should respect the diplomatic conventions which we had not previously been doing. The case went to the Supreme Court. It was a transfer case. He had transferred the proceedings out to the accession state. The Supreme Court turned him over on that because it was at a very late stage in the care proceedings.[2] But they upheld all that he said as a matter of principle, how we should respect the faith, the language, the culture of the children and not simply turn them into little English children. So I was contracted to work in an advisory capacity so that as a specific case came up in the English courts, I would get a contact from the consul in London saying what should we do about this: how should we react, should we apply for party status in the proceedings, etc?

Did you set up the consultancy because you feared that there would otherwise be a wrench leaving full-time sitting?

I'd worked for 50 years or something like that, and I certainly was not wanting to fashion a life without work and particularly without legal work. And at the same time I was offering to mediate, and to arbitrate and I got a certain amount of work either through my old Bar chambers or direct. And so I chugged along and had quite a good practice until two things happened. One was that the management of these conflicted cases became better understood so that less aggressive orders were being made and so the accession states were not so keen to give me a contract. And I lost my last contract, which was from Slovakia, maybe in 2019 or something like that. And then came Brexit and so any work in Europe simply disappeared. So since then I have



done very little legal work. Sometimes I get an arbitration or mediation from my old chambers but whereas when you're at the Bar, if you get an inquiry 'Is Mr Allen free to do a trial' and the clerk says 'yes' then nine times out of 10 something will materialise, but if you're doing a mediation or an arbitration, it's not just the first inquirer, but you know there are conversations between the parties and maybe the other party doesn't want you and so in my experience only one in five enquiries would lead to a piece of work.

So recently I have taken to writing. In August 2021, *A Divided Heart* was published, nominally an account of walking all the Compostela Pilgrim paths on Austrian soil but really a declaration of my love of Austria, its culture, its people, its history, its landscape and its lost glories.[3] Recently my second book has gone to be typeset. It's a history of my forebears, part one, and of my life, part two. Now I am writing my third, which will be a biography of a rich Irish family in the first generation, that married into the Habsburg nobility in the second generation, and that became a hybrid in the third with the orphaned girls remaining forever Habsburg and only the orphaned son making a distinguished life as diplomat and legislator in England. The first book is now out of print, but I have some copies still which I am selling direct through thorpe@1hc.com.

You said in *Al-Khatib v Masry* that from the point of view of the Court of Appeal there is no case, however conflicted, which is not potentially open to successful mediation. Do you stand by that observation now having sat as a mediator?

Well, I think it's a bit of an exaggeration, but my heart is with the sentiment.

Did you prefer first instance work or when you moved up to the Court of Appeal? Were they chalk and cheese?

I didn't really have a preference or feel that I was entitled to a preference. I mean you accept office to give a service and so long as you are thought to be giving a useful service as a trial judge you do your best. And then if you get promoted you do your best there. I think I was only a trial judge for 8 years and then a long time in the Court of Appeal. And when I went to the Court of Appeal I had a choice. I could have tried to recover confidence as a generalist. Or I could have said 'no, my mission is family appeals' and in a way the easier path was to concentrate on family appeals which I did. And I never regret that because I think I gave better service by concentrating on what I knew best. When I was at the Bar, I did have a more general practice and so it would have been possible for me to have got back into fields that I had once tilled but then neglected, but I didn't do that and I have no regrets about it.

In the world of financial remedies, you were the leading figure for a long time. What cases are the most memorable of the ones that you did?

Well the awful thing is I have a very imprecise memory. I remember more clearly cases that I did at the Bar and I did a lot of trials when I was in the in the Family Division. I tend to remember things that weren't money cases. I was very interested in mental capacity because at that stage the law was much more fluid and there hadn't been a statute and there had been no very clear definition of what was capacity and what wasn't. And I liked those cases and I did quite a few of them. And then of course my biggest endeavour as an advocate was to do the Cleveland Inquiry. I learned so much from that because I hadn't been doing any public law as an advocate, and suddenly I had to get deep into public law work.

How was it that as an advocate who had not done public law that you were selected for such a very important role?

Well, I think entirely by chance because I was a good friend of Elizabeth Butler-Sloss and I had shared a room with her when she was in chambers and when she accepted the job the Treasury tried to get her to agree that they would instruct a leader or one of two leaders who they had used in other public inquiry fields and she said 'no, I don't agree, I want one of the silks from the family Bar'. And she said, 'I want either Mathew Thorpe or Edward Cazalet'. I remember that to accept the brief meant doing something immediately in the long vacation in August at very short notice, and I think Edward had commitments and he couldn't even consider it and I had no particular commitments and I was keen to have a go. So it was entirely thanks to Elizabeth that I got the brief.

How long did that take up of your time?

It started in August and I think final submissions were the following February. So it was a long job. When I was a trial judge I did quite a lot of public law work because of course I had that reputation from Cleveland. And I did these capacity cases because they interested me. And of course I did the money cases because in my final years at the Bar maybe 60% of my fee income came from Charles Russell and I was doing many of their 'big money cases', although I was also doing private children's cases for them as well.

In *Dart* back in 1996 James Munby QC, as he then was, sought to persuade you that the courts had been getting the interpretation of section 25 wrong and the applicant should not be restricted to his or her reasonable needs. You were fairly forthright in saying that that was a matter for Parliament and not the judiciary. Lord Nicholls took a somewhat different view some 4 years later. Was he right to do so?

Well James Munby was a Chancery silk, so he comes into a money case and he starts making what seemed to be extravagant submissions. And I was a great admirer of Roger Ormrod who was the designer of this yardstick of reasonable requirements. And I knew how well it worked and I was committed to upholding the yardstick. And anyway there was abundant Court of Appeal authority which said that was the proper approach, and so it seemed to me that it wasn't open to us to depart from that so his submission seemed bound to fail at our level. And of course 4 years later it gets to the House of Lords and in a very, very impressive judgment Lord Nicholls says this won't do because it's discriminatory and we've moved away from that sort of old patriarchal society and we must do better. So the world changed.

Was it a fair criticism? Do you think the law had not kept up with the times?

Well, I think that the social changes had been very great and were no longer compatible with the Ormrod yardstick. And

he was quite right to point out that just giving the wife her reasonable requirements when the husband maybe had a massive fortune was hardly fair. So it was a change that was perhaps bound to come once the issue reached that height. But I still thought that if there was to be a wholesale fresh approach, it should be set by the legislators, not by the judges. And I still think that because I don't think the judges have made a very good job of it over the following 22 years or so.

How would you criticise the judges post-*White*?

Well, I think that they've made it so complicated. I mean, it's okay for a practising silk, he or she can understand all these sort of concepts. The midwife has been Brenda Hale and of course she's a brilliant academic mind, but most people practising in family law are not at that intellectual level. And I still think that Parliament has always fought shy.

If there are three things that I have done in my judicial career which I look back on with satisfaction, one was to start with Gerald Angel the ancillary relief working party, the 'pilot scheme' in 1996. Nicholas Mostyn recently said we must record the history of this and he got Class Legal to publish some articles. It was important. It did achieve a lot. The other thing that I look back on with satisfaction was to start the Interdisciplinary Committee. I was very taken with the teaching of Professor Murch and Professor Hooper in Bristol, and they were saying that the family justice system is rotten because there are all these silos, all these ghettos, and they don't talk to each other, and the result is chaos and we must all work together. And I thought that was so impressive and in those days we had the wonderful Stephen Brown as President and as one of his judges you could go to him with an idea and if he thought there was the smallest risk in going down that road your letter would go unanswered and you would know that's a 'no' but he was very supportive of innovation as long as it didn't seem to him risky, so we had the Interdisciplinary Committee and the International Committee. Those three things started with little idea of what potential they had but they sort of generated a life of their own and grew and grew. The Interdisciplinary Committee ended up as the Family Justice Council and the International Committee, chaired by Andrew Moylan, still meets regularly and does excellent work.

Staying with your thoughts on interdisciplinary work and the danger of silos, one of the criticisms of the Financial Remedies Court is that excluding more generalist judges from hearing financial remedies work is not a good idea. Do you think financial remedies work is poorer if it is only heard by specialist judges?

I think the Financial Remedies Court is a wonderful achievement. I have profound admiration for Nicholas Mostyn. We were in chambers together and when he was first in chambers he was my junior of choice if there was not a lot of money about, because you knew the solicitors could afford him. In those days it was two-thirds of the leader's fee, but they could get him probably for one-quarter of the leader's fee. And he was so clever. I think he has done a wonderful job and financial work is so important to the families that are locked in that I think they deserve people who really know what they're doing. I think one of the deficits in the system in my day was that the District Judges really knew what they were doing, but the Circuit Judges really had very little idea and there was an appeal from the District Judge to the Circuit Judge which was a bit of a mockery and we tried to do something about that. So I think the Financial Remedies Court is a major achievement.

Who would you pick out as the leading figures during your career?

If I go back to the days when I was at the Bar there were some very good trial judges. I think Michael Eastham was a wonderful trial judge. And there were some very bad trial judges. When I was in silk the system was so questionably correct. You could say to your clerk, 'look, we're going to go and fix this case', and you'd say, 'Richard, for heaven's sake fix it in front of Eastham J and under no circumstances will I ever appear in front of X again'. The relationship between the Clerk of the Rules, Ruth Few, and the Bar clerks was so 'you scratch my back' that it happened. I don't know whether it does now, but we were able as specialist silks to see that the cases that mattered were tried by the judges who were best able to try them.

But I think that it's important to understand that a judge is a member of a team and the team has a leader. So if you're a trial judge in the Family Division, the President is very important and he is managing his team. He's leading his team. And he needs to have a lot of skill in doing that because they're sometimes pretty difficult people and they don't want to cooperate with the President, the leader, and Stephen Brown was very good at that. And in the Court of Appeal your leader is the Master of the Rolls and I was working for Tom Bingham all the way through to David Neuberger. The outstanding Master of the Rolls was Harry Woolf. Such a brilliant leader.

What in particular marked him out?

Huge empathy for everyone who was in his team. He had such care for us all. If you had anything in your private life that was going wrong, or if you had a death in the family or something like that he would be so supportive. I can't really express my admiration for him in that way as a leader. And it's terribly important. Tom Bingham was a cerebral figure, he was a brilliant figure, but he hadn't got that talent at all.

Is empathy then the most important characteristic in a judge or are other characteristics equally if not more important?

It is only important in the team leader. I think it's very important in the President of a High Court Division. And it's terribly important in the Master of the Rolls. He's got 30 judges working under him. And I dare say, in the Supreme Court, I have no idea, but I dare say the President has the same function, but leading a much smaller team.

And who would you pick out as the great Presidents of the last 50 years in the Family Division?

I think I only worked for Stephen Brown who was President when I went in and when I left. He was followed by Elizabeth Butler-Sloss and she was followed by Mark Potter who was followed by Nicholas Wall and by that time I was observing them from afar rather than working for them.

What characteristics or strengths do you think first instance or appellate judges ought to be able to demonstrate? What are their competencies if not empathy?

I can think of so many really good trial judges. You know Michael Eastham, I've instanced. I had huge admiration for Edward Cazalet and for Michael Connell. Since then there have been wonderful judges, people like James Holman, selfless, dedicated, really exceptional people. And I think we all know that vanity in a judge is a dangerous thing. Selfless dedication is what you are entitled to ask of judges whether they're in the Court of Appeal or at first instance.

One of the great attractions of working in the Court of Appeal is the sense of community, that you're put together as a trio for a spell of 6 weeks, and then you all go somewhere else, but everybody was in my experience impressively clever and always without any of that dangerous vanity. They were all real team players and it was a great privilege really to work in that atmosphere.

If you had to pick out the finest advocates that you've seen in front of you over all those years either at first instance or appellate advocates, who would you name?

James Comyn could charm the birds from the trees. He was supreme. And that's why everybody wanted him. They wanted him at the Old Bailey, they wanted him in the latest sensational defamation trial. He was such a seductive cross-examiner. So mild, so reassuring. People felt 'oh we can trust this man'.

A good cross-examiner has those qualities – rather than aggression?

Well, every advocate has his or her own style, but I particularly admire that.

And what about in more recent years? Who would you pick out?

I think the best advocate if I'm again going back was a silk called Peter Boydell. He was the top silk in planning. He was the top silk at the parliamentary Bar when I was doing that work. If you were against him you just were mesmerised by his skill. He could put before the committee a complicated scene and make it seem simple. He never hesitated. He never paused. it just came. You thought this must be right, so convincing.

And what about in the financial remedies field? You've already mentioned Nicholas Mostyn.

Nicholas Wilson was a jolly good advocate. Robert Johnson was pretty good. Paul Coleridge was pretty good.

I think it's just worth saying that the whole art of advocacy has changed dramatically. When I'm thinking of what was wonderful advocacy I'm thinking of the days when there were no skeleton arguments. There were no written submissions. There were no endless files. There was no pre-reading from the judges because they got nothing to read. So if you were going into the Court of Appeal you could open your case and they were hearing from you for the first time what the case was about and they'd sit there. By the time your opponent got up he had to completely shift what had become the sort of received view of the case. So very different skills. I remember once when I was a trial judge I was sent to do a stint in Liverpool and there was an advocate up there who was maybe the most successful family silk. He was called David Harris. There I was in Liverpool and he comes in and he says something about his skeleton argument. I said 'Mr Harris. What's a skeleton argument?' I'd never heard of it. It was completely foreign and it's not that long ago.

Do you think better justice was done without all this pre-prepared paperwork or is it just the way it is?

I tend to think it was better in its own way, and of course also, Nicholas Mostyn I think changed the art of advocacy because he was so numerate. I don't know where he'd acquired this skill. Maybe at school, maybe at university? I don't know where he got it, but he was so good with figures. And so he was reducing his submissions on paper to figures. I think that changed things. You almost had to be an accountant as well as an advocate to keep up with him whether you were his opponent or you were the judge in the case.

One of Nicholas Mostyn's recent passions is of course, to have taken up the cudgel of transparency. In *Clibbery v Allan* and *Lykiardopulo* you expressed views about the confidentiality of financial remedy proceedings, and you've obviously seen his recent judgments.

I quite understand all the arguments. I just know that I was starting in Mitre Court in the early 60s and there were senior juniors in chambers doing the sort of Charles Russell work. The big clients in those days were the English landed class and occasionally English tycoons. The pop culture was going to come 15 years later. The English landed gentry were terrified of the papers and one thing that we always said was you needn't worry, absolutely not a word will come out. That's what I was brought up with: that these were private proceedings. And so when I was pontificating in those cases in the Court of Appeal I was really only expressing what I believed to be orthodox and an important orthodoxy that people are entitled to privacy. But of course the world has completely changed. Do I think all these people known as celebrities are deserving of privacy? Why should they be? They court publicity all the time in their lives. That is their meat and drink, their source of revenue. Why should they suddenly think that they're entitled to privacy?

Does that justify the removal of privacy from everybody who goes through the Financial Remedies Court?

Well, you know, I think also the world has changed in that there were then no alternatives. You knew that if you couldn't agree you had to get a judge to decide. But that's not the world we now live in. You can do a private FDR, you can arbitrate, you can do all kinds of mediation. I think now litigation is elective. And if you elect that you should understand that one of the consequences is that it may be reported.

What if one side wants to have privacy and the other side is quite happy to have it in the open? Perhaps for tactical reasons?

In the end I think it's very difficult to make absolute rules. I think case-by-case has always been the foundation of discretion and I don't think that the judges should be deprived of discretion on an issue like that.

Do you think it's odd that financial remedies cases in the Court of Appeal have always been in open court? Do you think there's any justification for the difference?

I remember an occasion in which somebody came in and tried to persuade us that the hearing in the Court of Appeal should be in private. We laughed at such a ludicrous submission.

Why is it so different do you think?

I think partly because you accept as gospel what you've always been used to. You think it must be gospel because that's the way it's always been. And again, I think it's a not a bad thing to have as a deterrent. You've had as part of the public service the skill and wisdom of a trial judge who has spent days agonising over your case and given you a result. And unless its plainly barmy I think you should get on with it.

So the publicity of the Court of Appeal will act as a deterrent to stop you in your tracks with the first instance decision?

I think a lot of people would think that the Court of Appeal was a very unattractive next step because of the considerable additional costs and then if you add in it's going to be in open court that's another consideration that they should factor in.

You read about the figures that people spend on lawyers.

I think they're totally shocking. You know Margaret Booth, a very long time ago, in a case I can't remember what it was called, said this is a scandal.[4] And she should know because she'd been Joe Jackson's junior of choice for a long time, so she knew all about legal costs in upmarket cases. And everybody's had a go since. James Munby fulminated about it and didn't make any difference.[5] Nicholas Mostyn has now said the government should do something about it.[6] And actually I rather agree, but I think the problem is that those on the bench who try and make the case they're all poachers turned gamekeeper. I mean look at Nicholas Mostyn, you know he was milking the cow for years and then is suddenly saying this is disgraceful. I felt the same myself. I had some wonderful years immediately before Cleveland. And you know I was being marketed by clerks who were paid to get the best fee the market would bear and I never said to them, 'look, I don't think we should be asking for that'. I said, 'OK, if you can get it, Richard, you get it'.

But with the benefit now of a few more years from when you were poacher, do you have any immediate suggestions as to what could be done to stop the exorbitant expenditure on legal costs?

It seems to be an ill for which there is no cure. I was part of the group that dismantled *Calderbank* because it was the Ancillary Relief Committee which I was chairing at the time and I went along with it. But was it sensible? I think *Calderbank* worked quite well as a restraint on unnecessary litigation costs. It really did make people think. If it was nicely pitched, it was risky to turn it down.

So at the time those who didn't like *Calderbank* offers won the day. Do you regret that decision?

I was chairing the committee as a Family Division judge. So I was maybe too complacent about it. I didn't really challenge those who were arguing for change. If the majority wanted I'd say, 'okay, that's it, give it a try'.

Would a return of some form of *Calderbank* be your number one family reform?

I don't know how practical it is nowadays to try and resurrect that mechanism. But mechanisms of various sorts have been very helpful. I'm thinking of the forensic accountants who developed the *Duxbury* model. What a wonderful tool that's been.

There's now new tables for pensions.

I don't know anything about them, but I do think that there's a lot to be said for a more formulaic approach as exists in Canada. Formula has proved pretty unpopular here because it was tried in child support and has attracted a lot of criticism. There are clever minds who could come up with something which would simplify by the invention of some sort of standard which could be applied to most cases.

So stepping out of the law, what would be your desert island piece of music, film and book be?

Well, as a piece of music I would take Schubert's last three piano sonatas. They're usually performed by some great pianist on a single disc. So you get three sonatas for one. Or his final quintet. They are really moving. For me Schubert is a god like genius. As for a film I would choose an old French film made in the war called *Les Enfants du Paradis*. You know you see endless films and you never remember a single shot. Once I saw that, it was embedded in my memory. I mean as a piece of theatre it's just unforgettable. And as for a book I'm a great admirer of a book called *The Transylvanian Trilogy* written by Count Miklós Bánffy. A most interesting man. A great Transylvanian landowner who was dispossessed, humiliated, his whole country was given away at the end of the first war. And then he himself was reduced to abject poverty by the communist regimes in post-war Hungary. He was for a time foreign minister for Hungary. He was also a great theatre director. He had a pretty sad life towards the end, the last 20 years of his life were pretty miserable but he continued writing short stories. All his estates and grand houses in Transylvania had been taken away and he was living there in poverty, and eventually he got to Budapest and died about a year later in the 40s. This book that he wrote which is very long should

be at least on the same level as Proust, it's that sort of length of book, and it's more readable.

And what luxury would you take to your desert island?

Luxury has been my Achilles heel all my life. So I'm no stranger to luxury. And there's hardly an area where I haven't indulged in luxury. From shoes ... It's one of my great shames really how materialistic and hedonistic I have been all my life. Maybe no longer. Maybe I'm becoming more penitent. So what would I take? There's no point in taking marvellous cheese, because it's either going to be eaten or it's going to go bad. Maybe take a marvellous bottle of wine, but you know you either sit and look at it for years or you drink it and it's gone. I think I'd be inclined to take with me some single object easily portable weighing not more than maybe a pound and in dimension no bigger than a foot and then every time I looked at it I would admire its beauty, remember the circumstances in which I had acquired it, its provenance, its history. That it had been part of my life really.

Sir Mathew. Thank you very much indeed.

Notes

1 *Re N (Adoption: Jurisdiction)* [2015] EWCA Civ 1112, [2016] 1 FLR 621.
2 *Re N (Adoption: Jurisdiction)* [2016] UKSC 15, [2016] 1 FLR 1082.
3 *A Divided Heart – Walking the Jakobsweg in Austria: The Pilgrim Paths to Santiago de Compostela* (Journey Books, 2021).
4 *Evans v Evans* [1990] 1 FLR 319.
5 *KSO v MJO and JMO (PSO Intervening)* [2008] EWHC 3031, [2009] 1 FLR 1036 at [76]–[82].
6 *Xanthopoulos v Rakshina* [2022] EWFC 30 at [14].

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